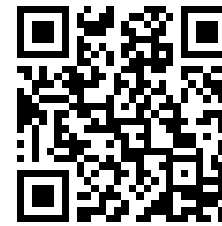

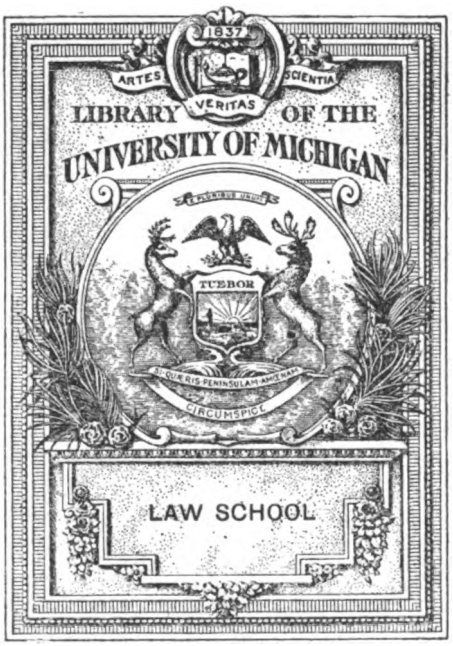

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

VOL. XXII.

NEW SERIES,
BY PETER T. WASHBURN,
Counsellor at Law.
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JUDGES

OF THE

Supreme Court, during the time of these Reports.

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*Hon. STEPHEN ROYCE, *Chief Judge.*		*3
Hon. ISAAC F. REDFIELD,	*Assistant Judges.*	
Hon. MILO L. BENNETT,		
Hon. DANIEL KELLOGG,		
Hon. HILAND HALL,		
Hon. LUKE P. POLAND,		

AN ALPHABETICAL TABLE OF THE NAMES

OF THE

CASES COMPRISED IN THIS VOLUME.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF VERMONT.

*9 *COUNTY OF WINDSOR.

MARCH TERM, 1849.

[Continued from Vol. 21, page 418.]

PRESENT:

HON. STEPHEN ROYCE,
CHIEF JUDGE.
HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG,
HON. HILAND HALL,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

JOHN P. BROWN v. FRANKLIN BILLINGS.

(*Windsor*, March Term, 1849.)

The action upon book account, to recover for property claimed to have been sold by the plaintiff to the defendant, but where the property was in fact sold and delivered to a third person, who was doing business in the name of the defendant, and who, as between himself and the defendant, had no right to pledge the credit of the defendant for the purchase of the property, cannot be sustained upon the ground, merely, that the plaintiff was justified in regarding the defendant as the principal in the business, unless he also had sufficient grounds for believing, that such third person was authorized to make the purchase upon the credit of the defendant. And such authority cannot be established merely by showing, that such third person had in a few instances made purchases in the name of the defendant, such purchases having been in fact unauthorized by him before they were made, and not understandingly sanctioned and adopted afterwards.

*10 *Book account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows. The plaintiff claimed to recover of the defendant $456,73, for wool sold by him under the following circumstances. Some time previous to July, 1842, Pliny Parker and Benjamin Billings were engaged in manufacturing woolen goods in Ludlow, under the firm of Parker & Billings, and in September, 1842, they failed in business, and their property was attached by one Spalding, as constable. After the attachment was made, Spalding carried on the manufacturing business in his own name, for the attaching creditors and the debtors, until November 28, 1842, when he sold the cloth, and some other personal property belonging to Parker & Billings, to the defendant. After the sale the defendant agreed with Parker & Billings, that he would go immediately to Boston and make such arrangements there, as would enable them to procure the materials for dyeing in the name of Spalding,—to which arrangement Spalding assented,—and also make arrangements with some firm in Boston, to have the goods thereafter manufactured by Parker & Billings consigned in the name of the defendant. The defendant accordingly made the proposed arrangements in Boston, and the materials for dyeing were procured by Parker & Billings, upon orders drawn in the name of Spalding, for about one year, and then Spalding gave notice to Parker & Billings, and also to the defendant, that his name must be no longer used for that purpose. Upon receiving this notice Parker & Billings informed Spalding, that the business of manufacturing was all the defendant's, and that he might as well order the materials for dyeing in his own name; and after that they were ordered by Parker & Billings in the name of the defendant. All the goods sent to market were forwarded in the defendant's name from February, 1843, to July, 1847, and all consignments, bills, orders and papers relating thereto, were made and signed by Parker & Billings for the defendant, or by the defendant in his own name. About the time the defendant went to Boston, for the purpose of making arrangements for the materials for coloring and for the sale of the cloth, it was agreed between the defendant and Parker & Billings, that the defendant should furnish them with stock, so far as he could conveniently, and that from the *11 *avails of cloth, consigned as above mentioned, the defendant should receive his pay for stock, so furnished by him, and for any other liabilities he might have assumed for Parker & Billings.

Under this agreement the defendant, until June, or July, 1846, furnished a large portion of the wool manufactured by Parker & Billings; and in manufacturing no attempt was made by the defendant, or by Parker & Billings, to keep the wool, which each furnished, in separate parcels, but it was mingled before manufacturing. The defendant was to have the avails of the cloth first sent to market, whether it was manufactured from wool furnished by him-

self, or by Parker & Billings. Parker & Billings, during the time above mentioned, were in the habit of hiring help and paying them from the stores in Ludlow, and in such cases the accounts were usually kept against Parker & Billings and were paid in cloth manufactured by them. They also, in a great measure, supported their families by the sale of cloth in the country, and by manufacturing cloth by the yard, or on shares, and from the avails of the business they were enabled to pay some of their old debts. Parker & Billings, during the same time, made a few purchases of wool upon the defendant's credit; but there was no evidence tending to show, that they were authorized by the defendant to do so, or that the defendant was ever advised, that his credit had been pledged by them, until about the time, that he ceased to furnish stock; neither had the plaintiff been informed, previous to the sale of his wool, of but one instance, where the defendant's credit had been pledged by Parker & Billings for the purchase of wool;—and Parker & Billings, as between them and the defendant, were not in fact authorized to buy wool upon the defendant's credit. The boxes and barrels in and about the factory building, containing goods for market, or goods brought from market, were marked with the defendant's name; and the stock and other property in said building were represented by Parker & Billings, until the spring of 1847, as being the property of the defendant; and the defendant, in November, 1844, in an application to an insurance company for insurance upon the stock in said building, represented the stock to be his, and this application was renewed by the defendant from time to time until the spring of 1847. When the contract was made between the defendant and Parker & Billings, both parties understood,
*12 that it would have the *effect, to place the property in the factory beyond the reach of the creditors of Parker & Billings; but, as between themselves, it was only made for the purpose of securing the defendant for all advances he might make for stock and other articles put into the factory; but the business was so conducted by them, that the community generally understood, that the defendant was principal and Parker & Billings his agents, and the reports, made by Benjamin Billings and others, came to the plaintiff's knowledge before the sale of wool by the plaintiff. On the twenty seventh day of November, 1844, the machinery in the factory, which had been attached as above mentioned, was sold at sheriff's sale, and was purchased by the defendant and left in the factory, under a contract with Parker & Billings, that they should pay to the defendant nine per cent. on the cost, yearly, with the privilege of purchasing the same at cost. The freighting for the factory, to and from Boston, from November, 1844, to January, 1847, was done by one Barton, who received from Parker & Billings about $150 therefor. In January, 1847, the defendant called upon Barton, and inquired to whom he charged the freighting, and, on being informed, that the whole account had been charged to him, he said, that he doubted his liability, but that he would look into it; and in a short time afterwards he informed Barton, that he would pay the balance of his bill, which was then about $250,00. Under the circumstances above related, Benjamin Billings, on the eighth day of September, 1846, purchased of the plaintiff the wool sought to be recovered for in this action, which was charged by the plaintiff to the defendant soon after the purchase, and was delivered to Parker & Billings. The county court, May Term, 1848,—REDFIELD, J., presiding,—rendered judgment for the defendant, upon the report. Exceptions by plaintiff.

R. Washburn and *Washburn & Marsh* for plaintiff, insisted, that, under the circumstances, the defendant was liable to the plaintiff for the wool, and that it was immaterial, what was the secret arrangement between Parker & Billings and the defendant, inasmuch as the defendant held himself out as the principal, and suffered Parker & Billings to hold him out as the
principal, and them*selves as his *13
agents, in the business,—and cited Pickering v. Busk, 15 East 38; Long on Sales 233; Munn v. Commission Co., 15 Johns. 44; Perkins v. Washington Ins. Co., 4 Cow. 659; Andrews v. Kneeland, 6 Cow. 354; Williams v. Mitchell, 17 Mass. 98; Odiorne v. Maxcy, 13 Mass. 178; Whitehead v. Tuckett, 15 East 407, 412.

S. Fullam, for defendant, insisted, that in order to charge the defendant, the auditor should have found, that Benjamin Billings bought the wool upon the defendant's credit, and that he was authorized to do so by the defendant.

The opinion of the court was delivered by

ROYCE, Ch. J. The plaintiff cannot be entitled to succeed in his present suit, unless the transaction between him and Benjamin Billings can be treated as a direct sale of the wool to the defendant, and to him alone.

On no other ground is this action of book account adapted to the case. And that it was not in fact such a sale, considered as between the defendant and Benjamin Billings, or Parker & Billings, is rendered certain by the finding of the auditor. The defendant did not authorize the purchase, nor did the property go to his use, or enure to his benefit, in such a sense as to render him liable in the character of a purchaser.

But the plaintiff contends, that he had a right to consider the defendant the real purchaser, though he may not have been such, as between himself and the firm of Parker & Billings. This is claimed on the strength of those numerous facts and circumstances, which are detailed in the auditor's report. It is apparent, that several of these had a direct and strong tendency to show, that the defendant, for a considerable period, was the owner and principal in the operations of the factory, and, of course, the party for whom purchases of stock for the prosecution of that business would be made. It was not enough, however, that the plaintiff might be justified in regarding the defendant as the principal, unless he also had sufficient grounds for believing, that Parker and Billings were authorized to make the purchase on his

credit. Now the only evidence of their authority to buy wool on the defendant's credit arose from the few instances of their assuming to make such purchases, *14 only one of which had *come to the plaintiff's knowledge. But these, being unauthorized by the defendant, could not legally affect him, unless it appeared, that he had understandingly sanctioned and adopted them, as purchases made on his account. And if there was any evidence, properly tending to show this, it was not of a character to be at all conclusive. The same remark may be made in relation to any supposed recognition by the defendant of the purchase in question.

But all the facts and attending circumstances, when duly considered in connection, would not seem to have indicated, at any time, that the defendant was the party solely, if even chiefly, interested in the business of the establishment. The entire property and business had previously belonged to Parker & Billings, who continued all the while to prosecute the same business in the same place. And though it was doubtless notorious, that the defendant furnished much of the stock, yet it must have been equally well known, that Parker & Billings also furnished stock; and this they must have done with their own means and credit, as they never, except on a few occasions, and then without his knowledge, or consent, assumed to use the name or credit of the defendant. It also appears, that they not only hired and paid the laborers from the avails of the business, but supported their own families, and paid some of their former debts, from the same source. They would appear, indeed, to have been constantly and openly in the performance of those acts and the exercise of those privileges, which would not properly belong to their character and situation as mere agents. With all these facts within his observation, we think the plaintiff could not reasonably regard the conduct of the defendant as certain or satisfactory evidence of his absolute and sole ownership. And hence we conclude, that such a liability was not fixed upon the defendant by the sale in question, as would be requisite to sustain the present action.

Judgment of county court affirmed.

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*15 *COUNTY OF ORANGE.

MARCH TERM, 1849.

[Continued from Vol. 21, page 455.]

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD,
HON. LUKE P. POLAND, ASSISTANT JUDGES.

JOHN WHITE v. MOSES MORTON.

(*Orange*, March Term, 1849.)

Declarations made by the owner of a farm in the presence of the occupant of the farm, and during his occupancy, and assented to by the occupant, at the time, as to the terms upon which the occupant is managing the farm, may be proved by the occupant, in a suit in his favor against an attaching officer, for taking the products of the farm as the property of the owner, for the purpose of showing, that the occupant, by the contract between him and the owner, was entitled to an undivided half of the produce of the farm.

Declarations of the owner of a farm, while the farm is in the occupancy of another person, with whom the owner labors in carrying on the farm, made in connection with some act of the owner, in carrying on the farm, may be proved by the occupant of the farm, in a suit between him and another person, for the purpose of proving the contract, under which the farm was occupied.

*One tenant in common of personal property *16 may sustain trover against an officer for his undivided moiety of the property, when the officer has sold the whole property upon execution against the co-tenant.

Trover for a quantity of straw, hay and grain. Plea, the general issue, with notice of special matter of defence, and trial by jury, December Term, 1848,—REDFIELD, J., presiding. On trial it appeared, that the defendant took the property in question, as belonging to David White, upon a writ in favor of Hutchins & Buchanan against David White, and sold it, in due form of law, upon the execution obtained in that suit. The plaintiff gave evidence tending to prove, that he took a farm of David White, in 1846, to cultivate and have half the produce, and that the property sued for was the produce of the farm that year, and that it was taken by the defendant before any division had been made. The plaintiff, to prove the contract with David White, under which he occupied the farm, offered to prove certain declarations made by David White in 1846, it appearing, that David White labored with the plaintiff in carrying on the farm; to which evidence the defendant objected, but it was admitted by the court; but the court instructed the jury, that any declaration, made by David White in the presence of the plaintiff, as to the plaintiff's cultivating the farm for one half of the produce, would amount to nothing, unless assented to by the plaintiff, and then only from that time, or unless made in connection with some act of David White in carrying on the farm,—and that, to this extent, the declarations were competent evidence. The defendant offered David White as a witness, to prove, that the plaintiff did not take the farm upon shares; but he was objected to by the plaintiff and excluded by the court. The defendant requested the court to charge the jury, that, if they found, that the property sued for was the common and undivided property of the plaintiff and David White, at the time of the attachment and sale on execution, the plaintiff could not recover for it in this form of action. But the court instructed the jury, that this action would lie for the plaintiff's undivided half of the crops, after sale on execution. Verdict for plaintiff. Exceptions by defendant.

*A. *Underwood* and *C. B. Leslie* for *17 defendant.

J. Potts for plaintiff.

The opinion of the court was delivered by

ROYCE, Ch. J. This was trover for a quantity of straw, hay and grain, which the defendant, as deputy sheriff, attached and sold on process against one David White and as his property. The plaintiff claimed, that he was a joint owner of the property with David White, on the ground of having raised it upon the farm of David White, while he, plaintiff, carried on the farm upon shares, or at the halves, in the season of 1846. And to prove that he was so carrying on the farm, when these crops grew upon it, the plaintiff offered in evidence the declarations of David White, that such was the fact. From the statement in the bill of exceptions and the charge of the judge, we must understand the jury to have found, that these declarations were made in the season of 1846, in the presence of the plaintiff, and were assented to by him; or else, that they were made in that season, "in connection with some act of David White in carrying on the farm,"—it appearing, that he labored upon the farm with the plaintiff.

We consider, that this evidence was admissible, either as showing a mutual recognition by David White and the plaintiff of the terms on which the plaintiff was cultivating the farm,—or as proving declarations of David White properly constituting part of the *res gestæ*. We have no occasion to decide, whether a mere isolated admission of David White, during that period, would be admissible to affect the defendant, as a party claiming under him; for the ruling of the county court did not go to that extent. And for this reason, if for no other, the case is distinguishable from that of Hines et al. v. Soule, 14 Vt. 99, Carpenter v. Hollister, 13 Vt. 552, and Warner v. McGary, 4 Vt. 507. It was as admissions, merely, that the declarations offered in those cases were held not to be admissible. See, also, 1 Stark. Ev. 47, et seq.; Pool v. Bridges, 4 Pick. 378; Boyden v. Moore, 11 Pick. 362; Elkins v. Hamilton, 20 Vt. 627.

The other decisions that the trial,—as that David White was not an admissible witness for the defendant, and that
*18 trover would *lie for the plaintiff's undivided moiety of the crops, when the defendant had sold the whole upon the execution,—have not been questioned in the argument. It is sufficient to say, that both of these decisions are sustained by repeated determinations of this court. Judgment affirmed.

SUSANNAH EDSON v. SILAS TRASK, and LEONARD B. SMITH, Trustee;—SILAS TRASK, Claimant.

(*Orange*, March Term, 1849.)

One who contracts to sell personal property, in his possession, but of which he is not the owner, to be delivered at a future day, and receives the purchase money, but does not deliver the property by reason of its having been reclaimed by the real owner, may be held as trustee of the vendee for the amount of such purchase money.

And it makes no difference, in this respect, that the property, thus contracted to be sold, would have been exempt from attachment and execution in the hands of the vendee, if received by him.

Trustee process. The suit was appealed by the plaintiff from the judgment of a justice of the peace discharging the trustee. In the county court the principal debtor, Trask, appeared and entered as claimant, and a hearing was had upon the trustee's disclosure, stating the facts substantially as follows. In April, 1848, the trustee purchased of Belknap & Steele a cooking stove, for $17,62, and gave his promissory note for it, payable on demand, subject to a condition, that the stove was to remain the property of Belknap & Steele, until it was paid for. In May, 1848, the trustee sold to Trask, the principal debtor, the house in which he lived, together with the stove, and Trask was to have possession of the house and stove on the first of September, 1848; and Trask paid to the trustee $15,00 for the stove. But, the note executed by the trustee not having been paid, Belknap & Steele demanded and received back the stove; and the trustee acknowledged, that he was indebted to Trask for the amount of the $15,00, and interest, paid by Trask to him for the stove. Trask owned no
*stove, unless he owned the one sold *19
to him by Smith, the trustee. The county court, December Term, 1848,—REDFIELD, J., presiding,—adjudged the trustee chargeable, upon his disclosure, for the $15,00 and the interest. Exceptions by claimant.

E. Weston, for claimant, insisted,—1. That Trask's claim upon Smith was for a cooking stove, which was an article exempt from attachment, and that so Smith could not be held trustee for goods and effects of Trask;—2. That if Trask's claim were not for a cooking stove, it was for damages for the breach of the implied warranty of title to the same; that trask did not give Smith credit and that Smith was not a mere debtor to him;—3. That Smith was liable to Trask in case for deceit, in selling him a stove, and receiving payment, when he knew he did not own it;—and cited Hart v. Hyde, 5 Vt. 328; Crocker v. Spencer, 2 D. Ch. 68; Adams v. Newell & Tr., 8 Vt. 190; Parks v. Cushman & Tr., 9 Vt. 320; Rev. St. 190, § 4; Strong v. Barnes, 11 Vt. 221; 2 Steph. N. P. 1016; 1 Chit. Pl. 130; and Smith v. White, 6 Bing. N. C. 218; [37 E. C. L. 591.]

J. P. Kidder, for plaintiff, insisted, that the money, which Trask paid for the property, was a mere credit in the hands of the trustee, and cited Way et al. v. Raymond, 16 Vt. 371; Weeks v. Hunt, 13 Vt. 144; and Vt. State Bank v. Stoddard, 1 D. Ch. 157.

The opinion of the court was delivered by

ROYCE, Ch. J. Two questions are presented in this case,—1. Whether the liability of Smith to Trask was of such a character, as to render him a trustee, within the meaning of the statute,—and 2. Whether Trask was entitled to claim and hold the benefit of that liability against the plaintiff, his creditor, under the provisions of law exempting certain property to a limited amount from attachment and execution.

As between Trask and Smith, the latter was not liable simply as a debtor for the fifteen dollars received in payment for the stove, except at the election of Trask. He

was at liberty to sue in special *assumpsit* upon the contract, and go for all actual damages, including the consideration paid, or to proceed in general *assumpsit* *20 for *the consideration only. But this choice of remedies on the part of Trask could not, of itself, prevent his creditor from holding Smith a trustee for the amount of consideration received by him. To that extent his liability would be clear and certain in either action. It is urged, however, that there was no such indebtedness on the part of Smith, as could properly be deemed a credit, and much less a credit intrusted with him, within the intent of sec. 4, ch. 29 of the Revised Statutes. His liability for the fifteen dollars did not, it is true, result from any stipulation to refund it; for the agreement did not contemplate a re-payment of the money, but only a specific fulfilment of the contract. But it was none the less a certain and definite liability, arising directly from a violation of the contract, and as such we consider it a kind of indebtedness embraced within the statute. The case would seem to be quite analogous to that of Williams v. Reed, 5 Pick. 480, where a guardian undertook to convey the estate of his ward under a license, and the conveyance being defective, so that no title passed or was claimed under it, the guardian was held chargeable, as trustee of the purchaser, for such part of the purchase money as he had received. An engagement to indemnify has been holden to constitute a sufficient indebtedness for this purpose, after a right of action had accrued upon it in consequence of actual damnification. Downer v. Topliff & Tr., 19 Vt. 399. Indeed, as there is now but a very limited right to enforce the collection of debts by arrest of the person, it is obvious, that the statutory provisions for reaching the effects of debtors in the hands of third persons should be liberally expounded in favor of creditors. See Brown v. Davis & Tr., 18 Vt. 211.

There was also a trust and credit given to Smith for the execution of the agreement on his part; for it was not found by the county court, that the sale had been perfected by any delivery of the stove, but Smith had contracted to sell it to Trask, together with the house in which it was, and to give possession by a day appointed. And in the meantime Trask had paid the consideration. There is not enough stated in the case to warrant us in assuming, that the money could only have been obtained from Trask through actual fraud and imposition practised by Smith. The case is, therefore, within none of those rules excluding a resort to this kind of process, which are recognized in Barker v. Esty & Tr., 19 *21 Vt. *131. It is insisted, however, that there was, at least, an implied warranty of title, and that in prosecuting upon that warranty Trask might sue in case, instead of *assumpsit*. But a declaration in the old form of case upon a warranty, though it allege fraud, does not, as a matter of course, require that any actual fraud should be proved; the plaintiff will be entitled to recover on proof of the warranty and a breach of it. Williamson v. Allison, 2 East 446. Beeman v. Buck, 3 Vt. 53. Vail v. Strong, 10 Vt. 457. So that admitting, for the present purpose, that there was such a warranty, and such a right to sue upon it, yet we consider, that, in the absence of such fraud as would convert the transaction into a positive tort, the right to elect between the two forms of action would be no more decisive against the trustee process, than the right of choosing between special and general *assumpsit*. The result is, that in our opinion the liability of Smith was such, that the trustee process might well be sustained against him; especially, upon the comprehensive construction which sec. 4 of chap. 29 of the Revised Statutes is to receive under the statute of November 5, 1845.

The second question is easily disposed of. The statutory exemptions of property in favor of debtors are uniformly limited to specific chattels, and do not extend to debts or pecuniary claims due to the debtor, (if sufficient in amount to be attachable by trustee process,) with the single exception, so far as I recollect, of debts or claims due for pension money. Now it is, indeed, settled by the cases cited, that had Trask, the claimant, acquired a title to the cook stove by his purchase, it would not have been attachable in his own possession, or in that of Smith, since it appears, that he had no other. But he in fact acquired only a cause of action against Smith; and that, as we have already considered, was of a character to be liable to this form of attachment.

Judgment of county court affirmed.

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*COUNTY OF LAMOILLE. *22

APRIL TERM, 1849.

[Continued from Vol. 21, page 488.]

PRESENT:

HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. DANIEL KELLOGG,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

JOHN B. DOWNER v. HORACE DANA AND ELIHU NORTON.†

(*Lamoille*, April Term, 1849.)

Where one of two defendants, in an action *ex contractu*, suffers default, and judgment is rendered against the other defendant upon hearing, although the rendition of separate judgments would be erroneous, yet a judgment so rendered against one of the defendants would not be absolutely void.

But if the defendant, who appears, enter a review, the effect is to vacate the judgment as to both defendants, and to carry the whole case to the next succeeding term, notwithstanding a separate judgment may have been entered upon the record against the defendant who was defaulted.

And if execution issue upon such separate judgment, against the defendant who was defaulted,

†POLAND, J., having been of counsel in this case, did not sit at the trial.

and the defendant be committed to jail, and execute a jail bond, such commitment is illegal, and no action can be sustained upon the jail bond.‡

*23 *The statute of 1835 [Acts of 1835, p. 7] which provided for a severance of defendants in actions *ex contractu*, in certain cases, had no application to a case where all the defendants were parties to the contract in suit.

Debt upon a jail bond. The plaintiff alleged in his declaration, that he recovered judgment against the defendant Dana at the September Adjourned Term, 1838, of Lamoille county court, for $510,67 damages, and $15,99 cost, that execution was issued thereon October 6, 1838, that Dana was committed to jail December 4, 1838, that the defendants executed a jail bond for the admission of Dana to the liberties April 12, 1839, that Dana committed a breach of the condition of the bond September 24, 1842, and that the bond was duly assigned to the plaintiff April 2, 1843. The defendants pleaded *non est factum*, and also pleaded, that there was no such record of judgment, as alleged in the declaration; and upon these pleas issue was joined. Trial by jury, June Term, 1844,—ROYCE, Ch. J., presiding. On trial it appeared, that the plaintiff commenced an action against the defendant Dana and Solomon Downer, upon a note executed by them jointly, at the December Term, 1837, of Lamoille county court; that at the September Adjourned Term, 1838, of the same court Dana suffered a default, and judgment was thereupon rendered against him, upon the note, for $510,67, damages, and $15,99 costs; and that upon this judgment execution was issued, and Dana committed to jail, and the jail bond executed as alleged in the declaration; that at the same September Adjourned Term judgment was rendered in the same suit against Solomon Downer, and he entered a review, and that at the December Term, 1838, of the same court, final judgment was rendered against him for $516,69 damages, and $5,57 costs, upon which last judgment execution was issued against him. The county court decided, that there was no such record, as that alleged in the declaration, and directed a verdict for the defendants. Exceptions by plaintiff.

L. P. Poland for plaintiff.

In order to support the decision of the county court, the judgment against Dana must have been so illegal and irregu-
*24 lar, that the *imprisonment of Dana upon the execution was unlawful and the plaintiff liable in trespass for false imprisonment; for if the imprisonment were lawful, and the judgment a justification to the plaintiff, the jail bond taken was also legal. Witt v. Marsh et al., 14 Vt. 303. Allen v. Huntington et al., 2 Aik. 249. Whether this judgment was erroneous, even, and might have been avoided by a writ of error, the authorities are contradictory. Minor v. Mech. Bank, 1 Pet. 46. Tuttle v. Cooper, 10 Pick. 281. Hall v. Rochester, 3 Cow. 374. Shirreff v. Wilks et al., 1 East 48. But in none of the cases is it held, that such judgment would be void, or that it would not be valid, to all intents, until set aside,—but the contrary. Allen v. Fisher et al., 1 D. Ch. 277. Fletcher v. Mott, 1 Aik. 339. Walbridge v. Hall, 3 Vt. 114. Allen v. Carpenter, 7 Vt. 397. Gibson v. Scott et al., Ib. 147. Evarts v. Gove, 10 Vt. 161. Bank of Whitehall v. Pettes, 13 Vt. 395. Sewell v. Harrington, 11 Vt. 144. Chase v. Scott, 14 Vt. 77. Butler v. Haynes, 3 N. H. 21. Gorrill v. Whittier, Ib. 265. Cate v. Pecker et al., 6 Ib. 417. Clason v. Morris, 10 Johns. 524. Perry et al. v. Hyde et al., 10 Conn. 329. And when such a judgment comes in question collaterally, the court must presume every thing in favor of the record. By Dana's suffering a default, and judgment being rendered in the plaintiff's favor thereon, Dana and his co-defendant became legally severed, so that the farther course or result of the cause, as to Solomon Downer, did not in any way affect the judgment already rendered against Dana. One of several defendants, in an action *ex contractu*, may appear for himself alone; and if he so appear, and another defendant be defaulted, he can only enter a review for himself. This judgment was recovered, while the statute of 1835 was in force, applying the same rule to parties in actions *ex contractu*, as in actions *ex delicto;* and under that statute the parties were so far several, that one could review for himself, and not for his co-defendant, who had not appeared. Acts of 1835, p. 7.

H. P. Smith for defendants.

The record does not show a valid and subsisting judgment against Dana, authorizing the issuing of the execution and the commitment. The action against Dana and Solomon Downer was upon a joint *contract, and, by the principles *25 of the common law, they could not be severed by separate judgments at different times. United States v. Linn et al., 1 How. 108. Hall v. Rochester, 3 Cow. 374. 2 Tidd 803. 1 Chit. Pl. 567. Scott v. Larkin, 13 Vt. 112. Gaylord v. Payne et al., 4 Conn. 190. By the review the judgment against Dana was vacated. The statute of 1835 applied only to cases, where some of the defendants were not parties to the contract, —which is not this case. Scott v. Larkin, 13 Vt. 112. But if the judgment against Dana were not void, but would protect the plaintiff in an action for false imprisonment, the defendants may yet show its irregularity in defence of this suit upon the jail bond. Witt v. Marsh et al., 14 Vt. 303.

The opinion of the court was delivered by

BENNETT, J. This is an action of debt upon a jail bond; and the important question arises under the defendants' plea, that there is no such record of judgment, as is alleged in the declaration. The case is one of some difficulty, and has now been argued, at this and previous terms, before all the members of the court; and I will now proceed to pronounce the opinion of a majority of the court.

It has been argued for the defendants, that the several judgments rendered against Solomon Downer and Dana, at the September Adjourned Term of the county court, 1838, were absolutely void; but I am not prepared to assent to that proposition.

‡ See Jones v. Spear & Tr., 21 Vt. 426; Paine et al. v. Tilden et al., 20 Vt. 554.

The court had jurisdiction of the subject matter of the action, and of the parties. The judgments were no doubt erroneous, and might have been reversed upon error. The question, however, now is as to the effect, which the review entered by Solomon Downer shall have upon the judgment against Dana.

The action against Dana and Solomon Downer was upon a joint contract; and, upon common principles, the recovery must have been had against both defendants, or neither of them. A defence interposed by one of them would enure to the benefit of the other. Though one suffer a default, yet if the other interpose a successful defence, no damages can be assessed, or costs taxed, against him. Though co-defendants may sever in their defence, yet there can legally be but a single assessment of damages, and that must be against all of them.

*26 *If the co-defendants sever in their pleas, and an entire judgment is rendered against all, it is obvious, that a review entered by one of them must vacate the judgment as to all, and have the effect to carry the cause over to the next term of the court as to all of them. The question, then, is, shall the separate and erroneous assessment of damages against Dana prevent the review of Solomon Downer from having the like effect? I think it should not. It seems but reasonable, that the review should operate to open the entire cause of action against all the defendants. If the review did not have the effect to vacate the judgment against Dana and carry the cause over as against both, there could legally be no recovery against Solomon Downer at the next term; and if Dana should fail to satisfy the judgment against him, the plaintiff could have no remedy against Solomon Downer. The review should have the same effect. as if there had been but a single assessment of damages.

The statute of 1835, which has been referred to, does not help the plaintiff. It was not made to reach a case like this. Both Dana and Solomon Downer were parties to the note.

On the whole, then, a majority of the court think, there is no valid judgment, upon which the jail bond can be supported; and the judgment of the county court is affirmed.

GALEN MERIAM AND ORVIS B. PERRY v. MARTIN ARMSTRONG.†

(*Lamoille*, April Term, 1849.)

A sheriff, who arrests a debtor upon mesne process, may himself become bail for such debtor by indorsing his own name upon the back of the writ, in the manner required by statute.

A sheriff, who arrests a debtor upon mesne process, and then becomes bail by indorsing his own name upon the writ, and returns, that he has thus become bail, is estopped, when *scire facias* is brought by the creditor against him as such bail, from contesting his legal competency thus to become bail upon process served by himself.

*27 *Scire facias*, brought against the defendant as bail upon mesne process for one Edmund Clark,—the plaintiffs alleging, that they sued out a writ, in due form of law, against Clark, and delivered it to the defendant, who was sheriff, to serve and return, and that the defendant arrested Clark thereon, and then became bail for him by indorsing his own name upon the back of the writ, and made return that he had so become bail, and that the plaintiffs subsequently recovered judgment against Clark, and took out execution, and that a return of *non est inventus* was made thereon, in due form. To this declaration the defendant demurred. The county court, December Term, 1844,—ROYCE, Ch. J., presiding,—rendered judgment, that the declaration was insufficient. Exceptions by plaintiffs.

L. P. Poland and *D. A. Smalley*, for defendant, insisted, that an officer, serving a writ, cannot become bail thereon, or be legally liable, as such, to the creditor,—and relied upon Rev. St. chap. 28, § 23 et seq.; Brown v. Lord, Kirby 209.

S. Wires and *W. W. White*, for plaintiffs, insisted, that the defendant might well become bail,—but that at least, under the circumstances, he was estopped from contesting his liability as such.

The opinion of the court was delivered by

BENNETT, J. The present action is *scire facias* against the defendant, as bail upon mesne process, which issued in favor of the present plaintiffs against one Edmund Clark. The defendant, being sheriff of the county, received the writ to serve, and, having served it, he entered his own name as bail upon the back of the writ, and made return, that he, Martin Armstrong, became bail, &c. No question is made, but that all the necessary proceedings were had to charge the defendant as bail, provided the plaintiffs can be justified in so treating him; and this is the only question raised on the demurrer to the present declaration.

It is said in argument by the defendant's counsel, that the plaintiffs should have sued the defendant for official neglect, in not taking bail; and that to maintain this action would be at war with gen*eral *28 principles, against sound policy, and in contravention of the statute law of the state. The first question, however, for consideration will be, whether the defendant can be permitted to aver his own want of capacity to become bail.

It is a familiar principle, that many admissions operate, in effect, as an estoppel, and may be pleaded by way of estoppel *in pais;* and in the case of Simmons v. Bradford, 15 Mass. 32, it was held, that the same principle applied to the case of a sheriff, who falsely returned, that he had taken bail. In that case the sheriff was sued for not delivering to the creditor the bail bond on request, he never having returned it into the clerk's office. The defence set up was, that the only bond taken by the defendant's deputy was one executed by the debtor alone, without any surety, and that the deputy offered to deliver to the plaintiff this bond, when the latter called upon him for it. But the court say, "that inasmuch as this is not a bail bond, there being no bail, to whom the principal was supposed to have been delivered, and no surety liable for him in case of his avoidance, to allow this as a defense to the action would be to al-

†POLAND, J., having been of counsel, did not sit upon the trial of this suit.

low the sheriff to aver and prove, that the deputy did not take bail, in direct contradiction to his return,—which cannot be done." Though the plaintiff, in such a case, might disaffirm the return of the officer and show its falsity, yet that right is not reciprocal. See, also, the case of Eaton v. Ogier, 2 Greenl. 46.

In the present case, as the creditors have seen fit to affirm the officer's return, by declaring against him as bail, we do not think, that it is competent for him to defeat the action, by averring, in contravention of his return, that no bail was in legal effect taken by him. This would be to permit a party to take advantage of his own wrong. The officer voluntarily assumed the situation of bail, and he should be held subject to all its liabilities, even although he might not be enabled to avail himself of all its privileges. When the sheriff returned, that he had become bail by indorsing his name on the back of the writ, he must have intended, that he would, in effect, become surety for the debtor's appearance at court, and that the creditors should have all the security, which they could have had, if bail had been regularly put in; and the creditors having, in this respect, affirmed the doings of the sheriff, he cannot be allowed to repudiate his acts, and turn them round to an ac-
*29 tion on the case, *even though it be granted, that they might, at their election, have disaffirmed his acts and sued him in an action on the case. This is no hardship upon the officer; for it is difficult to see, how an action on the case would have been more to his advantage, than the present proceeding. But if so, it would be a sufficient answer to say, that he might have avoided the hardship by a strict performance of his duty. We think, then, upon this ground the present declaration should be held sufficient.

But we see no insuperable difficulty in considering the bail as regularly and legally put in. The Revised Statutes, chapter 28, section 23, provide, that when the body of a person is arrested on mesne process, it shall be the duty of the officer to commit such person to jail, unless the person so arrested shall expose personal property, sufficient to secure such officer, or procure some person to become surety, to the satisfaction of such officer, by such surety's indorsing his name on the back of such writ, as bail thereon. If the person arrested applies to the officer to become his bail and indorse the writ, and the officer sees fit to do it, we see no good reason, why, from that time, the relation between the officer and the person arrested should not be simply that of bail and principal. The bail is not, by our law, by way of a bail bond taken to the sheriff and by him assigned to the creditor, but is taken, by means of the indorsement upon the back of the writ, direct to the creditor; and the person arrested being in the custody of the officer, when he becomes bail, no formal delivery of the principal to the surety can be required.

The creditor, it is true, has the right to have the bail sufficient, at the time it is taken; and the officer, in his official capacity, is responsible for all damages occasioned by its insufficiency, unless he shall prove on the trial, that the surety was sufficient, when taken. We see no reason, why, if the officer, or his bail, are sued for neglect of official duty in not taking sufficient bail on the writ, the rights of the creditor are prejudiced by the officer being the bail himself. The question as to his sufficiency can as well be tested by evidence, as the sufficiency of a third person.

But it is said in argument, that, if it is once settled, that a sheriff may become bail on the back of the writ, it is to be feared, that the practice will become general, and consequently the future solvency *of the officer endangered, and *30 thereby the rights of the creditor put in jeopardy. But it is a *non sequitur*, that the practice would become general. There is no reason, why it should be so. The officer must be supposed to have the same regard to his future solvency, as other individuals. But if so I apprehend the officer could not be deprived of his justification, in any case, simply on the ground that the person taken as bail was engaged in a business, that might more or less endanger his future solvency,—though perhaps this might be an element entering into the consideration of the question as to the sufficiency of the bail.

It is said, that the statute provides, that the surety may call upon the officer, who served the writ, for a bail piece; and that the officer could not make a bail piece to himself;—but why not? The bail piece is not process, or any thing in the nature of process; but it is merely a memorial, or record, of the delivery of the principal to his bail; and by the statute the bail piece is made sufficient evidence, to entitle the surety to a warrant from any justice of the peace to take the body of the principal. The bail have the right, at any time, to arrest the principal; and this right grows out of their relation, without any bail piece, or process issued upon it; and the object of the statute, giving the surety a right to apply for a warrant, was to enable him to call to his aid the officers of the government, which he could not do upon common principles, independent of the statute. But suppose the sheriff, in his official capacity, could not make a bail piece to himself, as the bail of the principal; does it follow, that he could not legally become bail? This provision in the statute, for a warant to take the body of the principal, is for the benefit of the surety; and if, in such case, it is incompatible with principle, that the sheriff should have a bail piece, it might well be considered, that he waived this privilege, when he consented to become bail.

We have been referred to the case of Brown v. Lord, Kirby 209, as an authority against this view of the subject; but it is to be remarked, that at that time the bail on mesne process, by the Connecticut statute, was by the way of a bail bond to the sheriff; and it might well be held, that the sheriff could not be both obligor and obligee. But with us there is no privity of obligation between the bail and the sheriff; but it is between the bail and the plaintiff in *the process. The officer, who makes *31 the arrest, in a certain sense acts as

the agent of the plaintiff, both in making the arrest, and in taking the bail.

The result, then, must be, that the judgment of the county court is reversed, and judgment entered, that the declaration is sufficient.

Upon application of the defendant, he had liberty to re-plead, upon terms, and the cause was continued.

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*32 *COUNTY OF ORLEANS.

APRIL TERM, 1849.

[Continued from Vol. 21, page 503.]

PRESENT:

HON. STEPHEN ROYCE,
CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

STATE v. ABEL BUGBEE.

(*Orleans*, April Term, 1849.)

One who sells spirituous liquors as the servant of another, neither he nor his principal having any license, under the statutes of this state, is liable personally to indictment, although he acted without compensation in making the sale.

A single act of selling spirituous liquor, without license, constitutes an offence, under the statute of 1846.

Where a respondent is charged with distinct offences in different counts, and the jury return a general verdict of guilty, and it is apparent, that no evidence was given upon the trial, tending to prove one of the offences charged, the supreme court will not arrest the sentence by granting a new trial, but will render judgment upon those counts only, upon which the conviction was properly had.

*33 *Information, in two counts,—one for selling spirituous liquor in quantities less than one pint, the other for keeping tavern. Plea, not guilty, and trial by jury, June Term, 1848,—DAVIS, J., presiding. On trial testimony was given on the part of the prosecution tending to prove, that the respondent, on the day alleged in the information, was present at a tent kept by one Hunt,—a caravan of animals being there exhibited,—and assisted Hunt in mixing and selling various kinds of spirituous liquors to many persons, who called for them and drank them and paid the respondent therefor, and that the respondent had no license granted him, under the statute, for so doing; and the declarations of the respondent were proved, tending to show, that he did assist Hunt, on that day, an hour or two, but that he did so without solicitation, and without compensation, and that he had no interest whatever in the business. There was also testimony tending to prove, that pies, cake and fruit were kept for sale at the tent. The counsel for the respondent contended, that if the jury believed, from the evidence, that the respondent was acting gratuitously as the servant of Hunt, in the manner above indicated, he would not be responsible criminally, even though Hunt might have no legal authority to sell liquors; and that a single act of selling at a tent, on a public occasion, or even continuing to sell at one time for an hour or two, did not present a case within the true intent and meaning of the statute, as charged in either count of the information. But the court instructed the jury, that in order to constitute dealing in spirituous liquors in quantities less than one pint, it was not necessary to find, that the respondent received any pecuniary benefit from the sale; that selling for another would subject the respondent to the same penalty, as if he were selling for himself, unless he had reason to believe, that his principal was legally authorized to sell in the manner he did; that the testimony on the part of the prosecution tended to prove, that the respondent had no license; that no evidence had been put in on the part of the prosecution, tending to show that Hunt had not a license, and that the respondent had put in none tending to show that he had, or that the respondent believed he had, at that time; that they could take judicial notice, in the ab*sence of any *34 proof either way, that neither the judges of the county court, nor any other body or board of men, had authority by law to grant licenses, extending to the period in question, to sell liquors, except for medicinal, chemical and mechanical purposes; and that nothing appeared in the case, nor was it claimed by the respondent, that the selling by the respondent, if any, was of that restricted character; and that a single act of unauthorized selling, and more especially a series of acts of that kind, for an hour or two, if they found such to be satisfactorily proved, would constitute the statute offence, as charged in one, or both, of the counts of the information. The jury returned a verdict of guilty against the respondent. Exceptions by respondent.

G. C. Cahoon for respondent.

———— state's attorney.

The opinion of the court was delivered by

BENNETT, J. Two questions are raised in this case. It is claimed, that if the respondent, in making the sale, acted gratuitously, as the mere servant of Hunt, he would not be personally liable to indictment, though Hunt had no license. But we think this is not sound. If the respondent justify the act of selling under Hunt, as his principal, he must show an authority in his principal to sell. The agent, who does the act, can stand in no better situation than his principal. He justifies under him; and if the principal had no authority to sell, the agent could have none.

It was immaterial, whether the agent had a compensation for his services, or not. He none the less made the sale for his principal, though he performed the acts of his agency gratuitously. Hunt having had no license to sell, the respondent must stand as principal, so far as appertains to this prosecution.

The court were called upon to charge the jury, that a single act of selling without

license did not constitute an offence, under the statute of 1846. But we think it did. The language is in substance the same, as in the statute of 1839; and that statute has received a judicial construction by this
*35 court. If the respondent *attempted to justify under Hunt, it was for him to show Hunt's authority.

The court, it is true, told the jury, that if they found the facts proved according to what they had given them in charge, it would constitute the statute offence, as charged in one or both counts. There was no evidence tending to support the second count, and the jury should have been so charged. But the conviction on the first count was right. The court will not arrest the sentence by granting a new trial, but will sentence on that count alone, upon which the conviction was properly had, though the jury returned a general verdict of guilty. This is in analogy to cases, where there has been a general verdict of guilty on several counts, when a part of them are bad. The court in such case do not arrest the sentence, but proceed to sentence on the good counts alone.

The judgment of this court is, that the respondent take nothing by his exceptions, and he is sentenced to pay a fine of ten dollars and costs.

Sylvester Robinson v. James Wilson.

(*Orleans*, April Term, 1849.)

Upon the trial of an action for an assault and battery, where the defendant relies upon a prior assault by the plaintiff as a justification, the defendant will not be allowed to give in evidence the record of a conviction of the plaintiff, criminally, for such prior assault.

The decision of the county court, in determining that the cause of action arose from the wilful and malicious act of the defendant, cannot be revised by the supreme court, so far as it proceeds upon matter of fact.

Upon the hearing before the court in reference to the allowance of such certificate, the defendant is not entitled to read affidavits from the jurors, who tried the case, stating that they did not consider the trespass wilful and malicious.

Neither has the defendant the right, upon such hearing, to introduce evidence in reference to the character of the trespass: but it rests in the discretion of the court, whether to allow a farther hearing.

No legal inference, as to the character of the assault, is to be drawn from the amount of the verdict rendered by the jury.

*36 *Trespass for assault and battery. Plea, the general issue, with notice that the defendant would justify, by proving that the plaintiff committed the first assault. Trial by jury, December Term, 1848,—Poland, J., presiding. On trial the defendant offered in evidence the record of a judgment against the plaintiff, upon a criminal complaint, for the assault upon the defendant set forth in the defendant's notice of justification: to the admission of which the plaintiff objected, and it was excluded by the court. The jury returned a verdict for the plaintiff for one cent damages, and judgment was rendered upon the verdict. The plaintiff then moved for a certificate, that the trespass by the defendant was wilful and malicious. The defendant then offered the affidavits of the jurors, who tried the cause, to show, that they did not consider the assault wilful, or malicious, and that they considered the justification proved, but returned a verdict for nominal damages on account of inadvertent excess of force used by the defendant in self-defence. The defendant also offered farther evidence in regard to the character of the assault. But the court rejected all the evidence so offered by him. The defendant then insisted, that the legal inference from the verdict was, that the act of the defendant was not wilful, or malicious. But the court granted the certificate, and allowed the plaintiff to recover full costs. Exceptions by defendant.

T. P. Redfield for defendant.

J. Cooper for plaintiff.

The opinion of the court was delivered by

Bennett, J. We think there was no error in the county court, in excluding the record of the conviction of the plaintiff in the prosecution in behalf of the state. It might have been procured by the testimony of this very defendant, who now proposes to use the record. If put in, it would prove nothing as to the excess of force. Both parties may be guilty of a breach of the peace, and liable to be proceeded against criminally.

In relation to the allowance of the certificate by the county court, it is mostly a question of fact; and the decision of the county court *is not revisable, so *37 far as it proceeds on matter of fact. If it were allowed in an improper case, it would perhaps be otherwise. The opinion of the jury, that they did not consider the trespass wilful and malicious, is not material. The court are to determine that fact; and they have the right to determine it upon what was disclosed upon the trial. Where there has been a full trial, it would be absurd to hold, that, on the question whether the certificate ought to be allowed, the court are bound, as matter of law, to hear the case over again. We think it is safe to hold, that it must rest in the sound discretion of the county court, whether the case is such an one, as to require a farther hearing. We cannot perceive, that any legal inference, as to the character of the assault, is to be drawn from the verdict of the jury. If any inference is to be drawn, it was an inference of fact, which the county court might draw.

From the verdict of the jury it might be supposed, they considered the excess of force as small; and it is not usual for juries to measure the excess of force by so small a scale, as was adopted in this case, provided it was upon that ground the verdict was given for the plaintiff; but probably it might have been a compromised verdict. But be this as it may, the amount of damages given by the jury cannot control the county court in relation to the certificate. They are to judge for themselves, whether it should be allowed on the ground that the trespass was wilful and malicious, or not.

The result, then, is, that the judgment of the county court is in all things affirmed.

*38 *COUNTY OF CALEDONIA.

MAY TERM, 1849.

[Continued from Vol. 21, page 519.]

PRESENT:

HON. STEPHEN ROYCE,
CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

JOSEPH FELCH v. H. C. GILMAN AND GEORGE O. KEACH.

(*Caledonia*, May Term, 1849.)

After a highway has been laid out by the selectmen, and has been made by the town, and has been kept in repair and travelled by the public for some twelve or thirteen years, and the land owner has accepted his land damages for the laying out of the road and built his fences by the side of it, and has acquiesced during all that time in treating it as a public highway, he cannot sustain trespass on the freehold against those who go upon the road to repair it, upon the ground that the selectmen had never filed with the town clerk a certificate of the opening of the road.

When a public highway is legally laid out, the town, as incident to the right of way which they obtain, acquire the right of digging the soil and using the timber and other materials, found within the limits of the highway, in a reasonable manner, for the purpose of making and repairing the road, or bridges upon it.†

*39 *If, in repairing a highway, earth is improperly piled against the fence of the adjacent land owner, his remedy is not by an action of trespass upon the freehold, but by a special action on the case.

Trespass *quare clausum fregit*. Pleas, the general issue, and several pleas in bar. Trial by jury, December Term, 1848,—POLAND, J., presiding. On trial the plaintiff introduced evidence tending to prove, that there was a highway across the farm on which he lived in Waterford, being the same premises described in his declaration, passing partly through woodland, and partly through cleared land, which had been worked and travelled for some eight or ten years; that in the cleared land the road was fenced on one side by a stone wall and on the other by a board fence; that in the woods the road was fenced on one side only, by a brush fence; that in the autumn of 1846 the defendants, and others in their employment, went upon said highway to repair the same, and cut down three maple trees, standing within a few feet of the travelled path in the woods, and used them to make a wharfing upon the lower side of the road; that they also widened the road in the cleared land, and in so doing piled the earth and soil against the board fence, standing on the lower side of the road, for several rods, so as in some places to reach as high as the top of the bottom board in the fence; and that in the same autumn, by direction of the defendant Keach, a maple tree was cut in the woods, by the side of the road, and used in repairing a bridge upon the road, which had been broken down by the plaintiff in drawing a load over it just previously. The defendants gave in evidence a copy of the record of the laying out and survey of the road in question, by the selectmen of Waterford, in April, 1835, and also a copy of the record of the survey and laying out of a continuation of the same road, by the selectmen of Waterford, in February, 1840. The defendants also gave evidence tending to prove, that the town of Waterford constructed the road across the plaintiff's land, soon after it was laid out in 1835; that the plaintiff fenced the road about the same time, and the road had ever since been used and travelled by the public, without objection by the plaintiff, and that the plaintiff had himself used the road considerably, and that the road, from the time it *was *40 constructed, had been included in a highway district and kept in repair by highway taxes. The defendants also gave evidence tending to prove, that the trees cut by them stood within the limits of the survey of 1835, and so near the travelled path, that the road could not be made of sufficient width, without removing them; that the road, at that point, was out of repair, and that the trees were needed for the purpose, for which they were used; that the road in the cleared land was on the side of a hill, and was less than two rods wide between the fences; that in the winter the snow drifted into the road from the upper side, so as to render it difficult to pass; that the road was worked upon the extreme lower side of the line of the survey, to avoid the drifts, and that there was no other feasible way of avoiding that difficulty; that the board fence, against which the earth was piled, was within the limits of the road, as surveyed in 1835; and that when the continuation of the road was laid out in 1840, the selectmen paid the plaintiff $13,33, for damages on account of the road laid across his land in 1835, and that he accepted the same. It appeared, that the defendant Keach was appointed highway surveyor, and the defendant Gilman agent, to expend a certain tax upon this highway, and that they were acting in those capacities in making the repairs they did upon the road. It was admitted, that the selectmen of Waterford had never filed with the town clerk any certificate of the opening of this road, previous to the time when the defendants made the repairs complained of by the plaintiff. The court charged the jury, that if they found, that this road had been adopted by the town of Waterford and kept in repair for the period attempted to be proved by the defendants, that the plaintiff had accepted the damages offered him by the town and had permitted the road to be travelled, without objecton, by the public, for the period attempted to be proved, and had kept the road fenced, he could not now object, that the road had not been legally opened by the selectmen, by a certificate for that purpose, and thereby make the defendants trespassers; that if the trees cut by the defendants were within the surveyed

†See Baxter v. Winooski Turnp. Co., post, 114, Chittenden Co.

limits of the highway, and it was necessary to remove them, in order to make the road of sufficient width, or if they were needed for repairs of the road at that place, the defendants had a right to take and use
*41 them for that purpose; that if the *plaintiff's fence, in the cleared land, was within the surveyed limits of the road, and the earth was piled against it in making repairs of the road, the plaintiff could not maintain trespass therefor; and that, if the fence stood on the true line of the highway, but the natural formation of the land was such, as to render it necessary to build the road upon the extreme lower side of the line of the survey, in order to avoid drifts, or for other good reason, and thereby the earth was placed against the fence, as attempted to be proved by the plaintiff, the defendants would not be trespassers. Verdict for defendants. Exceptions by plaintiff

———— for plaintiff.

Peck & Colby for defendants.

The opinion of the court was delivered by

BENNETT, J. This is an action of trespass *quare clausum fregit*. The first question presented is, can the plaintiff sustain this action against the defendants for going upon his lands to repair the highway, upon the ground that the selectmen of the town had not filed a certificate with the town clerk of the opening of the road. We think he cannot. This road was laid out in 1835; it had been fenced by the plaintiff about the same time, and he had accepted his land damages, and the town had made the road and kept it in repair. It had been travelled by the public some twelve or thirteen years, and this without any objection from the plaintiff. It would now indeed be strange, if he should be allowed to turn round and sue persons, who travel the road, or should go on to it to repair it. The road has in fact been recognized by the town, as a public highway, and they are bound to keep it in repair. The plaintiff has acquiesced in treating it as a public highway, and it is now too late for him to object, that the town have not the right to repair it.

The only remaining question is, can the action be maintained in consequence of the cutting of the trees to use in the necessary reparation of the road? No doubt the fee of the land remains in the landholder; and he may maintain trespass, subject to such rights, as are acquired under the easement, which the public get. The public have simply a right of way, and the powers and privileges incident to that right. We
*42 think digging the soil and *using the timber and other materials, found within the limits of the highway, in a reasonable manner, for the purpose of making and repairing the road, or bridges, are incident to the easement. It is a common principle, that when the law gives a right, it at the same time impliedly gives what is necessary to a reasonable enjoyment of that right. This incidental, and to some extent a contingent, right should no doubt be taken into the account in assessing the landholder's damages. See Jackson v. Hathaway, 15 Johns. 453, per PLATT, J. Peck v. Smith, 1 Conn. 103, per SWIFT, J. 2 Metc. 147, 151, 457, 467.

In regard to the throwing the earth against or by the side of the fence, we do not perceive, that the right to repair the road was exercised in an unreasonable manner, in that respect; and if it had been, trespass upon the freehold would not lie for such an injury. The landholder's remedy must be by a special action on the case.

The judgment of the county court is affirmed.

DANIEL B. DENISON v. JOHN TRUE.

(*Caledonia*, May Term, 1849.)

Whether forgetfulness of the day of court is such an accident, or mistake, as will entitle a party to sustain a petition to the county court to have a default set aside, under chap. 33, sec. 8, of the Revised Statutes, *Quære*.

One summoned as trustee, in a suit before a justice of the peace, cannot maintain a petition, under chap. 33, sec. 8, of the Revised Statutes, to vacate a judgment rendered against him.

Petition to vacate the judgment of a justice of the peace, rendered upon default against the petitioner, who was summoned as trustee in the suit in which the judgment was rendered,—the petitioner alleging, that he was unjustly deprived of his day in court by fraud, accident and mistake. The defendant, who was the plaintiff in the original suit, moved to dismiss the petition, upon the ground, that one summoned as trustee cannot sustain such petition, under the statute. The county court, June Term, 1848,—HALL, J., presiding,—ordered the petition dismissed. Exceptions by petitioner.

————, for petitioner, relied upon the Revised Statutes, chap. 33, sec. 8.

**G. C. Cahoon*, for defendant, cited *43 Huntington v. Bishop, Tr., 5 Vt. 186; Earl v. Leland, 14 Vt. 328; Trombly et al. v. Clark, 13 Vt. 118; and Sanford v. Huxley, 18 Vt. 170.

The opinion of the court was delivered by

BENNETT, J. It is stated, as the ground of this petition, that the trustee was prevented from appearing at the day of the justice court, in consequence of his having forgotten the day of the court. It might well be inquired, whether this is such a mistake, or accident, as to come within the spirit of the statute, upon which this proceeding is professedly grounded; but we do not find it necessary to pass upon this question.

We do not think a trustee can in any case maintain a petition under the statute to vacate a judgment against him, and open the cause for trial in the county court. The language of the statute is, that when a judgment shall be rendered by a justice of the peace by default, and the defendant shall have been unjustly deprived of his day in court by fraud, accident, or mistake, or when a party, from like cause, has been prevented from entering his appeal, the county court may sustain a petition, &c.

This court have held, that a trustee was not so far a party to the suit, as, under the general law, to be entitled to a review. Neither could he appeal the cause from a justice of the peace to the county court;

and after the statute was passed, which authorized a trustee to appeal the cause, still it was held that he could not, under the general law, tender a confession of judgment. We think, the legislature, when they passed what has sometimes been denominated the "fraud, accident, or mistake law," did not contemplate a case like this. When they used the word "defendant," they intended the party defendant in the action itself, and not one brought into court incidentally, in whose hands goods, chattels, &c., have been attached, as being the property of the principal defendant.

There may be some reason, why the fraud, accident, or mistake law should be extended to a trustee; but we think it was not so designed. If the legislature should think proper, they can so extend the law. It is their business to do it, rather than ours.

The judgment of the county court is affirmed.

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*44 *COUNTY OF ADDISON.

JANUARY TERM, 1849.

[Continued from Vol. 21, page 171.]

PRESENT:

HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG,
HON. HILAND HALL,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

ENOCH PAINE v. TOWN OF LEICESTER.

(*Addison*, Jan. Term, 1849.)

Upon a writ of *certiorari*, in road cases, as upon a writ of error, in cases where that writ lies, the supreme court will revise the proceedings of the inferior tribunal in matters of law: but their decision upon questions of fact, involving the exercise of discretion, can only be revised by placing upon their proceedings the facts, which show that they could not, in point of law, render such judgment as they did.

And the supreme court, in such cases, will presume as much, and perhaps more, in favor of the regularity of the proceedings of the inferior tribunal, as in actions at common law.

*45 *The questions, how far the public good, or the necessity of individuals, may require a road, or how many persons live upon the road, or whether the road is laid to accommodate the land of one person only, are all matters of fact, to be decided exclusively by the commissioners and the county court.

Upon application for a writ of *certiorari*, the court will exercise a discretion in denying the remedy, even where it is obvious, that some formal error has intervened; and in this respect they will consider the amount of pecuniary interest involved.

It is no objection to the validity of the proceedings of the county court, in laying out a cross road, or lane, that it is laid only to land not occupied as a dwelling place. The question, whether, or not, there is convenient access to the land, without laying out the road, is one of fact, to be determined by the county court.

Petition for writ of *certiorari*. The selectmen of Leicester, on the twenty fifth day of January, 1848, caused a survey of a cross road, or lane, as a pent road, across the land of the petitioner and of John Bullock, to be made and recorded, in which they stated, that, having given notice to the land owners, and having viewed the premises, they judged, "that the public good and the wants and necessities of individuals" required such a road; and they set forth the *termini*, courses and distances of the centre line, the road to be one and an half rods wide, and directed the erection of gates, or bars, upon the road, and ordered, that they should all be kept in repair by John Bullock: and they assessed the damages of the petitioner at five dollars, taking into consideration the fact, stated by them, that the land of the petitioner, across which the road was laid, was a lot remaining entire, as originally divided among the proprietors of Leicester, in which there was an allowance for highways, of which none had been previously taken. The petitioner then preferred his petition to Addison county court, at their June Term, 1848, praying for the appointment of commissioners to inquire into the necessity and convenience of the road so laid out, and the manner in which it was laid out, and the damages sustained by the petitioner. Commissioners were accordingly appointed, and reported, that the road, as laid by the selectmen, ought to be established, subject to the conditions in respect to bars and gates imposed by them; that they found, that the selectmen, on the twenty fourth day of January, 1848, gave personal notice to the petitioner and to John *Bul- *46 lock, whose land was crossed by the proposed line of road, that they would meet on the twenty fifth day of January, 1848, at a place specified, for the purpose of examining the road and assessing the damages, and that the petitioner did not appear, and that the selectmen then proceeded to make their examination, and assessed the petitioner's damages at five dollars,—Bullock waiving all claim for damages. The commissioners also reported, that the petitioner's land, across which the road was laid, was an entire lot, as originally divided among the proprietors of the town, and that there were ten acres of allowance land attached to the lot for roads; that John Bullock owned land upon the north and south sides of the petitioner's land, adjoining a public highway upon the west, but that between that highway and the easterly part of the lot north of the petitioner's land there was a high ridge of land, beyond which there was a valley of improved land belonging to the petitioner and to Bullock, and also land of one Stanley, the products of all which must either be transported across the high bridge above mentioned, or over the road laid by the selectmen; and the commissioners appraised the petitioner's damages at five dollars and reported that Bullock relinquished all claim for damages. The petitioner filed exceptions to this report; but the county court, at their December Term, 1848, accepted the report, and ordered, that the road be established, and

awarded execution against the petitioner for cost.

Barber, Bushnell and *J. Prout*, for petitioner, insisted, that it did not appear, that the "conveience of the inhabitants and the public good," required the laying out of the road, as required by statute;—that it appeared, that the road was not laid wholly at the expense of the town;—that it appeared, that the road was laid wholly for the convenience of one individual,—Bullock;—that it did not appear, that the selectmen acted on an application in writing of three freeholders;—that the road was not laid absolutely, but only upon condition, that Bullock should erect and keep in repair the gates, or bars, across the road;—that there was error in relation to the damages, in charging the making and keeping in repair of the gates upon Bullock; and that there was error in the county court, in not specifying a time for the payment of damages by the town and awarding execution, in case of failure to pay; and they relied up-
*47 on *Rev. St. ch. 20, §§ 1-6, 10, 12, 26; Commonwealth v. Sawin et al., 2 Pick. 547.

E. N. Briggs for petitionees.

The opinion of the court was delivered by

REDFIELD, J. It is perhaps hardly necessary to go very fully into an examination of all the questions raised in the discussion of this case at the bar. But such cases are somewhat unfrequent in our practice, and confined within far narrower limits, than in the English practice. One cannot fail to perceive, that in the English courts of chancery, King's Bench and common pleas the remedy by writ of *certiorari* is very extensive. Its more general use is, to bring up a judicial proceeding from an inferior court, at some stage anterior to the judgment. It seems, that writ will not lie in any case, where the proceedings are according to the course of the common law, and where judgment has been already rendered,—the proper remedy then being by writ of error. King v. Penegoes, 2 D. & R. 209; S. C., 5 Petersd. Abr. 168, citing 1 Salk. 150, 6 Mod. 61, 2 Ld. Raym. 971, 13 East 411, 412, n. *a*. These cases, upon examination, will be found to involve other points, and that mainly; but the principal case decides the very point, for which we have cited it.

But in the English practice this writ is used to bring up indictments, and proceedings of a summary character, in almost all their stages of advancement, and upon almost all grounds, as the reported cases show,—which will be found thoroughly digested in 5 Petersdorff's Abr., and 2 Bacon's Abr., Tit. *Certiorari*. The remedy has not been used for any such purposes in this state. Many of the objects, which in England have been obtained by *certiorari*, are here obtained by writ of *mandamus* from this court to the inferior tribunal, requiring them to proceed to give such a judgment, as the law requires, or to do certain other acts. The chief difference in the remedy by *certiorari* and *mandamus* is, that by the former the record is brought into the superior court, and that court then proceeds with the case, while by the latter the case is to be proceeded with according to the order of the superior court, but in the inferior court.

But in this state the jurisdiction in all matters, both civil and *criminal, *48
being portioned out to separate courts, and each jurisdiction being exclusive, it would tend to bring every thing into utter confusion, to give the party an election, to remove his case, at will, into the superior court. And when a writ of error will lie, as it always will after judgment, when the proceeding is in the ordinary course of the common law, the remedy by *certiorari* is needless.

But where the proceeding is in the nature of an order of sessions, or decree of commissioners, although done in a court of record, a writ of error will not lie,—as has been often held in regard to orders of the county court laying out highways. The only remedy in such cases is by *certiorari*, or *mandamus*. But it must not be supposed, that this court intend to sit to revise every determination of the county court in regard to this very anomalous and onerous portion of their jurisdiction. We know very well, that neither our leisure, or our education, have qualified us to exercise uncommon wisdom in regard to the subject of highways. If we could go upon the ground and spend the requisite time, we could do something towards coming to a correct determination, perhaps. But when the statutes of the state require us to act as a supervising board of road commissioners, we must do what we can, to discharge the very cumbersome duty. But we certainly have not, as yet, acquired any such facility in such matters, or any such assurance of the infallibility of our judgments in regard to them, as would warrant our frequent interference.

This remedy by *certiorari*, in road cases, is intended mainly, we believe, to answer the objects and ends, which are intended to be reached by a writ of error, in those cases where that writ lies, that is, to revise the proceedings of the inferior tribunal in matters of law. Those matters, which rest in discretion in the court below, are always, mainly, matters of fact, and can be far better tried in the county court, than here. Hence the question, how far the public good, or the necessity of individuals, may require a road, is matter of fact, to be judged of exclusively by the commissioners and the county court. And how many, or how few, persons may live upon the road, or whether the road is laid to accommodate the land of one person only, are all questions of fact, upon which the discretion of the county court is to be exercised, and which cannot be revised here, unless by placing the facts upon the proceedings of the county *court which show that *49
they could not, in point of law, render such a judgment, as they did.

And it must not be supposed, that all the facts, necessary to give the jurisdiction, or to legalize the proceedings, must be spread out, or else this court will quash them. It may be true, that some cases may be found in the state of New York, or elsewhere, in which some such reasoning may have fallen from the court. But surely no

such rule can be fairly vindicated. We should presume as much, perhaps more, in favor of the regularity of these proceedings, as in actions at common law.

How, then, can it be said, that this court are here imperiously called upon to quash these proceedings?

It must be always borne in mind, that, in regard to all these prerogative writs, whereby this court assumes a supervisory jurisdiction over subordinate tribunals, we have, and in many cases exercise, a discretion in withholding the remedy, even when it is obvious, that some formal error has intervened. Among the constant and important considerations, which should guide the exercise of that discretion, is one consideration, which applies with great force to the present case, the very small amount of pecuniary interest involved. And when a civil case is utterly insignificant in point of pecuniary amount, it becomes almost impossible to gird ourselves up to a point of painful solemnity, in order to discuss the vital importance of the principles involved.

We know, indeed, that for one man to ask for a public highway across another man's land, for the mere purpose of accommodating and thereby increasing the value of his own land, is, past all contradiction, a most absurd request. And we should be unwilling to believe, that any board of selectmen, or commissioners, would lay a road under such circumstances. But it is impossible for us to say, in any given case, that a road is laid for any such purpose, unless it so appear by the report of the commissioners, or by the finding of the county court. This court can no more revise the finding of those tribunals, than of a jury, in a given case.

And when it does appear by the record, as in the present case, that the road is laid to accommodate the land of different persons, we could make no inference, that the public good did not require it,—but the contrary. A highway may be as important to accom*modate farms, unoccupied as dwelling places, as if they were so occupied. The owners must in some fair way have access to them for themselves and their cattle, summer and winter. And the reason no dwelling houses are built, or occupied, on many lands, is the want of highways. It surely requires no labored argument, to expose the absurdity of requiring a man to cross a mountain with his produce, or bargain with a crusty neighbor, as he best can, or commit a trespass, every time he enters upon his own land, by crossing that of others,—which it seems to me must be the result, if one man may not ask a highway, merely to accommodate his land. How can he build a house, if he should choose to, unless he have some convenient road to his land? And whether he have, or not, is matter of fact, to be determined by the county court; and from their granting the land owner, in this case, this road, this court must presume he had not a suitable road before. If the present owner do not desire to build a house upon the land accommodated by this road, he may wish to sell to one who will, or he may change his mind. We cannot see any limit, of the kind attempted to be established, to the discretion of the county court, in laying highways

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This seems to dispose of the main question in this case. The other points urged are merely technical, and not sufficient grounds for allowing the writ, in our discretion, even if they were well founded in law,—which we think, indeed, they are not.

The petition is dismissed, with costs to the petitionees.

Heirs of FRIEND ADAMS v. HIRAM ADAMS AND HARRY ADAMS, Administrators of FRIEND ADAMS. (In Chancery.)

(*Addison*, Jan. Term, 1849.)

Courts of probate, in this state, have the entire and exclusive jurisdiction of the settlement of estates, to the same extent, that jurisdiction of matters of contract, or tort, *inter vivos*, is given to the common law courts. The court of chancery has not concurrent jurisdiction, in this respect, with the probate court, and will not interfere in the settlement of estates, except to aid the jurisdiction of the probate court in those points only, wherein its functions and powers are inadequate to the purposes of perfect justice, and then in the same *degree, and for the same reason, that it interferes in other cases, where the principal jurisdiction is in the courts of common law.

*51

Unreasonable delay, in the probate court, in proceeding with the settlement of an estate, is no ground for calling in the aid of the court of chancery.

Nor will the court of chancery interfere to grant relief, where some of the parties affected by a decree of the probate court were infants, and had no proper guardians appointed, at the time the decree passed.

The mere fact, that an administrator, rendering his account in the probate court, will not produce the books and papers of his intestate, and is not compelled by the probate court to do so, is no reason why the court of chancery should interfere in the settlement of the estate.

But when there are claims existing between the administrator, or executor, and the estate which he represents, the court of chancery has jurisdiction to examine and adjust them, and the allowance of the claim by the commissioners will not, on account of the defect in parties at the hearing before them,—the administrator representing both debtor and creditor,—be a bar to its re-examination by the court of chancery.

Claims against an administrator, for money and property of the estate, which have come into his hands during the administration, are exclusively within the jurisdiction of the probate court.

The neglect of an administrator to cause an inventory and appraisal to be made of the choses in action of the intestate is of no importance in any court.

Under the Revised Statutes of this state real estate, to be regarded as an advancement, must be expressed in the deed to be such, or be expressed to be conveyed for love and affection; and if a pecuniary consideration be expressed in the deed, the estate conveyed cannot be made an advancement, by merely showing, that the deed was in fact executed upon the consideration of love and affection.

The entire subject of advancement is within the jurisdiction of the probate court.

But where the administrators of an estate claim title in themselves to land of the intestate, by virtue of deeds asserted to have been executed by the intestate in his life time, and it appears to the court of chancery, that these deeds were false and fabricated, or were obtained by the administrators out of the usual course, and not in good

faith, that court will enjoin the administrators from asserting title under such deeds, and will require them to account for the land as the property of the estate.

Where administrators have received money as compensation for trespasses committed by a third person upon the land of the intestate, the *52 court of chancery, *to avoid all doubt, may take jurisdiction, so far as to cause an account to be taken in that court for the amount so received, — although it would seem. that this matter might be adjusted in the probate court.

Where, upon a bill in chancery being brought in favor of the heirs of an estate against the administrators, it appeared, that the intestate, at the time of his decease, held a note for $1000 against the administrators, and had also a credit for $1000 upon the account book of the administrators, it was held, that the court would presume, that these represented different items of indebtedness, and that it was not competent for the administrators, by their answers, without evidence *aliunde*, to show that the credit was entered for the same indebtedness evidenced by the note; and that the administrators could not avail themselves of an alteration of the words, in which the credit was entered upon their books, without evidence *aliunde* of their right to make the alteration.

Where the plaintiff's claim, as set forth in a bill of chancery, rests upon a written contract, and the right of action is not barred by lapse of time, the admission of the contract. by the answer, and the allegation of payment, or of any other matter merely in discharge, are to be treated as distinct, and the latter must be proved, in order to avail the defendant; but, *per* REDFIELD, J., if the claim of the plaintiff rest wholly in oral proof, and the answer of the defendant is relied upon, to make out the plaintiff's case, the defendant may admit such a contract, and allege, that it was in its inception inoperative, or that it has been subsequently paid, or released, and the whole answer, upon both points, is to be regarded as evidence,— although the court are not bound equally to believe all parts of it, but may charge the party upon his admission, and refuse to believe what he says in his excuse.

Where a will was suppressed by those interested in the estate, and administration was taken without regard to it, and the will was never proved in the probate court, the court of chancery decreed the payment of the legacies given by it. Mead et al. v. Heirs of Langdon, Washington Co., 1834, cited by REDFIELD, J.

Appeal from the court of chancery. The case is sufficiently stated in the opinion delivered by the court.

C. D. Kasson and *C. Linsley* for orators.

E. F. Woodbridge and *A. Peck* for defendants.

The opinion of the court was delivered by

REDFIELD, J. This is a bill in chancery, wherein the plaintiffs in substance allege, that they are heirs at law of Friend *53 Adams, late *of Panton, deceased, intestate, and bring this bill for the benefit of all the heirs, or so many as may choose to come in under the claims set forth in the bill.

The bill states,—1. That Friend Adams deceased, intestate, on the nineteenth day of April, 1839, leaving no widow, but leaving the plaintiffs and defendants and some others, his children, and the representatives of such as have deceased;—2. That he had a large property at the time of his decease; —3. That on the second day of May, 1839, administration was granted to the defendants;—4. That they immediately took and have kept possession of all the books and papers of the intestate;—5. That the defendants inventoried real estate, to the amount of $69,776, and personal estate to the amount of about $20,600;—6. That the estate was represented insolvent, commissioners were appointed, and debts were allowed against the estate to the amount of $12,213,92;—7. That from the time of the defendants' appointment until April, 1844, the defendants, without cause, wholly omitted to make any farther progress in the settlement of the estate;—8. That on the twenty first of April, 1844, the probate court required the defendants to render their account of administration on the third Monday of May following; that publication was duly made; that this hearing was continued from time to time until the second day of April, 1845, when the defendants made themselves chargeable for $23,389,69, and charged such debts and expenses, as to make the balance only $5,106,04, besides the real estate, to be distributed among the heirs; and that this account was duly passed by the probate court;—9. That the defendants made application to the probate court for distribution, which proceedings are still pending;—10. That at the time of the settlement all the children of a daughter of Friend Adams, who had married one Ferris, and had deceased, except two, were minors and had no guardians appointed; —11. That in the proceedings before the probate court the defendants would not bring the intestate's papers and books into court, and were not examined upon oath, and refused to give information of what they had received as advancement. or of how much they were owing the intestate at the time of his decease, or of divers sums of money and property held by the defendants in trust for the decedent at the time of his decease, and refused all access to the books for the purpose of ascertaining these *facts;—12. That on the ——— day of *54 ———, A. D. 183—, Friend Adams was the owner of the Gage lot, consisting of two hundred acres in Addison. worth $5000; that Gage was tenant to the deceased; that the deceased conveyed this land to the defendants, in trust, as the plaintiffs conjecture and allege, to enable the defendants to bring an action of ejectment to recover of Gage for the benefit of their father, and, after the recovery, to convey to him; and that no consideration was paid;—or else, that the conveyance was in mortgage; —or else, an advancement;—or else, it was for a consideration to be paid, but which never was paid;—and that Friend Adams had some paper until, or near, the time of his death, which would have showed the true state of facts, and which will show the defendants' liability to account for the value in some way;—13. That in the year 1834 the intestate conveyed to the defendant Hiram Adams a farm in the south west corner of Panton, of about fifty acres, by a deed in the usual form, but which was never recorded until after the decease of his father, and that the land was never occupied by Hiram, but by his father, from that time; that the land was conveyed by Friend Adams to Edwin Adams, to make him a freeholder, and was by him occupied from 1835 until the death of Friend

Adams, without claim upon the part of Hiram; that Hiram, finding an old deed to himself among his father's papers, undestroyed, by means of it, and threatening to turn Edwin out of possession, compelled him to buy this fifty acres; and that this has never been in any way accounted for by Hiram, and should be;—14. That the intestate, some time before his decease, conveyed to the defendant Harry Adams the house and lot where he lives in Vergennes, of the value of $1500, without any consideration; that the deed was never recorded until the ninth day of May, 1839; and that this should be accounted for, the same as the former land deeded;—15. That the defendant Harry Adams, on occasion of his forming a partnership with the Parkers, applied to his father to help him to a capital, and he sold the Hill & Hapgood place, and turned in $500 of the notes, which were the same as cash to Harry, and have never been accounted for; and that this was not known to the plaintiffs, at the time of the settlement before the probate court;—16. That the intestate held, at the time of his decease, a note for $750 against Harry, of which Harry took possession after the *55 death *of his father, and for which he refuses to account;—17. That Friend Adams made advances to Harry, before he went west, and took from him at that time a certain paper writing, without date or signature, showing that Harry had $1100 of his father's property in his possession; and that since the decease of the intestate Harry admitted the liability for that sum, and promised one of the plaintiffs to account for it; but that before the probate court he refused to give any account whatever; and that he wholly refused to produce the writing,—as he did also before the probate court;—18. That about the year 1835 Enoch D. Woodbridge recovered a judgment against the proprietors of Addison, for some $600, and levied his execution upon land of the proprietors, undivided, near Snake Mountain; that Friend Adams, being one of these proprietors, and claiming this land, gave a sum of money, about $700, to satisfy the execution and release the land; and that Harry either paid the judgment, or suffered the land to vest in Woodbridge, and then procured it assigned to himself, but now wholly refuses to give any account, either of the land or the money;—19. That the daughter of Friend Adams, Cynthia, married one Ferris, and their farm, in Chazy, became incumbered, and Friend Adams gave to Hiram $1000, with which to redeem it for the daughter, as advancement towards her share, and that Hiram redeemed the land and sold it for $2000, and put the avails into his own pocket;—20. That about the year 1837 Hiram borrowed $1000 and gave his note to his father, which was among the papers of the intestate, when they came into the administrators' possession; and that the intestate also had a credit on the partnership books of H. & H. Adams of $1000 cash, which they subsequently claimed to be for the $1000, for which the note was given, and finally altered to "sheep," and before the probate court would only account for $700 for both;—21. That Hiram and Harry occupied the brick store of the deceased, in Vergennes, worth a yearly rent of $175, and Hiram occupied the house of the deceased, in Vergennes, worth a yearly rent of $175, and that Hiram occupied about four hundred acres of the Barnum farm, worth $300 annually, and that Harry occupied three hundred acres of the same farm, worth $200 annually, and that they have given no account whatever of the same;—22. That since the appointment of the defendants as administrators, they have cut large quantities of *valuable timber on the *56 Barnum farm, committing waste to the amount of more than $1000, and have refused to give any account whatever of the same;—23. That the defendants, about the year 1843, received $200 of Twitchell, for trespasses committed on the lands of the intestate, for which they wholly refuse to account;—24. That the defendants did not cause the notes and choses in action of the estate to be inventoried, or appraised, and only entered such on their account, as they admitted their liability for, being $17,000, and no more, when in fact the deceased died leaving choses in action of the value of more than $30,000, which the defendants have put to their own use, as also of large amounts of real estate, which they held in trust for the other heirs;—25. The habit of the intestate, in making deeds of land to his children for temporary or occasional purposes, and, when that purpose was answered, their being surrendered, and frequently not destroyed; that some such were made, without having been ever delivered, and were in the possession of the intestate at the time of his decease, and were obtained by the defendants, and that the defendants claimed, that such as were in their names conveyed title to them;—also, the intestate's loose manner of keeping his papers, and the defendants' having access to them for three weeks before his death, and examining them in an "eager manner," and their keeping them away from the inspection of the other heirs, until they obtained letters of administration, and ever since,—except the "Chapin notes," which were for a short time delivered to the plaintiff Daniel, and which contained a memorandum of a settlement between Friend Adams and H. & H. Adams but a short time before his death, and which the defendants refused to produce before the probate court, pretending that they had mislaid or lost the same;—26. That Hiram in the absence of the other heirs, obtained an allowance of about $2118 by the commissioners,—which was wholly fraudulent;—27. That all the foregoing deeds, recorded after the decease of Friend Adams, were never delivered in his life time;—28. That in January, 1840, the defendant Harry admitted to Edric Adams, the plaintiff, that the two hundred acre farm in Addison and the house and lot in Vergennes should be accounted for by him, and the $1100 received when he went west, and did write down, "Ad.—200—$4000; House, Harry, $1500";—29. That the defendants have divers *books and papers in their possession, *57 by which all this might be fully understood and justly settled, which they refuse to produce; and that the plaintiffs have

made application to the probate court for a re-examination of the account; which proceeding is still pending; that the plaintiffs are without any proof from witnesses competent to testify in a court of common law, and must therefore rely wholly upon the oath of the defendants and the production of papers by them; that the defendants were never required by the probate court to render an account under oath; and that the extreme paucity and weekness of the powers of the probate court to vigorously compel a full and ample discovery, and to do complete justice, make it almost a mockery to go there;—30. That some of the heirs were infants, and had no legal guardians appointed to appear for them, and so had no legal notice, and that others resided out of the state, and had no legal notice;—31. That the other heirs, on application to them to become parties to the bill, declined;—32. And that the defendants have conspired together to defraud the other heirs.

Very much of this bill may be disposed of, without going at all into the answers, or proofs, by reference simply to the appropriate and settled and long and well recognized boundaries between the jurisdiction of courts of probate in this state, and the court of chancery. In England it is undoubtedly true, to a great extent, that the subject of the settlement and distribution of estates is a matter, over which the ecclesiastical courts and the court of chancery exercise, in some sense, a concurrent jurisdiction. And the court of chancery, in England, have so lightly esteemed the proceedings in the ecclesiastical courts, upon this subject, that they have not hesitated to take the subject from them, after they have entered upon it, or even to revise their decrees, after they have been definitely passed. 1 Story's Eq. Jur. 513, § 542, and cases cited in the notes. This they profess to do, on account of the lameness of the powers of the ecclesiastical courts and their inability to do perfect justice to all concerned to the same extent which could be done in a court of equity. Ib. But the American courts of equity have not gone to the same extent, perhaps, in interfering with the settlement of estates before probate courts. But they have generally, I think, held the jurisdiction to be concurrent. Seymour v.
*58 *Seymour, 4 Johns. Ch. R. 409. Such seems to have been the view taken by the plaintiffs' counsel in the present case. But the law of this state is undoubtedly different.

It has always been held here, that courts of probate have as much the exclusive jurisdiction of the matters coming properly within their cognizance, as any other courts of law. Hence, when the court of chancery have interfered in the settlement of estates, it has been merely in aid of the powers of the court of probate, and where, from some defect of the adequate means, it was not in their power to do the same justice, in the same way, which could be done in a court of equity, and which it seemed desirable should be done in the particular case. This is a policy established by a long and uniform course of decisions, upon grounds which have always approved themselves to the profession and the citizens at large, and which there is no necessity and no sufficient reason now to disregard.

It was clearly the intention of our legislature, from the very first, to give the entire jurisdiction of settlement of estates to the probate courts, in the same manner, and to the same extent, that the jurisdiction of other matters of contract, or tort, *inter vivos*, was given to the common law courts. The contemporaneous and constant construction of all statutes passed upon this subject, for more than seventy years, and they have been numerous, and, at different periods, somewhat dissimilar, concur in the same conclusion. This has all occurred with the full knowledge, that the subject was differently regarded in England, and, to some extent, also, in the other American states. And whenever it has become necessary to resort to the aid of a court of chancery in these matters, in this state, which has been but seldom, indeed, that court has uniformly, it is believed, disclaimed any purpose of interfering generally, so as, in any sense, to exercise supervision over the probate court.

The cases, in which the court of chancery have, before this, interfered at all in the settlement of estates, so far as now occurs to us, have been confined within the narrowest limits, as to the subject matter, as well as the number of instances. In the case of unpaid legacies the court of chancery has always exercised a kind of general concurrent jurisdiction, as in matters of account. Howard et ux v. Brown, 11 Vt. 361, and cases cited. Sparhawk et al. v.
*Ex'rs of Buell, 9 Vt. 41. In the case *59
of Mead et al. v. Heirs of Langdon, decided in Washington County in 1834, and never reported, this court set up and decreed the payment of legacies, given in a will never proved in the probate court, but which had been suppressed by those interested in the estate and administration obtained without regard to the will. This decision went mainly upon the ground, perhaps, of the destruction of the will, and the consequent difficulty with regard to proper parties in any proceeding at law, inasmuch as the legatees were not among the legal heirs and not in the confidence of the administrator, so that the parties at law did not in fact represent the interest of the plaintiffs in the bill. This, too, was perhaps, mainly the ground of the equitable interference in the case of Morse et al. v. Slason, 13 Vt. 296. There may be some few other cases in our reports, which do not now occur to me; but it is believed all will be found to go upon the ground merely of aiding the jurisdiction of the probate court in those points only, wherein its functions and powers are inadequate to the purposes of perfect justice, in the same degree, and for the same reason, that it interferes in other cases, where the principal jurisdiction is in the courts of common law.

It is to be borne in mind, too, in determining how far a court of chancery will interfere to aid the jurisdiction of the courts of probate, that the probate courts already have a very extensive chancery jurisdiction, by which claims, in some respects of purely equitable cognizance, may be there

adjusted. But for the most part that court has not, by its mode of procedure, such adequate means of giving full redress in matters of purely equitable nature, as exist in the courts of equity. Hence, as a general thing, no doubt, the court of chancery retains its ancillary jurisdiction to the same extent over matters in the probate courts, which it has over those in the common law courts.

And now, to apply these general propositions to the subject matter of this bill, it must be apparent, that most of it is clearly and manifestly within the exclusive jurisdiction of the probate court. We may in this way fairly dispose of such parts of the bill, for the reason, that, if the allegations do not make out a case for the plaintiff, it will be in vain to go into the proofs, inasmuch as the plaintiffs must prevail, if at all, *secundum allegat et probata*.

*60 *In following the abstract, which I have made of the bill, the seventh point is the first, which seems to contain the least ground of complaint against the defendants,—and that is mere delay. It will not, I suppose, be expected, that this court will establish the rule, that the court of chancery is to assume the jurisdiction and the burden of settling all estates, where there has been unreasonable delay in the probate court. If this were to become a ground of equity jurisdiction, it is very much to be feared, that the entire business of the common law courts would be absorbed by that court. The eighth seems to us, as we shall have occasion hereafter to show more at length, to afford reasons against, rather than in favor of, the equity interference. The ninth seems to be of no importance any way, unless it be to give a fair and continuous history of the entire proceedings in the probate court.

The tenth is certainly no ground, ordinarily, of equitable interference. That some of the parties defendants in a judgment, in a court of law, were infants, and had no proper guardians appointed, would be, in most instances, only ground of error, at most. In some cases *audita querela* has been sustained, where, by statute, the remedy by writ of error was taken away. But I am not aware, that any general equity jurisdiction has ever been attempted to be founded upon any such basis. Since the determination of this court, giving to the probate courts a qualified and limited power to revise and set aside their own decrees, there can be no necessity for the interference of courts of equity, for any such reason as this.

The eleventh ground of complaint in the bill is one, that has been much insisted upon in the argument, and seems to have been much relied upon as a ground of recovery, from the first. It may therefore merit a somewhat minute consideration. It seems to consist of two parts,—1. The defendants would not bring the intestate's books and papers into court;—2. The defendants were not themselves examined upon oath in the probate court. Whether, indeed, the first part of this charge is intended to rest mainly upon the contumacy of the defendants, or the defect of the powers of the probate court, it could have no force to create a jurisdiction in the court of chancery. The contumacy of the defendants, however unreasonable, or persevering, could be of no importance any way. They should be suitably dealt with and taught more courtesy. As *to the want of power in *61 the probate court to compel the production of books and papers, and to punish summarily for any contemptuous disregard of their orders, I could not myself entertain the slightest doubt. I entertain no apprehension, that any such doubts would ever occur to any one. Sitting in the court of probate, I might, indeed, choose to determine all doubtful claims against the administrator, until the books should be produced, and thus compel their production in the manner intimated in the statute in regard to actions of account and book account. But I could not, I think, hesitate, in a proper case, to take steps to compel the production of books in the probate court, by an express order to that effect. But it is hardly necessary to determine that question, perhaps, as the other course, of deciding all disputed claims against the defendant, until the books were produced, would be quite sufficient for ordinary purposes, in that court. This same charge is farther somewhat amplified, in running the matter somewhat more into detail; but no new principle is introduced, so far as we can perceive. So much of this charge, as rests upon a mere defect of proof in the probate court, is again re-asserted in the final summing up of the case, and will there deserve a separate consideration.

The twelfth, thirteenth and fourteenth are of the same character, and will be considered upon the answer and proofs hereafter. The fifteenth is merely the charge of leaving $500 of property, belonging to the estate, in the hands of Harry, one of the administrators, at the time of the decease of the intestate, and which has not been accounted for before the probate court. The sixteenth and seventeenth are of the same character. The twentieth is similar. And the twenty first seems to be nothing more than a claim, that, at the decease of the intestate, the administrators were indebted to him, and have omitted to carry that indebtedness into the accounting before the probate court. The twenty sixth, in which Hiram is charged with obtaining fraudulently a large allowance against the estate, seems to us to come under the same category with the other claims in this class.

This class of claims seems to us to come within the principles of the decision in the case of Morse v. Slason. If the administrators were owing the estate, at the time of their appointment, they surely could not be compelled to put that indebtedness into their *joint account, thus making *62 each, and the bondsmen of each, liable for the debts of the other, when it might not yet have been collected; and if not voluntarily paid by the other, it does not occur to us, how any legal steps could be taken by the administrator, who was not the debtor, to compel payment. Where the administration is committed to the debtor, and to him only, and he being of sufficient ability to pay at any moment, it may be well enough, and is no doubt generally so

done to make him debtor on his account to the amount of his previous indebtedness to the estate. But this is rather a fiction of law, by which the administrator is charged as having received, during the administration, what he might or ought to have received. And perhaps the powers of the probate court might extend to the adjusting, and bringing into the joint account such previous indebtedness. But it is obvious, that it must be done under very great disadvantages,—the debtors themselves virtually representing the creditor also.

We see no reasonable objection to allowing the court of chancery jurisdiction, in all cases of claims in favor of the administrator, or executor, against the estate, as well as *vice versa*. This was in effect determined, in the case last referred to. There is reason and propriety in bringing such claims before some tribunal, where the real parties in interest can be formally allowed to appear. And we do not think the allowance before the commissioners should stand in the way of such re-examination upon the proofs in the case. That was virtually an allowance, obtained while the defendants represented both parties, and could not, in any just sense, be esteemed as possessing the requisite attributes of a judgment of a court of competent jurisdiction, there being a total want of the appropriate parties, and, by consequence, a defect of jurisdiction of the subject matter. These claims must therefore be examined upon the answers and proofs, and, if properly sustained, be referred to the master in the court of chancery.

The eighteenth seems to belong to the same class of claims, in principle, as the twelfth. The nineteenth seems to be a charge of holding property from the estate in trust for Cynthia, the intestate's daughter, and selling the property and putting it to the use of Hiram. This charge is against Hiram only. Many of the claims are separate; but this seems to have a farther
*63 objection, that it is no claim *in favor of the intestate, but of Cynthia Ferris, or her heirs, if she have deceased, and should be pursued by the parties in interest. Neither the allegations, or the proofs, establish any trust in favor of Friend Adams, or his estate. If this were a loan to Hiram, or an advancement towards the share of Cynthia, or her heirs, it may be investigated and set right in some proper mode and time, but not here.

The twenty second and twenty third seem to be nothing more, than charges of having received funds, belonging to the estate, during the time the defendants were administrators, which they ought to have accounted for and have not. This is a matter wholly within the jurisdiction of the probate court, and their judgment upon the administration account would be final. And if that judgment were set aside, it would still be a matter exclusively within the jurisdiction of that court, and could with no propriety be brought into the court of chancery. The money received of Twitchell may be in some sense connected with the land, out of which it arose, and will be farther considered in that connection.

The twenty fourth, so far as it is a charge of not making an inventory and appraisal of the choses in action, is of no importance in any court. It is seldom done in the probate court, and whether done, or not, is of little importance. The inventory, without the appraisal, could avail little; and an appraisal could be no more than a remote approximation to the truth. The general charge of squandering real estate, which should have been held in trust for the other heirs, is not relied upon.

The twenty fifth seems to be nothing more, than an attempt to apologize for some apparent defects in the plaintiffs' evidence, and to heap upon the defendants' heads some farther particulars of misconduct; but it is all included in former charges, which have been and will be sufficiently commented upon. The twenty seventh is connected with the twelfth. The twenty eighth is an attempt to charge the defendants with an acknowledgment of trust in writing.

The twenty ninth does not seem to contain any new matter, except as showing, that the plaintiffs have ample redress for most of the matters, contained in this bill, in the probate court, with some farther impeachment of the defendants and the court of probate,—the one for positive perversity, and the other for cowardly shrinking
*from duty, if not for positive conniv- *64
ance with the defendants. Sufficient has already been said, to show the opinion of this court in regard to the propriety of the court of chancery extending its powers of guardianship over the probate court, who might in turn be called upon to reciprocate the office to us.

This review of the bill seems to us to have disposed of everything contained in it, except the land, which it is claimed the defendants either had no title to, or else held as a mere trust, or as an advancement, and the indebtedness existing between the estate and the defendants at the time of the decease of the intestate. It will be necessary, we think, to examine these claims upon the pleadings and the proofs.

In regard to the deeds, the bill charges the matter in almost every imaginable form. The answers, in effect, deny everything upon this point, which tends to charge the defendants. Some of the grounds, upon which it is claimed, that the defendants are to be made liable, are clearly not tenable,—as that the lands included in these deeds are to be taken as advancement. It is very certain, I think, that, under the Revised Statutes, real estate, to be regarded as an advancement, must be expressed in the deed to be such, or else to be for love and affection. It is certainly difficult to give the language there used any other reasonable interpretation. And it is almost certain, that the Revised Statutes, upon this subject, were not intended to introduce any new law. The views put forth in the case of Newell v. Newell, 13 Vt. 24, by the learned judge who delivered the opinion of the court, are in the main, I think, the general opinion of the profession in this and most of the other American states. There may be some difference of opinion, how far the English rule, that a deed, expressed to be for love and affection, may still be shown by parol not to have been intended to be an advance-

ment, obtains here. But all sound lawyers, I think, now concur in the opinion, that a deed, expressed to be for a pecuniary consideration, cannot be made an advancement, by simply showing, that it was in fact executed upon the consideration of love and affection. If that were to be admitted in regard to real estate, it would be placing the proof, in regard to that, upon far more precarious grounds, than what is required in relation to personal estate,—when all just reasons evidently require the contrary. These deeds are all expressed
*65 to be *for a pecuniary consideration, except the one to Hiram of one hundred acres in Panton, dated March 14, 1831, and recorded after the death of Friend Adams; and there does not appear to be any charge in the bill applicable to this claim, or any claim under this deed; and if there were, the entire subject of advancement is clearly within the jurisdiction of the probate court, and is now before them, on appeal.

But to examine the answers in detail;—In regard to the Gage lot, the defendants say, that they were in want of pasture land, and made their wants known to their father, and that he made out a deed of this two hundred acres, worth $2000, and that they immediately took possession and have kept possession ever since. They admit, that they paid nothing for it, deny all trust, or agreement to receive it as advancement, and esteem it a mere gift. Considering that this farm was worth from $2000 to $3000 at the time, that the deed was never acknowledged, or recorded, during the life time of the grantor, and that this and other deeds of a very surprising character, which were confessedly supposititious, were, immediately after the decease of the gantor, spread upon the record, it is calculated to excite some apprehension in regard to the entire fulness and faithfulness of the account given by the defendants of the mode and manner, as well as the motives, of this conveyance. The declarations of the defendants, in regard to their own standing in relation to their father's property, at and about the time of his decease, certainly go far to convince any one, that they did not then claim title to this land. And the consideration, that no such pretence was ever set up, or heard of, until after the death of Friend Adams, still farther confirms the belief, that the deeds, put on record at the death of Friend Adams, were in some sense false and fabricated. I do not pretend to have formed any definite opinion, how this deed was obtained, or how early it existed; but I entertain no doubt whatever, that it should be perpetually silenced and buried, as a source of title in the defendants. There is a general aspect about the very account given of it by the defendants, which is too ludicrous to be examined, by any one of ordinary perception of the congruity of things, with a grave countenance,—certainly without a painful effort to preserve a decent and becoming gravity!

This claim and that for the house lot
*66 in Vergennes, against Harry *Adams, rest upon very similar grounds. Harry admits, in his answer, that he never paid any thing for this, and says it was an absolute, unconditional gift. The excuse, which he offers for an inducement to his father to convey the land to him, is certainly such as is not commonly allowed by men, who amass large estates, to deprive them of their possessions, even in favor of their children. It might be a sufficient reason, why the father would suffer his son to occupy it without rent,—but not ordinarily even to that extent. It seems to us, that Harry must have obtained this deed in some way out of the ordinary course, and that his claim under it is not in good faith.

The claim to the benefit of the land levied upon by the Woodbridge execution is certainly somewhat dubious in favor of the defendant Harry, to say the least. But according to his answer, he gave nothing for this execution, except the note to Woodbridge and the bill of cost to Gage,—both of which claims have been allowed in his favor against the estate, if we have not mistaken the proof in the case. And having himself treated the property, as belonging to the estate, in so unequivocal a manner, and claiming it as a gift, without any written evidence, and admitting that nothing was paid, except this, which it is now shown was allowed against the estate, we see no reason, why the land on Snake Mountain should not be held as belonging to the estate,—and also the $100 received of Twitchell. This claim, of itself, is one, which it seems to us might well enough be adjusted in the probate court; but a decree here will save all doubt, and the plaintiffs are allowed to take one, according to the views expressed above.

The only remaining claim, under this head, is for the fifty acres in Panton, against Hiram; and this is virtually abandoned in the argument. There does not seem to be any ground to sustain this claim, upon the pleadings and proof.

The allowance before the commissioners to Hiram, the $1000 note for borrowed money, which was treated as the credit on the book, the use of the brick store in Vergennes and of the Barnum farm, seem to be the other claims, mainly, which have not been disposed of by the court, or abandoned in the argument, or failed wholly to be sustained in the proof. The use of the Lovell house in Vergennes, by Hiram, might possibly be included in this same category;
*but the testimony in the case seems *67 to render it probable enough, that Hiram has rendered some kind of equivalent for the use of that house; and we should not subject any claim to re-examination, unless we felt entirely dissatisfied with the disposition before made of it.

I shall not attempt to go much into detail, in regard to the proof upon these points. In regard to the $1000 borrowed, and for which it was claimed the $1000 note was given, which it was claimed to set aside wholly upon the ground, that the same sum was credited on book, it is obvious, that the defendants' answer cannot be allowed to have any such effect. The credit, of itself, is sufficient to establish a claim for $1000 in money, and the note another $1000, and both should be allowed, unless satisfactory evidence, aside from the answer, can be adduced, to show that they

were really one and the same thing. The interlineation of "sheep" should not be allowed to defeat the credit, unless the right to make the alteration is established by proof *aliunde*. These rules are very obvious. The intestate did rely upon this note, and no doubt would equally rely upon a credit on the defendants' book, which must be presumed to have been made with his concurrence, and certainly will be presumed to have been for a different thing. Clearly then, no alteration of the book, which the parties, for the purposes of the credit, had constituted the depositary of their evidence of debt on the part of the defendants, and in which both would consequently have such an interest, that neither would be justified in altering it, without the consent of the other, any more than they would a written contract between them, can avail the defendants. So, too, in regard to admissions, or declarations, of the defendants, put into the case by the plaintiffs, which are in some sense responsive to the bill, and which are favorable to the defendants,—they are not beyond the control of the court, and are not to be received to do away written contracts, or credits on book, but, like similar admissions in trials at common law, are indeed evidence, but not conclusive. The triers may believe and act upon so much, as operates against the defendants, and reject the other portions.

It is, indeed, questionable, whether, when the plaintiffs' claim rests upon a written contract, or admission, and the defendant is called upon, in the bill to admit, or deny, its existence, and does admit it, *68 *which makes a full case for the plaintiff, the defendant can go farther, and show, that it is not now of binding obligation upon him. The opinion of Chancellor KENT, in Hart v. Ten Eyck, 2 Johns. Ch. R. 62, restricts the rule, as to the defendant's right to discharge himself, when he is only charged by his admission in the answer, to the very same sentence, and to the same transaction. This case was, indeed, reversed in the court of error upon this point, as stated in a note to Woodcock v. Bennet, 1 Cow. 744, where the rule is laid down, which is substantially followed in the later cases in that state, that whatever is fairly a reply to the general scope of the claim set up in the bill, whether in the stating or charging part, and whether by way of denial, or excuse, or avoidance, is to be treated as evidence for the defendant. This is far more rational, and just, and easy of application, than the restricted rules contained in the case of Hart v. Ten Eyck; but I am not sure, that it is yet fully established.

All writers and all the cases state the rule upon this subject alike, to wit, that what is responsive to the bill is evidence for the defendant, and what is not responsive is not. But in applying the rule there is almost infinite diversity. But I think this may be considered as settled, that where the plaintiff's claim, as set forth in the bill, rests upon a written contract and the right of action is not barred by lapse of time, the admission of the contract and the allegation of payment, or of any other matter merely in discharge, are to be treated as distinct, and the latter must be proved, in order to avail the defendant; but on the other hand, if the claim of the plaintiff rests wholly in oral proof, and the answer of the defendant is invoked, to make out the plaintiff's case, the defendant may admit such a contract, and allege that it was in its inception inoperative, or that it has been subsequently paid, or released, and the whole answer, upon both points, is to be regarded as evidence; although many, perhaps a majority, of the cases contradict this latter proposition, and most of the elementary books say, that the matter of avoidance, in order to be evidence, must be contained in the "same sentence." 2 Daniel's Ch. Pract. 1426. Ridgeway v. Darwin, 7 Ves. 404, and note by Mr. Sumner. Thompson v. Lambe, Ib. 587. The same rule is adhered to in Robinson v. Scotney, 19 Ves. 582; but the party was there relieved, by being permitted to put his answer in a different form,—just as if the form of the allega*tion should make any dif- *69 ference! The reporter's note to this case seems to me to hint at the true ground of limiting the responsiveness of the defendant's answer. He says, "Charge by admission discharged only by showing the application immediate on the receipt of the money, as one transaction, not by distinct, independent items on the other side of the account."

The old rule, which dates as far back as Kirkpatrick v. Love, 2 Ambl. 589, that if the discharge was in the same sentence with the admission, it would avail the defendant, otherwise not, seems now almost wholly abandoned, as resting in no sound reason. Lord HARDWICKE, in Talbot v. Rutlege, 4 Bro. C. R. 74, very boldly condemns the chancery rule *in toto*, and approves the rule at common law, as stated above, which is obviously the only sensible one. And I understand Chancellor KENT, in Hart v. Ten Eyck, to contend for a distinction, in regard to the effect of the testimony of a defendant in chancery, whether it is contained in the answer, or is given before the master;—p. 88. There may be something in this distinction, but I find it no where else alluded to, and I confess myself unable to comprehend its force.

I think the rule, which obtains at law, that the whole admission, with all its qualifications, whether of avoidance, or discharge, shall be received and considered as evidence, although you are not of course bound equally to believe all parts of it, but may charge the party upon his admission, and refuse to believe what he says in his excuse, and which is so decidedly approved by Lord HARDWICKE, in Talbot v. Rutlege, and by Lord ERSKINE, in Ormond v. Hutchinson, 13 Ves. 54, is the only sensible rule, and the one the courts of equity will finally be compelled to adopt. It is the one virtually adopted in the state of New York, but not fully, I admit, in the English chancery. It is the rule as to reading an answer, in one case, as evidence in another case, either at law, or in equity,—with this qualification, that by reading one part of an answer you open the door to the other party to read the whole; but the effect is still an

open question to the triers,—and always applies to an answer to a bill of discovery merely; and Chancellor KENT, in Hart v. Ten Eyck, seems to think the rule, for which he contends in equity, to be similar to the one at law, wherein the party is entitled to have all, that he said at the same *70 time given in evidence. But *the rule for which he contends is, that he must not only say it at the same time, but in the same sentence, and it must have reference to the identical transaction.

This rule must, to be consistent, either stop at the very point where the defendant makes himself chargeable, or it must admit all that is said in regard to that particular indebtedness. Whether the party discharges himself in the same sentence, or after the intervention of a period and a capital letter, is of no importance to the rule of pleading, or evidence. And whether the payment was the same day, or the next, or the next week, or month, or year, is of no possible import whatever. The only inquiry is, whether the receipt and the payment are stated in the answer as part and parcel of the same transaction, and whether the real admission, intended to be made, and the only one that was or would have been made, was the compound result of both receipt and payment. I can readily conceive a case, where the matter offered in discharge is so remote, that it should not be esteemed, perhaps, a qualification of the admission, but ordinarily, I apprehend, it should be so esteemed, and whenever good sense and sound reason prevail, will be so esteemed. It is certainly so at law. There is no reason to doubt, that it was equally so in trials in the civil law. But, for some reason, the court of chancery has seen fit to engraft a still farther refinement upon the old rule.

This has sprung, I believe, from viewing the answer as a mere plea, and nothing more. But it is really a matter of evidence, so far as it is fairly an answer to the bill. If the bill, in order to be good against a demurrer, must allege not only the receipt of the money, but that the defendant still retains it in his hands, I do not well see, why the reply to the former is more responsive to the bill, than the latter. And if a simple denial, that the defendant still detains the money, would be considered evasive, as it most undoubtedly would be, and the defendant be required to answer farther, and set forth when and where and to whom he paid it, I do not, I confess, well comprehend, how the answer, which the defendant is compelled to give, is to be regarded as not responsive to the bill.

But the rule in the court of chancery is no doubt somewhat more limited, at present, than this. The language of Lord ERSKINE, in Ormond v. Hutchinson, seems to indicate an approach to this rea- *71 *sonable extension. "He (plf.) cannot, reading the answer as to the contract and consideration, stop at the end of a sentence, but must proceed to the end of the immediate subject, to which the defendant is answering; as at law a witness cannot be stopped when the party, wishing to elicit from him particular facts, finds it convenient to stop him, but must be allowed to finish the particular subject, and to proceed to state anything with reference to it. Otherwise the party might obtain an advantage, stopping the evidence just at the qualification. But that does not apply to distinct matter." But this rule could have no such application, as to enable the defendant to defeat a written contract by his own testimony; for that is, in no just sense, a qualification of his admission, and that is the true limit, perhaps. This claim will therefore be referred to the master, so far as it has not already been allowed in the probate court,—which is, I understand, the note of $1000 against Hiram, the credit having been allowed at $1000, and the sheep at $741.

As it regards the allowance before the commissioners in favor of Hiram, it will be set aside by the court of chancery, and the whole matter of Hiram's indebtedness referred to a master. This determination is made upon the ground, that the matter has never been properly adjudicated, where all parties in interest could appear and be heard,—the debtor and creditor being in fact represented by the same person,—and upon the farther consideration, that this court are fully satisfied, that no such sum was due to Hiram. We are satisfied of this from the fact, that the intestate was a man of great pecuniary means, and Hiram of comparatively none at all; that in Hiram's business, and with his means, he would be far more likely to borrow money, than to lend, especially of his father. The fact, too, that in July, 1837, he gave to Friend Adams his note for $1130,50, for other notes which he then took up, and for doing which it is impossible to conjecture any reason, while he held all this bundle of notes against Friend Adams, which have since been allowed by the commissioners, running back to 1831, which, if the allowance is fair, he must then have held, induces us to believe, there must have been some mistake in the matter, and therefore to subject it to farther investigation.

The rent of the Barnum farm, before the death of Friend Adams, *will be *72 referred to the master, both as to Harry and Hiram. It is possible the father might have intended they should occupy this farm without rent, but it does not appear probable to us. The master can determine. The defendants will have the full benefit of their own testimony in regard to that; and if, notwithstanding that, the master believes they formed unreasonable expectations as to the purposes of Friend Adams, he will make them chargeable with the use of the farm. The same, also, as to the brick store. It seems to me more probable, that this might have been intended to be rent free, in consideration of assistance rendered by the defendants to Friend Adams, and of some advantage he might derive from his sons being in the store;—but of this I am not satisfied,—the report of the master will determine.

This disposes, we think, of all of that portion of the bill, upon which it seems to us the plaintiffs can prevail. It has cost great labor and expense to bring the matter to trial, and to examine and decide it. Beyond the mere apology for our own wan-

derings in the case, we are not disposed to complain of the countless mass of irrelevant matter, with which this case is surrounded. The decree, which the orators obtain, is of sufficient importance to justify the proceeding; and the nature of the case is such, that it was, no doubt, difficult to know in advance precisely how to frame the bill, which accounts for the manner in which the bill is drawn; and the plaintiffs will recover costs upon those portions of the bill and evidence, where they have prevailed, and pay costs where they have failed.

The decree of the chancellor is reversed, and the case remanded to the court of chancery, with directions to that court to enter up a decree for the plaintiffs, perpetually enjoining the defendants from setting up any title in law or equity, to the Gage lot, and requiring them to inventory the same as part of the estate of Friend Adams, and to render an account of all rents and profits of the same before the decease of Friend Adams, before one of the masters of the court. The same as to the Snake Mountain land, upon which the Woodbridge execution was levied, and the $100 received of Twitchell, and the house and lot in Vergennes,—except that for this the defendant is not required to pay rent. And the claim for the $500, for that portion sold to Hill & Hapgood, will be referred to a mas-
*73 *ter to state the sum due, and the orators will have a decree for the same;—and also the claim for the use of the brick store, if anything is reasonably due to the estate for the use of the same, under the circumstances. The allowance by the commissioners in favor of Hiram is to be perpetually enjoined from being used by him, either in law, or equity; and the whole matter of indebtedness between him and the estate, including the use of that portion of the Barnum farm occupied by him until the decease of Friend Adams, is to be referred to a master to state the sum due. It shall also be referred to a master, to state how much is due from Harry, if any thing, for the use of a portion of the Barnum farm.

Whatever sums are found due from the defendants, they shall be required to charge themselves with in their administration account before the probate court, and sums found their due shall be credited to them in that account.

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*74 *COUNTY OF CHITTENDEN.

DECEMBER TERM, 1849.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. DANIEL KELLOGG,
HON. HILAND HALL, ASSISTANT JUDGES.

STATE v. PHILIP SMITH.

(*Chittenden*, Dec. Term, 1849.)

Upon the trial of an indictment, in several counts, for violations of the license law by the sale of spirituous liquors, it is not error in the county court to permit the prosecutor, after having given evidence tending to prove as many distinct breaches of the law by the respondent, within the time covered by the indictment, as there are counts in the indictment, to proceed and prove other sales within the same period of time.

The putting the prosecutor to his election for what offences he will proceed, in cases of this kind, is matter of practice, and should rest in the sound discretion of the county court; and the most, which the respondent can claim, is that the election should be made before he is called upon for his defence.[1]

A conviction, upon an indictment for a breach of the license law, will be, *prima facie*, a bar to a second indictment for a similar offence by the respondent previously committed. BENNETT, J.

The license law of this state, enacted in 1846, is not unconstitutional.†

*Indictment, in three counts, for *75 breaches of the license law of this state, enacted in 1846. Plea, not guilty, and trial by jury, March Term, 1848,—BENNETT, J., presiding. On trial the prosecutor gave evidence tending to prove three distinct sales of spirituous liquors by the respondent, without license, between the first day of May, 1847, and the day of presenting this bill, and then offered evidence to prove other sales within the same period of time,—to which the respondent objected, claiming that the prosecutor, by his evidence, had elected, for what sales he would proceed; but the court overruled the objection, and allowed the prosecutor to give evidence tending to prove sales exceeding in number the counts in the indictment. The respondent requested the court to charge the jury, that the statute, upon which this indictment was founded, was unconstitutional; but the court instructed the jury, that the statute was valid; and the jury returned a verdict, that the respondent was guilty upon the first two counts of the indictment, and that he was not guilty upon the third. Exceptions by respondent.

L. E. Chittenden and *C. D. Kasson* for respondent.

H. Adams, state's attorney.

The opinion of the court was delivered by

BENNETT, J. This is an indictment against the respondent for a violation of the license laws, in three counts; and the only question argued is, was it error in the county court to permit the government, after having given evidence tending to prove a sale at three different times, to prove a sale at any other time? We think not. It might have been the case, and probably was, that

[1] Where separate public offenses charged against the same person are misdemeanors of a kindred character, they may be joined in separate counts in one information, to be followed by one trial for all. The law only requires, in such case, that after the state has introduced its proof election shall be made as to which particular transaction the state will rely on for a conviction. State v. Skinner, (Kan.) 8 Pac. Rep. 420. Upon a criminal trial, where the state has offered evidence tending to prove several distinct and substantive offenses, it is the duty of the court, upon the motion of the defendant, to require the prosecutor, before the defendant is put upon his defense, to elect upon which particular transaction he will rely for conviction. State v. Crimmins, (Kan.) 2 Pac. Rep. 574.

† See Bancroft et al. v. Dumas, 21 Vt. 456.

the attorney for the government had failed, in the first instance, to make out a fair *prima facie* case upon all the counts in the indictment, if upon any,—especially as, in the end, a conviction was had only upon two of the counts; and this supposition is consistent with the bill of exceptions, which stated, that after having given evidence tending to prove, &c.

It was claimed, that the government had made their election, for what sales they would proceed, the moment they had
*76 introduced any *evidence, tending to prove three distinct sales, and that they could not abandon them and go for other sales; and, if permitted so to do by the court below, that it was error. But we think, that this doctrine of putting the prosecutor to his election is matter of practice, and should rest in the sound discretion of the court below. It is said by ALDERSON, J., in Wrigglesworth's Case, "that it is not usual to put the prosecutor to his election immediately upon the case being opened; and semble, that the reason for putting a prosecutor to his election being that the prisoner may not have his attention divided between two charges, the election ought to be made not merely before the case goes to the jury, as it is sometimes laid down, but before the prisoner is called upon for his defense, at the latest." See Roscoe's Crim. Ev. p. 203. We think there is much good sense in the views expressed by Justice ALDERSON, and that all that a prisoner can claim from this doctrine of election, under a sound exercise of the discretion of the court, especially in a case of this kind, is, that it should be made before the prisoner is called on for his defence. We all know, who are conversant with trials for a violation of the license laws, that in point of fact the prosecutor is often compelled to go to trial, without being in full possession of his proofs. If in such cases the prosecutor was required to make his election from the first, it would indeed be a hardship upon him, and more than the prisoner should require. If the prosecutor is required to make his election, before the cause goes to the jury, and before the respondent is called upon for his defence, it should satisfy all that can be justly claimed.

It is said in argument, that if the course of trial adopted by the county court is sustained, the respondent may be convicted for an offence, for which he was not indicted. This may be so; and it does not follow, that it might not have been so, if a conviction had been had for any of the sales, which the prosecutor first attempted to prove. We have no means of knowing, which were the precise sales proved before the grand jury, and upon which the indictment was found.

It has also been said, that it was error in the county court to permit the prosecutor to attempt to prove more than three distinct sales, because, upon conviction, the record could not be pleaded in bar to an indictment for a sale prior to the find-
*77 ing of the present *bill. But we are inclined to think, that a conviction in this case should be a *prima facie* bar to any second indictment for any prior sale. And we are especially inclined to think, it should be so held, since this court have decided, that it was not essential, that the names of the persons, to whom the sale was made, should be stated in the indictment. It has been sometimes said, that to make out a bar arising from a prior conviction, the prisoner must not only produce the record, but also substantive testimony, that the offence is the same as that for which a conviction had been had. Though doubtless, in a plea in bar, it is necessary that there should be an averment as to the identity of the offence, yet that may, as matter of evidence, appear directly from the record; and if it does not so appear, it may be averred, and be proved by parol. And in a case like the present we think the identity of the offence should be intended, and that, if the offence were not the same, the showing should come from the prosecutor, upon a proper replication. If this be not so, I apprehend an indictment, omitting the name of the person, to whom the sale was made, and not averring, that he was unknown, should have been held bad for uncertainty. There is nothing in the case of State v. Ainsworth, 11 Vt. 91, which is at variance with the idea, that the record in this case should be held sufficient to make out a *prima facie* bar.

The constitutional question in relation to the license laws, saved by this bill of exceptions, having been decided in a previous case, and being now waived, we need take no time with it. It is sufficient, that it has been settled.

We think, then, that if this court has power to revise the decision of the county court,—of which I have much doubt,—that court exercised their discretion soundly, and that the respondent has no just ground of complaint, and that much less is there any error in their proceedings.

The result is, that the respondent take nothing by his exceptions, and this court will pass sentence.

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*SAMUEL S. SKINNER v. NATHANIEL A. TUCKER. *78

(*Chittenden*, Dec. Term, 1849.)

A deposition, properly taken to be used upon the trial of a case before a justice of the peace, may be opened by him on any day before it is to be used, as well as in open court on the day of trial.

If a deposition be properly taken, *ex parte*, to be used upon the trial of an action of book account before a justice of the peace, and be properly opened, and the case pass by appeal to the county court, and be there referred to an auditor, the deposition may be used upon the hearing before the auditor, notwithstanding it was not in fact used before the justice of the peace, and has never been filed in the office of the clerk of the county court, and the party taking it has refused to the adverse party any access to it, or any knowledge of its contents.

An *ex parte* deposition, taken to be used before referees acting under a rule from the county court, may be received in evidence by the referees, without having been previously filed with the clerk. Anon., Orange Co., 1847, cited by HALL, J.

Book account. Judgment to account was rendered, and an auditor was appointed, upon whose report judgment was rendered by the county court, September Term, 1848, —BENNETT, J., presiding,—in favor of the

defendant. The only questions made in the case were upon the admission, by the auditor, of a deposition, in reference to which the facts were reported as follows. The deposition was taken by the defendant, *ex-parte*, on the twenty third day of February, 1848, and certified in due form, to be used upon the trial of this suit before the justice of the peace, before whom it was commenced, on the twenty fifth day of February, 1848, to which day the trial then stood continued. On that day the suit was again continued by the magistrate to the third day of March, 1848, and it was then again continued from time to time, and finally passed to the county court by appeal. The deposition was opened by the justice of the peace on the first day of March, 1848, the adverse party not being present, or consenting thereto, and was delivered to the defendant's attorney, and was not used upon the trial before the justice, nor was it ever placed on file in the office of the clerk of the county court; and it appeared, that the defendant's attorney had refused, upon application, to allow the plaintiff, or his attorney, to see it. To the decision of the county court the plaintiff excepted.

*79 *W. W. Peck*, for plaintiff, insisted, that the deposition, not having been taken with notice, nor filed with the county clerk, according to the Rev. St., chap. 31, sec. 11, was inadmissible as evidence before the auditor.

Smalley & Phelps, for defendants, cited Walsh et al. v. Pierce, 12 Vt. 130; Starksboro' v. Hinesburgh, 15 Vt. 200; Rev. St., c. 31, § 11; and Lord v. Bishop, 16 Vt. 110.

The opinion of the court was delivered by

HALL, J. It is insisted in behalf of the plaintiff, that the deposition was inadmissible, because it was not duly opened, and also because it was not filed with the clerk of the court for thirty days before the trial. We do not think that either of the objections should prevail.

There is no statute provision in regard to the opening of depositions taken to be used before justices. They ought doubtless to be opened by the justice, but as the opening of them is in its character a ministerial act, it may be done on any day before the deposition is to be used, as well as in open court on the day of trial.

The deposition, having been properly taken and opened, became legal evidence in the suit, and would, we think, continue such evidence, wherever the suit was carried, until its final determination; unless, indeed, the right to use the deposition became suspended by the removal of the reason, which justified the taking of it.

It was not necessary to file the deposition with the clerk. The statute requiring depositions to be thus filed for thirty days before the session of the court, in which they are to be used, has, we believe, been uniformly understood to apply only to depositions taken to be used on trials in the supreme and county courts. The statute contemplates, that depositions may be taken to be used before justices of the peace and boards of auditors and referees, as well as before the county and supreme courts, as appears by the form prescribed for certifying them; and when thus taken, they are not requred to be filed. At the March Term of the supreme court in Orange county, in 1847, it was held, in a case not reported, that an *ex parte* deposition, taken to be used before a board of referees acting under a rule from the county court, was properly received in *evidence by the referees, without having been previously filed wth the clerk. *80

This decision was in conformity with the language of the statute, as well as with the long established practice under it.

The deposition in this case having been properly taken to be used before the justice, and properly opened by him, was, we think, legally admissible in evidence before the auditor, without having been filed with the clerk; and the judgment of the county court is therefore affirmed.

FREDERIC FULLER v. WILLIAM P. BRIGGS.

(*Chittenden*, Dec. Term, 1849.)

In a suit brought by a deputy collector against the collector of customs for the district of Vermont, to recover payment for his services as deputy collector, it was held competent for the plaintiff to prove, that it was the uniform course of business with the government at Washington, to keep no account with the deputy collectors, but to charge all sums, collected for duties in any one district, to the collector, and for the collector to pay the deputy collectors for their services, and charge, in his account with the government, the sums of money so paid, in connection with evidence, that the services were performed at the request of the defendant, and of subsequent repeated promises, on the part of the defendant, to pay for the services so performed, for the purpose of establishing the fact, that the services were rendered in consideration of an express undertaking on the part of the defendant, to be responsible to the plaintiff therefor.

And although the government do not allow the collector's account for money paid for the services of a deputy collector, unless the account is accompanied by a voucher, duly executed and sworn to by the deputy, showing that the money has been in fact paid to him, yet it is not necessary, in order to entitle the deputy to recover from the collector for his services, that he should first furnish him with such voucher. It is sufficient, if he offer to furnish the voucher, whenever he is paid the money.

If the jury, in such case, find the fact, from competent evidence, that it was the understanding of both parties, at the time the request was made and the service rendered, that the defendant should be personally responsible to the plaintiff therefor, the plaintiff will be entitled to recover.

A declaration, in such case, which alleges, that the defendant was indebted to the plaintiff for work and labor, &c., before that time done and performed by the plaintiff in and about the business of the defendant, at his request, as deputy collector and inspector of the customs, the defendant being collector of the customs, and that being so indebted, the defendant, in consideration thereof, afterwards promised to pay, is sufficient upon motion in arrest of judgment.

Assumpsit. The plaintiff declared *81 against the defendant, in the first count in his declaration, as follows;—"For that whereas heretofore, to wit, on the first day of August, 1841, at Burlington aforesaid, the defendant was indebted to the plaintiff in the sum of one hundred dollars for work and labor and services, care, skill and diligence, before that time done and

performed and bestowed by the plaintiff in and about the business of the defendant, at his request, as deputy collector and inspector of the customs, who then and for a long time before and since was collector of the customs for the district of Vermont; and being so indebted, he, the defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Burlington aforesaid, undertook and faithfully promised the plaintiff to pay him said sum of money, when he, the defendant, should be thereunto afterwards requested." There was also a count for money had and received. Plea, the general issue, and trial by jury, November Adjourned Term, 1846. On trial the plaintiff gave evidence tending to prove, that he was appointed a deputy collector and inspector, while A. W. Hyde was collector for the district of Vermont, and that soon after the defendant was appointed collector in 1841, he informed the plaintiff, that he might continue to act as deputy collector, and discharge the duties of that office, until the defendant should give him notice to the contrary, and that the plaintiff did continue to discharge such duties for two months thereafter, before any notice to discontinue was given to him. The plaintiff also offered to prove, that it has always been the uniform course of business with the government at Washington to keep no account with the deputy collectors, but to charge all sums, collected for duties in any one district, to the collector, and for the collector to pay the deputy collectors for their services, and charge, in his account with the government, for the sums of money so paid;—to which testimony the defendant objected; but it was admitted by the court. The plaintiff also gave in evidence a letter, addressed to him by the defendant under date of July 10, 1841, in which the defendant promised to settle the plaintiff's account and pay him the balance. The plaintiff also gave evidence tending to prove that in the latter part of July or first of August, 1841, he left his account against the defendant with D. A. Smalley for collection, the plaintiff then claiming
*82 $90, that being *the compensation allowed him, as deputy collector, for one quarter; that Smalley soon afterwards called upon the defendant for a settlement of the demand, and the defendant expressed a willingness to pay $60, and said that one Elkins, who had served as deputy collector for one month of the quarter, was entitled to the residue; that Smalley soon afterwards informed the plaintiff what the defendant said in reference to it, and the plaintiff then authorized Smalley to receive the $60 in full discharge of the demand, and delivered to Smalley an unexecuted voucher, in the form usually given to the collector by the deputy; that Smalley soon afterwards informed the defendant, that he was authorized to accept the $60 in full discharge of the demand, and the defendant then promised, that he would pay it; that in several conversations with Smalley thereafter the defendant promised to pay the demand, making no objections or conditions whatever; and that the affair continued in this condition, without payment, until after the defendant had left the office of collector, and had settled his account with the government; and that then the defendant, upon being again called upon, said that he should not pay the $60, because he had settled his account with the government, and nothing had been allowed to him for this claim, and that he was not personally responsible to the plaintiff. It appeared, that the defendant had not in fact received any thing from government on account of this claim, not having charged the claim in his account. It also appeared, that at a previous trial of this suit the defendant had admitted, that until his settlement with government, he had funds, in his hands, belonging to the government, more than sufficient to pay this claim, and that he insisted, that he should have paid the claim, if the plaintiff had furnished him with a voucher, so as to have enabled him to charge it in his account. It appeared in evidence, that the deputy collectors are nominated, or recommended, by the collector, and that the nomination is approved by the Secretary of the Treasury of the United States, and that the rate of compensation, to be paid to the deputy collectors, is also fixed by the government, upon the representation of the collector, and that the collector has no power to remove a deputy collector, unless such removal is approved by the Secretary of the Treasury. It also appeared, that nothing is allowed to the collector, in his account with the government, for payment to a deputy col*lector unless the *83
account is accompanied by a voucher from the deputy, verified by oath, acknowledging the receipt of the money.

The defendant gave evidence tending to prove, that in many instances he had obtained from his deputies a receipt and affidavit, showing that they were paid their salary, in advance of its being paid, so as to enable the defendant to charge it in his account and send on the proper voucher, and that the future settlement was then a matter of confidence between him and his deputies, and that this practice was somewhat common with him. The defendant also read in evidence, by consent of the plaintiff, a letter from the Secretary of the Treasury to Smalley, dated January 19, 1844, in which it was stated, that the removal of the plaintiff, by the defendant, from his office of deputy inspector, was approved May 25, 1841, and that no charge had been made in the defendant's account for any payment to the plaintiff. The court instructed the jury, that, to enable the plaintiff to recover, it was not indispensable, that he should prove an express contract on the part of the defendant to be personally responsible for the plaintiff's wages as deputy inspector: but if they found, from the uniform course of business at Washington relative to this subject, with which it might well be supposed the parties to this suit were well acquainted, and from the subsequent promises of the defendant, as contained in his letter, and as testified to by Smalley, to pay the plaintiff's claim, that the services now sued for were performed by the plaintiff at the request of the defendant, under an expectation, that he was to look to the defendant personally for his pay, and that the defendant, on his part,

at the same time, expected to be personally responsible, that this created such a privity between them, as to render the defendant personally responsible;—and that the uniform course of business at Washington and the after promises of the defendant to pay the claim were only to be used as evidence, tending to prove how these parties originally understood it; and that in this point of view this was competent evidence;—and that unless they found, from the whole evidence bearing upon this point, that such was the understanding of the parties, they should return their verdict for the defendant. The court also instructed the jury, that it was not necessary, that the plaintiff should have executed
*84 and tendered to the defendant a *release, or receipt in full, for the money, before he had a right to call on the defendant for payment, if they found the defendant personally liable; and that, in this case, the fact, that the plaintiff had never tendered to the defendant such receipt, would not preclude the plaintiff from recovering, however it might be, if the defendant had tendered payment, and the plaintiff had then refused to execute the proper voucher. The jury returned a verdict for the plaintiff, for the $60, and the interest. Exceptions by defendant. After verdict, the defendant moved that judgment be arrested for the insufficiency of the declaration, which motion was overruled by the court; to which decision the defendant also excepted.

W. P. Briggs and *L. Underwood* for defendant.

There is nothing in the case, tending to show, that the defendant assumed any personal responsibility to the plaintiff, or that the plaintiff performed the duties of his office, relying upon the responsibility of the defendant. The plaintiff understood, that he was an officer of the government, and that in performing his duties he acted as deputy collector, and not as the mere servant of the defendant. He did not enter upon the duties of his office at the request of the defendant; for he was a deputy, when the defendant received his appointment, and was so, without regard to the inclination of the defendant, until he was removed by the Secretary of the Treasury. This excludes the presumption of credit being given to the defendant personally. When a government officer acts within the scope of his authority, he is not personally responsible for any contract made for the benefit of the government. Theob. on Pr. & Agent 320. Ex parte Hartop, 12 Ves. 352. Owen v. Gooch, 2 Esp. R. 567. Macbeath v. Haldimand, 1 T. R. 172. Bowen v. Morris, 2 Taunt. 374. Allen v. Waldegrave, 8 Taunt. 566, [4 E. C. L. 280.] Hodgson v. Dexter, 1 Cranch 345. Walker v. Swartwout et al., 12 Johns. 444. Sheffield v. Watson, 3 Caine 69. Olney v. Wickes, 18 Johns. 123. Bainbridge v. Downe, 6 Mass. 253. 10 Mass. 350. The evidence objected to by the defendant, in relation to the custom of doing business with the government, should have been excluded. The relation of collector and deputy collect-
*85 or, and their lia*bility, is established by law, and the custom established by government can have no tendency to make the defendant personally responsible. Nothing short of an express contract could make the defendant liable, nor would he be liable even then, if the contract was in the line of his duty as collector, and was made for the benefit of the government, and that was known to the plaintiff. The presumption is, that an officer, acting in the line of his duty, contracts as agent, and is not personally responsible. Rathbon v. Budlong, 15 Johns. 1. Mann v. Chandler, 9 Mass. 335. 1 T. R. 172. 1 Cranch 345. 12 Johns. 444. King v. Butler, 15 Johns. 281. Olney v. Wickes, 18 Johns. 122. Tracy v. Swartwout, 10 Pet. 95. Elliott v. Swartwout, 10 Pet. 153. 3 Mason 446. The government would not have justified the defendants in paying the plaintiff his salary, without a voucher, that he had performed his services. This the case shows was the custom at Washington, which the plaintiff was as much bound to know as the defendant. The declaration is insufficient. It alleges, that the services were performed by the plaintiff, as deputy collector under the defendant, who was collector, and does not allege a prior request or promise to pay.

Smalley & Phelps for plaintiff.

In contracts made by agents the liability of the agent depends upon the character of the contract. It is a question of intention. Fox v. Drake, 8 Cow. 191. Roberts v. Button et al., 14 Vt. 195. Hinsdale v. Partridge, Ib. 547. And this rule extends as well to agents of the government, as to agents of individuals. 2 Kent 633. Gill v. Brown, 12 Johns. 388. Rathbon v. Budlong, 15 Johns. 1. Sheffield v. Watson, 3 Caine 69. Osborne v. Kerr, 12 Wend. 179. Olney v. Wickes, 18 Johns. 122. Perry v. Hyde, 10 Conn. 329. Macbeath v. Haldimand, 1 T. R. 172. 1 T. R. 674. Rice v. Chute, 1 East 582. Ib. 583, n. Prosser v. Allen, 1 N. Gow 117, [5 E. C., L. 889.] Under the circumstances, without any other contract than the mere employment of the plaintiff as deputy, the law would imply a promise to pay the plaintiff. The plaintiff was entitled to a verdict upon the count for money had and received. When a person has money of the debtor in
his *hands, out of which he has au- *86
thority from the debtor to pay a creditor, and thereupon promises the creditor to pay him, the action for money had and received will lie against him in favor of the creditor. Sutton v. Burnett, 1 Aik. 197. Cheeny et al. v. Clark, 3 Vt. 431. Robertson v. Fauntleroy, 8 J. B. Moore 10, [17 E. C. L. 530.] 32 E. C. L. 335. And this principle applies to government officers, as well as to others, Freeman v. Otis, 9 Mass. 272. The evidence of the uniform usage and rule of the Treasury department was properly admitted. It was directly relevant to the issue left to the jury by the court, as showing, that the parties to the contract understood, that no claim could be made upon the government for the services of the deputy, and that the claim must be upon the defendant.

The opinion of the court was delivered by

KELLOGG, J. The defendant was collector of the customs for the district of Ver-

mont, and the plaintiff a deputy, who served in that capacity under the defendant; and this suit is brought to recover for those services. The suit is founded upon an express undertaking of the defendant to be personally responsible to the plaintiff for his services. And so far as the testimony had any legal tendency to establish that fact, or was proper for the consideration of the jury in passing upon the question, in connection with the previous request of the defendant to the plaintiff to perform the service, and the subsequent repeated promises of the defendant to pay for the same, we do not see, why it was not properly received and submitted to the jury. To such use, only, was this testimony restricted by the county court in their instructions to the jury The testimony had a tendency to account for the promises subsequently made by the defendant to the attorney of the plaintiff, as indicating how the parties originally understood the contract.

The defendant insisted, that the plaintiff could not recover without proof of an express promise on the part of the defendant, and that it was necessary, that the plaintiff should deliver to the defendant a proper voucher, enabling him to charge the amount in his account with the government, before he was entitled to recover. The case shows, that the plaintiff had furnished his attorney such a voucher, of which the defendant was informed by the attorney, *87 and *that he could have it on payment of the claim. This, we think, was all the plaintiff was bound to do. The court did not instruct the jury upon this point in the terms insisted by the defendant, but did instruct them, "that if they found the services were performed by the plaintiff at the request of the defendant, under an expectation, at that time, that he was to look to the defendant personally for his pay, and that the defendant, on his part, at the same time, expected to be personally responsible for the payment of the same, this created such a privity between them, as to render the defendant personally responsible; and that the course of business at Washington and the after promises of the defendant to pay the claim were only to be used as evidence tending to prove, how the parties understood it; and that, unless they did find, from all the testimony bearing upon the point, that such was the understanding of the parties, they would return their verdict for the defendant." This was, substantially, an instruction to the jury that they must find, from the evidence, an original personal undertaking of the defendant, at the time of the request, to pay for the services, to warrant a suit against him. Under this charge the jury must have found, that it was the understanding of both parties, at the time the request was made and the service rendered, that the defendant should be personally responsible to the plaintiff for the same. This was clearly all that was necessary, to entitle the plaintiff to recover. In the judgment of the court the charge was proper and all the case required.

The defendant moved in arrest of judgment for the insufficiency of the declaration, which motion was overruled by the court below. This question does not seem to have been much relied upon at the argument, and we are unable to discover any such insufficiency in the declaration, as to warrant an arrest of the judgment.

The motion in arrest was properly overruled, and the judgment of the county court is affirmed.

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*SIDNEY BARLOW v. EDWARD WAINWRIGHT. *88

(*Chittenden*, Dec. Term, 1849.)

A tenancy by a parol lease for a term of years, which, under the Revised Statutes, chap. 60, sec. 21, is at first an estate at will only, by the continuance of possession and payment of rent by the lessee for several years, (in this case three years,) becomes a tenancy from year to year.

When a tenancy, which is in its inception an estate at will only, thus becomes a tenancy from year to year, the tenant cannot, at any time during the year, at pleasure, surrender the premises, against the will of the landlord, and thus excuse himself from the payment of accruing rent.

Nor is it any defence for the tenant, in such case, when sued by the landlord in *assumpsit* for the use and occupation of the premises, that he in fact abandoned the possession of the premises. If the tenancy remain undetermined, the tenant is liable for rent, whether he in fact occupy the premises, or not.

Nor does it alter the rights of the parties, that the tenant, after having been in possession of the premises for a few months, associated with himself a partner in the business carried on by him on the premises,—no new agreement being made with the landlord, in relation to the occupancy.

And the parol agreement between the parties in such case, which is acted upon by them until the estate becomes a tenancy from year to year, will still govern their rights as to the amount of rent and the time of payment.

Assumpsit for the use and occupation of a store in Burlington, Plea, the general issue, and trial by the court, September Term, 1847,—BENNETT, J., presiding. It appeared on trial, that the plaintiff was the owner of the store in question, and that the defendant, on the twenty second day of July, 1841, hired it of the plaintiff, by parol agreement, for the term of five years, commencing from the first day of April, 1841, at an annual rent of $125,00, one half payable on the first day of April and the residue on the first day of October in each year; that the defendant took possession of the store, under that agreement, and remained from two to four months, one Carlos Wainwright having charge of the store as his agent; that the defendant then formed a co-partnership with one Alonzo A. Wainwright, under the firm of E. & A. A. Wainwright, and the firm occupied the store for about two years, the rent being paid from the funds of the firm, *during that *89 time, by Carlos Wainwright, who still continued to have charge of the store, —but there was no evidence of any new agreement having been made between the plaintiff and the firm of E. & A. A. Wainwright in reference to the store; that then the firm of E. & A. A. Wainwright was dissolved, and the business at the store passed again into the hands of the defendant, and he occupied the store, without any new agreement, at the same rent, until the twenty first or twenty second day of July,

1844; that the defendant then left the store, and, on the twenty second day of July, 1844, tendered to the plaintiff the possession and the key, and paid all the rent due to that day, but nothing beyond it, at the rate of $125 per year; and that the plaintiff then declined to receive the possession of the store, and it remained vacant from that time until the twenty eighth of November, 1844, when the plaintiff leased it, at a rent of $135,00 per year, to another person, who went into the possession. It appeared, that during all the time the store was occupied as above stated, the rent had been paid semi-annually, on the first days in April and October in each year. Upon these facts the plaintiff claimed to recover the rent of the store from the twenty second day of July to the twenty eighth day of November, 1844, during which period the store had remained vacant. The court decided, that the plaintiff was entitled to recover the rent from the twenty second day of July to the first day of October, 1844, at the rate of $125 per year, and rendered judgment accordingly. Exceptions by defendant.

Smalley & Phelps for defendant.

The possession of the defendant being under an express contract to occupy for five years from a given day, no tenancy from year to year can be implied, and no notice of an intention to quit was necessary. Messenger v. Armstrong, 1 T. R. 54. Right v. Darby, Id. 162. Ellis v. Paige, 1 Pick. 43. Nor was the special contract, though by parol, void, as between the parties, under the statute of this state. If the defendant left the premises, before the five years expired, the plaintiff's remedy would be by action upon the contract; and if the statute of frauds interposed to take away that remedy, it would not justify the plaintiff in implying a tenancy from year to year in opposition to the express contract.
*90 Hollis v. *Pool, 3 Met. 350. Neither does chap. 60, sec. 21, of the Rev. St. vary the rights of the parties. But if the case is within that statute, and the tenancy of the defendant thereby became a tenancy at will, there is no authority for converting it into a tenancy from year to year. Nichols v. Williams, 8 Cow. 13. 1 Pick. 48. 3 Met. 350. Rising v. Stannard, 17 Mass. 286. And it is well settled, that a tenant at will is not entitled to notice to quit. Keech v. Hall, 1 Doug. 21. Timmins v Rowlison, 1 W. Bl. R. 533. Thunder v. Belcher, 3 East 449. Even if the occupancy, as it existed, created a tenancy from year to year, it was not against the defendant, but against the firm of E. & A. A. Wainwright. Hamerton v. Stead, 3 B. & C. 478, [10 E. C. L. 220.] If the defendant were tenant from year to year, commencing on the first of April and paying rent semi-annually, and left, without notice, in July, he was clearly holden for the rent until the first of April following, inasmuch as the plaintiff was entitled to six months' notice, ending with the half year. If so, the defendant was likewise entitled to the premises during that time, and might have resumed possession; and the plaintiff, by re-letting the premises, rescinded the implied contract and waived his right under it. Hall v. Burgess, 5 B. & C. 332, [11 E. C. L. 485.] Walls v. Atcheson, 2 C. & P. 268, [12 E. C. L. 565.] 1 T. R. 162. The right of the plaintiff was entire. There is no rule of law, upon which the court can divide the claim and give damages for the time the premises remained vacant.

C. Russell for plaintiff.

1. The lease, being by parol, created an estate at will only, and the occupancy of the defendant under it was in law a tenancy from year to year, and was one in which notice to quit was necessary, to determine the tenancy. Rev. St., c. 60, §§ 6, 21. 2 Phil. Ev. 356. Rob. on Frauds 242. Adams on Ej. 108. Rigge v. Bell, 5 T. R. 471. Clayton v. Blakey, 8 Ib. 3. Schuyler v. Leggett, 2 Cow. 660. Bradley v. Covel, 4 Ib. 349. 2. The defendant is liable to an action for use and occupation of the store from the twenty second of July to the first of October, 1844, notwithstanding he abandoned the possession. The tenancy *was not de- *91
termined, until after the half year's rent, payable October 1, 1844, became due, and therefore the right of action for the rent due on that day was complete in the plaintiff. Whitehead v. Clifford, 5 Taunt. 518, [1 E. C. L. 266.] 3 Steph. N. P. 2724. 3. The defendant's having taken a partner, in the business carried on in the store, for a part of the time the store was occupied, cannot alter the nature of the tenancy, nor vary the plaintiff's right of recovery. Benson v. Bolles, 8 Wend. 175.

The opinion of the court was delivered by

BENNETT, J. It seems from the bill of exceptions, that the defendant hired of the plaintiff his store, by a verbal contract, for the period of five years from the first of April, 1841, at an annual rent of one hundred and twenty five dollars, payable semi-annually, on the first days of April and October in each year, and that the defendant went into possession, under the parol agreement, and the occupancy was continued until the twenty first or twenty second of July, 1844, when the defendant quit the possession of the store, and offered to give up the key and the possession to the plaintiff, which the plaintiff then declined to receive. The store remained vacant until the twenty eighth of November, 1844, when the plaintiff leased it to another person, at an increased rent of ten dollars, who went into possession under his lease. The case farther finds, that the rent had been semi-annually paid, on the first days of April and October, until the time, when the defendant quit the possession in July, 1844. The county court held, that the plaintiff should recover that portion of the half year's rent, falling due the first of October, 1844, which had not been paid; to which the defendant excepted.

Though in the court below the plaintiff claimed to recover rent to the time, when he took possession by his tenant, that is, to the twenty eighth of November, 1844, yet there is no exception on his part; and the county court, in disallowing the rent to the extent claimed, probably proceeded upon the ground, that the rent could not be apportioned. The correctness or incorrectness of such an opinion we are not now called upon to revise.

The only question now is, has the defendant any ground, upon which he can assign error. We think not. It is true, the Revised Statutes, chap. 60, sec. 21, declare
*92 that all interests or estates in *lands, created without any instrument in writing, shall have the force and effect of estates at will only; yet we think, that this estate, when once created, may, like any other estate at will, by subsequent events, be changed into a tenancy from year to year. In the case before us the lessee entered into possession, and the possession was continued from year to year, until July, 1844, and the rents semi-annually paid by the lessee and accepted by the landlord. From these facts a new agreement may well be presumed, and the estate, which was originally created by the statute as an estate only at will, expands into a holding from year to year.

This is the settled doctrine of the English courts, under their statute of frauds, which enacts, that all parol leases of land shall have the force and effect of leases or estates at will only. See Rigge v. Bell, 5 T. R. 471. Clayton v. Blakey, 8 T. R. 3. Doe v. Weller, 7 T. R. 478. Roe v. Lees, 2 W. Bl. R. 1171. See, also, 2 Cow. 660, and 8 Cow. 227, in which the courts of New York declared the law of that state to be the same. We think the words of our statute are satisfied by holding, that, in the first instance, the estate created in the present case was an estate at will, and only an estate at will, yet that it should enure, like other estates at will, and have the incidents common to an estate at will, one of which is its convertibility into a holding from year to year by the payment of rent. To go farther, and hold, that the estate, created under the statute as an estate at will, must ever remain such, would be to go beyond the statute, and evidently contravene its provisions, rather than obey them. The expression in the statute, "shall have the force and effect of estates at will only," evidently implies, as we think, that they should in every respect enure as a lease at will.

This question is not altogether new in this state. In the case of Hanchett v. Whitney, 2 Aik. 240, it was held, that an estate at will, created, under the statute then in force, by means of a parol lease, having run for a period of five years, was converted into a tenancy from year to year. The provision of the statute of 1797, then in force, was in effect the same as our present statute.

We do not discover, that the sixth section of chapter 60 of the Revised Statutes, page 312, to which the court have been referred, has any special bearing upon the question. The provision in that section, that any lease for more than one year
*93 shall not be good and *effectual against any other person than the lessor and his heirs, unless the same has been acknowledged and recorded, answers to a like provision in the fifth section of the statute of 1797. The provisions of the statute are the same as to deeds, which remain unacknowledged and unrecorded.

I am aware, that in Massachusetts, in the case of Ellis v. Paige et al., 1 Pick. 43, and in Hollis v. Pool, 3 Met. 351, it was held, that under their statute of 1793 a person entering under a parol lease for any certain time shall not, even after occupation and payment of rent, be treated as a tenant from year to year, but shall at all times be regarded as a tenant at will. The statute of Massachusetts is very similar in its phraseology to our statute of 1797. It enacts, that parol leases shall have the effect of leases or estates at will, only, and shall not, at law or equity, be deemed or taken to have any other or greater force and effect. Though the statute of that state, as well as the statute of this state, is decisive against the creation of a tenancy from year to year in the first instance, yet I do not see, how the reasoning of the court in those cases applies against the growth of an estate at will, created under the statute, into a tenancy from year to year.

It is true, the English statute of frauds has an exception, as to leases not exceeding the term of three years; and this is dwelt upon by the court of Massachusetts, as a reason why the decisions of the courts in England, under their statute, should not furnish a rule for them. I must confess, that I do not see the force of the reasoning of the court, which would prevent an estate at will from being turned into a tenancy from year to year in Massachusetts, and allow it under the English statute. In the case of Hanchett v. Whitney it was not supposed, that our statute of 1797 would have any other or greater effect, than the English statute, and that both alike, in the first instance, declared that the estate created by a verbal lease was only an estate at will, unless it came within the exception of the English statute, and that under our statute it might be turned into a tenancy from year to year, as well as in England. The court of Maine, in the case of Davis v. Thompson, 13 Maine 214, under a similar statute, have followed the Massachusetts cases; but no new views of the question are presented, and for myself I cannot coincide with those cases.

*It is said by TINDAL, Ch. J., in 7 *94
Bing. 453, that "if a party enters and pays rent a new agreement may be presumed," and that this is the ground of turning the tenancy into a holding from year to year. See, also, Cox v. Bent, 5 Bing. 185. In such case the tenant is entitled to six months' notice, ending with the expiration of the year; and without this the landlord cannot eject him. From this it should follow, that the defendant could not, at any time during the year, at pleasure, surrender the premises against the will of his landlord, and thus excuse himself from the payment of accruing rent.

But, suppose we regard the continuing interest of the defendant in the store to be still only that of a tenant at will, does it follow, that the defendant could have the right at any time, without previous notice, to determine his estate, and thus excuse himself from all liability to accruing rents? And could he especially do it in this case, at least, until the six months' rent, to become due the first of October, 1844, had fully accrued? He had seen fit to hold over after the first of April, 1844, and could he de-

termine his estate, while the next six months were running, and thereby acquire the right to apportion the six months' rent then accruing? But for myself I do not deem it important to recur to this ground. I am fully satisfied to treat it as a tenancy from year to year.

It is no defense in this case, that the defendant abandoned the possession of the store. If the tenancy remained undetermined, he is liable for rent, whether he in fact occupied the store, or not. 3 Steph. N. P. 2724. Redpath v. Roberts, 3 Esp. R. 225. The plaintiff, however, cannot claim rent from this defendant after his lease of the twenty eighth of November, 1844; and the county court limited his right to recover rent ending with the six months' rent due the first of October, 1844, and this, no doubt, upon the ground, that the plaintiff could not determine the tenancy, while the next six months were running, and thus acquire the right of apportionment. The plaintiff re-possessed himself of the store by and through his new tenant.

The fact, that the defendant, after having been in possession a few months, took a partner in the business carried on in the store, cannot alter the case. No new agreement was made, in relation to the occupancy of the store, with the plaintiff.

*95 The partner *of the defendant might well be considered, for the time being, as in under him, at least, as a *quasi* tenant. Besides it appears, that after about two years the partners dissolved their connection, and the store was again occupied by the defendant individually.

We then think, the court below were right in their view of the law, and that, although the contract was modified, yet it was not entirely destroyed, and should govern the rights of the parties, as to the amount of rent, and the times when the same became payable. See Schuyler v. Leggett, 2 Cow. 660.

The result is, the judgment of the county court is affirmed.

WILLIAM BRADLEY v WILLIAM P. BRIGGS AND ALEXIS CHANDLER.

(*Chittenden*, Dec. Term, 1849.)

Where, in an action of debt upon judgment, the defendants plead payment, and upon trial, for the purpose of sustaining the issue upon their part, rely upon the presumption of payment arising from the non-production, by the plaintiff, of an execution, which, it appears, duly issued upon the judgment, it is competent for the plaintiff, for the purpose of rebutting such presumption, to give in evidence the record of a suit in chancery, and the original bill in that suit, commenced by the defendants against the plaintiff, after the execution had expired, in which the defendants prayed for and obtained an injunction upon the plaintiff from enforcing collection of the same judgment now in suit.

And where it appeared, in such case, that the bill in chancery was filed, and the injunction obtained, within eight years before the commencement of this suit, and the defendants therein alleged, as a reason why the injunction should be granted, that they had been summoned as trustees of the judgment creditor, which suit was still pending, and that, if the plaintiff were allowed to enforce collection of his judgment, they might be compelled twice to pay the amount due from them, it was held, that this was a sufficient acknowledgment of the judgment debt, to take the case out of the statute of limitations.

And where such bill in chancery purports to have been signed and sworn to by both the defendants in this suit, it must be treated as a joint statement by both, although the signature of but one of them to the bill is proved.

Debt upon a judgment rendered by Chittenden county court, March term, 1838. The writ was served March 9, 1847. The defendants pleaded,—1. *Nul tiel record;*—2. That the cause of *action *96 did not accrue to the plaintiff within eight years next before the commencement of this suit;—3. Payment. These pleas were traversed. Trial by jury, September Term, 1848,—BENNETT, J., presiding. On trial the plaintiff gave in evidence the record of the judgment declared upon, and the first and second executions which issued thereon, but did not produce the *pluries* execution, which it appeared was issued upon the judgment March 27, 1839, and was delivered to a proper officer to execute. The plaintiff, to avoid the presumption of payment and the statute of limitations, then offered in evidence a copy of the record of a suit in chancery in favor of the defendants against the plaintiff, and also the original bill in the same suit, which purported to have been signed and sworn to by both defendants, and proved, that it was in fact signed by the defendant Briggs, but gave no evidence tending to prove the signature of the other defendant;—from all which it appeared, that the defendants, on the twelfth day of July, 1839, preferred their bill in chancery, therein alleging, that the present plaintiff had recovered against them the judgment now in suit, and was endeavoring to enforce collection thereof, and that a trustee process was then pending against them in favor of one Pierce, they having told Pierce, before he commenced his suit, that they could not legally resist the plaintiff's claim, and that they were thus liable to be twice compelled to pay the amount due from them, and praying for an injunction upon the plaintiff from collecting the judgment; and that the injunction prayed for was allowed on the twenty second day of July, 1839, and the bond for the injunction filed with the clerk of the court of chancery on the twelfth day of September, 1839; and that the answer to said bill was duly filed and the injunction dissolved at the May Term, 1843, of the court of chancery; and that the bill was finally dismissed at the September Term, 1847, of the same court; —to all which evidence the defendants objected, but it was admitted by the court. No other evidence was offered. The county court decided, that the testimony was sufficient to avoid the effect of the statute of limitations, in case it had run upon the judgment, and that the testimony was proper, as tending to rebut the presumption of payment from the non-production of the *pluries* execution; and the defendant not wishing to go to the jury *upon the issue of payment, a verdict *97 was taken for the plaintiff by consent, subject to exceptions by the defendant to the above decisions of the court.

L. Underwood for defendants.

L. E. Chittenden for plaintiff.

The opinion of the court was delivered by

BENNETT, J. Under the issue of payment, the defendants rely upon the presumption arising from the non-production of the *pluries* execution. We think, that the record of the proceedings in chancery was properly admitted, at least under that issue. The present suit was commenced less than eight years from the time the injunction was granted, which was the twenty second of July, 1839. The *pluries* execution was issued the twenty seventh day of March, 1839, and went into the hands of the proper officer to execute. The sixty days had run, before the injunction was granted; and the obtaining the injunction was an implied admission, that the judgment had not then been paid; and after that, the collection was stayed by the injunction. This, we think, effectually rebuts any presumption of payment, arising from the non-production of the execution.

We also think, that the county court were right in holding that the evidence was sufficient to avoid the effect of the statute of limitations. Though the injunction probably would not have the effect to stay the running of the statute, especially as it would not have been in contempt of the court of chancery, to have at any time instituted a suit on the judgment, yet we think, that the statements in the bill are a sufficient answer to the statute. It purports to have been signed by both Briggs and Chandler; and it is stated, that they informed Pierce, while the suit was pending, that they could not legally resist the payment of the claim. It passed into judgment, as they state in their bill, and there is no complaint as to the propriety or justice of the judgment. They then state, that they are liable to pay the judgment twice, by reason of the pendency of the trustee suit, unless the court of chancery shall interfere; and to prevent this, they seek the aid of that court. We think this is a full and explicit implied admission, that the debt was due; and there is noth-
*98 *ing in the case, to prevent the law from raising a promise to pay. There is nothing, which manifests an unwillingness to pay the debt once. All that the orators ask is to be relieved from the hazard of paying it twice: and the law will raise the promise to pay it to the one, who shall be entitled to it.

It is said, that more than six years had run from the time the bill in chancery was prayed out, before the present suit was commenced, though less than eight years. In the case of Gailer v. Grinnel, 2 Aik. 349, it was adjudged sufficient, to prove a promise within eight years. Besides, we might well regard the acts of the defendants, as a republication of the fact stated in their bill, so often as they made it the ground of judicial proceeding.

Though the signature of Briggs to the bill was only proved in the county court, yet it purports to have been sworn to by both of the orators, and it must be treated as a joint statement made by both of them. Consequently the question, whether the admission of Briggs alone would remove the statute bar in this case, it being a judgment, does not arise.

The result must be an affirmance of the judgment of the county court.

CHARLES MILLS v. HENRY W. CATLIN.

(*Chittenden*, Dec. Term, 1849.)

A deed should be construed according to the intention of the parties, as manifested by the entire instrument.

Although the covenants in a deed should not be so understood, as to enlarge the estate granted in the premises of the deed, yet, when a question arises as to what is granted, they may be resorted to, for the purpose of aiding the construction.

A covenant, in a deed, that the grantor is seized in fee simple of the premises conveyed, implies, that he has the whole title.

If the intention of the parties, upon the face of the deed, be ambiguous, the construction is to be most strongly against the grantor.

Where, in a deed, the premises conveyed were described in these words,—"the following described land in Colchester—all the land, which I own by virtue of a deed, dated the eighteenth day of January, 1843, from Asa S. Mills, re-
*corded," &c.—"being all my right and *99 title to the land comprising fifty acres off of the east end of lot No. 75 in said town,"—and the *habendum* was in these words,—"to have and to hold the above granted and bargained premises," &c.—and the grantor covenanted, that he was "seized of the premises in fee simple," that he had good right to sell the same, that they were free from all incumbrances, and that he would warrant and defend them against the lawful claims of all persons, it was held, that the thing granted was the land itself, and not merely such title to the land, as the grantor had, and that the grantor was liable for any breach of the covenants.

In assigning a breach of the covenant against incumbrances it is not sufficient to allege, in a direct negative, that the defendant has not kept and performed his covenant, but the breach must be specially assigned, setting forth the incumbrance complained of; but a general assignment of breaches of the covenant of seisin and of good right to bargain and sell is sufficient.

An outstanding life estate in the granted premises, at the time of the execution of the deed, constitutes a breach of the covenant of seisin, without eviction; and it is no defence to an action for the breach of the covenant, in such case, that the grantee has always continued in possession of the premises, since the execution of the deed.

Where the plaintiff proves an outstanding life estate, as a breach of the covenant of seisin, and gives evidence as to the age and general state of health of the tenant for life, and the annual value of the premises, it is not error for the court to allow Dr. Wigglesworth's tables for estimating life estates to be used by the jury, in computing the damages, under proper instructions in regard to the use to be made of them.

Covenant. The plaintiff alleged in his declaration, that the defendant conveyed to him, by deed, the equal, undivided half of fifty acres of land on the east end of lot No. 75 in Colchester, with covenants of seisin, of good right to bargain and sell, and against incumbrances, and averred, in general terms, a breach of each of these covenants. The defendant pleaded performance of his covenants. Trial by Jury, March Term, 1847,—BENNETT, J., presiding. On trial the plaintiff offered in evidence a deed to himself from the defendant, dated Au-

gust 5, 1843, conveying premises as follows, —"the following described land in Colchester—all the land which I own by virtue of a deed dated the eighteenth day of January, 1843, from Asa S. Mills, and recorded in the ninth book of records of land in Colchester, on page 468, being all my
*100 right and title to the land *comprising fifty acres of the east end of Lot No. 75 in said town;" and the *habendum* being in these words,—"To have and to hold all the above granted and bargained premises with all the privileges," &c.; and containing covenants in these words,—"that at and until the ensealing of these presents I am well seised of the premises in fee simple, that I have good right and lawful authority to bargain and sell the same in manner and form as is above written, that they are free and clear of all incumbrances, and that I will warrant and defend the same against the lawful claims and demands of any person or persons whomsoever." The plaintiff also offered in evidence, in connection with this deed, the deed from Asa S. Mills to the defendant, mentioned above, which purported, in the granting part, to convey "the following land, situated in Colchester," &c., "and described as follows, to wit, one equal undivided half of fifty acres from the east end of lot No. 75, which fifty acres is the same land deeded to Myron Mills and Henry W. Catlin on the fifth of November, 1833;" but in the covenants, in this deed, there was an exception named of a life estate in the premises, belonging to Hannah Mills. The defendant objected to the admission in evidence of both of these deeds; but the objection was overruled by the court. The plaintiff then offered to show a breach of the covenants declared upon, by proving that Hannah Mills had a life estate in the entire fifty acres, mentioned in the declaration, by force of a lease to her from Myron Mills and Asa S. Mills, dated March 14, 1837, which purported to convey to her, for her life, "fifty acres of the east part of 100 acre lot No. 75 in Colchester," and the possession of Hannah Mills under the lease, without any other evidence of such title;—to which the defendant objected, on the ground that the land described in the lease was not the same described in the declaration, and that, if it were, as that particular incumbrance was not specified in the declaration, the plaintiff could not show it in evidence; but the objection was overruled by the court, and the evidence admitted. The plaintiff then gave evidence tending to prove the annual value of the premises, and that Hannah Mills was sixty two years old, and that she enjoyed the usual health of a woman of her age, and then offered in evidence Dr. Wigglesworth's tables of the mode of estimating life estates, as published in Oliver's Conveyancer;—to which the defendant objected, but the court overruled the ob-
*101 jection and the *tables were allowed to go to the jury. There was no evidence of any outstanding title in Hannah Mills at the date of the deed from the defendant to the plaintiff, except the lease above mentioned. The defendant offered to prove, in mitigation of damages, that the plaintiff had always enjoyed the possession of the premises, and had never been ousted therefrom; to which evidence the plaintiff objected, and it was excluded by the court. The defendant requested the court to charge the jury, that there was no sufficient evidence to show a breach of the covenants declared upon; but the court instructed the jury, that the lease to Hannah Mills was, of itself, without showing either title or possession in either of the lessors at the time of its execution, sufficient evidence of such a breach, upon the ground that the defendant received his title from Asa S. Mills. The jury returned a verdict for the plaintiff, for $160 damages. Exceptions by defendant. After verdict the defendant moved in arrest of judgment, for the insufficiency of the declaration,—which motion was overruled by the court, to which decision the defendant also excepted.

C. D. Kasson for defendant.

The deed offered in evidence was improperly received, by reason of the variance. The declaration counts upon an absolute deed of "an equal undivided half of fifty acres of land," &c. But it is apparent, from the language of the deed, that the grantor intended no such absolute description of the premises. He describes the premises conveyed as "all the land I own by virtue of a deed from Asa S. Mills." If we refer to the deed from Asa S. Mills, we find that he manifestly did not intend to convey any such land, except as subject to the life estate, which is excepted in the covenants, though not mentioned in the premises. Jackson v. Clark, 7 Johns. 217. Jackson v. Hoffman, 9 Cow. 271. It is clear, that the deed from Asa S. Mills did not in fact convey to the defendant any greater estate, than the grantor had, that is, the remainder in fee; and as the defendant has only conveyed all he "owns by virtue of that deed," and as he did own the remainder only, the estate is different from that set up in the declaration, and the variance is fatal. The intention of the parties will prevail. 1 Mass. 219. 4 Ib. 135, *205. 6 Ib. 246. 9 Ib. *102 514. 11 Ib. 163. 17 Ib. 299. Crawford v. Morrell, 8 Johns. 195. Nor does the last clause in the defendant's deed alter this conclusion; it is not repugnant to but explanatory of the first clause,—expressly declaring, that the estate so granted was "all his right and title" only to the land mentioned;—and these words should not be construed as conveying the land itself. Van Dyck v. Van Beuren, 1 Johns. 345. Ward v. Bartholomew, 6 Pick. 409. Cutler v. Tufts, 3 Ib. 272. Hurd v. Cushing, 7 Ib. 169. Whitbeck v. Cook, 15 Johns. 491. Allen v. Holton, 20 Pick. 458. Litchfield v. Cudworth, 15 Ib. 26. Nor does the fact, that it is a warrantee deed, affect it. The covenants only relate to the "above granted and bargained premises," not to the specific land conveyed. Jackson v. Stevens, 16 Johns. 114. Corbin v. Healy, 20 Pick. 516. The breach is not well assigned. The declaration should set out the incumbrance. Julliand v. Burgott, 11 Johns. 6. Mitchell v. Warner, 5 Conn. 498; Kellogg v. Robinson, 6 Vt. 281. The mere fact of the existence of the life lease is no sufficient evidence of a breach. The lessors may have had no title at the time of its execution; or Asa S. Mills may have ac-

quired title since, and before conveying to the defendant. The *onus* was on the plaintiff, to show a breach, and he should show enough to show a valid subsisting incumbrance, or title, in a stranger. The basis of the rule of damages (Wigglesworth's tables) was erroneous. The different covenants require different rules of damages.

Platt & Peck for plaintiff.

The description of the land in the declaration does not vary from that which is contained in the deed to the plaintiff. The declaration contains the description in the deed from Asa S. Mills to the defendant. The latter is adopted in the deed to the plaintiff. The remainder of the premises in the latter deed is consistent with the previous part of the same premises. It is objected, that the clause in the premises of the deed to the plaintiff,—"being all my right and title to the land,"—incorporates into this deed the exception of the life estate, which is specified in the deed to Catlin, and thus controls the covenants in the deed.

*103 In *the first place, if the objection be just, to the extent claimed, it would be equally just, if the outstanding interest were other than it is, but less than a fee,—as if Catlin had no estate in the land, when he deeded. In other words, according to the objection, it is a deed of quitclaim. If the granting part of the deed were in the technical language of a deed of quitclaim, the covenants would fully operate; the premises would profess to convey what title the defendant had, and the covenants would be an assurance, that he had a perfect title. But, secondly, if this clause and the covenants are repugnant, the clause must be rejected,—else, several rules of interpretation will be violated;—the rule, that where general and particular, but inconsistent, words are used upon the same subject matter, the latter must prevail; Hickok v. Stevens, 18 Vt. 111; Thorpe v. Thorpe, 1 Ld. Raym. 235; 8 Co. 150*b*;—also the rule, that where repugnant terms, equally certain, are employed, the construction must be against the party using them; Hesse v. Stevenson, 3 B. & P. 566; Cutler v. Tufts, 3 Pick. 273; Sprague v. Snow, 4 Ib. 54. Effect may be given to this clause, by treating it as expressive of the grantor's connection with the land, as a co-tenant. The outstanding life estate, and the lessee's possession under it, might be proved as a breach of the first two covenants. The covenant of seisin in fee absolutely imports an assurance of a lawful fee, accompanied with actual possession, or the right to immediate possession. 15 Johns. 483, 550. 5 Conn. 500. 5 Vt. 19. Proof of the lease to Hannah Mills was sufficient to show an outstanding interest. Asa S. Mills and his privy in estate, Catlin, are estopped to deny that the lease was executed by right. 1 Greenl. Ev. §§ 23, 24. The life tables were properly read to the jury, as they were not instructed to be governed by them. The evidence offered by the defendant was properly rejected, as it was not proposed to show, that Catlin had bought in the life estate, and that the plaintiff entered in consequence of the purchase.

The opinion of the court was delivered by

BENNETT, J. An important question is raised in this case, in relation to the construction of the granting part of the deed from the defendant to the plaintiff. The grant, or rather the thing granted, *is thus described by the grantor.— *104 "the following described land in Colchester; all the land which I own by virtue of a deed, dated the eighteenth day of January, 1843, from Asa S. Mills, recorded," &c. —"being all my right and title to the land comprising fifty acres off of the east end of lot No. 75 in said town." This deed should be construed according to the intention of the parties, as manifested by the entire instrument. The *habendum* is, to have and to hold the above granted and bargained premises, &c., referring to the granting part of the deed. The deed has also the usual covenants, expressed in common form. The deed from Asa S. Mills to the defendant, in the granting part, purports to convey "the following land, situated in Colchester," &c., "described as follows, to wit, one equal undivided half of fifty acres from the east end of lot No. 75, which fifty acres is the same land deeded to Myron Mills and Henry W. Catlin on the fifth of November, 1833." We think, upon the whole deed, it is to be taken, that the thing granted in the premises of the deed is the land itself, and not simply such title to it as Catlin derived from his grantor.

The grant is, of the following described land, to wit, all the land, which I own by virtue of the deed of Asa S. Mills to me. These latter words are evidently used as descriptive of the thing granted, that is, of the land itself, and not of the quantity of interest in the land. The *habendum* in the deed is consistent with this. The covenants are, that the defendant is seized of the premises in fee simple, that he has good right to bargain and sell the same, that they were clear and free of all incumbrances, and that he would defend the same against the lawful claims of all persons whatever. Though it may be true, that the covenants in a deed should not be so understood, as to enlarge the estate granted in the premises of the deed, yet when it becomes a question of construction, as to what is granted, they may well be resorted to, to help out the construction,—and this upon the principle, that reference is to be had to the whole deed, and that every part is to have an operation, if possible.

If the thing granted in the premises of Catlin's deed were only such a right and title to the undivided half of the fifty acres, as he acquired from Asa S. Mills, then the operation of the covenants should be so limited, as to insure to the grantee such and only such an interest. But this would be opposed to the obvious import of *the covenants, and render them in a *105 great degree ineffectual. Catlin covenants, that he is seized of the premises in fee simple; and this implies, that he has the whole estate; and he covenants to defend them against all lawful claims whatever. But upon the defendants' construction of the deed, the covenants should only insure to the grantee such a title, as Catlin had acquired to the premises by his deed; and if he had acquired none, then they would

be worthless. This, in effect, would be only to covenant against his own acts, going to impair whatever title he might have acquired under his deed.

The closing words in the description of what is granted in the defendant's deed, viz., "being all my right and title to the land comprising fifty acres from the east end of lot No. 75," were probably thrown in, for the reason that only an undivided moiety of the fifty acres had been conveyed to Catlin by Asa S. Mills; and though these words, standing alone, are appropriate to describe the interest conveyed, yet to give them that operation, in the connection in which they are used, would be to reverse the rule, which requires the construction to be on the entire deed. Words should always be understood with reference to the subject matter and the connection in which they are used. The subject matter of the grant, we think, was the land itself; and it need hardly be remarked, that land, not only in its legal but popular sense, comprehends the soil, or ground, itself.

Upon the principle, then, that the construction is to be upon the entire deed, and that one part is to help expound another, and that every word, if possible, is to have effect, and none be rejected, and all the parts thereof agree and stand together, we think it must be held to have been the intention of the parties to grant the land, and that the *habendum* in the deed is to hold the land, and the covenants are, as they import to be, unlimited and relate to the land and insure title to it. But if after all we considered the intention of the parties ambiguous, the rule would be interposed, that the construction, in such case, is to be most strongly against the grantor, and in favor of the grantee,—and is to prevent an evasion of the covenants by the grantor, by his use of obscure and equivocal words.

It follows, then, that this declaration is according to the legal effect of the deed, and the objection of variance is removed.

*106 *Under the motion in arrest, it is claimed, that there is no sufficient breach of the covenant against incumbrances assigned, either in the declaration, or in the plaintiff's replication to the defendants' plea of performance. I understand the law is well settled, that in assigning a breach of the covenant against incumbrances it is not sufficient to allege in a direct negative, that the defendant has not kept and performed his said covenant; but the breach must be specially assigned, setting forth the incumbrance complained of. So far as this covenant is concerned, the declaration is ill clearly on demurrer; and whether this is such a defect, as would be cured by verdict, it is not necessary to consider, much less to decide. All the authorities agree, that a general assignment of breaches on the covenant of seisin and of good right to bargain and sell is sufficient. So much of the declaration, as is founded upon these two covenants, is well enough. The question then arises, does the outstanding life estate in Hannah Mills, at the time of the execution of Catlin's deed, constitute a breach of either of these covenants?

As Hannah Mills took her deed of her life estate from Catlin's grantor and one Myron Mills, Catlin cannot deny its validity; and we think her life estate in the premises was a breach of the covenant of seisin, and I also think of the covenant, that the defendant had a good and lawful right to convey in fee simple. Whatever have been the decisions in other states, our courts have held, that the covenant of seisin imports a covenant of title. See Catlin v. Hurlburt, 3 Vt. 403. In Richardson v. Dorr, 5 Vt. 19, it is said, that to satisfy a covenant, that the vendor is seised in fee simple, it must appear, that he not only had an estate in the lands in fee, but also that he was seised of the same and had a right of possession. If his estate were less than a fee, or if he were seised by wrong, it could not in either case be said, that he was lawfully seised in fee. To be seised in fee simple, a man must have the whole estate, and not simply a part of it. The covenant of seisin is an assurance to the purchaser, that his grantor has the very estate, both in quantity and quality, which he purports to convey. Platt on Cov. 306. Howell v. Richards, 11 East 642. The life estate, then, outstanding in Hannah Mills, was a breach of the covenant of seisin, and no eviction was necessary.

We see no objection, that the jury should have had the tables of *Dr. *107 Wigglesworth to aid them in calculating the value of the outstanding life estate; and it was evidently for this purpose, that they went to the jury. Evidence had been given of the age of Mrs. Mills, and the general state of her health, and there is no complaint, but what the jury received proper instructions in regard to the use to be made of the tables.

The evidence offered by the defendant, that the plaintiff had always been in the possession of the premises, since he took his deed from Catlin, was properly excluded by the county court. If so, the plaintiff would be liable to Hannah Mills for the mesne profits; and consequently it should not affect the damages in this case. Catlin had no right to put the plaintiff in possession, as against Mrs. Mills, and of course the possession could not enure to Catlin's benefit, so long as the plaintiff was liable to pay her for the use and occupation.

The only question raised on the bill of exceptions, growing out of the charge of the court, is in relation to the effect of the evidence, in showing a breach of the covenants declared upon. The declaration being good, so far as relates to the covenant of seisin, and the outstanding life estate being a breach of that covenant, the plaintiff may well retain his verdict. If the declaration were bad, so far as relates to the covenant against incumbrances, that part of it might have been met by a demurrer, and the residue by a plea. Though a question has been argued in this court in reference to the rule of damages adopted by the county court, yet no such question is saved on this bill of exceptions. It may perhaps be quite questionable, whether the county court adopted the correct rule; but it seemed to be satisfactory to the parties at the time.

The result is, we find no error in the proceedings of the county court, and their judgment must be affirmed.

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*108 *HIRAM BELLOWS v. Administrator of GEORGE A. ALLEN.

(*Chittenden*, Dec. Term, 1849.)

Under the Revised Statutes, chap. 48, sec. 10, which provides, that "actions of trespass and trespass on the case, for damages done to real or personal estate," shall survive, an action of trespass on the case against a sheriff, for the default of his deputy, in not paying to the plaintiff money collected by the deputy upon an execution in favor of the plaintiff against a third person, will survive. †

The case of Adm'r of Barrett v. Copeland, 20 Vt. 244, considered and explained.

Trespass on the case, brought against the defendant Allen, in his life time, as sheriff of the county of Chittenden, for the default of his deputy in not paying to the plaintiff money collected and received by the deputy upon an execution in favor of the plaintiff against one Nichols and others. Allen died while this suit was pending, and his administrator moved to dismiss the suit, upon the ground that the cause of action did not survive. It appearing, that the money collected by the deputy, had never in fact been received by Allen, the county court, September Term, 1848,—BENNETT, J., presiding,—dismissed the suit. Exceptions by plaintiff.

C. D. Kasson for plaintiff.

Admitting that the decision of this court in Adm'r of Barrett v. Copeland, 20 Vt. 244, is correct, in holding that the statute, which allows all actions of trespass, or case, "for damages done to real or personal estate," to survive, is limited to damages done to some "specific property," still we insist, that this case is clearly within that rule. The court, in that case, use the word "property," instead of "estate," as the thing, to which the damage must be done specifically. Doubtless the three words, "estate, property and thing," are to a certain extent convertible terms. Strictly, however, the word "estate" signifies the "interest, which man hath in a thing." And in this sense we claim the legislature should be taken as having used it. The word "property" is used indifferently, to signify either the "thing," or the "estate," or "interest," a man has in the thing. The word, therefore, as used by the court, cannot be supposed to limit

*109 *the signification of the word "estate." Every thing, therefore, which is the subject of property, or in which a man can have a pecuniary interest, may be regarded as estate, or property. Hence the elementary writers predicate estate, or property, of things,—things real and personal,—things personal in possession, or in action. Among the things in action are notes, bills, bonds, judgments, &c., each and all whereof are the subject matter of a man's estate, and in many cases constitute the entire estate, whereof he dies seized. The plaintiff had an interest and estate in the judgment and execution against Nichols; it was a specific chattel, or thing, or piece of property, in action, before it was collected; and by the act of collection by the sheriff either the money became his, *eo nomine*, or identically, and in either case it must be property, or it gave him a new right in action, substantially and equitably as a debt against the sheriff; or else the original judgment, or "right in action," had been, by the wrongful act of the sheriff, (inasmuch as the debt was so far destroyed,) injured and damaged to the amount of the money collected thereon.

J Maeck for defendant.

1. At common law torts died with the person, and no action could be sustained against the administrator, where the plea must be not guilty. Com. Dig., Administration B. 15. Hambly v. Trott, Cowp. 371. 1 Saund. R. 216 *a*. 2. Although cases may be found, where testator's, or intestate's, estates have been charged for torts committed by them in their life time, as where they have converted the property of others and received the money for it on sale, yet the action cannot be maintained against their representatives, if framed in tort. It must be *assumpsit*, or debt. Cowp. 371. 9 Petersd. Abr. 342. Wheatley v. Lane, 1 Saund. R. 216, n. 1. 3 T. R. 549. 3. The action does not survive by the statute. Rev. St. 269. Adm'r of Barrett v. Copeland, 20 Vt. 244. Read v. Hatch, 19 Pick. 47.

The opinion of the court was delivered by

HALL, J. If the plaintiff has any effectual remedy for the default of the deputy, it must be against the estate of the sheriff; for by the *provisions of the statute *110 no action can be maintained against the deputy, for his official misconduct,—the remedy for his defaults being against the sheriff only. For the default of the deputy, in not paying over the money collected on the plaintiff's execution, there can be no doubt the sheriff, in his life time, would have been liable. Whether the cause of action survives against his administrator must be determined by the provisions of the Revised Statutes.

Section 10 of chapter 48 declares, that "in addition to the actions which survive by the common law the following shall survive and may be commenced and prosecuted by the executor, or administrator, that is to say, actions of ejectment, or other proper actions to recover the seisin and possession of lands, actions of replevin and trover, and actions of trespass and trespass on the case for damages done to real and personal estate." The twelfth section of the same chapter makes the remedies by and against executors and administrators reciprocal, so that any cause of action, which would survive in favor of an executor, or administrator, is declared to survive against him. If the administrator of the plaintiff, in this case, could maintain the action against the sheriff while in life, for this default, then the administrator of the sheriff must be held liable.

I entertain no doubt, that the cause of action in this case would have survived to the administrator of the plaintiff. The last clause of the tenth section of the statute before recited gives to executors and administrators the actions of "trespass and trespass on the case for damages done to

† See Dana, Adm'r, v. Lull, 21 Vt. 383.

real or personal estate." The word "personal," in this clause, is contrasted with the word "real," and the term "personal estate," in the connection in which it is used, must be understood to embrace every species of property not of a freehold nature, including not only goods and chattels, but rights and credits also. Such is the ordinary legal signification of the term. In that sense the words "personal estate" are generally, if not universally, used throughout the Revised Statutes. Thus the statute provides in one section, that real estate may be disposed of by will, and in another that personal estate may be disposed of in the same manner; nuncupative wills of personal estate are allowed; a soldier may by such will dispose of his wages, or other personal estate; the personal estate of an intestate is first made chargeable with his debts, and when the personal estate is found insufficient, real estate is to be *111 *sold for their payment. In all these and numerous other instances, which might be mentioned, the words "personal estate" are evidently used to embrace every description of property, not coming under the denomination of real estate. And I apprehend there can be no doubt whatever, that the legislature, in passing the statute giving the actions of trespass and trespass on the case for damages done to personal estate, intended to furnish a remedy for injuries done to the rights and credits of a testator, or intestate, as well as to his specific goods and chattels.

The value of a debt due, as well as of a tangible article of property, may be impaired, or destroyed, by the act or neglect of another; and the owner of such debt would suffer damage thereby, for which he might always have had a remedy by action. The framers of the statute intended such remedy should survive to the representative of him, who had suffered the damage. If the plaintiff's administrator were now suing for the sheriff's default, the action would be one of that description. The act of the defendant, by his deputy, in collecting the money in discharge of the plaintiff's debt and neglecting to pay it over, is a plain and manifest damage to the plaintiff's personal estate, the remedy for which would survive to his administrator by the statute, and surviving to him, it would consequently survive against the estate of the defendant, who committed the injury.

It is insisted by the counsel for the defendant, that the case of the Adm'r of Barrett v. Copeland, 20 Vt. 244, is an authority against the survivorship of this action. But if the facts of that case are carefully examined, it will be found to have little or no analogy to the present case. The facts were these; —Copeland, the defendant in that suit, was constable of Middletown, in Rutland county, and having an execution in his hands against Barrett, he returned upon it, that he had arrested Barrett at Middletown, that Barrett escaped and fled, and that on fresh pursuit he re-took him at Bennington. Barrett brought his action for an assault committed at Bennington, and, on trial, Copeland introduced his execution and return, which the county court held to be conclusive evidence in his favor, and he obtained a verdict, which was, however, set aside by the supreme court. 18 Vt. 67. Before a final trial Barrett died and the suit abated. The administrator of Barrett then brought his action *against *112 Copeland for a false return, alleging, as the ground of injury, that, by Copeland's use of his false return in the action of assault and battery, the intestate had been defeated in that action, and had thereby been put to expense and damage.

It is plain, that there is a very broad distinction between that case and the present. Barrett was not the creditor in the execution, upon which the return was made. He had no debt in the charge of Copeland, which was or could be impaired, or lost, by his misconduct. The assault at Bennington was a mere wrong to the person of Barrett; and the injury to him by the use of the return in court, in regard to it, was of the same character. The right of action, which was impaired by the introduction of the return in evidence, was not a debt due to Barrett, and did not constitute any part of his personal estate. It was but a right of action for a personal wrong, which died with the person; and it is not perceived, how an injury to such a right of action could be held to be a damage done to personal estate.

We are all agreed, that Barrett v. Copeland is no authority against the survivorship of the present action, and that it does survive against the estate of the intestate.

Having been present at the hearing of Barrett v. Copeland, I wish to say a few words farther in regard to that case. I concurred in the decision, without reference to any supposed distinction, applicable to that case, between our statute and that of 4 Edward III. I thought that action did not survive under the English statute, and I think so now. If it had been an action by the administrator of the creditor in an execution against a constable, or a sheriff, for a false return, by which the debt had been lost, or impaired, I should have had no doubt, it would have survived under either statute. But being, as I conceived, a false return, which worked a mere personal wrong, I thought an action for it died with the person, both in England and in this state. I was then inclined, as I am more strongly now, on farther consideration, to give our statute, so far as it regards the survivorship of actions in favor of executors and administrators for injuries to personal estate, the same construction, that has been given to the English statute. I think the language of our statute naturally requires and demands the same construction. Indeed, the approved test, for determining that an action *sur- *113 vives under the English statute, is the application to it of almost the very words of our statute.

The note of Sergeant Williams to Wheatley v. Lane, 1 Saund. R. 216, *a*, has been considered a most clear and accurate exposition of the English law in regard to the survivorship of actions. It has been approved and substantially copied by Mr. Chitty and other subsequent elementary writers on that subject. In that note Mr. Williams speaks of the statute of 4 Edward III, chap-

ter 7, as follows;—"By an equitable construction of the statute, an executor shall now have the same actions, for any injury done to the personal estate of the testator, in his life time, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be. So that he may now have trespass, or trover, action for false return, for an escape, debt on a judgment against an executor, suggesting a devastavit, action for removing goods taken in execution before the testator (the landlord) was paid a year's rent, and other actions of the like kind, for injuries done to the personal estate of the testator in his life time."

The rule for determining the question of survivorship is thus twice stated by Mr. Williams to be, whether an injury has been done to the personal estate of the deceased. Our statute is a copy of this rule, except that for the word "injury" the equivalent word "damage" is substituted,—the statute declaring, that actions for damages done to personal estate shall survive. I do not perceive, how more apt and appropriate words to make our statute identical in construction with the English statute, could have been drawn, than those which are used, and I am therefore of opinion, that there is no ground whatever for saying, that there are any causes of action, which would survive under the English statute, that should not survive under ours.

The judgment of the county court, dismissing the suit, is reversed, and the suit remanded to that court for farther proceedings.

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*114 *CARLOS BAXTER v. WINOOSKI TURNPIKE COMPANY.

(*Chittenden*, Dec. Term, 1849.)

To enable a person to maintain a private action for a public nuisance, he must have sustained some damage, more peculiar to himself than to others, in addition to the inconvenience common to all.

It is sufficient to give a private action for the erection of a nuisance upon a public highway, if there be peculiar or special damage resulting to the plaintiff therefrom, though consequential, and not direct.

But a claim for damages arising from the plaintiffs not attempting, at certain times, to travel a public highway, because of its general badness, is hypothetical, and does not constitute such peculiar damage, as to give a private action for a public nuisance.

But in this state, where, by statute, towns are laid under obligation to keep and maintain their public highways and bridges in repair, and are made liable to indictment for neglect in this particular, it is only by force of the statute, that an individual, who sustains special damage through such neglect, can maintain a suit therefor against the town.

And in order to sustain such action in favor of an individual, upon the statute, the damage complained of must not only be special, in the language of the statute, but direct, either to the person of the traveller, to his team, carriage, or other property, and it must result to the person of the traveller, or his property, while he, or his property, was in a state of transition over the highway.

Under the charter of the Winooski Turnpike Company, incorporated by the legislature of this state in 1805, by which it was provided, that the corporation should be liable to pay "all damages," which should happen to any person, from whom toll should be demandable, which might arise from want of repair of their road, the liability of the corporation is co-extensive with that of towns.

And that corporation is not liable, in an action upon the case, brought by one who has occasion to use their road, and is liable to pay toll for such use, for any general damages, which the plaintiff may have sustained in carrying on his business, whether such damages resulted from his not attempting to travel the road at particular times, by reason of its general badness and insufficiency, or from not being able to travel it as expeditiously, and carry as large loads, as he otherwise might and would have done.

The county court may, in their discretion, if they are satisfied, that no cause of action is stated in the declaration and none proved on trial, stop the cause on trial, and direct a verdict for the defendant, although the defendant has traversed the declaration, instead of demurring to it, and the evidence is compe*tent and suffi- *115 cient to prove the declaration,—although it is not error for the court to allow the case to proceed and leave the issue to be found against the defendant, and let him relieve himself from the verdict as he best may.

It is not competent for a plaintiff to declare with a *continuando*, for injuries occasioned by the obstruction, or insufficiency, of a highway, or to allege a repetition of such injuries upon divers days and times between a day specified and the commencement of the suit. It is the *per quod*, in such case, which is the *gravamen* of the action, and not the insufficiency of the road; and the injury sustained at any one time cannot be continued, or repeated.

Where the injury, in such case, is improperly laid in the declaration with a *continuando* the plaintiff, without any waiver on his part, may, upon the objection of the defendant, be confined in his proof to a single injury, though the defect, in the manner of alleging the injury, might be ground for a special demurrer.

In an action against a turnpike corporation for excavating earth from the sides of their road against the plaintiff's land, whereby the plaintiff's fences were thrown down, the court charged the jury, that the defendant had the right to use the soil, within the limits of their road in a reasonable manner, for the repair of the road, either where it crossed the plaintiff's land, or in other parts of the road, where it crossed the land of other persons, contiguous to the plaintiff's land, provided they used reasonable care and prudence in reference to the rights of the plaintiff, in so doing;—and it was held, that herein there was no error.†

Trespass on the case. The plaintiff alleged, in the first and second counts in his declaration, in substance, that the defendants were a corporation, duly authorized to construct and maintain a turnpike road between Burlington and Montpelier, and to receive toll from persons travelling thereon, and bound to keep the same in sufficient repair, and liable to any person travelling thereon, from whom toll was demandable, for all damages sustained by them in consequence of any want of repairs of said road, and that they had constructed their road, and erected turnpike gates thereon, at which they demanded and received toll; and that the plaintiff was the owner of a large tract of land, as well woodland as pasturage and tillage, situated in Burlington, upon the line of said turnpike, and between which and the village of Burlington the

†See Felch v. Gilman et al., ante, page 38.

said road formed the necessary and
*116 only means of pas*sage and communication, and that the plaintiff, during the time specified in these counts, in order to transact his necessary business, was compelled frequently to pass and repass, and transport the produce of said land, to a very large amount each year, along said road, to the village of Burlington and Lake Champlain and other places adjacent, and was liable to pay and did pay toll to said defendants; and that, during the same period, that portion of said turnpike, over which the plaintiff was thus required to pass, was, by the gross neglect of the defendants to repair the same, wholly defective, out of repair and insufficient and dangerous for the purposes of travel thereon, and was, from time to time, wholly impassable,—whereby the plaintiff, during the same period, was greatly impeded and delayed in conveying his said produce to Burlington, as the season and his business required, and in transacting his usual and necessary business to and from his said land, and, during a large portion of the same period, was wholly prevented from so conveying his said produce, and from transacting his said necessary business, along said road, whereby he was deprived of great gains and profits, which he would have derived from the conveyance and sale of his said produce, and incurred great loss and expense in being so hindered and delayed, and in being so prevented from transacting his necessary business, and in being unable to so use and work the teams kept by him. In the third count the plaintiff averred, as cause of action, that on the first day of September, 1841, "and on divers other days between that day and the commencement of this suit," his horses, wagons, oxen and carts, in passing over said road on the plaintiff's necessary business, wholly through the defects and want of repair of said road, were mired, and were driven into ruts, sloughs and holes and over stones and rocks in said road, and were thereby greatly injured and destroyed. In the fourth count the plaintiff alleged, that the said road passed through his land, and he had erected fences at the sides thereof, which were necessary for the protection of his land, and that the defendants had unlawfully excavated divers large and deep holes and pits in the earth, so near to the plaintiff's fences as to cause the earth to fall away from them, and the fences to be thereby broken, prostrated and destroyed. Plea, the general issue, and trial by the jury, September Term, 1848,—

BENNETT, J., presiding.

*117 *On trial the court held, that though it might be true, that the plaintiff had occasion to travel the road in question in the manner alleged in the declaration, yet that he could not recover for any general damages, which he might sustain in carrying on his business, whether they resulted from his not attempting to travel the road at particular times, by reason of its general badness and insufficiency, or from his not being able to travel it as expeditiously and carry as large loads, as he otherwise might and would have done, had it not have been for the insufficiency of the road; and under this ruling of the court, all the plaintiff's evidence, tending to show such general damages, was excluded;—to which ruling of the court the plaintiff excepted. Under the third count the court held, that the plaintiff must be confined to proof of an injury sustained at some one time, while travelling the road, on account of its insufficiency, but might take his election; and under this ruling the plaintiff's evidence was excluded, tending to show, that he sustained special damages at any other time, except on the occasion for which he elected to proceed;—and to this ruling the plaintiff also excepted. Under the fourth count the plaintiff gave evidence tending to prove, that the defendants, during one season, dug clay from the sides of the road, where it crossed the land of the plaintiff, for the purpose of conveying it to the sandy part of the road, and that it was so conveyed and deposited in the road,—a part upon the road on the plaintiff's land, and the residue on parts of the road contiguous thereto, but after it had left the plaintiff's land and crossed the land of other persons,—and that the defendants were wanting in proper care and prudence, in reference to the plaintiff's rights, and dug their clay pits so near the plaintiff's fence, as to endanger its safety, and that, in consequence of these clay pits, in the spring of the year, when the frost was leaving the ground, some portion of the plaintiff's fence was prostrated, doing him damage. The evidence on the part of the defendants tended to prove, that in order to render the sandy part of the road, where the clay had been deposited, suitable to travel and draw loads over with ease, it was necessary and proper to carry on clay, to mix with the sand, and that there was no place in the highway, where they could procure the clay so conveniently, as at the place where they obtained *it; and that there was *118 none to be had on the sandy part of the road, where the clay in question was deposited; and that they used ordinary care and prudence in digging the clay, so as not to endanger or injure the plaintiff's fence by reason thereof; and that the plaintiff's fence was not thereby injured. The court charged the jury, upon this part of the case, that the defendants had the right to use the soil in the highway in a reasonable manner for the repair of the road, and that it was immaterial, whether they used the clay, or soil, taken from the sides of the road opposite to the plaintiff's land, in repairing the road running through the plaintiff's land, or in repairing the road contiguous to the plaintiff's land, and after it had passed from the plaintiff's land, provided the jury should find, that it was proper and necessary, that clay should be drawn upon the sandy part of the highway, in order to make it a good and suitable road, and that this was the most convenient place, where clay could be obtained in the highway, for the purpose of being carried on to the sandy parts of the road; but that in so doing the defendants were bound to use ordinary care and prudence in reference to the rights of the plaintiff, as the owner of the land opposite, and to conduct in such a way, as they had good reason to suppose would not endanger and injure the plaintiff's fence; and that, if the defendants so conducted, they would not be

liable, though it should afterwards result, that the plaintiff's fence was injured by reason of the digging; but that, if the defendants were wanting in ordinary care and prudence in regard to the rights of the plaintiff, and in consequence of the digging the plaintiff's fences were prostrated, they would be liable for the damages resulting from the digging; and that, if the defendants were liable, the jury would give such damages as had already been sustained, and also give compensation for such damages, as might thereafter be reasonably expected to accrue therefrom. The jury returned a verdict for the plaintiff. The plaintiff excepted to so much of the charge, as has been detailed.

Smalley & Phelps for plaintiff.

I. The evidence offered in support of the first and second counts should have been received. 1. It is conceded, that it was *119 pertinent and sufficient to sustain, *on the part of the plaintiff, the issue joined on those counts; but it was excluded upon the ground, that those counts did not set forth a sufficient cause of action. It is a well settled rule of pleading, that the general issue puts on trial the truth of the declaration, not its sufficiency. The defendant might demur, or move in arrest: but if he choose to make an issue, it is the right of the plaintiff to have it tried upon the evidence. Cort v. Birkbeck, 1 Dougl. 218. Gibson et al. v. Hunter, 2 H. Bl. 205. Bul. N. P. 313. Richardson v. Royalton, & W. Turnp. Co., 6 Vt. 496. 2. The damages set forth in the first and second counts are of a character to entitle the plaintiff to sustain the action. They are fully within the letter, as well as the spirit, of the provisions of the defendants' charter. Acts of 1805, pp. 154–161. They result directly from the wrongful acts of the defendants,—are definite, appreciable and serious. It is true, that a mere inconvenience, common to the whole public, will not authorize a recovery: but whenever a party has sustained distinct injury, or loss, peculiar to himself, of the nature stated in the declaration, from the wrongful act, or neglect, of another, even though it constitute a public nuisance, he is entitled to recover in an action for his damages. Iveson v. Moore, 1 Ld. Raym. 486. Hart v. Basset, 4 Vin. 519. Maynell v. Saltmarsh, 1 Keb. 847. Rose v. Miles, 4 M. & S. 101. Greasly v. Codling, 2 Bing. 263, [9 E. C. L. 572.] Wiggins v. Boddington, 3 C. & P. 544, [14 E. C. L. 705.] Bateman v. Burge, 6 C. & P. 391, [25 E. C. L. 490.] Wilkes v. Hungerford Market Co., 2 Bing N. C. 281, [29 E. C. L. 537.] Burrows v. Pixley, 1 Root 362. Pierce v. Dart, 7 Cow. 609. Squier v. Gould, 14 Wend. 159. Hubert v. Groves, 1 Esp. R. 148, is the only case to the contrary, and has been repeatedly overruled. 29 E. C. L. 537. 7 Cow. 609. 1 M. & S. 101.

II. The court erred, in restricting the plaintiff to proof of a single instance of injury under the third count. The cause of action declared upon is the neglect to keep a certain portion of the road in repair during the time specified. That is a single tort, and, being continuous in its character, may be laid with a *continuando*, as extending from one day to another. Gould's Pl. 102–105. 1 Saund. R. 24, n.

III. The fee of the land, over which a turnpike passes, remains *in the *120 original proprietor, subject to the public easement; Hooker v. Utica & M. Turnp. Co., 12 Wend. 371; and the soil cannot be taken away, to any extent, at the mere convenience of the proprietors of the road.

A. Peck for defendants.

In order to recover against the defendants in a civil action, for damages sustained by reason of defect or want of repair in the road, the plaintiff must show, that he has sustained some special damage. For damages sustained by the plaintiff in common with the rest of the community there is no other remedy, than by indictment. This is the rule at common law, not only in case of damage by obstructions in the highway by the tortious act of the defendant, but in cases of injuries for want of repairs. Co. Lit. 56 *a*. The reason of this rule is stronger, and the principle is carried farther, against a civil suit, when the action is for a nonfeasance and founded on the defendant's liability to repair, than when it is for some positive obstruction, erected by a tortious act. 4 Bl. Com. 167. Iverson v. Moore, 1 Salk. 15. Paine v. Partrich, Carth. 191. Fineux v. Hovenden, Cro. El. 664. Hubert v. Groves, 1 Esp. R. 148. Cases, where a party has been entirely prevented from passing, by some obstruction interposed, while he was in the actual use of the road, whereby special damage has ensued, are distinguishable from the case at bar,—first, because the injury is a direct consequence of a positive tort, while in the case at bar it is but a nonfeasance, or breach of duty to repair,—secondly, in those cases the damage complained of is limited to those, who are in the act of using the road, when the obstruction is interposed.—while in the case at bar the injury is the same to all the public, as to the plaintiff. It is not sufficient for the plaintiff to show an injury to him to a greater extent, than to the rest of the public; it must be of a different and special character. The statute imposing the liability on towns is limited in terms to cases of special damage; and as the defendants, by their act of incorporation, take upon themselves the duty of constructing and keeping in repair the road, the right of action against them was evidently intended to be merely co-extensive with the remedy against towns,—especially as a remedy by indictment is also given in the act of incorporation. *As the defendants *121 have paid damages to the land owners for the right to build the road across their land, they have a right to use the earth for that purpose, as they judge proper, provided they use ordinary diligence and do not wantonly injure the adjoining proprietors. Under the third count the plaintiff was not entitled to show more than one instance, in which he sustained special damage, as such injuries are not continuous and permanent in their nature. Gould's Pl. 102, ch. 3, sec. 86–95. Michell v. Neale, Cowp. 828. Brook v. Bishopp, 2 Salk. 639.

The opinion of the court was delivered by

BENNETT, J. It is to be taken, in this case, that the business of the plaintiff called

upon him to use the road in the manner set forth in the two first counts in his declaration; and the first question is, was the county court right, as matter of law, in holding that the plaintiff could not recover for any general damages, which he might have sustained, whether they resulted from his not attempting to travel the road, at particular times, on account of its general insufficiency, or from his not being able to travel it as expeditiously and carry as large loads, as he might and otherwise would have done.

To enable a person to maintain a private action for the erection of a public nuisance, he must have sustained some damage more peculiar to himself than to others, in addition to the inconvenience common to all, and I understand this position to be admitted by the plaintiff's counsel. Unless this were the rule, the doctrine, that a public nuisance is to be proceeded against only by indictment, would be abrogated. Though the general rule is well settled, yet questions have often arisen in respect to its application; and in regard to what shall constitute such a peculiar damage, as to give the right of a private action, there seems to be some conflict in the cases.

Some have assumed the ground, that the injury must not only be peculiar to the party, but also direct, and not consequential; and of this description are the cases of Paine v. Partrich, Carth 194, and Hubert v. Groves, 1 Esp. R. 148. In the latter case it appeared, that the plaintiff had, by reason of the obstruction of the public highway, been prevented from carrying on his business in so advantageous a manner, as he had a right to do, and was obliged to draw
*122 *his coal, timber, &c., by a circuitous and inconvenient way; yet Lord KENYON nonsuited the plaintiff, and the king's bench refused to set aside the nonsuit. The opinion of Lord HOLT, in the case of Iveson v. Moore, 1 Ld. Raym. 486, seems to be based upon the same ground; and though the court of king's bench were equally divided in opinion, yet, upon consultation before all the justices of the common pleas and barons of the exchequer, they were all of opinion that the action well lay.

The grounds of that opinion I am not aware are in print; but from a manuscript note made by WILLES, chief justice of the common pleas, it would appear, that the reason, which the judges mainly went upon, was, that it sufficiently appeared, that the plaintiff must and did suffer special damage, more than others, because it was set forth, that the only way to come to the plaintiff's coal pits from one part of the country was through the obstructed way; and consequently they thought, without an averment of the loss of customers, it should be taken, that the plaintiff had suffered particularly in respect to his trade, by the defendant's wrong. See Willes' R. 74, note *a*. The case came up upon a motion in arrest for the insufficiency of the declaration, and the allegation was that the way was stopped up, so that carts and carriages could not come to the plaintiff's colliery.

I consider, however, at the present day, that the decided balance of authority sustains the position, that it is sufficient to give a private action for the erection of a nuisance upon a public highway, if there be peculiar or special damage resulting therefrom, though consequential, and not direct. The case of Wilkes v. Hungerford Market Co., 2 Bing. N. C. 281, [29 E. C. L. 537,] and many others are of that description.

The claim, which the plaintiff made for damages arising from his not attempting, at certain times, to travel the road, because of its general badness, is hypothetical; and I apprehend, that there is no case, which would warrant the position, that this could constitute such peculiar damage, as to give a private action for a public nuisance. If, however, this were an action on the case at the common law, to recover damages for an obstruction of the highway by some positive act, whereby the plaintiff was delayed in passing it, or enabled to carry less loads, than he otherwise might and would have *carried, it might well ad- *123
mit of a question, whether this would not be such a special damage, as to give a private action. The case of Hart v. Basset, T. Jones' R. 156, 4 Vin. 519, was one, in which the plaintiff was entitled to receive tithes, and, by means of the obstruction, was forced to carry them a circuitous route. The allegation in the declaration was, that he was forced to carry them a longer and more difficult way. This was the only damage proved on trial, yet the action was held well to lay.

The case of Rose v. Miles, 4 M. & S. 101, was where the plaintiffs were compelled to carry their goods over land, at an increased expense, in consequence of the defendants mooring a barge across a public navigable canal. If a person is hindered and impeded in the transportation of his goods, by reason of obstructions, the injury seems to be of the same kind, though perhaps less in degree, than if he was compelled to take a circuitous route. There are other cases analogous in principle.

But we do not think it necessary to decide the question, whether the evidence offered under the two first counts showed such a special injury, as would, upon common law principles, have given a private action, in the case of an obstruction, raised by the wrongful act of an individual. In this state towns, by statute, are laid under obligation to keep and maintain their public highways and bridges in sufficient repair, and, for neglect in this particular, are liable to indictment. The statute also provides, that if any special damage shall happen to any person, his team, carriage, or other property, by reason of the insufficiency of any highway, or bridge, in any town, which such town is liable to keep in repair, the person sustaining such damage shall have a right to recover the same in an action on the case.

I take it to be well settled, that if the statute had not given the action, no individual, who had sustained special damage through the neglect of the town to repair their roads, could maintain a suit. It may be said, that where an individual sustains an injury by the neglect or default of another, the law gives a remedy. But that principle does not apply, where the public are concerned, as it may well be said, that

it is better that an individual should sustain an injury, than that the public should suffer an inconvenience. In Brooke's Abr., Tit. Action on the Case, pl. 93, it is *124 said, if a highway be out *of repair, by which a horse is mired, (to his injury,) no action lies. The reason assigned is, that the public are bound to repair, and the remedy is by presentment. Upon the authority of the case cited in Brooke, the court of king's bench, in the case of Russell et al. v. Inhabitants of the County of Devon, 2 T. R. 667, held that no action would lay against the county, to recover damages for an injury sustained by reason of a bridge being out of repair, which the county were bound to repair.

If, then, upon common law principles, no action could be maintained against a town for an injury growing out of their neglect, recourse must be had to the statute, to learn how far they are made liable to a civil action. We think, it must not only be a special damage, in the language of the statute, but direct, either to the person of the traveller, to his team, carriage, or other property, and that the damage complained of must result to the person of the traveller, or his property, while he, or the property, was in a state of transition over the road, or bridge. In the connection in which it is used, it is evident, that the statute, though it uses the expression "to any person," has allusion to the rights of the person of the traveller; and we think, it was the intention of the legislature, in the use of the words "or other property," following the words "team," or "carriage," to confine the statute to such property, as should be on the road. If the expression "or other property" is to be understood in an unlimited sense, it would seem to follow, that if the insufficiency of the road operated to the injury of the traveller's estate, though remotely and indirectly, as by compelling him to be at the expense and loss of time in traversing a longer and more difficult way, as in the case of Hart v. Basset, he would have his private action. We do not think the legislature intended any such latitude of construction.

If this be so, how do the defendants stand? They were incorporated in 1805, and are made liable to indictment for the insufficiency of the road, the same as towns. The statute also declares, that "they shall be liable to pay all damages, which may happen to any person, from whom toll is demandable, which may arise from want of repairs on said road." See Acts of 1805, p. 154, sec. 5. Though the expression, "all damages," may seem broader than the act in relation to towns, yet we think it *125 was only the intention of the *legislature to substitute this corporation in the place of the town, and to make their liability co-extensive with that of towns. No reason is perceived, why it should be more onerous than that of towns. The town is relieved from all liability, as it respects this road; the public have their remedy by indictment; and why should the rights to individuals be more extended, than against towns? In the charter of the Royalton and Woodstock Turnpike Company, granted in 1800, the phraseology in regard to their liability is the same, as in the defendants' charter; and in the case of Richardson et al. v. Royalton & W. Turnpike Co., 6 Vt. 496, it was held, that they were liable only to the same extent as towns under the general statute. We then come to the conclusion, that the court below were right in regard to the substance of the thing, that is, that the testimony offered under the two first counts would not lay the ground of a legal right to recover, though the offer were proved to its full extent.

The question then arises, was it error in the county court, upon the proceedings in this case, not to submit the evidence to the jury and have the plaintiff's damages assessed under these counts? I am aware, it has been said, that if the defendant plead the general issue, he cannot object to the evidence, or to a verdict's being found for the plaintiff, if the evidence prove the declaration, though the declaration do not set up any legal cause of action. I apprehend, that this position needs, at least, some qualification, and that the court may, in their discretion, if they are satisfied that no cause of action is stated in the declaration and none proved on trial, stop the cause on trial, although the defendant have traversed the declaration, instead of demurring to it. It does not follow from this, that it would be error in the court not to do it, and to leave the issue to be found against the defendant, and let him get rid of the verdict in the best way he can.

In England the practice is, if the plaintiff fail to prove every fact necessary to support the action, or if the facts proved are insufficient in law to maintain an action, the court direct the plaintiff called. 1 Sellon's Prac. 462. In Hubert v. Groves, 1 Esp. R. 148, the court ordered the plaintiff called; yet in that case the plaintiff had proved the declaration, and the only question was, whether that set out a legal cause of action. That case went to trial under a plea *of not guilty. And though the court *126 cannot nonsuit the plaintiff against his consent, yet if he persist in answering, when called, the court will direct a verdict against him. Sellon's Pr. 464.

We have not adopted the practice of directing the plaintiff called, but our practice has been, in such case, to direct a verdict for the defendant, unless the plaintiff shall elect to become nonsuit. In the case of Smith v. Joiner et al., 1 D. Ch. 64, the evidence showed a cause of action against the defendant, but the action should have been brought in the name of the sheriff, and not by the deputy, as it was. The court say, as this matter appears upon the face of the declaration, it should have been demurred to, but is fatal under the general issue; and a verdict was directed for the defendant. The case of Gleason v. Peck et al., 12 Vt. 56, was an *audita querela*, and the plea not guilty; and though the complaint was proved against one of the defendants, yet the court below decided the action could not be maintained against either. The declaration would have been held bad on demurrer. The judge, who gave the opinion of the court, seemed to think, that if the issue had been to the jury, the verdict must have been against such

defendant; but I apprehend, it is immaterial, whether the issue be to the court, or jury. Though the court do not in form render a verdict, yet they find the issue; and if they find the issue for the plaintiff and give judgment in his favor, upon a declaration that sets forth no cause of action, it will be reversed upon error; and I apprehend the court, on motion, would arrest judgment.

The point decided in the case of Barney v. Bliss et al., 2 Aik. 60, went simply to show, that if the matter in a plea amounted to no defence, and the plaintiff took issue upon it, it was not error for the court to admit legal evidence to prove the issue, and to direct the jury, if proved, to return a verdict for the defendant. The point now before us was not in the case of French v. Thompson, 6 Vt. 58. In that case the county court charged the jury, that a valid promise was proved, and the jury found for the plaintiff. The case does not establish the position, that if the promise set forth in the declaration and proved had been void, it would have been error for the county court, if they had thought proper, to have directed a verdict for the defendant,—though perhaps the reasoning of the learned judge goes that length.

*127 *It is said, that in such case the plaintiff is entitled to a verdict, because, if it is set aside upon a motion in arrest, the defendant recovers no costs. But I do not apprehend this is a sufficient reason, why the court should be compelled to do a nugatory act,—especially as the plaintiff is first in fault in pleading. If the declaration were defective for the want of some averment, which would be cured by verdict, and the proof were sufficient, the court doubtless should direct the issue to be found for the plaintiff. It has been frequently held by this court, that, when a case comes up upon exceptions, they will look into the whole record, and if, upon the whole record, the judgment of the county court was correct, it will be affirmed, though there may have been error in the decision of the county court upon the point to which the exceptions were taken. We think the judgment of the county court cannot be reversed upon any exception taken to the proceedings of that court upon the two first counts.

It is claimed, that there was error in the county court, in not confining the plaintiff, under his third count, to some one single injury, accruing at some one time, when the plaintiff was passing over the road. It is familiar law, that if a trespass be of such a nature, that it may either be continued, or repeated, the plaintiff may declare strictly with a *continuando*, or in the mode adopted in the present case. If, however, the trespass cannot be continued, or repeated, you cannot so declare. Monkton v. Pashley, 2 Salk. 638. 9 Bacon's Abr. 511. In the case of the obstruction, or insufficiency, of a public highway, it is the *per quod*, which is the *gravamen* of the action, —not the insufficiency of the road. The injury sustained at any one time cannot be continued, or repeated. The injuries sustained on different days, while pasing the road, must, from their very nature, be distinct and independent. There could be no more a continuation, or repetition, of the injury, than in the case of taking the plaintiff's horse. It is undoubtedly true, that for an injury from the obstruction of a private right of way, the declaration may be with a *continuando*, and the difference is, that in the latter case the *gravamen* of the action is the stoppage of the way, which may well be continued. Where the injury is improperly laid with a *continuando*, the plaintiff, without any waiver on his part, may, upon the objection of the defendant, be confined in his proof to a *single injury, though it might be the ground of a special demurrer. Gould's Pl. 107, sec. 95. *128

This court are satisfied with the charge of the court below under the fourth count in the declaration. The damages are, or should be, assessed to the landholders with the expectation, that the public may take materials from the highway for the purpose of building or repairing the road. The question as to the right, raised in this case, was decided some years since in Windsor County, where timber was cut upon the limits of the highway to repair a bridge; and the true rule was laid down by the county court as to the care, which the public should use in regard to the landholders' rights. Upon recurring to the declaration, it will be found, that there is no complaint, that the defendants carried the clay, dug upon the highway opposite to the plaintiff's land, beyond the line of his farm and there to be used on the highway. But if this question arose on the declaration, we should be satisfied with the ruling of the county court.

The judgment of the county court is affirmed.

STEPHEN HUNT v. CASSIUS DOUGLASS.

(*Chittenden*, Dec. Term, 1849.)

A bailment of property, with a power of sale, is a personal trust to the bailee, which he cannot delegate.

A. delivered a horse to B., for B. to use, with the power of sale; B. exchanged the horse with C. for another horse, and C. agreed, that he would pay to A. $15,00, as the difference between them, and the horse which C. received was to remain the property of A., until the $15,00 was paid; but B. at the same time told C., that he might trade away the horse, provided he kept the security good. C. accordingly exchanged horses three several times, and the horse, which he obtained upon the third exchange, was attached by the defendant as the property of C. It did not appear, that A. had ratified the acts of C., in exchanging for that horse, and it was held, that therefore the property in the horse had not vested in A., although the $15,00 remained unpaid at the time of the attachment, and that the horse was subject to attachment by the creditors of C.

*Trespass for taking a horse. Plea, *129 the general issue, and trial by the court, March Term, 1848,—BENNETT, J., presiding. On trial it appeared, that previous to the ninth day of February, 1847, the plaintiff was the owner of a certain horse, which he delivered to his brother, John K. Hunt, as his bailee, to be by him used and sold, or exchanged, and that in the course of that month John K. Hunt exchanged that horse with one Lee for another horse, representing to Lee, at the same time, that the horse belonged to his

brother, and Lee agreed to pay to the plaintiff $15,00, as the difference between the horses, and that the horse which Lee received should remain the property of the plaintiff until the $15,00 was paid, and that the $15,00 still remained unpaid. It farther appeared, that at the time of the exchange John K. Hunt gave Lee permission to exchange the horse, which he then received, provided he kept the security good, and that Lee subsequently exchanged that horse for another, and again exchanged twice subsequently, and that the horse which he obtained upon the third exchange was the one sued for in this action. The defendant, who was a deputy sheriff, attached and sold the horse in question, in due form of law, as the property of Lee. Upon these facts the county court rendered judgment for the defendant. Exceptions by plaintiff.

E. R. Hard and *Smalley & Phelps* for plaintiff.

1. The conditional sale of the horse by the plaintiff to Lee, being *bona fide*, did not change the property in the horse, nor render it attachable by Lee's creditors, until after the condition was performed. West v. Bolton, 4 Vt. 558. Bradley v. Arnold, 16 Vt. 382. Manwell v. Briggs, 17 Vt. 176. Smith v. Foster, 18 Vt. 182. 2. The condition of the sale never having been performed between the parties. the license to Lee to exchange and the exchange made under it, being likewise *bona fide*, did not change the property, either in the first horse, or in those procured by the exchange. Waldo v. Peck, 7 Vt. 434.

H. Leavenworth for defendant.

1. The plaintiff, having parted with the possession of the horse by contract, cannot maintain this action of trespass
*130 during the con*tinuance of the contract. Soper v. Sumner et al., 5 Vt. 274. Swift v. Moseley et al., 10 Vt. 208. 2. The sale of the horse was not conditional, but absolute. The authority given by John K. Hunt to Lee, to exchange as often as he chose, as well as the other circumstances connected with the transaction, make Lee the legal owner of the property.

The opinion of the court was delivered by

BENNETT, J. This was a case tried by the county court, without the intervention of a jury; and the only question for this court is, whether the facts stated in the bill of exceptions show, that, as matter of law, the judgment should have been for the plaintiff, instead of the defendant.

The defendant, as an officer, had attached and sold the horse in question, as the property of one Michael Lee, at the suit of one of his creditors. The facts found by the bill of exceptions are, that the plaintiff was the owner of a certain horse, which he put into the possession of his brother, John K. Hunt, to be used by him and disposed of, and that the bailee sold the horse conditionally to Lee, or rather exchanged with him for another horse, for which Lee was to pay fifteen dollars, as the difference, and the horse which Lee received was to remain the plaintiff's property until the fifteen dollars were paid, which the case finds to be still unpaid. The case farther finds, that when the bailee traded with Lee, though the exchange was accompanied with a condition, that the horse put away should remain the property of the plaintiff, until the difference was paid, yet Lee was told by the bailee, that he might trade away the horse, if he would keep the security good, and that Lee had traded three times, and that the horse now in question is the one which was obtained upon the third exchange. We think the court were right in giving judgment for the defendant.

Though it should be granted, that the plaintiff should be protected in his ownership of the first horse, until the condition was performed by Lee, upon the ground that the property in the horse had not passed, yet the question in this case is, had the property in the horse now in dispute vested in the plaintiff at the time of the attachment. The case shows, that John K. Hunt had the bailment of the first horse to use, clothed with a power of sale. This, of *course, was a personal trust; *131 and the bailee had no authority to delegate this trust to another. The maxim is, "*delegata potestas non potest delegari.*"

Lee then had no authority, as derived from the plaintiff, to deal in horses, and he disposed of the one he received from his bailee without right. This did not defeat the plaintiff in his title to that horse; and the title to the one received in exchange by Lee would not vest in him, at least not until the plaintiff had ratified the acts of Lee; and there was no evidence in the case, tending to show a ratification at the time of the attachment, and none in the case, unless the bringing of this suit should be regarded as such.

But if this were not so, I, for one, should not be disposed to extend the doctrine, which protects the vendor in his property, while in the possession of the vendee upon a conditional sale, as against creditors of the vendee, so far as to permit the vendee to exchange that property to an unlimited extent, and thereby invest the vendor with the title to the newly acquired property, even though the vendee may have a general authority so to do from the vendor.

It does not appear upon what ground the county court proceeded in rendering a judgment for the defendant. It might have been upon the ground of collusion in point of fact. Doubtless the case contains evidence tending to prove collusion; and it is aways necessary, that enough should affirmatively appear upon a bill of exceptions, that this court may see that there has been error in the court below.

We think the judgment of the county court should be affirmed.

ELIAS LYMAN v. TOWN OF BURLINGTON.

TOWN OF BURLINGTON v. ELIAS LYMAN.

(*Chittenden*, Dec. Term, 1849.)

The proceedings of the county court upon the report of commissioners, appointed by a justice of the peace, under the statute, to appraise the damages occasioned to a land owner by the laying out of a highway by selectmen, cannot be revised upon exceptions, but only upon *certiorari*.

The case of Adams v. Newfane, 8 Vt. 271, recognized and affirmed.

*132 *A deputy sheriff cannot serve process in favor of the town, of which he is a rateable inhabitant, although the sheriff, under whom he acts, is at the time an inhabitant of another town, and has no property or interest in the town in favor of which the process issues.

But this does not apply to a citation, or order of notice, appended to a petition for a writ of *certiorari*. Service of such a notice may be made by any person.

When commissioners, appointed by a justice of the peace, under the statute, to appraise damages occasioned to a land owner by reason of the laying out of a highway across his land, appraise the damages at a sum exceeding forty dollars, and therefore return their report to the county court, the court have power, for sufficient reason, to reject such report; and if they do so, and the same commissioners, without any new appointment, re-examine the premises, and make a new report to the county court, in due form of law, the court have power to accept such report and establish the appraisal so made.

It is not a sufficient reason for rejecting the report of the commissioners in such case, that they refused to hear the testimony of witnesses in reference to the value of the premises, over which the road is laid out, and the amount of damages sustained by the land owner.

When a petition for a writ of *certiorari* is founded upon some informality or irregularity in the forms of the proceeding sought to be vacated, and no injustice has been done, the court, in the exercise of their discretion, will refuse to grant the writ.

The first of these cases was a petition to a justice of the peace, pursuant to the statute, to appoint commissioners to appraise the damages sustained by the petitioner, Lyman, by reason of a highway being laid out across his land by the selectmen of Burlington; and the damages being appraised at more than forty dollars, the report of the commissioners was returned to the county court. The second case was an application to the supreme court, by the town of Burlington, for a writ of *certiorari*, to vacate the proceedings of the county court in accepting the report made by the commissioners. The facts are fully stated in the opinion delivered by the court.

Smalley & Phelps for petitioner.

C. Adams for Burlington.

*133 *The opinion of the court was delivered by

KELLOGG, J. The town of Burlington having, by their selectmen, laid a highway over land of Mr. Lyman, and the selectmen having refused to award him damages for the same, Lyman applied to a magistrate in an adjacent town and procured the appointment of commissioners to appraise his damages. The commissioners appraised his damages, and, the same being more than forty dollars, made return of their doings to the term of the county court next after their appointment; and objections being made by the town of Burlington to the acceptance of the report, the case was continued to the March Term of the court, 1848, at which term the court refused to accept the report, for the reason that it appeared, that the commissioners were not sworn to the faithful discharge of their duty. The case was farther continued to the September Term, and in the interim the commissioners again examined the premises, appraised the damages, and made report to the court at their September Term, 1848; at which term the town of Burlington filed exceptions to the report, and, upon hearing the same, the report was accepted; and to that decision the town of Burlington filed exceptions and removed the case to this court for revision. At the last term of this court the town of Burlington filed their petition, (having previously procured a citation and caused the town to be notified of the petition,) praying the court to issue a writ of *certiorari*, to bring the records of the proceedings in the county court before this court, and that the same be quashed for the reasons set forth in the petition. The exceptions were entered in this court, and, upon the return of the petition and citation, Lyman pleaded in abatement, that the citation was served by a rateable inhabitant of Burlington; — replication, that the citation was served by a deputy sheriff, and that the sheriff did not reside in Burlington, and was not liable to pay taxes there;—to this replication there was a demurrer. Lyman filed his motion to have the exceptions dismissed. The cases were heard together in this court upon the motion to dismiss the exceptions, the plea in abatement, and upon the merits of the petition for the *certiorari*.

The exceptions in the case Lyman against Burlington must be dismissed. They are not properly before this court. The case is identical with that of Adams v. Newfane, 8 Vt. 271, and is controlled by that case. It was there held, that this proceeding "was *not by the course of the com- *134 mon law, but entirely in the nature of proceedings of a court of sessions;—that it is the same as the appointment of committees by the county court to lay out roads and the accepting of their reports, which proceedings are not subject to revision but upon *certiorari*." That case is decisive of the present. The exceptions are therefore dismissed.

The first question that arises upon the petition is as to the sufficiency of the replication to the plea in abatement. This replication is founded upon the assumption, that the act of the deputy is, in law, the act of the sheriff, and that, inasmuch as the sheriff was not an inhabitant of Burlington, or subject to the payment of rates there, the service cannot be invalidated, though made by a deputy, who was a rateable inhabitant of the town. This assumption, we think, cannot be sustained. For it was held by this court in Fairfield v. Hall, 8 Vt. 68, that a deputy, who was a rated inhabitant of the town, could not serve a writ, to which his town was a party. The replication must therefore be held insufficient.

The replication being demurred to, the demurrer reaches back to the first defect in pleading, and raises the question of the sufficiency of the plea. The plea is based upon the assumption, that the citation, or order of notice, appended to the petition, is like the ordinary process of law and is subject to the same rules, as to service, as the ordinary process of the courts. In the present case, if we were to hold the plea sufficient, we should not think of abating the peti-

tion. The only effect of sustaining the plea would be to suspend the hearing upon the petition, until proper notice was given to the adverse party. But we do not think the plea can be sustained, either upon principle, or authority. The cases cited in support of it are cases of the ordinary process of law. The case at bar, we think, is clearly distinguishable from those cases. The service of this notice was not the service of process, in the common acceptation of the term. It was an application to this court for a *certiorari*, and an order of notice to the adverse party to appear and show cause, why the writ should not issue. The service of the notice is not regulated by statute, and we think it might well be made by any one. Even had the petitioner delivered a copy of the petition and order of notice to the adverse party, upon proper proof of the fact the court would have deemed it
*135 sufficient notice. The *whole proceeding is regulated by the rules and usages of the court. We therefore hold the plea in abatement insufficient.

This result renders it necessary to examine the questions presented in the petition.

The petition seeks to have the proceedings of the county court quashed, upon the ground that the commissioners had no authority to make the report, which was finally accepted by the county court,—that the county court had no authority to accept the report,—and for the farther reason, that the commissioners refused to take the testimony of witnesses, showing the amount of the petitionee's damages. It is urged by the petitionee, that the county court had no authority to appoint the commissioners, or to confer upon them any powers whatever in relation to the assessment of the damages, and to this proposition we readily accede. The commissioners were appointed by a justice of the peace, pursuant to the statute, and we do not perceive, that the county court undertook to clothe them with any authority. They derived all their powers from their appointment. The county court were limited, in their action, to such report as the commissioners should submit. This they might accept, or reject, as they should be advised was proper. The first report the county court refused to accept, for the reason that the commissioners were not sworn, and perhaps for other irregularities apparent in the proceedings of the commissioners. The commissioners re-examined the premises, made a new appraisal of damages, and submitted their second report. This report, being deemed regular and in due form, the county court accepted. In opposition to this proceeding of the commissioners and the county court it is urged, that the commissioners having made a previous report and the court having set it aside, the power of both upon that subject was exhausted, and that neither could take farther action in the premises. We think this objection cannot be sustained.

It is indeed true, that the statute does not provide for a second appraisal and report by the commissioners, or the acceptance of a second report by the court. The commissioners, however, were bound to make a legal report; and until they had made such a report, we think, it cannot with propriety be claimed, that they had exhausted their powers under their appointment. The statute provides, that upon the return of the appraisal to the county court the *same shall be es- *136 tablished, if no sufficient cause be shown to the contrary. From which it is evident, the court have the power to accept the report and establish the appraisal, or reject it upon sufficient cause. If the report is not conformable to law, it is the duty of the court to reject it. And the rejection of an informal and illegal report does not, we think, divest the court of the power to act upon a subsequent legal appraisal. The power so to do is, and must necessarily be, incident to the court. To hold otherwise would be productive of the most injurious consequences.

It is farther urged, that the proceedings should be set aside, for the reason that the commissioners refused to receive the testimony of witnesses in relation to the damages. The statute makes no provision in relation to the taking of testimony by the commissioners, nor does it even contemplate such proceeding. It directs them to "proceed to view the premises and make the appraisal." It evidently contemplates, that the appraisal is to be made by the commissioners, upon view of the premises. Doubtless the commissioners might resort to other means, if they deemed it expedient, to aid them in making their appraisal. But we do not deem their refusal to examine witnesses upon a subject a sufficient ground to justify setting aside their proceedings. Would it be deemed sufficient cause to set aside the levy of an execution upon real estate, that the appraisers refused to examine witnesses as to the value of the land they were appointed to appraise? We think not; and yet it might be urged in that case with quite as much propriety as in the present.

The application for a *certiorari* is addressed to the sound discretion of the court, and when it is founded upon some informality, or irregularity, in the forms of the proceeding, and no injustice has been done, the court, in the exercise of their discretion, will refuse the writ. In the present case there is no evidence before the court, that injustice has been done, and we discover no sufficient cause for awarding a *certiorari*. Consequently the writ is denied and the petition dismissed.

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*ELIJAH D. SLOCUM v. ALEXANDER *137 CATLIN, GUY CATLIN, HENRY W. CATLIN AND NEWELL LYON. (In Chancery.)

(*Chittenden*, Dec. Term, 1849.)

To make a deed of the equity of redemption of the grantor in real estate available against an attaching creditor of the grantor, proof of a registry of the deed in the proper office, or notice to the attaching creditor, before his attachment, of the existence of the deed, must appear.

The purchaser of the equity of redemption of mortgaged premises, who has paid the mortgage debt, but who has neglected to cause his deed from the mortgagor to be recorded, until after a creditor

of the mortgagor had attached the equity of redemption, has an equitable lien upon the premises for the reimbursement of the amount so paid by him.

The court of chancery will relieve from the legal consequences of a merger of the mortgage title in the fee, where equity requires it.

The execution debtor, or those who claim under him, cannot object to the validity of the levy of the execution upon the debtor's equity of redemption in mortgaged premises, that the mortgage debt was stated, in the officer's return of the levy, at less than the true amount. The error does not operate an injury to the debtor, but to the creditor, and of this the debtor cannot complain.

Appeal from the court of chancery. The orator alleged in his bill, that Alexander Catlin, on the eighteenth day of March, 1839, was the owner of certain real estate described in the bill, and that he then conveyed the premises to Stephen Haight, by a deed which was absolute in its terms, but which was understood and intended by the parties to be for the sole purpose of securing Haight for certain liabilities, which he had incurred for Alexander Catlin; that the administrator of Haight conveyed the premises to Guy Catlin, and Guy Catlin conveyed them to the other defendants, Henry W. Catlin and Newell Lyon; that Alexander Catlin was indebted to the orator, and the orator, on the twenty second day of March, 1842, attached the equitable interest of Alexander Catlin in the premises, and prosecuted his suit to final judgment and execution, and caused his execution to be levied upon the mortgaged premises; and that the defendants continued to occupy the premises after the levy of the orator's execution;— and the orator prayed, that the de-
*138 *fendants might be decreed to account for the rents and profits, and to apply the same to the payment of the debt due from Alexander Catlin to Stephen Haight, and that they release that portion of the premises covered by the orator's levy. The defendant Guy Catlin admitted, in his answer, the execution of the mortgage, and that it was made for the purpose set forth in the bill, and he averred, that Haight, previous to the seventh day of November, 1840, paid certain demands for Alexander Catlin to Strong & Co., Philo Doolittle, and one Taft, amounting to $233,10, and that on the twentieth day of July, 1839, the said Guy Catlin paid to Haight $150, for money by him paid for Alexander Catlin at Washington; that on the seventh day of November, 1840, by an arrangement between Haight, Alexander Catlin and Guy Catlin, Alexander Catlin conveyed his equity of redemption in the mortgaged premises to Guy Catlin; that Guy Catlin executed his note to Haight for $233,10, being the amount paid by Haight to Strong & Co., Doolittle and Taft, and at the same time received from Haight an agreement, that, upon the payment of said note, he would convey his interest in the premises to the said Guy Catlin; and that Guy Catlin afterwards paid the note and the administrator of Haight conveyed the premises to him. The deed from Alexander Catlin to Guy Catlin was recorded the twenty eighth of March, 1842. The defendants Lyon and Henry W. Catlin answered; but their answers set forth no material facts. The bill was taken as confessed, as to Alexander Catlin. The answers were traversed and testimony was taken, the substance of which is fully stated in the opinion delivered by the court. Decree for the orator. Appeal by defendants.

A. Peck for orator.

C. Adams for defendants.

The opinion of the court was delivered by

Kellogg, J. That the deed from Alexander Catlin to Stephen Haight is to be treated as a mortgage, we entertain no doubt. After the execution of the deed Alexander Catlin continued to oc*cupy and *139
control the premises, which were of much greater value than the amount of the liabilities assumed by Haight. Both Haight and Alexander Catlin treated it as a mortgage, and Guy Catlin, in his answer, admits, that the deed was made as an indemnity for the liabilities assumed for Alexander Catlin at Washington. Such being the fact, Alexander Catlin had an equitable interest in the premises, which was subject to attachment by his creditors, until he was legally divested of that interest. To make the deed from Alexander Catlin to Guy Catlin available, as against the creditors of Alexander Catlin, proof of a registry of it in the proper office, or notice to the attaching creditor, before his attachment, of the existence of the deed, must appear. But neither appears in the present case.

It was urged at the argument, upon the authority of Pratt v. Bank of Bennington, 10 Vt. 293, that a registry of the deed was unnecessary. That case, however, is not analogous to this. There the court held, that for the purpose of a foreclosure by the assignee of a mortgage, it was not necessary to record the assignment; and this upon the well settled principle in chancery, that the mortgage is regarded as a mere incident of the debt, and as accompanying it, wherever that may be assigned; and as the debt may be assigned by parol, the mortgage security may be transferred in the same way. This has no application to the transfer of the equity of redemption. We think, therefore, that the orator acquired a lien by his attachment. It is not necessary, in disposing of the questions raised in this case, to inquire what would have been the effect upon the rights of creditors, had the deed from Alexander Catlin to Guy Catlin been recorded before the attachment. No pecuniary consideration passed upon the execution of the deed, and there was a great disparity between the value of the premises and the amount of Mr. Haight's incumbrance. The conveyance by the administrator of Haight to Guy Catlin was a transfer of Haight's interest under the mortgage, or in effect an assignment of the mortgage. Guy Catlin having procured an assignment of the mortgage and a release from Alexander Catlin of the equity of redemption, the legal consequence was, that the mortgage interest became merged in the fee. It is, however, doubtless competent for a court of equity to relieve from the legal consequences of the
*merger, by setting up the mortgage, *140
where equity requires it should be

done. Guy Catlin having paid off the incumbrance, he has an equitable lien upon the premises for the reimbursement of the same. And the case appears to have been so considered by the chancellor.

But it has been urged, that the defendant Guy Catlin should have been allowed a lien upon the estate, by virtue of the mortgage, for the sum of $233,10, being the amount of the note by him executed to Haight on the seventh of November, 1840, in addition to the $150 by him paid on the twentieth of July, 1839. It appears, that the usual course was pursued, of referring it to a master to ascertain and report the sum due upon the mortgage, and also the rents and profits of the premises after the orator's levy. The master reported the sum due upon the mortgage to be $150 on the twentieth of July, 1839, and that there was no evidence, that the note to Strong & Co., the note to Philo Doolittle and the demand to Taft were included in the mortgage of Alexander Catlin to Stephen Haight, by virtue of an agreement between them, and that there was no evidence, that Haight ever paid, on the score of his original liability for the said Alexander, any more than the sum of one hundred and fifty dollars. This report was confirmed by the chancellor and formed the basis of his decree.

On examining the proofs we are unable to find any satisfactory evidence, to justify a different result than the one reported by the master. It is indeed true, that Guy Catlin, in his answer, alleges, that the execution and payment of the note to Haight of $233,10 was with the assent and at the request of Alexander Catlin, as was also the arrangement with Haight for the assignment of the mortgage; but this, not being responsive to the bill, is not evidence for the defendant. Nor is the paper detailing these demands of Strong & Co., Doolittle, and Taft, and containing the declaration and signature of Mr. Haight, that he had paid those demands for Alexander Catlin, satisfactory evidence of the fact. But suppose this difficulty removed, and we were to regard the fact of the payment of these demands by Haight established by the proofs, there is still another objection to the allowance of this claim. There is no evidence of any agreement between Alexander Catlin and
*141 Haight, by *which Haight was to hold the mortgage as security for such payment. We think, therefore, that this claim was properly disallowed.

It is farther objected, that the orators' levy of his execution is irregular and void, inasmuch as it appears, that the mortgage to Haight is not stated at the true amount, but at less than the amount. And the case of Paine v. Webster, 1 Vt. 101, is cited to sustain this objection. So far from its being an authority in support of the objection, it is a direct authority in support of the levy. That the incumbrance is estimated at too small a sum does not operate an injury to the debtor, but to the creditor, and of this the debtor cannot complain.

The result is, that the decree of the court of chancery is affirmed, with costs to the orator, and the case remanded to the court of chancery.

*COUNTY OF FRANKLIN. *142

JANUARY TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. DANIEL KELLOGG,
HON. HILAND HALL, ASSISTANT JUDGES.

JOHN DWYER v. SAMUEL P. HALL.

(*Franklin*, Jan. Term, 1850.)

The plaintiff sold to the defendant a mare for a specified sum, and the defendant agreed, that, if the mare proved to be with foal, he would pay an additional sum of four dollars to a third person, to whom the plaintiff was indebted in that amount. The mare having proved to be with foal, and the defendant having refused to make the payment as agreed, it was held, that the plaintiff might recover the four dollars in an action upon book account.

Book account. The plaintiff, among other items in his account, claimed to recover for one charge of four dollars, in reference to which the auditor reported the facts as follows. The plaintiff sold to the defendant a mare, at a specified price, and it was agreed be*tween them, *143 that, if the mare proved to be with foal, the defendant would pay the farther sum of four dollars to one Saxby, to whom the plaintiff had previously agreed to pay that amount, if the mare proved to be with foal; and the plaintiff then charged that amount to the defendant, on book account, conditionally, "if the mare should be with foal." Saxby was not privy to this agreement, and was never informed of it by the defendant, nor did he ever agree to discharge the plaintiff from his liability. The mare proved to be with foal; but the defendant refused to pay Saxby, and denied any liability to do so, and thereupon the plaintiff paid Saxby, and then brought this action. The auditor allowed the charge, and the county court accepted the report, and rendered judgment thereon for the plaintiff. Exceptions by defendant.

Stevens & Edson, for defendant, insisted, that the action on book account could not be sustained, for the reason, that there was no existing debt, when the charge was made, and relied upon Slasson et al. v. Davis, 1 Aik. 73, Nason v. Crocker, 11 Vt. 464, and Stone v. Pulsipher et al., 16 Vt. 428.

Wilson & Atwood, for plaintiff, insisted, that the action was properly brought in the name of the plaintiff,—citing Crampton v. Ballard, 10 Vt. 251, Pangborn v. Saxton, 11 Vt. 79. Hall v. Huntoon, 17 Vt. 244, Whiting v. Corwin, 5 Vt. 451, and Phalan v. Barney, 11 Vt. 82; that the item was a proper subject of charge on book,—citing Kingsland v. Adams, 10 Vt. 201, and Gilman v. Peck, 11 Vt. 516; and that the right to charge was not affected by the contingency, to which the right to demand payment was made subject,—citing Hall et al. v. Peck et al., 10 Vt. 474, Hickok et al. v. Ridley, 15 Vt. 42, and Rogers v. Miller, 15 Vt. 431.

The opinion of the court was delivered by

HALL, J. The real character of the transaction is, that the plaintiff sold the defendant a mare at a stipulated price, which price was to be enhanced to a larger sum, provided the mare proved to possess a certain quality, which it was then impracticable to determine whether she possessed, or not. If the mare at the time of the sale had been lame from a recent injury, *144 the extent of which could *not then be ascertained, and it had been agreed, that the purchaser should pay for her a certain price, and an increased price, provided she should recover from her lameness within a specified time, and the mare had been charged on book, I apprehend there could be no doubt, the seller could recover her value in this form of action, at either the higher or lower price, as the evidence should warrant. So, if the mare in the present case had been sold on credit and charged on book, we see no objection to the plaintiff's recovering her value in the book action, and at the enhanced price, if the facts in the case showed him entitled to it. Nor do we think, it would form any obstacle to the recovery on book, that by the agreement the price of the mare, or a portion of it, was to have been paid to a third person, instead of directly to the seller. Sales are not unfrequent, in which the purchase money is agreed to be paid to a third person in discharge of a liability of the vendor to him, but it has not been supposed, that we are aware, that such agreement in regard to the mode of payment would prevent the vendor from charging and recovering for the article on book.

The present is substantially an action to recover of the defendant a balance due to the plaintiff on the sale of a mare; and such in effect was the form, in which it was presented to the auditor. We perceive no valid objection to the form of the action for the recovery of this balance, and therefore affirm the judgment of the county court.

FRANCIS JONES v. LATHROP MARSH.

(*Franklin*, Jan. Term, 1850.)

Where a contract for the sale of property is entire, and the delivery of the property and the payment of the purchase money are concurrent acts, to be performed at the same time, neither party can maintain an action upon the contract, without averring performance, or an offer to perform, upon his part.

Where the vendor, in such case, promises to deliver the property at a specified time and place, and the vendee promises to pay for it upon delivery, these promises are dependent upon each other; the vendor is not compelled to part with his property without payment, nor the vendee to pay the money, without receiving the property.

***145 *And where the vendee, in such case, has advanced a portion of the purchase money, but has not performed the residue of his contract by payment upon delivery, and the vendor has resold the property, and has thereby incurred a loss to a greater amount than the sum advanced by the vendee, the vendee cannot recover back the sum so advanced by him, either on a count upon the contract, not averring performance on his part, nor on a count for money had and received.**

If the vendor, in such case, attend, with his property, at the time and place specified, ready to deliver the same, and the vendee do not appear, for the purpose of performing his part of the contract, the vendor may, after waiting a reasonable time, re-sell the property.

Assumpsit. The plaintiff alleged in his declaration, that on the thirty first day of September, 1847, he contracted with the defendant, to purchase of him all the new milk cheese which he then had on hand, and all that he should make between that time and the first day of October, 1847, at seven cents per pound, to be delivered at the wharf at St. Albans Bay on the fifteenth day of October, 1847, and that he advanced to the defendant fifty dollars on account of said contract, but that the defendant had never delivered the cheese; and the plaintiff claimed to recover the amount so advanced by him. There was also a count for money had and received. Plea, the general issue, with notice, that the defendant would prove, that he had ready for delivery, at the place agreed upon, on the fifteenth day of October, 1847, and for several days thereafter, all the cheese which he contracted to deliver, but that the plaintiff neglected to appear to receive the cheese, or to pay for the same, and that thereupon the defendant sold the cheese at a price less than seven cents per pound, and thereby incurred a loss of a large sum, to wit, seventy dollars. Trial by the court, September Term, 1849,—POLAND, J., presiding. On trial the plaintiff gave in evidence a written contract between the parties, which was in these words;—"Received, Franklin, September 31st, 1847, of Francis Jones, fifty dollars, in part pay for my dairy of cheese. I am to deliver all the new milk cheese I have now on hand, and all I make up to the first of October next, well boxed, on the wharf at St. Albans, by the fifteenth of October next, for which I am to have seven cents per pound on delivery. (Signed) Lathrop Marsh." And it was conceded by the plain*tiff, that the facts stated *146 in the defendant's notice under the general issue were to be considered by the court as true. The court rendered judgment for the defendant. Exceptions by plaintiff.

A. Burt for plaintiff.

Where a covenant or promise, goes only to a part of the consideration, and a breach thereof may be paid for in damages, it is an independent covenant, or promise, and an action may be maintained for a breach of it by the defendant, without alleging performance, or readiness to perform, in the declaration. Obermyer v. Nichols, 6 Binn. 159. Bennet v. Ex'rs of Pixley, 7 Johns. 249. Benson v. Hobbs, 4 Har. & J. 286. Morrison v. Galloway, 2 Ib. 467. Foster v. Purdy, 5 Met. 442. If the plaintiff's covenants, which form the consideration, be dependent, yet if part of the consideration have been accepted and enjoyed by the defendant, and the plaintiff have no other remedy than on the covenant, and the defect on his part be compensable in damages, the plaintiff may recover, without alleging performance of the residue. And the rule is thus laid down in Lewis v. Weldon, 3 Rand. 71, 81; Muldrow v. M'Cleland, 1 Lit. 1; Payne v. Bettisworth, 2 A. K. Marsh. 429;—and upon this ground, that a consid-

erable part of the consideration has been received and enjoyed by the defendant; Tompkins v. Elliot, 5 Wend. 496. It must therefore be averred in the declaration, or appear in the pleadings, that part has been performed and received. Bean v. Atwater, 4 Conn. 4–13. The true rule appears to be, that if part of the consideration have been executed, at the time the covenants are made, the covenants, which form the residue of the consideration, are independent, —as in the case of Bean v. Atwater. Stavers v. Curling, 3 Bing. N. C. 353, [32 E. C. L. 169.] Smith's Lead. Cas., n. pp. 14–17. If the purchaser of goods neglect to take them away in a reasonable time, and after notice, though the seller may charge him warehouse rent, and bring an action for not receiving them, if he be prejudiced by the delay, yet the buyer's neglect does not authorize the seller to put an end to the contract and sell the goods to another person. Long on Sales 109.

*147 **Rand & Child* for defendant.

1. The contract between the parties is an entire, indivisible contract; the delivery of the cheese by the defendant and the payment of the purchase money by the plaintiff are concurrent acts, and performance, or offer to perform, by the plaintiffs is a condition precedent to his right of recovery. Bank of Columbia v. Hagner, 1 Pet. 455. 2 Smith's Lead. Cas. 1, 10. 1 Ib. 17. 2 Stark. Ev. 886, 887. 1 Chit. Pl. 323, 324. Dana v. King, 2 Pick. 155. 2. The plaintiff's neglect, or refusal, to appear at the place designated in the contract for the delivery of the cheese amounts to an abandonment of the contract by him, and he is not entitled to recover in special *assumpsit* upon the contract, or in general *assumpsit* for what he has paid or performed under it. 2 Smith's Lead. Cas., Am. Notes, 31 Ib. 1. St. Albans Steamboat Co. v. Wilkins, 8 Vt. 54. Faxon v. Mansfield, 2 Mass. 147. Stark v. Parker, 2 Pick. 267. Jennings v. Camp, 13 Johns. 94. Ketchum et al., v. Evertson, Ib. 359. 2 Pick. 155. 3. The payment of the $50 merely bound the defendant to carry the cheese to St. Albans Bay and to comply with the farther conditions of the contract, upon his receiving the purchase money from the plaintiff; and if the plaintiff neglected, or refused, to complete the contract, he forfeited what he had paid. Esp. N. P. 15, 16. Langfort v. Adm'r of Tiler, 1 Salk. 113. Saville v. Saville, 1 P. Wms. 745. 13 Johns. 359. Chit. on Cont. 396, 431–435.

The opinion of the court was delivered by

KELLOGG, J. This was an action of *assumpsit*, counting upon a contract for the sale and delivery of the defendant's cheese. The declaration also contained a count for money had and received. The issue was tried by the court, and, upon the facts found, the county court rendered judgment for the defendant, and the question presented for consideration is, are the facts reported sufficient to sustain the judgment of the court below?

The contract, upon which the plaintiff seeks to recover, is entire and indivisible, and the delivery of the cheese by the defendant and the payment of the purchase money by the plaintiff are concurrent acts, to be performed at the same time. The contract remains unrescinded, and upon such a contract it is well settled by the

*authorities, that neither party can *148 maintain an action, without averring performance, or an offer to perform, his own part of the contract.

That the promises and undertakings of the parties are dependent would seem, by the language of the contract, to be placed beyond all doubt. But even if it were doubtful, whether the promises are dependent, or independent, it is said, that courts have uniformly favored the former construction, —that of dependent promises,—as being obviously the most just. The vendor ought not to be compelled to part with his property, without receiving the consideration; nor the vendee to part with his money, without receiving an equivalent in return.

But it is said, that although the promises of the parties are mutual and dependent, yet, inasmuch as part of the consideration has been accepted and enjoyed by the defendant, and the plaintiff has no other remedy than upon the agreement, and inasmuch as the plaintiff's failure to perform his part of the contract can be compensated in damages, the plaintiff should be allowed to recover, without alleging performance of the remainder. And some few authorities are cited by the plaintiff, as sustaining this doctrine. These cases, however, proceed upon the ground, that the principal part of the consideration had been received and enjoyed. For it is admitted, that where there has not been such acceptance of part, as makes it fraudulent to set up this defense, the action will not be sustained, though the plaintiff's undertaking be divisible. And in this case it can hardly be said to be fraudulent in the defendant to set up this defence, inasmuch as the amount advanced by the plaintiff upon the making of the contract is less than the loss sustained by the defendant upon a re-sale of the property.

Neither is the plaintiff entitled to recover upon the general count. The contract being entire and executory, although the plaintiff has performed a part of it, yet having failed to perform the remainder without any sufficient excuse, and without the consent of the defendant, he cannot recover, either upon the special or general counts. This proposition is sustained by numerous adjudged cases. 2 Smith's Lead. Cas. (notes) 31. 8 Vt. 54. 2 Pick. 267. 13 Johns. 94. Ib. 359. The case of Ketchum v. Evertson, 13 Johns. 359, is directly in point and decisive of the case before us.

*Nor is the plaintiff entitled to re- *149 cover the money by him advanced upon the contract; Esp. 16; 1 P. Wms. 745; 1 Salk. 113; at least, unless the amount realized from the sale of the property, when added to the sum advanced by the plaintiff, shall amount to more than sufficient to meet the contract price of the cheese and the expenses incident to the sale; and then he would only be entitled to recover such excess. The case shows, that there was no excess in the hands of the defendant.

The plaintiff having failed to appear at the time and place specified in the contract,

to receive and pay for the cheese, the defendant was at liberty to treat it as an abandonment of the contract by the plaintiff, and was justified in reselling the property. The county court must have found, that the defendant kept the cheese for the plaintiff a reasonable time, and beyond this he certainly was not bound to hold it. To require him to store the property and delay the receipt of his money would be unreasonable and what the law does not require of him. The right of the vendor to sell, under such circumstances, is clearly sanctioned by the authorities. Chit. on Cont. 396, 431. 1 Salk. 113. 13 Johns. 365.

Upon the facts found in this case we are unable to discover any ground, upon which the plaintiff is entitled to recover. The judgment of the county court is therefore affirmed.

MYRON HICKOK v. NELSON BUCK.

(*Franklin*, Jan. Term, 1850.)

The defendant leased to the plaintiff a farm for one year, and, by the contract, was to provide a horse for the plaintiff to use upon the farm during the term. At the commencement of the term he furnished a horse, but took him away and sold him, before the expiration of the term, without providing another. *Held*, That the plaintiff acquired a special property in the horse by the bailment, and was entitled to recover, in an action of trover for the horse so taken away, damages for the loss of the use of the horse during the residue of the term.

Trover for a mare and colt. Plea, the general issue, and trial by jury, June *150 Term, 1849,—ROYCE, Ch. J., presiding.

*On trial the plaintiff gave in evidence a lease of a farm to himself from the defendant, dated March 8, 1847, to be cultivated upon shares for one year, by the terms of which he was to furnish the plaintiff with a pair of oxen and a horse, to be used in carrying on the farm, and proved, that, at about the commencement of the term, the defendant put upon the farm the mare in question, for the plaintiff to use, that this was the only horse furnished by the defendant, or used by the plaintiff for that purpose, and that in October, 1847, which was during the term, the defendant, against the will of the plaintiff, took away and sold the mare, without furnishing any other horse for the plaintiff to use,—the plaintiff then insisting to the defendant, that he needed the mare to use. The court instructed the jury, that if they found, that the defendant placed the mare upon the farm in pursuance of the contract on his part, and that she was accepted by the plaintiff, as the horse to be used by him in carrying on the farm, the plaintiff acquired an interest in the possession and use of the mare, which would entitle him to sustain this form of action against the defendant for wrongfully taking away the mare,—especially if another horse were not substituted in her place; and that, if they found the mare was taken away by the defendant without consent of the plaintiff, and against his will, no other horse being substituted for him to use, he was entitled to recover just damages for the loss of the use of the mare upon the farm for the remainder of the term. Verdict for plaintiff. Exceptions by defendant.

H. E. Hubbell, for defendant, insisted, that the plaintiff's only remedy, if any, was by an action upon the contract, and not by action of trover.

M. Scott for plaintiff.

The opinion of the court was delivered by

KELLOGG, J. This was an action of trover for a mare and colt, and it appeared upon the trial, that the defendant, on the eighth of March, 1847, leased to the plaintiff a farm for the term of one year, and agreed to furnish a pair of oxen and a horse to carry on the same. That at the commencement of the term, the defendant put *upon the farm the mare in question *151 for the plaintiff to use in carrying on the same, and that it was the only horse furnished by the defendant or used by the plaintiff for that purpose. That in October, 1847, the defendant took the mare away from the plaintiff, without his consent, and against his will, and sold her, without furnishing any other horse for the plaintiff to use; and that the plaintiff objected to the defendant's taking the mare, and insisted, that he was entitled to the use and possession of her under the lease, and that he needed her

The defendant now insists, that for the act of taking the mare from the plaintiff the action of trover cannot be maintained, —that by the terms of the lease he was only bound to furnish a horse, and that his neglect so to do would only subject him to an action for breach of the contract. It must be conceded, that had the defendant neglected to put a horse upon the farm agreeably to his stipulation in the lease, the plaintiff could only have obtained redress for such neglect by an action for breach of the contract. But the defendant having placed the mare upon the farm in pursuance of the agreement, the plaintiff, having accepted her for the purpose therein specified, became bailee of the mare, coupled with an interest and a right to retain her during the term of the demise. The plaintiff had done nothing to forfeit this right, and the defendant could not, upon his own mere volition, put an end to the bailment. An invasion of this right of the plaintiff, by taking the mare against his will and before the expiration of the bailment, was a tortious act, for which the action of trover may well be sustained. The general property in the mare remained in the defendant, but by the bailment the plaintiff acquired a special property in her, and was entitled to the exclusive use and control of her, during the continuance of the lease. And the defendant's interference in the matter, by taking the mare against the will of the plaintiff, is to be regarded the same, as though done by one who had no interest in her.

This disposes of the only question raised, and as we find no error in the proceedings of the court below, the judgment of the county court is affirmed.

*152 *THOMAS O'HEAR v. AMOS SKEELES.

(*Franklin*, Jan. Term, 1850.)

Under the provisions of chap. 50, sec. 12, of the Revised Statutes, executors and administrators are placed upon the same ground with other suitors, as it respects their liability for costs, which may be adjudged against them.

Where a creditor of an estate appealed from a decision of commissioners allowing a balance against him in favor of the estate, and in the county court he recovered judgment in his favor for damages and costs, it was held, that execution for the costs was properly issued by the county court against the administrator personally, as for his own debt.

Audita querela. The plaintiff alleged, that he was administrator upon the estate of his father; that the defendant presented before the commissioners a claim against the estate, and a claim was presented in offset thereto, and the commissioners allowed a balance in favor of the estate; that the defendant appealed to the county court, and such proceedings were therein had, that that court rendered judgment in favor of the defendant, upon his claim and the offset thereto, for damages and costs; and that for the amount so awarded for costs the defendant had taken execution directly against the plaintiff, as for his own debt, and was endeavoring to enforce collection thereof; and the plaintiff prayed, that the execution so issued might be vacated. To this complaint the defendant demurred; and the county court adjudged the complaint insufficient. Exceptions by plaintiff.

L. E. Pelton, for defendant, insisted, that by the Revised Statutes the legislature intended, that the allowance of costs against executors, or administrators, in all cases, should be left to the discretion of the court, before whom the case is tried; but that such costs as were allowed should be paid to the recovering party, without regard to the solvency, or insolvency, of the estate; and cited Rev. St., c. 50, § 12; c. 44, § 33; c. 49, §§ 18, 21; c. 48, § 19; c. 47, § 1; Slade's St. 345, § 59; Ib. 333, § 7; Ib. 353, §§ 93, 94; Ib. 345, § 61; Thomp. St. 63, § 6; 1 Wms. Saund. R. 335, 336; 2 Tidd's Pr. 979; 16 Mass. 530.

*153 **H. R. Beardsley* for plaintiff.

Chap. 50, sec. 12, of the Rev. St. was only intended to vary the common law rule of issuing an execution for costs against the effects of the intestate in the administrator's hands, so far as to authorize the issuing of the execution against the administrator's own estate in cases, where by law an execution might issue at all; but no execution could issue for costs in the case stated in the complaint. It is not competent to sever the damages from the costs and issue execution alone for costs. By Rev. St., chap. 49, sec. 22, the final decision and judgment, in cases so appealed, shall be certified to the probate court. The costs, when allowed, are as much a part of the judgment, as the damages; and the costs and damages together make a debt against the estate, which is to be paid in whole, or in part, according as the administrator shall have assets. The cases, where execution may properly issue against the goods and chattels of the administrator for costs, are those where the judgment is alone for costs.

The opinion of the court was delivered by

KELLOGG, J. This was an *audita querela* to set aside and vacate an execution issued upon a judgment rendered by the county court. To the complaint there was a demurrer and joinder, and the county court adjudged the complaint insufficient, and rendered judgment for the defendant. The county court, in which the judgment was rendered, upon which the execution issued, awarded costs against the administrator. The *gravamen* of the complaint is the taking of execution against the proper goods and estate of the complainant, and attempting to collect the same. Chap. 50, sec. 12, of the Revised Statutes provides, "that when costs in any case are allowed against an executor, or administrator, execution shall not issue against the estate of the deceased in his hands, but shall be awarded against him, as for his own debt; and the amount paid by him shall be allowed in his administration account, unless it shall appear, that the suit, or proceeding, in which the cost shall be taxed, shall have been prosecuted, or resisted, without just cause." From this provision of the statute we think it obvious, that the legislature intended to vary the common law rule in relation to the liability of executors and ad- *154 ministrators for costs, which may accrue by reason of suits by them prosecuted, or resisted; and that instead of awarding execution against the estate of the deceased in their hands, the same should issue against them, for the costs that might be adjudged, as for their own proper debt. Such is the language and spirit of the statute.

But it is said, that this can only apply to those cases in which by law an execution can properly issue, and that it is not applicable to a case like the one set forth in the complaint. This objection is founded upon the supposition, that the costs and damages cannot be severed,—that inasmuch as the final decision and judgment is, by sec. 22 of chap. 49, required to be certified to the probate court, the costs, as well as the damages, must be certified to that court. If this objection be well founded, it would follow as a consequence, that executors and administrators might greatly embarrass creditors resisting their claims, not only before the commissioners, but in the county court, and thereby subject them to a heavy expenditure of cost in establishing their claims, and this without the administrator incurring any personal responsibility, and without affording an adequate remedy to claimants, in cases of insolvent estates.

We believe it was the intention of the legislature to place executors and administrators upon the same footing with other suitors, as it respects their liability for costs, which may be adjudged against them; and that in so doing they intended to afford security to the recovering party for costs awarded him, and, by authorizing the administrator to charge the same in his administration account, to subject the propriety of his conduct, in incurring the ex-

penditure, to the decision of the probate court. This is calculated to impose a salutary restraint upon administrators, and to guard the estates of deceased persons against heedless expenses in unjustifiable litigation. Nor is there any thing unreasonable in this provision of the law. For if the administrator have not assets of the deceased in his hands, sufficient to indemnify him for the costs that may be awarded against him, he should procure such indemnity from those, for whose benefit he is prosecuting, or abstain from litigating doubtful claims. Nor do we perceive any insuperable difficulty in severing the costs from the damages. By awarding execution
*155 against the administrator for *the costs, we give full force and effect to the provisions of sec. 12 of chap. 50 of the Revised Statutes, and by certifying the decision and amount of the damages to the probate court, the requirements of sec. 22 of chap. 49 are complied with. By this construction the two sections referred to are made to harmonize.

The judgment of the county court is affirmed.

Charlotte D. Warner v. John Percy.

(*Franklin*, Jan. Term, 1850.)

Where land is conveyed by a deed with covenants of warranty, and a creditor of the grantor, claiming that the deed is fraudulent, causes an execution in his favor to be levied upon the land as the property of the grantor, the grantor is a competent witness for the grantee, to prove that the deed was not fraudulent, in an action of ejectment brought by the grantee against one who claims title under the levy.

And where the defendant, in such case, proves, that the grantor was indebted to the execution creditor, at the time the deed was executed, and claims, that the deed was executed with the fraudulent intent to avoid that debt, it is competent for the plaintiff to prove, that the grantor had at the same time claims to a considerable amount against the creditor, for property delivered and services rendered, notwithstanding no claim of offset was make by the grantor, at the time the creditor recovered his judgment against him. The judgment, being rendered subsequent to the execution of the deed, does not conclude the grantee as to the existence of any indebtedness to the creditor, or its amount, or the circumstances attending it.

Any testimony, in such case, which shows, that the grantor had, or supposed he had, at the time of the execution of the deed, claims against the creditor sufficient to meet the demand of the creditor against him, has a direct tendency to rebut the presumption of any fraudulent intent in the grantor to avoid the rights of that creditor.

Ejectment for land in Highgate. Plea, the general issue, and trial by jury, April Term, 1849,—Royce, Ch. J., presiding. The plaintiff claimed title to the land by virtue of a deed to herself from Nathan Woodward, with covenants of warranty, executed February 28, 1842; and the defendant claimed title to the same land under the levy of an execution in favor of L. E. Pelton
*156 against *Woodward, made in 1845, and a deed from Pelton to the defendant, executed February 3, 1847. The defendant gave evidence tending to prove, that the deed to the plaintiff was fraudulent, as to the creditors of Woodward, and that Pelton was a creditor of Woodward, at the time that deed was executed, for a large portion of the amount for which he subsequently obtained judgment and execution, and that Woodward, at the time of the conveyance, was indebted to various persons, other than Pelton, in sums varying from $10 to $30 each, and that after the conveyance Woodward remained in possession of the land, as he had been previously, and exercised the same acts of ownership in respect to it, and that the land conveyed constituted nearly all his attachable property, and that he had intimated, on one or two occasions, that he conveyed the land to the plaintiff to avoid the debt to Pelton. The plaintiff, to prove that the deed was not fraudulent, introduced Woodward as a witness,—to whose admission the defendant objected, but he was admitted by the court. The testimony of Woodward tended to prove, that he conveyed the land in question to the plaintiff in consideration of labor performed by her in his family, and that at the time of the execution of the deed to the plaintiff, he had claims against Pelton, to a considerable amount for property delivered and services rendered to him, and that Woodward acted as the agent of the plaintiff, and under her direction, in disposing of the products of the premises subsequent to the execution of the deed to her. It appeared, that in July, 1842, Pelton commenced an action upon book account against Woodward, who was then absent from the state, and recovered judgment against him without his having notice of the suit, and that in May, 1845, Pelton commenced an action upon that judgment, of which Woodward had notice, and recovered therein the judgment upon which the execution issued, which was levied upon the land. The court charged the jury, that the evidence offered by the plaintiff to disprove the existence of Pelton's debt, or to show claims in favor of Woodward against him, was not admitted for the purpose of impeaching the validity of the last judgment recovered by Pelton, but to aid in determining whether Woodward intended to defraud Pelton in conveying the land to the plaintiff; that unless Woodward then supposed himself indebted to Pelton, upon a settlement of all their dealings, his motives could not be deemed fraudulent, as to
*Pelton; that, the deed to the plain- *157
tiff being prior to the judgment, the plaintiff would not be concluded by it from showing that Woodward was not in fact indebted to Pelton at the time she received the deed; and that, from the whole evidence, the jury were to determine the character of the transaction between the plaintiff and Woodward, as having been in good faith, or fraudulent. Verdict for plaintiff. Exceptions by defendant.

L. E. Pelton and *H. R. Beardsley*, for defendant, insisted, that Woodward was interested in the event of the suit, and was improperly admitted as a witness,—citing Edgell v. Lowell, 4 Vt. 405; Loker v. Haynes, 11 Mass. 498; Jackson d. Mapes v. Frost et al., 6 Johns. 135; Swift v. Dean, Ib. 523;—that Woodward was improperly allowed to testify, that there was nothing due from him to Pelton, as this was in effect contra-

dicting the record;—that all the testimony, which tended to prove, that there was no indebtedness from Woodward to Pelton, at the time the deed was executed, was immaterial, and therefore improperly admitted, since, if the deed were fraudulent, it would make no difference, whether Pelton was a creditor at the time, or became so subsequently,—citing Wadsworth v. Havens, 3 Wend. 411; Reade v. Livingston, 3 Johns. Ch. R. 481; Penfield v. Carpender, 13 Johns. 350; Squier v. Gould, 14 Wend. 159; Farmers' & M. Bank v. Whinfield, 24 Wend. 419.

N. L. Whittemore and *Stevens & Edson*, for plaintiff, insisted, that the grantor in a deed with covenants is a competent witness for the grantee, when the only defect in the title is claimed to be the fraud between the grantor and grantee, and cited Edgell v. Lowell et al., 4 Vt. 405; Loker v. Haynes, 11 Mass. 498; Worcester v. Eaton, Ib. 375; Bridge v. Eggleston, 14 Ib. 250; Hill v. Payson, 3 Ib. 559; Cow. & H.'s Notes to Phil. Ev., Part 1, pp. 77, 80; Adm'r of Seymour v. Beach et al., 4 Vt. 499.

The opinion of the court was delivered by

BENNETT, J. This was an action of ejectment, and the plaintiff claimed title under a warrantee deed from N. Woodward, executed in February, 1842; and the defendant claimed title under a deed from L. E. Pelton, executed February 3, 1847; and *158 Pelton's claim *of title was under Woodward, by means of a judgment and the levy of an execution, subsequent to the plaintiff's deed. The plaintiff called Woodward as a witness, and the first question is, whether he was a competent witness, when called by the plaintiff. The case of Adm'r of Seymour v. Beach et al., 4 Vt. 498, establishes the position, that he would not have been competent, if called by the defendant. The witness would have had an interest in establishing Pelton's title under the levy, as he thereby satisfied his own debt. See Bland v. Ansley, 5 B. & P. 331; and, under the authority of Adm'r of Seymour v. Beach et al., this interest would not have been balanced by reason of his covenants in the plaintiff's deed. It is held in that case, that the witness could not be subjected to an action on his covenants in his deed, notwithstanding the title under the levy prevailed over the title under the deed upon the ground of fraud. From that case it follows, that if the interest of the witness were not balanced in the present case, it was against the party calling him; and of course the witness was competent.

It seems, also, by the bill of exceptions, that the plaintiff, under objections from the defendant, was permitted to give evidence tending to prove, that, at the time of the conveyance by Woodward to the plaintiff, he (Woodward) had claims to a considerable amount, in the language of the exceptions, against Pelton for property delivered him and for services rendered him; and the question is now presented for our decision, whether such evidence was admissible, for the purposes for which it was received by the county court. It was an important point, on the part of the defence, to show the motive, which induced Woodward to execute the deed to the plaintiff. Was it done with the intention to defraud Pelton? We agree with the county court, that if Woodward had, or supposed that he had, legal claims against Pelton, sufficient to meet whatever Pelton had against him, it has a decided tendency to rebut any presumption of a fraudulent intent in Woodward to avoid the rights of Pelton. The reason must be obvious. The mutual claims might be made the subject of a set-off, and by this means be mutually cancelled.

We also agree with the county court, that this was proper evidence on the question whether Woodward was really indebted to Pelton at the time when the plaintiff received her deed,—that is, in such a sense, that Woodward could by a fraudulent conveyance *avoid any substantial *159 right of Pelton. The plaintiff is not concluded by the judgment against her grantor, especially as it is subsequent to her deed. As between Pelton and Woodward, the judgment is conclusive, so far as relates to Pelton's title under his levy; but, so far as the plaintiff is concerned, how far back the indebtedness extends and what was the relative state of the mutual claims of the parties to the judgment must be open to inquiry. We see no possible objection to any part of the charge of the court, so far as detailed. The charge gives Pelton the right to levy upon this property, provided the conveyance was made to the plaintiff in fraud of any of Woodward's creditors; and we think it as favorable to Pelton, as any one can claim it should have been.

The judgment of the county court is affirmed.

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*COUNTY OF ADDISON. *160

JANUARY TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. DANIEL KELLOGG,
HON. LUKE P. POLAND, ASSISTANT JUDGES.

JOHN LOWRY AND ARCHIBALD H. LOWRY v. HIRAM ADAMS.

(*Addison*, Jan. Term, 1850.)

For the purpose of ascertaining the intent of the parties in making a contract the court will consider the situation of the parties, the subject matter of the contract, and the object to be attained by it; and, even when the contract is reduced to writing, will allow these circumstances to be shown by parol evidence, if the intent of the parties, upon the face of the contract, is doubtful, or the language used by them will admit of more than one construction.

D., who was a merchant in the country, dealing in merchandize of all descriptions usually kept for sale in a country store, being about to purchase his stock of goods in New York, received from the defendant, who was his father in law, and who had previously been his partner in business, a written guaranty, directed to no *161 person named, by which the defendant agreed to be responsible for what goods D. might purchase in New York more than he paid for

himself; *Held*, that the intent of the defendant was apparent, to give to D. the necessary credit, to enable him to purchase his stock of goods of as many different dealers, as might become necessary, in order to complete his assortment.

Held, also, that the defendant thereby became responsible to every person, who should sell goods to D., relying upon the credit of the guarantee, and that he became liable to each in the same manner, and to the same legal effect and extent, as if he had given a separate letter to each; and that his liability was not affected by the fact, that the goods were sold to D. upon the usual credit given to country merchants for similar purchases.

Notice of the acceptance of a guarantee must be given to the guarantor within a reasonable time; and the question, whether proper notice has been given, is usually one of fact, to be determined by the jury upon consideration of the relative situation of the parties and all the attending circumstances.

Assumpsit upon a written contract of guaranty. Plea, the general issue, and trial by jury, December Term, 1849,—BENNETT, J., presiding. On trial the plaintiff gave evidence tending to prove, that in September, 1846, E. N. Drury was a merchant in Vergennes, dealing in merchandize of the various descriptions usually kept in a country store; that he was the son in law of the defendant, and had been a partner with him in business, and had purchased the defendant's interest in the goods of their firm; that Drury being about going to New York to purchase his fall stock of goods, the defendant gave to him a written guarantee, signed by himself, addressed to no person in particular, dated September 17, 1846, which was in these words,—"Mr. E. N. Drury is buying goods in New York, and what he may want more than he pays for himself I will be responsible for:" that about the twenty second of September, 1846, Drury, upon the credit of the defendant's guaranty, purchased goods of Stearns & Johnson, in New York, and deposited the guaranty with them, saying that he should purchase goods of other persons in New York, and desiring Stearns & Johnson to exhibit the guaranty to those who might call and see it, and to hold it for the benefit of those from whom he might purchase; that about the 25th of September, 1846, Drury desired to purchase goods of the plaintiffs, upon a credit, and informed the plaintiffs, that he had re-
*162 ceived a general *guaranty from the defendant, which was deposited with Stearns & Johnson, and desired the plaintiffs to examine it; that the plaintiffs accordingly examined the guaranty, and sold to Drury, upon the faith of it, goods to the amount of $371,38, taking Drury's promissory note for the amount, payable in four months, not as payment, but for the purpose of liquidating the account; that subsequently, about the ninth of November, 1846, the plaintiffs sold to Drury, upon the faith of the same guaranty, other goods, to the amount of $81,90; that no part of the purchase money of the goods sold at either time had ever been paid to the plaintiffs; that the plaintiffs in December, 1846, gave notice to the defendant, that they had sold to Drury goods to the several amounts above specified, upon the faith of the guaranty, and that they should rely upon the defendant for payment; that at this time, and for some time subsequent, Drury was engaged in his usual business, and was apparently solvent: and that subsequently his goods were attached at the suit of Harry Adams, upon notes given by Drury to the defendant and by him indorsed to Harry Adams. The testimony on the part of the defendant tended to prove, that such notice was not given until some time in April, 1847. Upon these facts, the court having intimated, that they should charge the jury, that the plaintiffs could not sustain an action upon the guaranty, the plaintiffs submitted to a verdict for the defendant, with liberty to except. Exceptions allowed.

F. E. Woodbridge and *E. J. Phelps* for plaintiffs.

The guaranty was intended to apply to the purchase, by Drury, of the amount and descriptions of goods, reasonably necessary to make his fall stock, of the various persons to whom it was necessary to resort, in order to obtain them. Its effect was not exhausted, until the stock was completed, and cannot be restricted to the first individual, who happened to furnish, upon the faith of it, a single variety of the goods required. It is simply a question of the intention of the parties. A general guaranty of this character attaches in favor of whoever acts upon the faith of it, to an extent only limited by its terms. Lawrason v. Mason, 1 U. S. Cond. R. 605. Walton v. Dodson, 3 C. & P. 162, [14 E. C. L. 504.] Mason v. Pritchard, 12 East 227. Story on Bills, §§ 544-6. Fell on Guar. *39. McClung v. Means, *163 4 Ham. 196, [Ohio Cond. R. 773.] It is to be taken in connection with the situation of the parties, the circumstances under which it was executed, and the object proposed to be effected; 13 Pet. 89; Wilson v. Troup, 2 Cow. 195; Lawrence v. Dole, 11 Vt. 549; French v. Carhart, 1 Comst. 96; Chit. on Cont. 74; and with the acts of the parties under it; Livingston v. Ten Broeck, 16 Johns. 22; 1 Comst. 96; and with the known usage of trade; Colemard v. Lamb, 15 Wend. 330; Smith v. Dann, 6 Hill 543. And if any doubt can arise as to the intention, it is a question that should have been submitted to the jury; Fowle v. Bigelow, 10 Mass. 379. By the law of New York no notice of the acceptance of the guaranty was necessary; Smith v. Dann, 6 Hill 543; Douglass v. Howland, 24 Wend. 35. But if notice were necessary, the case shows that reasonable and sufficient notice was given. At most, it would be a question for the jury, under proper instructions.

J. Pierpoint for defendant.

1. The guaranty relied upon by the plaintiffs, not having been addressed to any person in particular, might be accepted and acted upon by any one; but when accepted by one, it became a special guaranty, and has the same legal effect, and is to be declared upon, as though it had been originally addressed to such person. The declarations of Drury can have no effect in the case, and are inadmissible to enlarge the operation of the writing. 5 Wend. 307. 26 Ib. 425. 19 Ib. 557. 2. The guaranty does not authorize the selling of goods to Drury on a credit, by a person who accepts it. 3. The notice to the defendant of the accept-

ance of the guaranty was insufficient. Lee v. Dick, 10 Pet. 482. Reynolds v. Douglass, 12 Pet. 497. Adams v. Jones, Ib. 207. 4 Greenl. 521. 7 Ib. 115. 1 Mason 323. Craft v. Isham, 13 Conn. 28. Edmondston v. Drake, 5 Pet. 624. 17 Johns. 134. Bradley v. Cary, 8 Greenl. 234. 3 Conn. 438.

The opinion of the court was delivered by

POLAND, J. From the bill of exceptions and other papers referred to in this case the following facts appear to have been *164 proved by the *plaintiffs at the trial of this cause in the county court. That E. N. Drury was the son in law of the defendant, and some time previous to September, 1846, had been in partnership with him in mercantile business in the city of Vergennes, and had purchased the defendant's interest in the partnership business and had succeeded him therein. That in the month of September, 1846, Drury, being about to go to the city of New York to purchase his usual supply of fall goods for his store in Vergennes, applied to the defendant for a letter of credit, to enable him to purchase said goods; and the defendant, on the seventeenth day of September, 1846, gave to Drury a writing in these words, to wit;—"Mr. E. N. Drury is buying goods in New York, and what he may want, more than he pays for himself, I will be responsible for; Vergennes, September 17, 1846. (Signed) Hiram Adams." That Drury carried said writing to the city of New York and, on the twenty second day of September, 1846, presented the same to Stearns & Johnson, and, upon the strength and credit of it, purchased of them a small bill of goods. That Drury left said paper in the possession of Stearns & Johnson, and at the same time told them, that he should buy goods of other persons in New York, and desired Stearns & Johnson to keep said paper in their possession and exhibit it to those who called on them to see it, and to hold it for the use and benefit of any person, from whom he might purchase goods. That on the same day, or within a day or two after, Drury applied to the plaintiffs to sell him a bill of goods on credit, and at the same time informed them of said writing, and that he had deposited the same with Stearns & Johnson for the purposes above stated; and the plaintiffs thereupon sent their clerk to the store of Stearns & Johnson to see the writing, and it was exhibited to the clerk by Stearns & Johnson, and a copy of it was taken by him and delivered to the plaintiffs. That the plaintiffs, being satisfied of the sufficiency of said paper, sold and delivered to Drury a bill of goods, amounting to the sum of $371,38, and took his note for the amount, payable in four months from date, (September 25, 1846,) relying upon the said paper as their security for payment. That on the ninth day of November, 1846, the plaintiffs, upon the credit and faith of said paper, sold and delivered to Drury another bill of goods, amounting to the sum of $81,90. That Drury returned with said goods to Vergen- *165 nes, *and continued to carry on his business there, as a merchant, until some time in the winter of 1847, when he failed and became insolvent, and the plaintiffs have never been paid for said goods.

The plaintiffs introduced evidence tending to prove, that between the sixth day of December, 1846, and the second Tuesday of the same month they gave notice to the defendant, that they had sold and delivered the above mentioned bills of goods to Drury, upon the faith of defendant's said guaranty, that the same were not paid for, and that they should look to the defendant for payment,—and also proved, that they gave notice to the defendant, on the twenty fifth day of January, 1847, that Drury had not paid said note. The county court ruled, that the plaintiffs could not maintain their suit against the defendant upon said guaranty; whereupon the plaintiffs submitted to a verdict for the defendant, with leave to except to the ruling of the court; and the question is now before us upon the correctness of that decision.

1. The defendant insists, that, although the writing signed by him was not addressed to any particular person, yet that, when it had been presented by Drury to Stearns & Johnson, and they had given Drury credit upon the faith of it, its object and purpose had become complete and executed, and that thereafter the paper was to have the same legal effect and consequences, as if it had been originally addressed to Stearns & Johnson by the defendant.

If the purpose of the parties were such, that it might have been fulfilled by such use of the paper, or if the parties, at the time it was executed, might reasonably be supposed to have contemplated only a single purchase upon the credit of it, at some one particular house, this position of the defendant is doubtless correct. It becomes important, then, to ascertain and determine, if possible, the true object and intent of the defendant in executing the paper and delivering it to Drury; for the law aims in all cases, if possible, to give effect to and carry out the real designs of the parties in every species of contracts; and in no one class of cases have the courts gone so far for that purpose, as in those of mercantile transactions and securities.

For the purpose of ascertaining the intent of the parties in entering into any contract, courts will look at the situation of the parties making it, the subject matter of the contract, the motives of the parties in entering into it, and the object to be attained by it; and, *even in cases where *166 the contract is reduced to writing, will allow all these circumstances to be shown by parol evidence, if the intent of the parties, upon the face of the contract, is doubtful, or the language used by them will admit of more than one interpretation. See French v. Carhart, 1 Comst. 96, and observations of JEWETT, Ch. J., p. 102; Chit. on Cont. 74, and notes. When, from the contract itself and all the surrounding circumstances, the true object and intent of the parties has been ascertained, courts will enforce the contract according to that intent, unless there be found in the way some stubborn, inflexible rule of law, absolutely requiring a different determination.

Considering the case in this view, what was the intention and understanding of the defendant, at the time he made and delivered the guaranty, or letter of credit, in

question, to Drury? Drury was going to New York to purchase his usual fall supply of goods for the business of a country store, where goods of every variety and description are usually kept for sale. The defendant had been a merchant himself, and had formerly carried on the mercantile business in the same store then occupied by Drury, and must have known, that it would be impossible for Drury to have supplied himself with all the various kinds of goods, usually kept for sale in a country store, at any single house in New York, and that he must necessarily make purchases of goods at several different houses. The defendant, having been in business and known to be responsible, under this state of things gives to Drury a general letter of credit to carry to New York, addressed to no one, in which he agrees to be responsible for the goods Drury may purchase, more than he pays for. It would seem from the writing itself, and from the situation of the parties, impossible for any one to doubt, what the defendant really intended, when he executed the paper and delivered it to Drury. We are fully satisfied, that his object must have been, and that he intended, to give to Drury the necessary credit to enable him to purchase his fall stock of goods, of the various descriptions and varieties kept in a country store, at as many different houses, and of as many different dealers, as might become necessary for that purpose.

Is there, then, any imperative rule of law in the way of giving effect to this intention of the parties, and which *167 will prevent these *plaintiffs, who sold goods to Drury upon the credit and faith of the defendant's letter, from holding the defendant liable, because another firm had previously trusted Drury with a bill of goods upon the credit of the same letter? No case has been shown us, and the counsel for the defendant admits, that after a laborious search he has not been able to find any decided case, or statement by any elementary writer, that, upon a general letter of credit, like the present one, the signer could only be liable to the person who gave the first credit upon it. In the case of McClung et al. v. Means, 4 Ham. Ohio R. 193, the supreme court of Ohio seem to have held, that, upon a guaranty very similar to the present, different persons might give credit upon the faith of it,—though judgment in that case was given for the defendant, upon another point. We do not find, that this precise point has been adjudged by the courts, either in England or in this country; but in many cases we find *dicta* fully warranting the sustaining of such an action. See McLaren v. Watson's Ex'rs, 26 Wend. 436, 437, by VERPLANCK, Senator; Birckhead v. Brown, 5 Hill 642. See, also, opinion of Judge STORY, in note to Story on Bills, 545 to 555; Story on Cont. 737, and cases cited in notes; Smith's Merc. Law 448, and Am. editor's note; Lawrason v. Mason, 3 Cranch 492; Bradley v. Cary, 8 Greenl. 234. Without taking farther space upon the question, we are not able to discover any principle, or authority, by which we are precluded from giving to the defendant's letter of credit the effect we are satisfied he intended,—that is, to make himself responsible to each and every person, who should sell goods to Drury, relying upon the faith and credit of it, and that he became liable to each in the same manner, and to the same legal effect and extent, as if he had given a separate letter to each.

2. The defendant also objects, that, inasmuch as the plaintiffs sold the goods to Drury on a credit, the defendant cannot be held liable upon his guaranty, because that did not authorize a sale on credit. We think this objection not well founded. The very object of the guaranty was to enable Drury to purchase on a credit; and if giving credit for the goods released the defendant, the guaranty was a mere nullity and amounted to nothing. No question seems to have been made in the county court, but what the credit was reasonable, and the usual and ordinary credit given to country merchants for similar purchases in *168 New York; and, as we view the case, this credit was just what the guaranty was intended to procure.

3. The defendant also insists, that he was entitled to notice of the acceptance of his guaranty by the plaintiffs within a reasonable time, and that the facts disclosed in the case did not show such notice. It appears to us, that by a fair construction of the bill of exceptions the case was turned in the county court upon the main question in the case, and not upon the ground of the want, or insufficiency, of the notice to the defendant, that his guaranty had been accepted and acted upon by the plaintiffs,—still, as the exceptions state the proof which was given upon the question of notice, and the point has been discussed by the counsel, we have taken that into consideration. Upon this question the counsel for the plaintiffs contend, that by the law of the state of New York no such notice is necessary to be given, to charge the guarantor, and that, as this guaranty was made by the defendant and sent to New York and there accepted by the plaintiffs, the law of that state must govern, and not the law of this state, which requires notice. Upon that question we give no opinion, as we are not satisfied, from the authorities produced, that no notice of acceptance is required in case of general guarantees, like the present.

Our law requires notice of the acceptance of guaranties in all cases, whether the same be general, or special. No specified time is fixed, within which this notice must be given; it must be within a reasonable time, taking into the account all the circumstances of the case. It is apparent, then, that this question can hardly ever be resolved into a mere question of law, to be decided by the court, but must generally be a question of fact, to be determined by the jury, under proper instructions. It appears, from the exceptions, that the plaintiffs gave notice to the defendant, that they had trusted Drury on the strength and credit of his guaranty and should look to him for payment, some time in the fore part of December, 1846, a little more than two months after the first bill of goods was sold to Drury, at which time the credit had a little more than half run. Nothing appears from the exceptions, that, at the time of this

notice being given to the defendant, he made any objection to the notice, as being unseasonable, or that he expressed any
*169 surprise, on being *informed of such acceptance by the plaintiffs. Neither does the case show, that the defendant had surrendered any security he might have received from Drury, or that he was in any way injured in consequence of not having earlier notice from the plaintiffs. It appears affirmatively, upon the other hand, that Drury, at the time such notice was given, and for some time thereafter, continued to be engaged in his usual mercantile business, apparently solvent, and until his property was attached at the suit of the defendant. Upon these facts alone we do not think it could be properly assumed, as matter of law, that the notice was not seasonable, and that the defendant should be discharged in consequence,—but the question should have been submitted to the jury.

But we think, in view of the facts reported as having been shown at the trial, there was evidence, which might have been submitted to the jury, and from which the jury would have been warranted in finding the defendant had notice, that his guaranty had been accepted, at an earlier period of time than December. Drury was the defendant's son in law, had been his partner, and had just before this succeeded him in business. The defendant had given Drury a letter of credit, to enable him to procure goods in market; he went to New York, procured his goods, and returned with them into the immediate neighborhood of the defendant, and commenced selling them. Under these circumstances one could hardly doubt, but that the defendant would have become informed in relation to the amount of purchases made by Drury, for which he was liable; and his subsequent silence, when notified by the plaintiffs in December, goes far to corroborate the idea, that he already knew it. If he received information from Drury, that the plaintiffs had trusted him on the credit of the defendant's guaranty, it is equally as good, as if given directly by the plaintiffs. Oaks v. Weller, 16 Vt. 63.

In the same case of Oaks v. Weller the jury were charged, "that they might find such notice from the circumstances of the case, if they found them sufficient; and that the relative situation and connection in business, existing between Taylor and the defendant, which the evidence tended to prove, might be taken into the account." That charge was held correct by this court; and BENNETT, J., in delivering the opinion of the court, uses the following language, "Taylor was in the employ of Weller as his
*170 hired man, *placed in a situation, where they might have had frequent conversations about this matter, both having an interest in the result of the propositions made to Oaks, and no reason is shown, why Taylor should suppress from Weller any information, he might have received relative to it. In such cases most men would make it a subject of conversation, and it is exceedingly natural that they should."

Taking into view the relationship between the defendant and Drury, their former connection in business, and the responsibility the defendant had assumed for him by giving him credit in New York, one could hardly doubt, but that on his return the defendant would be informed, to what extent his guaranty had been used. These facts, taken in connection with the defendant's subsequent silence, when notified of the acceptance by the plaintiffs, we think were amply sufficient to entitle the plaintiffs to have the question of notice submitted to the jury.

The judgment of the county court is therefore reversed and a new trial ordered.

CHARLES Y. FELTON v. ETHALINDA DEALL.

(*Addison*, Jan. Term, 1850.)

The defendant, being the owner of a farm and ferry, leased them by parol to one H., for the term of one year, upon certain conditions, among which it was provided, that the profits and proceeds of the farm should be divided equally between the defendant and the lessee, that the lessee should keep and manage the ferry at his own expense of labor, the defendant to put the boat in good order at the commencement of navigation and the expense of subsequent repairs to be borne one half by the defendant and one half by the lessee, that the lessee should pay to the defendant one half of the receipts for the ferry weekly and every week during the continuance of the lease, that the lessee was to conduct all his business, as such tenant, and to manage the said "farm and premises," so leased to him, in a careful, prudent and husbandlike manner, and was to allow no one, but a suitable man, to attend the ferry, and was to be responsible to the defendant for "damages occasioned by wilful misconduct, or neglect, in the management of the said farm and premises and in the management of the said ferry and the scow and boat." *Held*, that by this agreement H. became tenant of the defendant, both of the farm and ferry, and that the defendant was not responsible for the negligence of H. in so managing the ferry, that damage had accrued to the person and property of a passenger in the boat.

*Trespass on the case for so negli- *171
gently managing a ferry boat, that the person and property of the plaintiff, who was a passenger in the boat, suffered injury. Plea, the general issue, and trial by jury, June Term, 1849,—BENNETT, J., presiding. On trial it appeared, that the defendant owned a farm situated on Lake Champlain, in Ticonderoga, in the state of New York, from which the ferry in question crossed the lake to Shoreham in this state; that by an act of the legislature of New York the defendant and her assigns were entitled to maintain and use the said ferry for a time specified; and that after the passing of the act the defendant did establish and maintain the ferry in question. It also appeared, that in 1846 the defendant leased the ferry and the south part of the farm to one Bailey by an agreement in writing, under seal: by which it was provided, among other things, that the defendant should continue to reside upon the farm, that the profits and proceeds of the farm and premises should be divided equally between the defendant and Bailey, that Bailey should keep and manage the ferry at his own expense of labor, the defendant to put the boat in good order at the commencement of navigation and the expense of subsequent repairs to be borne one half by Bailey

and one half by the defendant, that Bailey should pay to the defendant one half of the receipts of the ferry weekly and every week during the continuance of the lease, that Bailey should conduct all his business as such tenant, and should manage "the farm and premises so let and leased to him, in a careful, prudent and husbandlike manner, and should on no account allow any but a faithful, honest, obliging and temperate man to attend the ferry, and that Bailey should be responsible to the defendant "for damages occasioned by wilful misconduct, or neglect, in the management of the said farm and premises, and in the management of the said ferry and the said scow and boat." It also appeared, that in April, 1848, the defendant, by a parol agreement, leased the same ferry to one Hobbie, for the period of one year, upon the same provisions and conditions in relation to the ferry, as were provided for in the lease to Bailey, and also the whole of her farm,—in relation to which there were some slight modifications of the terms of that lease,—and that Hobbie entered into the possession of the farm and of the ferry under that lease, and continued to manage the ferry, under the lease, *172 from that time until *after the accruing of the injury complained of by the plaintiff. It also appeared, that the ferry landing was upon the farm of the defendant, and that she continued to reside upon the farm, as she had done for several years previously; but it appeared, that it was generally understood in the vicinity, that the defendant had leased the farm and ferry to Hobbie for one year, and that the plaintiff, who resided at Shoreham, had notice, before he commenced this suit, that the ferry was so leased. The plaintiff gave evidence tending to prove, that in May, 1848, he went upon the ferry boat, which was the property of the defendant, with a horse and wagon, for the purpose of crossing from Ticonderoga to Shoreham, and that from the negligence and want of care and skill of Hobbie in managing the boat, the boat was upset, and the plaintiff sustained injury to his person and property. The court decided, that the defendant, under the circumstances, was not liable for the default or neglect of Hobbie; and a verdict was thereupon returned in favor of the defendant. Exceptions by plaintiff.

H. Hale and *C. D. Kasson* for plaintiff.

The defendant was interested in the freight money, and, according to the rule in Ambler v. Bradley, 6 Vt. 119, might recover it in her own name; if so, there was such a privity, as renders her liable for losses, or injury. This case seems to fall directly within the case of Bowman v. Bailey, 10 Vt. 170, where the court held, that though a case like this was not a partnership, yet the interest was joint, and all might sue for the freight. All persons interested in the freight are liable for injuries. Story on Bail. §§ 506, 507. Waland v. Elkins, 1 Stark. R. 272, [2 E. C. L. 109.] The substance of the agreement shows, that it was not a lease, but only a mode of paying Hobbie for carrying on the farm and managing the ferry. Bishop v. Doty, 1 Vt. 37. By the terms of the agreement Hobbie was to be liable to the defendant for all losses, &c.,—plainly showing, that she regarded herself as primarily liable.

E. J. Phelps for defendant.

Under the circumstances it is very apparent, that the defendant was not the carrier, and was not liable to those carried. The foun*dation of all such *173 liability is the assuming to act and transact business in that capacity, and the reception of the profits. The mere ownership of property, which is used by another person, under a lease, in the prosecution of such business for his own benefit, creates no liability. It has been universally held, that such a state of facts makes the hirer, or lessee, the owner *pro hac vice*, and that he alone is responsible. Ladd v. Chotard, 1 Minor's Ala. R. 366. Boyer v. Anderson, 2 Leigh 550. Emery v. Hersey, 4 Greenl. 407. Reynolds v. Toppan, 15 Mass. 370. Taggard v. Loring, 16 Mass. 336. Thompson v. Snow, 4 Greenl. 268. Frazer v. Marsh, 13 East 238. McIntyre v. Bowne, 1 Johns. 229. Abbott on Ship. 52, 70. Ang. on Carriers, § 147.

The opinion of the court was delivered by

KELLOGG, J. This was an action upon the case, charging the defendant with an injury occasioned to the plaintiff by the negligence of the defendant's servant. Upon the facts disclosed in the case, the court below instructed the jury, that the defendant was not personally liable for the injury done to the plaintiff. This decision being excepted to, the case is brought here for the opinion of this court. The defence relied upon is, that at the time of the injury, of which the plaintiff complains, the ferryman, whose negligence occasioned the injury, was not the servant of the defendant, and that she was in no manner accountable. The decision of the question depended upon the construction given to an instrument executed by the defendant to one Bailey and referred to in the bill of exceptions. It was therefore a proper subject for the determination of the court.

That the defendant, in March, 1848, leased her farm and ferry, by parol agreement, to Hobbie, for one year, upon the terms and stipulations contained in her written lease to Bailey, is not controverted, and that Hobbie then went into the occupancy of the demised premises, under the lease, is not denied. Nor is it questioned, that if the contract of letting by the defendant to Hobbie was such as to divest the defendant of the occupancy and control of the farm and ferry, and vest the same in Hobbie for the term of the demise, the defendant would not be liable for injuries occasioned by the negligence of Hobbie. In other words, if, by the contract, *Hobbie *174 became the tenant, rather than the servant, of the defendant, she is not responsible for his acts.

But it is urged, that the contract with Bailey was not a lease of the premises. It is difficult to perceive any tenable ground, upon which this objection is founded. The instrument certainly contains the usual covenants and all the ordinary characteristics of a lease. It is, however, contended, that though the instrument be regarded as a lease, yet that it did not divest the de-

fendant of the control of the premises. This objection, we think, is equally unfounded. There is no reservation of a right to the defendant to interfere with or in any manner control the lessee in the management of the premises. The lease does, indeed, bind the lessee to a very strict and faithful performance of the stipulations therein. but upon his failure to perform the same, the lessor's only remedy would be by suit for a breach of the covenants. It is the ordinary case of a lease of premises, to be managed and controlled by the lessee during the continuance of the lease; and the lessor, during the term, had no more authority than a stranger, to disturb the lessee in his occupancy, or in any manner interfere with his right to the management and control of the premises. It cannot, therefore, as it appears to us, be said, that the defendant, at the time of the injury complained of, had any control over the acts of Hobbie; and if she had no right to control him, she cannot be made responsible for his acts.

It is farther insisted, that the clause in the lease, securing to the defendant a moiety of the earnings of the boat, created such an interest in the defendant in the profits of the ferry, as makes her responsible for the negligence of Hobbie in the management of the same. We cannot, however, yield our assent to this proposition. There is nothing in the lease to warrant such a conclusion. The object of this clause is simply to fix the amount of rent, to be paid for the use of the ferry, and the same is to be ascertained by the amount of the receipts. And the fact, that the rent of the ferry is to be paid by weekly instalments, does not change or vary the legal character and effect of the lease. There is no pretence for saying, that the defendant and her lessee, Hobbie, are partners in the matter of the ferry. She has no authority to appoint or employ ferrymen, or to control them, when employed by Hobbie.

*175 *It is farther urged, that the clause in the lease, making the lessee liable to the defendant "for all damages occasioned by wilful misconduct, or neglect, in the management of the farm and premises, and in the management of the ferry and boat," subjects her to the present suit. We do not think, however, that this part of the lease is open to such a construction, or that the parties to it ever contemplated such a liability. The liability imposed upon Hobbie by this clause applies as well to the farm as to the ferry, and we think it only applies to such damages, as should result to the reversionary interest of the defendant from the misconduct or neglect of the lessee. Should the ferry be rendered less valuable to the defendant by reason of misconduct or neglect of the lessee, it would doubtless be a breach of this covenant, for which he would be liable. So if by his misconduct the boats should be injured, he would be responsible to the defendant. In fact, any injury to the demised premises, injuriously affecting the reversion and occasioned by the misconduct of the lessee, would render him liable to the defendant; but we do not think, it was ever intended by the parties to embrace injuries done by the lessee to third persons, and for which the law in no manner makes the defendant responsible.

The judgment of the county court is affirmed.

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*COUNTY OF RUTLAND. *176

JANUARY TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD,
HON. HILAND HALL,
HON. LUKE P. POLAND. ASSISTANT JUDGES.

JAMES BARRETT, Jr., v. IRA SEWARD.

(*Rutland*, Jan. Term, 1850.)

An infant, under the age of twenty one years, may receive a special deputation from the sheriff, to serve a particular writ, under chap. 11, sec. 8, of the Revised Statutes. POLAND, J., dissenting.

If such special deputy is appointed at the request of the plaintiff in the writ, the sheriff will be excused from all liability to the plaintiff for the acts of such deputy, but he will be liable to the defendant in the writ, and to third persons, the same as for the acts of a general deputy. HALL, J.

Book account. The writ was served upon the defendant, by attachment of property, by W. G. Edgerton, who was specially deputized by the sheriff by indorsing upon the writ these words,—"I deputize W. G. Edgerton to serve and return this writ. (Signed) J. Edgerton, Sheriff." The defendant pleaded in abatement, that W. G. Edgerton, at the time he was deputized and made service of the writ, was an infant, under the age of twenty one years. To this plea the plaintiff demurred. The county court, November Ad- *177 *journed Term, 1847,—HALL, J., presiding,—adjudged the plea insufficient. Exceptions by defendant.

Thrall & Smith, for defendant, insisted, that an infant was incompetent to take and execute the office of deputy sheriff, and cited 3 Bac. Abr., Infancy A, p. 118; Ib. 126; Moore v. Graves, 3 N. H. 408; Reeve's Dom. Rel. 261; Claridge v. Evelyn, 5 B. & A. 81, [7 E. C. L. 55;] Campbell v. Stakes, 2 Wend. 137; 1 Sw. Dig. 589; Cuckson v. Winter, 2 M. & R. 313, [17 E. C. L. 713.]

S. H. Hodges and *S. Foot* for plaintiff.

It has been expressly decided, that an infant may be legally deputed by a sheriff to serve a particular writ. Moore v. Graves. 3 N. H. 408. And see Com. Dig., Officer B, 3. There is no good reason against it in this state, where the sheriff is liable *civiliter* for the acts of his deputy, and no suit will lie against the latter. Johnson v. Edson, 2 Aik. 299. Hutchinson v. Parkhurst, 1 Ib. 258. Abbott v. Kimball, 19 Vt. 551. The acts of the special deputy are in truth the acts of the principal, who is responsible for whatever he does, and may therefore deputize whom he pleases, since it is at his own peril, and not that of any one else.

The opinion of the court was delivered by

HALL, J. There were many offices, requiring the exercise of judgment, discretion and experience, which an infant was by the common law deemed incompetent to execute. But the service of a writ, being a ministerial act, demanding only diligence and skill, there would not appear to be any strong objection to its being done by a minor, unless upon the ground of his want of liability to others for acts done under color of the process.

It is said by Judge Swift, in his Digest, page 589, that an infant cannot be deputed to serve a writ as an indifferent person, for the reason, that he would not be liable to the plaintiff for non-feasance, nor to the defendant, for mis-feasance. This is probably a correct view of the law in regard to the personal liability of an infant for his acts in the service of process; and if the infant under the deputation in the present case is to be considered as alone responsible for his conduct, it would certainly form a very strong reason for holding him incompetent.

*178 *But we do not think, the responsibility rests upon him. The sheriff is authorized by statute, (Rev. St. chap. 11, sec. 5,) to appoint general deputies, who become public officers. He may also depute a proper person to serve a particular writ at the risk of the plaintiff, by endorsing upon it a special deputation; and whenever he deems it necessary, he may also depute a person to serve a warrant in a criminal case, or any other precept, by endorsing a special deputation upon it.

There are obviously two classes of cases, in which a sheriff may appoint special deputies,—the one on the application of the plaintiff in a writ, and the other, where for his own convenience he may choose to perform the duties of his office by special deputy. In the latter case, especially, he must be held responsible for the acts of such deputy. For it cannot be supposed the legislature intended, that the sheriff might have an unlimited discretion in the appointment of special deputies, and incur no responsibility for their acts. And where a special deputy is appointed at the risk of the plaintiff in a writ, it is apprehended the sheriff would be equally liable to the defendant in the process and to third persons, that he would in the other case, though he would doubtless be excused from liability to the plaintiff. These special deputies are perhaps in a stricter sense the mere servants of the sheriff, than his general deputies are, and he must be held at least equally responsible for their acts.

By the provisions of the statute, chap. 11, sec. 20, the sheriff's deputies, which must include special as well as general deputies, are not allowed to be sued for their official defaults, but all actions for such defaults must be directly against the sheriff. The sheriff, then, being responsible for all acts of his special deputy, done under color of the process he is deputed to serve, the want of the personal liability of an infant deputy would seem to form no valid objection to his appointment.

In Moore v. Graves, 3 N. H. 408, it was held, that a special deputy of a sheriff might be an infant, the sheriff being alone responsible for his acts. We have come to the same result in this case, and for the like reason.

The judgment of the county court is therefore affirmed.

POLAND, J., dissenting.

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*DANIEL CARRUTH v. RALPH PAIGE. *179

(*Rutland*, Jan. Term, 1850.)

Upon the trial of an action upon book account, before a justice of the peace, the defendant stated that he would not take advantage of the statute of limitations, but if it was a just account he would pay it, but at the same time contended, that it was not a just account. *Held*, that this was not a sufficient acknowledgment of the debt to avoid the operation of the statute.

The decision in Phelps v. Stewart et al., 12 Vt. 256, as to the sufficiency of an acknowledgment to avoid the operation of the statute of limitations, considered and approved.

Book account. The action was commenced before a justice of the peace, and came to the county court by appeal, taken by the plaintiff. Judgment to account was rendered, and an auditor was appointed. The defendant insisted before the auditor, that a portion of the plaintiff's account was barred by the statute of limitations. It appeared, that at the trial before the justice, the defendant stated, that he would not take advantage of the statute of limitations, but if it was a just account he would pay it, but at the same time contended, that it was not a just account. The auditor reported, that if this was a sufficient acknowledgment to avoid the statute, there was due from the defendant to the plaintiff $48,93; but that otherwise the amount due to the plaintiff was $4,60. The county court, April Term, 1849,—HALL, J., presiding,—rendered judgment for the plaintiff, upon the report, for $4,60. Exceptions by plaintiff.

Thrall & Smith for plaintiff.

1. The defendant, in person, and in open court, expressly declined to interpose the statute bar. This a party might well do; and having done so, the trial of the case must proceed upon its merits, without reference to the statute. 2. The admission and promise of the defendant were sufficient to have removed the bar, if it had been interposed. The indebtedness of the defendant and the justness of the claim have been established by the auditor, and the promise of the defendant to pay the judgment is become absolute. Bal. on Lim. 188, 190. Paddock v. Colby et al., 18 Vt. 485. Blake v. Parleman, 13 Vt. 574, 577.

**Foote & Hodges* for defendant. *180

The defendant made no new promise, expressed no willingness to pay, or to be liable, and acknowledged no indebtedness, or obligation. There is therefore no such acknowledgment, as will remove the statute bar. Phelps v. Stewart et al., 12 Vt. 256. Cross v. Conner, 14 Vt. 395.

The opinion of the court was delivered by

HALL, J. The language used by the defendant, which is relied upon by the plaintiff to save the account from the operation of the statute of limitations, would doubtless have been held sufficient under former English decisions. But if the modern rule, requiring some acknowledgment, from which a willingness to be liable for the debt may be fairly inferred, is to be adhered to, there would not appear to be any ground for giving it that effect. The declaration of the defendant, that he would pay the debt, was not only accompanied with the condition, that it should be found to be just, but with the protestation, that it was unjust. The language was also used, while he was engaged in the very act of contesting the plaintiff's recovery of the account, because, as he alleged, it was unjust. Under these circumstances it seems impossible to maintain, that the defendant intended to admit any liability for the debt.

The counsel for the plaintiff rely upon Paddock v. Colby, 18 Vt. 485, as an authority for construing the defendant's admissions into a waiver of the statute bar. The language of the defendant in that case to the officer was, "that he had assured the plaintiff, that he would not take advantage of the statute of limitations." This language, unlike that in the present case, was unconditional, and unaccompanied with any protestation, that the claim was unjust. If it could have been inferred in that case, that the assurance of Colby to Paddock, that he would not take advantage of the statute of limitations, had been made before the statute had become a bar, and that Paddock had in consequence allowed the six years to run before bringing his suit, the defendant might perhaps have been very properly estopped from recalling his assurance, upon the common doctrine, that admissions, which have been acted upon, are conclusive upon the party making them. It should also be observed, that the language of the court in that case upon
*181 the question in regard to the *statute of limitations is very brief; and that any decision upon that question seems unnecessary, the defendant in the case being held not liable for the claim upon another ground.

But whatever may have been the ground of decision in that case, we are disposed to adhere to the doctrine laid down in Phelps v. Stewart et al., 12 Vt. 256, and which has been repeatedly re-asserted and acted upon by this court, that to prevent the operation of the statute, "there must be an acknowledgment of the debt as still due, with an apparent willingness to remain liable for it, or at least without any avowed intention to the contrary."

It is very plain, that the defendant did not, by any thing he is reported to have said on the trial before the justice, express any willingness to be liable for the debt, but that he was, on the contrary, all the time declaring it to be unjust and contesting the plaintiff's right to recover it.

We are all agreed, that the defendant's acknowledgment was insufficient, and that the judgment of the county court should be affirmed.

JOHN T. GRIFFITH & Co. v. BUFFUM & AINSWORTH.

(*Rutland*, Jan. Term, 1850.)

If one partner purchase property upon his individual credit, for the use of the firm, and the vendor is not aware of the existence of the partnership, he may, when he discovers it, hold the firm liable for the price.

A. and B. agreed to work together in the business of manufacturing marble. B. was to furnish the marble, and A. was to pay him one half of the cost of it. B. was to board A., and both were to contribute their labor and skill in the business, and the products and avails of the business were to be equally divided between them. *Held*, that they became partners, as between themselves.

Book account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows. In September, 1845, the defendants agreed between themselves, that they would work together in the manufacture of marble; that Buffum should furnish the marble for manufacturing, should contribute his own *182
labor, and should board Ainsworth; that Ainsworth should devote his labor and skill to the business and should pay to Buffum one half of the cost of the marble, which Buffum should furnish for manufacture; and that the products and avails of the business should be equally divided between them. Under this contract the defendants prosecuted the business until the spring of 1846, and from time to time divided the avails of their business, and finally settled and closed the business between themselves, agreeably to the terms of their contract. The plaintiffs' account was for marble. The amount charged in the first item was contracted for by Buffum alone, before the defendants entered into their agreement above mentioned, but was delivered afterwards, and was wrought and sold by the defendants, under their agreement. The marble charged in the remaining items of the plaintiffs' account was purchased by Buffum alone, after the agreement was made between him and Ainsworth, and was manufactured by the defendants, and the avails were divided between them, pursuant to their agreement. In the final settlement between the defendants Ainsworth accounted to Buffum for one half of the cost of the marble so purchased of the plaintiffs. While conducting their business the defendants twice purchased marble of other persons, and paid therefor in one instance by their promissory note, and in the other by property, which they owned together; and the marble thus purchased was manufactured and the avails equally divided between them. The plaintiffs, at the time of selling the marble, with the exception of that charged in the first item of their account, knew that the defendants were at work together, but did not know upon what contract they were so doing, until after the conclusion of their business. Upon these facts the auditor submitted to the court the question as to the joint liability of the defendants. The county court, April Term, 1848,—HALL, J., presiding,—rendered judgment for the defendants, upon the report. Exceptions by plaintiffs.

Cook, Harrington and *Ross* for plaintiffs.

1. The defendants are jointly liable as partners. The effect of the agreement between them was, that each should share equally, not only in all the profits of the business, but also in the expenses *183 *and losses. Chit. on Cont. 240. Kellogg v. Griswold, 12 Vt. 291. 3 N. H. 64. Whether they were partners as to others may be determined from their conduct. If they so conducted their business, as to make themselves liable as partners in respect to third persons, it is not material, whether their contract would make them partners *inter se*, or what their agreement was in fact. Stearns v. Haven et al., 14 Vt. 540. Kellogg v. Griswold, 12 Vt. 291. Bailey v Clark, 6 Pick. 372. 2. Partners are all liable for articles furnished for the benefit of the firm, and which are so used by the firm, although the vendor suppose himself dealing with and giving credit to an individual partner, and although the articles furnished be a particular kind of stock used in their business, which it was expressly agreed between them one of the partners should furnish on his separate account. Reynolds v. Cleveland, 4 Cow. 282. Sylvester v. Smith, 9 Mass. 119. Dix v. Otis, 5 Pick. 38. 3 Kent 26. Sims v. Willing, 8 S. & R. 103. 1 Esp. N. P. 116. Everitt v. Chapman, 6 Conn. 347. Woodward v. Winship, 12 Pick. 430.

D. E. Nicholson for defendants.

The defendants were not partners in respect to any part of the subject matter reported by the auditor, either by virtue of the contract between themselves, or the manner of their subsequently conducting their business. Although they might have been partners as between themselves and any other person, or even the public generally, the manner of the purchase and disposition of the marble in question would not make them jointly liable to the plaintiffs, of whom Buffum alone made the purchase. And Ainsworth, having paid Buffum, who was the only person with whom he contracted, should not be held responsible to the plaintiffs, with whom he never contracted. Story on Part. §§ 45-50.

The opinion of the court was delivered by

HALL, J. The question for our decision is, whether, upon the facts reported by the auditor, the defendants are properly chargeable with the marble slabs sold and delivered by the plaintiffs to the defendant Buffum.

There seems to be no doubt, that if *184 one partner purchase prop*erty upon his single credit, for the use of the partnership concern, and the seller is not aware of the existence of the partnership, he may, when he discovers it, have the benefit of the partnership liability. The ground of making the partnership firm liable is, that the property having been obtained for their joint benefit and to enable them to make a common profit, it is but just, that they should be jointly liable to pay for it.

It is doubtless essential to the validity of such a claim by the vendor, that the partnership should have been unknown to him at the time of the sale; for if he were aware of the partnership, or ignorant of it through his own fault, he would be presumed to have made his election to give credit to the individual instead of the firm, and, having made such election, would be bound by it. 3 Stephen's N. P. 2402.

It is not claimed on the part of the defendants, that the plaintiffs had any knowledge, that they were partners. The existence of such partnership is denied, and the question is, whether the defendants were in fact partners.

It is true, that two or more persons may be made liable to third persons as partners, when, as between themselves, they are really not so. But such liability only arises, when third persons have trusted to their credit,—have parted with their property upon the faith of the acts or declarations of the supposed partners, indicating that they were such. In this case the plaintiffs were not deceived by any false appearances; they gave no credit to the firm, but trusted Buffum only;—and if Ainsworth is to be made liable, it can only be, because he was really and truly a partner with Buffum.

In order to constitute a partnership between the parties themselves, it is necessary, that they should have a common interest in the profit and loss of the business, in which they are engaged. It is not essential, that each should furnish a share of the capital, or property, which is to become the stock or subject matter of the business of the partners. One may furnish the capital, or stock, and another contribute his labor and skill. And if it be agreed between the parties, that one shall furnish on his own account a particular kind of stock to be used in the business, yet, if when purchased it becomes the subject of labor and skill, and in its altered state is to be sold for the common benefit, it constitutes a partnership business; *and if such *185 particular kind of stock be purchased on his own account by the party, who is, by the agreement, to furnish it, yet the seller, on discovering the partnership, may make the firm chargeable for it. This position is sustained by many authorities referred to in the argument. 3 Kent 26. Sylvester v. Smith, 9 Mass. 119. Everitt v. Chapman, 6 Conn. 347.

In the present case the parties agreed to work together in the business of manufacturing marble. Buffum was to furnish the marble and Ainsworth to pay him one half of the cost of it. Buffum was to board Ainsworth, and both were to contribute their labor and skill in the business; and the products and avails of the business were to be equally divided between them. We think, the parties became strictly partners, as between themselves. Whatever the manufactured articles should sell for, above the cost of the materials and labor bestowed upon them, would be profits, which the parties were to share in common; and if the sale should be for less than such cost, the parties would suffer a loss, which would fall equally on both. The defendants thus having a common interest in the profit and loss of the business, and the marble charged in the plaintiffs' account having been used by the defendants in such

business, we think they are liable for it as partners.

The judgment of the county court is therefore reversed, and judgment is to be rendered for the plaintiffs for the amount of their account, as reported by the auditor.

FREDERIC H. VANDERBURG AND JOHN CAMPBELL v. MARY E. CLARK.

(*Rutland*, Jan. Term, 1850.)

Where the plaintiff, in a suit commenced originally before the county court, is a resident without this state, and the defendant is described in the writ as being a resident of the county in which the writ is made returnable, and the defendant pleads in abatement, that he is not a resident of that county, he must allege his residence to be in some other county within this state, and must prove his allegation substantially as laid.

In this case, which was an action upon book account, the plaintiffs were residents of the state of New York. The writ was made returnable before the county court for the county of Rutland, and the defendant was described as
*186 being *a resident of Rutland in that county. The defendant pleaded in abatement, that she was not a resident within the county of Rutland, but was a resident of Woodstock in the county of Windsor. The plaintiffs replied, that the defendant was not a resident of Woodstock, but was a resident of Rutland, and issue was joined. The county court, upon this issue, found the fact, that the defendant was not a resident of Rutland, but did not find, where she did reside, but rendered judgment for the defendant, that the writ abate. *Held*, that the defendant had not proved the substantial allegations in the plea, and that the county court should have found the issue for the plaintiffs, and have rendered a judgment in chief, that the defendant account;—and the supreme court reversed the judgment of the county court, and rendered judgment, that the defendant account, and appointed an auditor.

When an issue of fact, upon a plea in abatement, in an action of book account, is tried by the county court, and the facts are found and placed upon the record, it is competent for the supreme court to revise the decision of the county court upon the effect of such facts, and to enter up such a judgment, as the county court should have rendered.

Book account. The plaintiffs were described as residents of the city, county and state of New York, and the defendant as a resident of Rutland, in the county of Rutland. The writ was made returnable to the county court, and was dated March 7, 1848. The defendant pleaded in abatement, that at the commencement of the suit she did not reside in the county of Rutland, but did reside in Woodstock, in the county of Windsor, and that the plaintiffs did not reside in the county of Rutland, but did reside in the state of New York. The plaintiffs replied, that the defendant, at the commencement of the suit, did not reside in Woodstock, but did reside in the county of Rutland; and upon this replication issue was joined. Trial by the court, April Term, 1849,—HALL, J., presiding. The court certified upon the bill of exceptions, that they found that the plaintiffs resided without this state, and that the defendant had formerly resided in the county of Rutland, but, previous to the commencement of this suit, had abandoned her residence there, without any intention of returning to the county to reside; but that they did not find, where her actual residence was, but only that it was not in the county of Rutland. Judgment was rendered for the defendant, that the writ abate. Exceptions by plaintiffs.

M. G. Everts for plaintiffs. *187
Thrall & Smith for defendant.

The opinion of the court was delivered by

REDFIELD, J. This case was an issue of fact upon a plea in abatement, joined to the court, wherein they found certain facts, and thereupon decided the issue in favor of the defendant. The question to be determined in this court is, whether, from the facts found by the county court and placed upon the record, they should have decided the issue for the one party, or the other. There seems to be no more difficulty in revising the decision of the county court upon an issue of this kind, than in a case where the facts are agreed, or where the issue is tried by a jury and they find a special verdict. In all such cases, if the county court decide, that the finding determines the issue for either party, it is competent for this court to revise their judgment, and to enter up such a judgment, as the county court should have rendered upon the facts.

In this case the plaintiffs reside out of the state, and the defendant is described in the writ as residing in this county and this town. The defendant pleads in abatement, that she does not reside here, but in Woodstock in the county of Windsor. The plaintiffs take issue by saying, that the defendant does not reside in Woodstock, but in Rutland; so that the defendant's plea seems to be fully traversed; and it is therefore incumbent upon her to prove all of it, which is material. Upon the trial the court found, that the defendant did not reside in Rutland, but did not find, where she did reside. The defendant therefore failed to show, that she resided in Woodstock, or any where else in the state. Was this material to be alleged in the plea? or, if alleged, to be proved?

The statute is express, that "if neither party resides in this state, the suit may be brought in any county in the state." Hence, in order to oust the jurisdiction of the county court in this county, it was necessary for the defendant to allege a residence in some other county, and of course to prove it, and to prove it substantially as laid,—which the defendant failing to do, the county court should have adjudged the issue for the plaintiffs, the result of which would have been a judgment in chief, that the defendant
ac*count. And as the statute requires *188
this court to render such judgment, as the county court should have done, that judgment will be entered up here,—as was done in the case of Peach v. Mills, 13 Vt. 501. See, also, Bell v. Mason, 10 Vt. 509, where judgment on a report of referees was reversed, and judgment for the other party entered up. The same is every day's practice upon special verdicts.

Judgment of county court reversed; and, upon the facts found by the county court and placed upon the record, this court ad-

judge, that the defendant do account. Auditor to be appointed in this court.

NOTE BY REDFIELD, J. It is not uncommon for the supreme court to send a case, tried by the county court, for a new trial. But this, it is believed, should be confined to that class of cases, where there was some error in the trial, or else where the facts are not placed upon the record by the county court. If there be no error in the trial, and the facts found are detailed at length upon the record, we can perceive no difference, in regard to the propriety of this court rendering final judgment, between that case, and a trustee case, where the facts are found by the court, or a case stated, or an auditor's report, or a special verdict, or a report of referees;—in all which cases it is the constant practice of this court to enter up final judgment.

JOB GREEN v. JOSIAH D. HULETT.

(*Rutland*, Jan. Term, 1850.)

The plaintiff was laboring for the defendant under an entire contract for service, and the defendant, without cause, directed him to leave his employment, and the plaintiff soon afterwards did so. *Held*, that the plaintiff might recover payment for the labor actually performed by him, although he continued at work a few hours after being directed by the plaintiff to leave, and although, upon a subsequent day, he stated, as a reason for not returning to the defendant's employment, that he doubted the defendant's solvency.

Book account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows. The plaintiff's account was for labor; and that part, in reference to which any controversy was had, was performed under a contract, *189 *made in March, 1845, by which the plaintiff agreed to labor for the defendant seven months, at ten dollars per month, fifty dollars to be paid in money, and twenty dollars to be paid in property, to be delivered at any time through the summer. The plaintiff commenced labor, under the contract, on the first day of April, 1845, and continued to work until the second day of August. The plaintiff was unable, by reason of illness, to earn ten dollars per month, and agreed with the defendant, that he would make an allowance on that account; and the auditor reported, that the plaintiff's labor was worth but eight dollars per month. On the second day of August, above mentioned, the defendant, being at the place where the plaintiff was at work, had an altercation wth the plaintiff, in which, without any justifiable cause, he ordered the plaintiff to leave his employment. This was about the middle of the day, on Saturday, and before dinner. The plaintiff did not immediately leave, but continued to work until about three o'clock in the afternoon, when it commenced raining, and he left. The plaintiff did not return until the next Monday morning, when he informed the defendant, that he should not work for him any longer, but should leave, as the defendant had directed. The defendant replied, that he could not help it, but that he should not pay the plaintiff for what he had done, if he did not work his time out; but the plaintiff refused to work for the defendant any longer, and alleged, as a farther reason for leaving, that the defendant was going to "break down" and he (plaintiff) was afraid he should not get his pay. The auditor allowed the plaintiff's account, as charged, and reported, that there was a balance due to the plaintiff of $17,43. The county court, November Adjourned Term, 1848,—HALL, J., presiding,—accepted the report, and rendered judgment thereon for the plaintiff. Exceptions by defendant.

F. Potter, for defendant, insisted, that the plaintiff had shown no sufficient excuse for not performing his contract, and cited Marsh v. Rulesson, 1 Wend. 514.

D. E. Nicholson for plaintiff.

*The opinion of the court was delivered by *190

POLAND, J. The defendant insists, that inasmuch as the plaintiff contracted to work for him for the term of seven months, and the contract was entire, and the plaintiff left before the expiration of the full term, he is therefore precluded from any recovery for that portion of the time he actually worked, and that the case is brought within the decisions in St. Alban Steamboat Co. v. Wilkins, 8 Vt. 54, Brown v. Kimball, 12 Vt. 617, Ripley v. Chipman, 13 Vt. 268, and other cases to the same point.

If the plaintiff voluntarily abandoned the contract, without any good cause, this position would doubtless be correct. But the auditor reports, that on the day the plaintiff left, the defendant had an altercation with the plaintiff, and, without any fault on the part of the plaintiff, or any just cause for so doing, ordered the plaintiff to leave his service and employment.

The doctrine of entire contracts was never, we apprehend, carried to the extent of prohibiting any recovery for a part performance, when the performance of the whole was prevented by the act of the defendant. The defendant, however, insists, in this case, that, as the plaintiff did not act immediately upon this order to leave, but remained until after dinner, and worked an hour or two, he must be deemed to have waived this discharge by the defendant, and to have left without cause, and so forfeited all claim to payment for his services. This view of the case does not appear to us to be well founded upon the facts, as reported by the auditor. It would seem more proper, that the defendant should have retracted his order to the plaintiff to leave, before the plaintiff went away if he desired him to remain, than to hold that he might keep silent until the plaintiff had left, and then insist upon a forfeiture of his wages.

Neither do we see, that the case is altered by the fact, that on Monday the plaintiff gave an additional reason, why he refused to return into the defendant's service, or that this should have any effect to prevent his recovery. If the defendant had absolved the plaintiff from any farther obligation to perform the contract, as we think he did on Saturday, it made no difference, what reasons he gave for his refusal to return to his service on Monday. The ancient, rigorous doctrine, in relation to contracts of this kind, has been much *modified by the de- *191 cisions made within a few years; and a party is not allowed to claim the benefit

of any such forfeiture, except when there has been a clear breach shown on the part of the party who has performed the service.

From the facts reported we think, the auditor correctly allowed the plaintiff for his labor, and the judgment of the county court accepting his report is affirmed.

PORTER & BALLARD v. CARLTON A. MUNGER.

(*Rutland*, Jan. Term, 1850.)

Where one offered as a witness is incompetent through interest, and he executes a release of his interest to the party calling him, and the act is apparently for the advantage of the party, the law will presume his assent to it, and a delivery of the instrument to his attorney will be sufficient.

Interest is allowed in this state, upon the price of goods sold upon a credit, after the time of credit has expired. And the same rule will be applied to contracts made in another state and to be performed there, but put in suit in this state, unless it be shown, that the *lex loci* requires a different rule.

In an action upon book account the plaintiff may recover for all of his account, which is due at the time of the hearing before the auditor, notwithstanding a portion of the account consists of charges for property sold upon a credit after the commencement of the suit, and notwithstanding the contract was made in a state, where no form of action is known, in which a recovery can be had for property sold after the suit is commenced. The question is one relating to the remedy, and is governed by the *lex fori*.

Where property is sold, with an agreement that payment shall be made by the note of the vendee, payable at a future day, and indorsed by a third person, and payment is not made in the manner agreed, the vendor may charge the property on book, and recover for it in an action upon book account.

It is no objection to the plaintiff's right of recovery, in an action upon book account, for goods sold, that he at first charged the goods to the defendant and another person, supposing that they were jointly liable therefor, it appearing that the defendant was in fact individually liable.

Book account. Judgment to account was rendered, and an auditor was appointed, who reported the facts as follows. The plaintiffs offered as a witness James L. *192 Porter, to whom the *defendant objected, as being interested in the event of the suit; and testimony was introduced, tending to prove such interest. The witness thereupon made and executed a full release of all his interest in the result of the suit, and delivered the release to the plaintiffs' counsel. The defendant still objected to the admission of the witness, for the reason that the plaintiffs' counsel had no authority to receive such release; but the witness was admitted by the auditor to testify. This suit was commenced in December, 1844, and the plaintiffs claimed to recover for certain goods bargained and sold by them to the defendant in June, 1844, upon a credit of six months. The plaintiffs also sold and delivered to the defendant certain goods on the twenty fourth of May, 1845, amounting to $482,97, upon a credit of six months. These goods were charged by the plaintiffs to Munger & Paige, but the auditor found, that the defendant was chargeable with them alone. The plaintiffs commenced a suit against Munger & Paige, November 25, 1845, to recover for these goods, but were defeated, upon the ground that Munger and Paige were not jointly liable for them. It appeared, that on the twenty third of May, 1845, Munger and Paige were at the plaintiffs' store in New York, and talked about making an arrangement in some business between the plaintiffs and Munger. In that arrangement Paige was to indorse for Munger; and in connection with that business a conversation was had, that the plaintiffs were to sell more goods to Munger, and Paige would be responsible; but no definite terms were agreed upon, and Paige left the city. But on the next day, May 24, 1845, Munger completed the arrangement with the plaintiffs, and purchased the goods, which were charged to Munger & Paige. Munger and Paige were not partners, and Munger did not profess to buy the goods for Munger & Paige; but the plaintiffs supposed, from what Paige said to them, that he would become indorser for Munger, and therefore charged the goods to Munger & Paige; but no authority was given to the plaintiffs to charge the goods to Munger & Paige, and the auditor did not find, that they made a joint purchase of the goods. Munger executed a note for the amount, dated May 24, 1845, payable to Paige, or order, in six months after date, and delivered it to the plaintiffs, —which note Paige refused to indorse. The auditor found, that the plaintiffs expected Paige to indorse the note, at the *time it was received, and it not having been indorsed, that it was not a *193 discharge of the book account. The note was attached to the auditor's report, to be cancelled, if so directed by the court. The hearing before the auditor was had on the eighteenth of September, 1848. The auditor computed interest from the time payment for the goods became due, and reported, that, if the plaintiffs were entitled to recover for the goods sold May 24, 1845, there was due from the defendant to the plaintiffs $1152,31. The county court, November Adjourned Term, 1848,—HALL, J., presiding,—accepted the report, and rendered judgment thereon for the plaintiffs for the full amount reported by the auditor. Exceptions by defendant.

Thrall & Smith for defendant.

1. James L. Porter should not have been admitted as a witness. The report shows, that he was interested, and it does not appear, that the interest was of such a nature, that he could release himself. It is incumbent upon the plaintiffs to show affirmatively, that the witness was properly discharged of his interest. The release was ineffectual, for want of a party to negotiate for and receive it. The discharge of an interest in a matter implies a contract between the parties to be affected by it, and requires the necessary parties to make such contract. It is not within the scope of the duties, or powers, of counsel, to act in such matters. 6 Johns. 94. Vail v. Conant, Adm'r, 15 Vt. 320. Yuran v. Randolph, 6 Vt. 374. Penniman v. Patchin, 5 Vt. 352. 7 Cranch 436. Paddock v. Colby, 18 Vt. 488. 2. The accounts were unliquidated, and interest should not have been computed thereon. The contracts were made and to be

performed in New York, and such interest should be given, as would have been given there. Fanning v. Consequa, 17 Johns. 511. Story on Bills 165. In New York interest is not given by the courts on unliquidated accounts, running between the parties. 1 Johns. 315. Johnston v. Brannan, 5 Johns. 268. Newell v. Griswold, 6 Johns. 45. 3. The auditor should not have allowed, in this action, the charge for the goods sold May 24, 1845. The right of action for
*194 these *goods accrued long after this action was commenced. The merits of a matter litigated, and the "rights involved in actions," are to be determined by the *lex loci contractus;* and the measure of damages recoverable is to be determined by the same law. Story's Confl. of Laws 938. Harrison v. Edwards, 12 Vt. 648. Peck v. Mayo et al., 14 Vt. 36. It is only the mode, or form, of securing such remedies, as the plaintiff has by the *lex loci*, that is afforded by the *lex fori*, and not the remedies themselves. Story's Confl. 935, 953. The objection in this case is not to the form of the action, but it is, that the plaintiff is allowed to recover, by virtue of the *lex fori*, increased damages in the action, above what he is entitled to by the *lex loci*. By no form of action in New York can a party recover for a cause of action, that accrues after the action is commenced. 4. The right never existed to charge on book the goods sold May 24, 1845. They were to be paid for by a note, payable to a particular order, and the note was made, agreeably to the contract, and was delivered. The case furnishes no evidence, that Munger had any responsibility for procuring the indorsement of Paige; that was the business of the plaintiffs.

Foot & Hodges for plaintiffs.

An acceptance, by the plaintiffs, of the release of the witness, James L. Porter, of all his interest, is to be presumed, as the act was beneficial to them. Bailey v. Culverwell, 8 B. & C. 448, [15 E. C. L. 223.] Townson v. Tickell, 3 B. & A. 31, [5 E. C. L. 28.] Hatch v. Hatch, 9 Mass. 307. Church v. Gilman, 15 Wend. 656. Phil. Ev. 303. It was the duty of the auditor to adjust the accounts between the parties, as they stood at the time of the audit. Ambler v. Bradley, 6 Vt. 119. Martin v. Fairbanks, 7 Vt. 97. Pratt v. Gallup, 7 Vt. 344. The taking of the note, under the circumstances, did not operate as a payment for the goods delivered May 24, 1845. Keyes v. Carpenter, 3 Vt. 209. Gilman v. Peck, 11 Vt. 516. Wainwright v. Webster, 11 Vt. 576. Torrey v. Baxter, 13 Vt. 452. Butts v. Dean, 2 Met. 76.
*195 *The opinion of the court was delivered by

POLAND, J. The first question, arising upon the report of the auditor in the present case, relates to the admission of James L. Porter as a witness for the plaintiffs.

The auditor reports, that evidence was introduced, tending to show that he was interested, whereupon the witness executed a full release and discharge of all his interest in the suit, and delivered the same to the plaintiffs' counsel; that the defendant then objected to the witness for the reason, that the plaintiffs' counsel had no authority to receive such discharge; but that the witness was admitted and testified. It does not appear from the auditor's report, what the nature of the interest of the witness was, which the evidence tended to prove, or that it was such an interest, as could be removed simply by a release and discharge from him to the plaintiffs. But we assume from what is reported, that no question was made by the defendant, but that the interest of the witness was of that character, that it could be released, or discharged, by himself alone, and that the release, or discharge, which the witness executed to the plaintiffs, was sufficient in its terms to cut off any interest, which he might have in the result of the suit, if properly delivered to and accepted by them. We assume this to be so, because nothing appears from the report, that the defendant made any question in regard to it, and the auditor reports nothing, from which we can infer there was any ground of objection, which could properly have been taken; and in this, as in all other cases, the party seeking to exclude a witness on the ground of interest takes the burden of proving the disqualification. After the discharge had been executed by the witness to the plaintiff, the only objection raised to his admissibility by the defendant was the want of authority in the plaintiffs' counsel to accept the release for them; and this is the only question we have to consider upon this part of the case.

From what is reported by the auditor, it seems to us, that the inference must be, that the interest shown in the witness must have been an interest in or claim upon the debt, which the plaintiffs held against the defendant; because otherwise a mere release from him to the plaintiffs would not have extinguished the interest in him and rendered him competent. Such being the interest, a release or discharge of it, and thus making the debt the sole property of the
*plaintiffs, or releasing it from some *196
lien or claim the witness held upon it, was an act apparently for the benefit of the plaintiffs; and if so, upon well established principles the law would presume their assent or acceptance, even if delivered to a stranger, until the contrary was made to appear. The decisions upon this subject have gone great lengths, and courts have at various times presumed assent to and acceptance of offers and gifts, bequests and devises, and even of deeds and other conveyances of real estate. So the assent of creditors to assignments by their debtors has been presumed; and in cases where one person has assumed to act as agent for another, but without any authority to do so in fact, if his acts were apparently for the benefit and advantage of his principal, his assent thereto has been presumed. See cases collected on this subject in Cowen & Hill's Notes to Phil. Ev., Part I, 303. In this case the release being delivered to the plaintiffs' attorneys, who were acting in some sense as agents for them, we think there is ample ground to presume it was with their assent and approbation, and that the witness was properly admitted to testify. See, also, Lady Superior &c. v. McNamara et al., 3 Barb. Ch. R. 375. Tompkins v. Wheeler, 16 Pet. 106. Doe v. Knight,

5 B. & C. 671, [11 E. C. L. 632.] Church v. Gilman, 15 Wend. 656.

2. The defendant also objects to the report of the auditor, upon the ground that he has computed interest upon the sums reported in favor of the plaintiffs from the time they severally became due by the terms of the agreement between the plaintiffs and defendant.

No question is made, but that if the parties had all resided in this state, and goods had been sold here upon a specified credit, the plaintiffs would be entitled to interest, as the auditor has computed it. The objection rests upon what is assumed to be the law of New York in such a case; and it is doubtless true, that as this contract was made in that state, and, for aught that appears, was expected to be performed there, their law would regulate the rate and terms of the interest due to the plaintiffs. The authorities cited by the defendant from New York are merely to the effect, that upon an unliquidated running account between parties, where the balance is shifting and uncertain, interest will not be given. We apprehend, that these authorities by no means show, that under the circumstances of this case interest would not be allowed to *197 the plaintiffs *after the expiration of the credit agreed between the parties and the plaintiffs had become entitled to payment for their goods. The courts of this state are governed by their own law in construing and enforcing contracts made in other states and countries, unless it be shown, that the *lex loci* requires a different rule; and as that is not done in this case, we think the allowance of interest by the auditor, after the credit expired, should not be disturbed.

3. The other questions raised in this case all relate to the allowance by the auditor of the bill of goods sold by the plaintiffs to the defendant on the twenty fourth day of May, 1845, (which was after the commencement of this suit.)

The first objection of the defendant to the allowance of this bill of goods is based upon this ground,—that they were sold and delivered, after this suit had been brought. It is not questioned, but that by the laws of this state, if the goods had been sold here, the plaintiffs would have been entitled to recover this item, inasmuch as the credit had expired previous to the trial before the auditor. This objection is also based upon the ground, that the sale and delivery of the goods was in New York, and by the law of New York the plaintiffs there could not have recovered the price in any action commenced before the credit expired;—it is insisted, that the same rule must apply here.

It is well settled, that the *lex loci contractus* forms the rule, by which the validity, obligation, interpretation, construction and effect of all contracts in relation to personal estate are to be governed. So, too, the competency of parties to contract, and, in general, every thing, which is necessary to perfect and consummate the contract, depend upon the *lex loci*. This is founded upon the supposition, that the parties contract in reference to the laws, where they are situate, and intend to have their contract governed by those laws, unless a contrary intent be shown. Upon the other hand it is equally well settled, that every thing pertaining to the remedy for enforcing performance of a contract, wherever made, is governed wholly by the *lex fori*. The defendant claims, that this is a question affecting the validity and obligation of the contract itself, and not relating merely to the legal remedy to enforce it.

It has long been settled, that the form of the action, the mode of proceeding and everything pertaining to the manner of obtaining *redress belong to the rem- *198 edy, merely and are governed by the *lex fori*. So it is settled, that the questions, when a debt becomes barred by the lapse of time, when and in what manner offsets will be allowed, whether the debtor's body can be arrested upon the debt, and many other things, having in effect a serious and important influence upon the rights of the parties, are governed by the *lex fori*, and not by the *lex loci*. In this case, in the state of New York, where the contract was made, the plaintiffs could not have brought their suit on book, because they have no such action; but no question is made by counsel, but what they may sue in that form here, and thus make themselves witnesses in support of their claim,—which they could not do in New York. So if a suit had been brought in New York, the plaintiffs would have had no right to seize property, until after a recovery of judgment; but it is otherwise here.

Upon a full consideration of the numerous authorities, which have been cited on this subject, we are fully satisfied, that this is a question relating to the remedy merely, and governed by our law; for it would be a singular state of things, if the law of New York is to govern as to the time when an action may be commenced here, but our own law must govern in relation to the time, when the parties' right to maintain a suit shall be barred. See Story's Confl. of Laws, sec. 571 et seq. Pickering v. Fisk, 6 Vt. 102.

The defendant also objects to the allowance of this bill of goods for another reason. He insists, that the plaintiffs never had any right to charge them on book account,—and also, that the plaintiffs accepted his note in payment for that bill.

The auditor reports, that the plaintiffs, at the time, charged the goods to Munger & Paige, supposing Paige to be jointly liable with the defendant, and subsequently brought a suit against the defendant and Paige jointly, in which suit they failed, upon the ground that the goods should have been charged to the defendant alone. The auditor reports, that at the time of the sale of this last bill of goods by the plaintiffs to the defendant the plaintiffs expected to receive the defendant's note, payable in six months, indorsed by Paige. The report does not say, that it was so agreed between the plaintiffs and the defendant; but such, it would seem, must be the necessary inference from the facts reported; for the defendant at the same *time executed *199 his note for the amount of that purchase, payable to Paige, or order, and delivered it to the plaintiffs, who presented it to Paige, to be by him indorsed, which he refused to do. The auditor therefore found,

that the note operated as no payment, or discharge, of the account.

Whatever might have been the decisions at an early period in this state, it is now settled, beyond controversy, that it forms no objection to charging for property sold, or for services performed, that at the time of such sale, or performance of such service, there was a special contract made as to the mode and time of payment therefor, if such payment has not been made. So in this case, if it was agreed between the plaintiffs and the defendant, that this bill of goods should be paid for by the defendant's note, indorsed by Paige, as found by the auditor, and payment was not made in that way, the plaintiffs might well charge them on book and recover for them in this form of action. The fact, that they first charged the goods to Munger & Paige and endeavored to maintain an action against them jointly, is a matter of no importance; for the auditor has found, that the defendant was alone liable, and that they should have been charged to him alone.

We find no error in the judgment of the county court, and the same is therefore affirmed.

David Warren v. Jacob Edgerton.

(*Rutland*, Jan. Term, 1850.)

Each debtor in an execution is to be regarded as liable for the whole debt, *in solido;* and the officer having the execution to levy is not bound to regard any equities subsisting between the debtors themselves, or between the debtors and their other creditors.

An officer, who is about to levy an execution upon the land of one of several execution debtors, cannot be required to regard the offer of such debtor to expose to him the personal property of his co-debtors and to indemnify him for levying the execution, for its entire amount, upon such personal property.

A. purchased of B. land, which was then subject to attachment in a suit against B., C. and D., then pending, in favor of another person. *200 Judgment having *been obtained against all the defendants in that suit, the officer holding the execution demanded of B. payment of its amount. B. offered to expose to the officer personal property of C. and D., the other execution debtors, sufficient to satisfy the execution, and A. and B. offered to indemnify the officer, if he would levy upon such personal property. The officer declined to do so, but levied the execution, for its full amount, upon the land which B. had conveyed to A., and A., to redeem the land, was compelled to pay the amount due, with the officer's fees for the levy. *Held*, that A. could not maintain an action against the officer for levying the execution upon the land, or for falsely returning, that the execution debtors had neglected to expose personal property sufficient to satisfy the execution.

Trespass on the case. The plaintiff alleged in the first count in his declaration, that on the seventeenth day of February, 1847, he purchased of Addison Buck certain land in Pittsford, which was then under attachment in a suit in favor of Holbrook, Carter & Co. against said Buck, Blanchard Rand and Germain F. Hendee; that judgment was rendered in said suit against all the defendants therein, and execution issued, which was delivered, for service, to the defendant Edgerton, who was then sheriff of the county of Rutland; that although Buck, Rand and Hendee were the owners of personal property, in severalty, sufficient to have satisfied the execution, which personal property was exposed and tendered by Buck to the defendant, that he might levy the execution upon it, yet the defendant wrongfully levied the execution upon the land above mentioned; and that the plaintiff, to redeem the land, was compelled to pay the full amount due upon the execution, with the officer's fees for the levy. In the second count it was alleged, that the defendant had falsely returned upon the execution, that the debtors had not exposed or tendered personal estate sufficient to satisfy the execution and all legal charges. Plea, the general issue, and trial by the court, April Term, 1848,—Hall, J., presiding. On trial it appeared, that the plaintiff had received from Buck a deed of the premises levied upon, and that the premises had been attached, and judgment was rendered and execution issued, in the suit in favor of Holbrook, Carter & Co. against Buck, Rand and Hendee, and that the execution was levied by the defendant upon the land, and that the plaintiff, to redeem the land, paid the amount due upon the execution and for the officer's fees, as stated in the declaration. The defendant stated in his return upon the *execution, in common form, that *201 he levied upon the land in question by reason of the execution debtor having neglected to make payment of the amount due upon the execution, and not having exposed or tendered personal estate sufficient to satisfy the same. It also appeared, that in the morning of the day on which the execution was levied, the defendant called upon each of the execution debtors, and demanded payment of the amount due; that Buck informed him, that he should turn out the personal property of Rand and Hendee, the other execution debtors, and offered to go with the defendant to the respective dwelling houses of Rand and Hendee, and tender and expose personal property, belonging to them, upon the execution; that the defendant refused to go with him, or to take the personal property of Rand, or Hendee, but offered to take any personal property of Buck, which he would expose to him. Subsequently, and before the levy was made, Buck renewed his offer to the defendant, and the plaintiff and Buck offered fully to indemnify the defendant for taking the personal property of Rand and Hendee; but the defendant again refused to take any personal property, except such as should be shown to him, belonging to Buck, and proceeded to levy the execution upon the premises in question. It also appeared, that Rand and Hendee had personal property, sufficient to satisfy the execution, and that Rand lived within fifteen rods of the place where the demand was made upon Buck, and that Hendee lived two or three miles distant. It also appeared, that at one of the conversations between Buck and the defendant, Buck claimed, that Rand and Hendee were the principal debtors in the execution; but it did not appear upon the trial, whose the debt was, as between Buck, Rand and Hendee, or whether it legally or equitably belonged to one of them to pay it, more than to the other. Upon

these facts the county court rendered judgment in favor of the defendant. Exceptions by plaintiff.

E. N. Briggs and *C. L. Williams* for plaintiff.

The property was wrongfully taken by the defendant upon the execution. As against Buck the defendant had no right to levy upon Buck's real estate. The provisions in reference to an officer's power, or right, to take the real estate, or the body, of an execution debtor are substantially the same. Rev. St., c. 42, §§ 14, 15; c. *202 *28, § 24. Sl. St., c. 28, §§ 2, 3. And the right to take either the body or real estate of an execution debtor is postponed to that of taking personal property. Warner v. Stockwell et al., 9 Vt. 21. Eastman v. Curtis, 4 Vt. 620. Hall v. Hall, 1 Root 120. All the execution debtors within the officer's precinct are to be regarded as one person, so far as relates to their having real or personal estate; and the officer must take the personal property of either of them, which is exposed to him, before he can take the real estate, or body, of either of the others.

E. Edgerton for defendant.

It was the right of the creditors in the execution to select any one of the debtors, and compel a satisfaction from him, without regard to any supposed equities between the debtors. Parker v. Dennie, 6 Pick. 227. The officer is not bound by statute to take property on an execution upon the indemnity of any person, other than the creditor, or his agent, or attorney. Rev. St., 239, § 10.

The opinion of the court was delivered by

REDFIELD, J. We think each debtor in execution is to be regarded as liable for the whole debt, *in solido;* and the officer having the execution to levy is not bound to regard any equities subsisting between the debtors themselves, or between the debtors and their other creditors. Whether there be any mode, in which such equities can be reached, is not necessary now to be determined.

It is obvious to us, that to hold that one execution debtor might turn out the personal property of his co-debtor, and might, upon giving indemnity, require the officer to levy the entire amount of the execution upon such property, while other debtors might, with the same pertinacity, be pressing counter commands upon the officer, would lead to inextricable embarrassment, if the officer were disposed to perform his duty, and would, in every way, be liable to the greatest abuses. Judgment affirmed.

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*203 *DANA D. BUCKMASTER v. NATHAN SMITH.

(*Rutland*, Jan. Term, 1850.)

Where personal property is sold, upon condition that the title shall not vest in the vendee, unless he pay the price agreed upon by a specified time, the vendee has no attachable interest in the property or its increase, until performance of the condition.

If, after the time for payment of the price has expired, the price not being paid, a creditor of the vendee attach the property, he cannot defeat the vendor's right to sustain an action of trover against him for the property, by tendering to him the amount, which the vendee agreed to pay, and the interest thereon.

In such action of trover, brought by the vendor against the attaching creditor of the vendee, the rule of damages is the value of the property at the time of the attachment.

Where the property sold, in such case, was a mare, it was held, that the vendor continued also to be the owner of the colts, brought by her, until performance of the condition.

Trover for a mare and colt. Plea, the general issue, and trial by jury, April Term, 1849,—HALL, J., presiding. The substance of the testimony is sufficiently detailed in the opinion delivered by the court. Verdict for the plaintiff for the value of the mare and colt. Exceptions by defendant.

S. Fullam for defendant.

E. Edgerton for plaintiff.

The opinion of the court was delivered by

POLAND, J. The substantial facts of this case are as follows. In the spring of 1846 the plaintiff, being then the owner of the mare sued for, put her into the possession of Amos Pike, under an agreement, that Pike was to pay the plaintiff four thousand feet of boards for her, of the value of $16.00, in the course of the then ensuing winter; and if the boards were delivered, the mare was to become the property of Pike; but until the delivery of the boards, she was to remain the property of the plaintiff. The boards were never delivered, but the mare remained in the possession of Pike until the month of July, 1847, when she was attached by the defendant as *the *204 property of Pike, upon a debt against him. In the spring of 1848 the mare brought the colt, which is sued for; and the plaintiff demanded the mare and colt of the defendant, before he brought his suit. The defendant offered to show, that previous to said demand upon him he offered and tendered to the plaintiff the sum of $16, and the interest thereon from the time Pike received the mare of the plaintiff, but the plaintiff refused to receive the same. This evidence the court excluded.

The first question to be determined in this case is, whether Pike had any attachable interest in the mare, at the time she was attached in July, 1847.

Under the doctrine that has been established by repeated decisions in this state, in relation to these conditional sales, the general property in the mare remained in the plaintiff, subject to be divested by the performance of the condition of payment of the boards by Pike; and the performance of this condition by him must precede the vesting of any title in himself. West v. Bolton, 4 Vt. 558. Nothing appears from the exceptions in this case, that there had been any new agreement, or understanding, between the plaintiff and Pike, as to his having any other or different right to the mare, beyond such as he acquired by the original contract. The time, within which he was to deliver the boards, had expired, and he had failed to perform the condition, upon which depended all his interest in the mare; and we do not perceive how, as between himself and the plaintiff, he could have compelled the plaintiff to receive the $16,00

for the mare, or could have prevented the plaintiff from recovering the possession of her, discharged of all claim on his part, or, if he had converted the mare in any way, how he could have reduced his liability below the value of the mare. The creditors of Pike clearly could not, by attaching the mare, acquire any higher right to her, than Pike had himself; and, as we view the case, Pike had at the time of the attachment no property whatever, either general, or special, farther than a mere possession, in the mare, and no interest that could be attached. The plaintiff, being the owner of the mare, would also be equally the owner of the colt.

This view of the case seems to dispose of all the questions raised in it;—for the tender by the defendant of the $16 and interest is based entirely upon the supposition, *205 that the plaintiff's claim was a *mere lien upon the mare to that extent, which the defendant might, in the place of Pike, step in and remove by payment of that sum. The question as to the rule of damages is also raised upon the same view of the plaintiff's right; which we think is not supported by the facts appearing in the case. The cases of West v. Bolton, above cited, Bigelow v. Huntley, 8 Vt. 1551, Grant v. King et al., 14 Vt. 367, and Smith v. Foster, 18 Vt. 182, are all direct authorities in support of the view we have taken of this case.

It is urged by the defendant's counsel, that the effect of sustaining the decision below in this case will be to allow property to be placed and kept beyond the reach of creditors, and lead to the perpetration of frauds by dishonest debtors; and it is very possible, that this suggestion may not be wholly unfounded; but we consider the doctrine of conditional sales, and of the rights of the parties under them, as too well settled in this state, to allow any interference by the court. If the contemplated evils shall be found to exist, the legislature can easily provide a remedy. Judgment affirmed.

BENJAMIN F. LANGDON v. JESSE PAUL.

(*Rutland*, Jan. Term, 1850.)

If the mortgagor, after a decree of foreclosure has been obtained by the mortgagee, and before the expiration of the time limited for redemption, cut and carry away timber from the mortgaged premises, the mortgagee may recover from him the value of the timber in an action on the case in the nature of waste, or under a count in trover.

In this case the plaintiff declared against the defendant in a plea of the case, "For that the defendant, before and at the time of the committing of the grievance hereinafter next mentioned, held and enjoyed, as tenant thereof to the plaintiff, and by the sufferance and permission of the plaintiff, a certain farm or tract of land, with the appurtenances, situate in said Rutland, bounded on the north by land of Edgar L. Ormsbee, on the west by Otter Creek, on the south by land of Leverett Chatterton, and on the east by land of Demon Gorham, containing one hundred acres, more or less —that is to say, as tenant thereof as aforesaid for so long time as *the *206 plaintiff and defendant should respectively please, to wit, at Rutland aforesaid. Yet the defendant, contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his reversionary interest of and to the said farm and land with the appurtenances, while the same were so in the possession of the defendant as tenant thereof to the plaintiff as aforesaid, to wit, on the first day of January, A. D. 1843, and on divers other days and times between that day and the commencement of this suit, at Rutland aforesaid, wrongfully and unjustly felled, cut down, and prostrated and caused and procured to be felled, cut down and prostrated divers trees,—to wit, one hundred pine trees, fifty maple trees, fifty beech trees, fifty oak trees, fifty birch trees and one hundred other trees of plaintiff, of great value, to wit, of the value of seven hundred and fifty dollars, then standing, growing, and being in and upon the said land, and took and carried away the same, and converted the same to his own use,—whereby the plaintiff has been and is greatly injured, prejudiced and aggrieved in his reversionary interest and estate of and in the said farm and land with the appurtenances, to wit, at Rutland aforesaid." There was also joined a count in trover, for the same trees. Plea, the general issue, and trial by the jury, September Term, 1847,—HALL, J., presiding. On trial, to show title in himself and the tenancy of the defendant, the plaintiff introduced the record of a decree of foreclosure of the premises described in his declaration, in favor of the plaintiff against the defendant and others, made by the court of chancery, September Term, 1844. It appeared, that the defendant cut sixteen pine trees on the premises in the month of December, 1844, and drew them from the land and sold them, before the time limited in the decree for the redemption of the premises had expired, and that the defendant was in possession of the premises, at the time the trees were cut. Upon this evidence the court instructed the jury, that the plaintiff was entitled to recover. Verdict for plaintiff. Exceptions by defendant. This suit was commenced at the April Term, 1845, and at the April Term, 1847, the defendant filed a motion to dismiss, for the reason that the writ was signed and the recognizance taken by the attorney of the plaintiff; but no trial was had upon the motion to dismiss, until after a review had been entered, and a verdict had been returned for the plaintiff, as above stated. The case was then continued to the November Adjourned Term, 1848, of the county *court, and before a *207 judgment was rendered upon the verdict for the plaintiff the defendant offered to prove the allegations in his motion to dismiss; but the court,—HALL, J., presiding,—rejected the evidence, and overruled the motion to dismiss, and rendered judgment for the plaintiff upon the verdict. Exceptions by defendant.

Thrall & Smith for defendant.

1. The relation of the parties to each other

and to the property affected, and the interest of the plaintiff in the premises, are not such as to entitle the plaintiff to sustain this action. The relation of the mortgagor and mortgagee, after condition broken, is a species of tenancy, but subjects the parties to none of the incidents of landlord and tenant. Wilson v. Hooper, 13 Vt. 655. 4 Kent (6th Ed.) 155. 2 Sw. Dig. 166. Until condition broken the mortgagee has only a chattel interest in the premises; after the law day, and until the equity of redemption is foreclosed, and the time given to redeem expires, the mortgagee has a defeasible, contingent estate in the premises, and the right of possession; and during both these stages the fee in the land, for all purposes, is in the mortgagor. 4 Kent 159–165. Clark v. Beach, 6 Conn. 142. Hooper v. Wilson, 12 Vt. 697. 3 Bac. Abr., Mortgage C. Catlin v. Washburn, 3 Vt. 26, 42. 2. The mortgagee's interest and estate in the premises being only contingent, and not vested and absolute, he cannot sustain an action for waste, or any other action for an injury to the premises; if he have any remedy for an injury to the premises by the mortgagor, it is in chancery. 4 Kent 161. Peterson v. Clark, 15 Johns. 205. Greene v. Cole, 3 Saund. R. 252. 2 Sw. Dig. 166. If the mortgagee out of possession is permitted to sustain this action against the mortgagor, he may sustain an action against any other person, for tortious acts upon the premises;—but certainly his rights and estates are not of that absolute character, that he can thus interfere and control the mortgagor. The recovery of the land is no satisfaction of the mortgage debt, except for the value of the land at the expiration of the time given for redemption. Lovell v. Leland, 3 Vt. 581. There is no distinction in the interest and estate of the mortgagee after condition is broken without prosecution, and after time for redemption is fixed by the court. Clark v. *208 Beach, 6 Conn. 142. The mort*gagee in possession is liable and may be made to account to the mortgagor for waste. Rawlings v. Stewart, 1 Bland 22. Givens v. McCalmont, 4 Watts 460. To sustain an action for waste the plaintiff must have the immediate estate in remainder, or reversion, vested in him at the time the waste is committed—an estate of inheritance. The plaintiff had no such estate. His interest is not that of a reversioner, or remainder man. 1 Chit. Pl. 71, 276. Greene v. Cole, 3 Saund. R. 252. 4 Kent 352. 3. The case, as presented, does not show that any waste has been done. The plaintiff gave no testimony to show, that an injury had been done to the reversionary interest in the inheritance. This must be alleged and proved. 1 Chit. Pl. 72. Jackson v. Pesked, 1 M. & S. 234. 4 Kent 355. Baxter v. Taylor, 4 B. & Ad. 72, [24 E. C. L. 41.] The court cannot intend, that the cutting of trees is waste. Young v. Spencer, 10 B. & C. 145, [21 E. C. L. 71.] Jackson v. Brownson, 7 Johns. 227. The question should have been submitted to the jury. 4. The action necessarily involves the question of title to the premises. Whitney v. Bowen, 11 Vt. 250. The proceedings upon the bill of foreclosure were no evidence of title. Shed v. Garfield, 5 Vt. 39. Broome v. Beers. 6 Conn. 198. Palmer v. Mead, 7 Ib. 149. 5. The plaintiff is not entitled to recover upon his count in trover. He had neither a general or special interest in the timber; nor had he, when the suit was brought, the possession, or the right to immediate possession, of either timber, or land. 6. The motion to dismiss should prevail. A motion is never out of time for a defect of this character, which renders the writ a nullity. Rev. St. 179, § 5; 180, § 10. 1 D. Ch. 133. 17 Vt. 73. Ib. 118. Ingraham v. Leland, 19 Vt. 304. 1 Pick. 32. 6 Ib. 364.

E. Edgerton for plaintiff.

1. The proceedings in chancery were evidence to show the plaintiff a mortgagee and the defendant a mortgagor of the land in question. The mortgage was stated in the bill and admitted in the answer: the decree was based upon the mortgage and necessarily involved its existence, and was an adjudication of the title, as between the same parties. Viles et al. v. Moulton, 13 Vt. 510. 1 Greenl. Ev., §§ 528, 534, 557.

*2. An action on the case "in the nat- *209 ure of waste" is a proper remedy in the present case. The act complained of was an injury to the plaintiff's reversionary interest. The relation of mortgagor and mortgagee is a relation of landlord and tenant. It has sometimes been called a tenancy at will, and at other times a tenancy at sufferance. In strictness it is neither; although in some respects it resembles them both. In either case the landlord may determine the tenancy at his pleasure;—and yet it is said, (2 Bl. Com. 175,) that the interest of a landlord at will is an estate in reversion; and so, too, by analogy, is the estate of the mortgagee, during the tenancy of the mortgagor, a reversionary interest. The actual possession is in the mortgagor, and the right of possession remains in him, until the entry of the landlord, or a notice to quit; and while the mortgagor continues thus rightfully holding, the mortgagee cannot, either in fact, or by fiction, be in the possession also;—his interest is one to commence in possession after the tenancy and possession of the mortgagor have ceased, and is therefore reversionary. Morey v. McGuire, 4 Vt. 327. Hooper v. Wilson, 12 Ib. 695. Lull v. Matthews, 19 Ib. 322. West v. Treude, 1 Cro. Car. 187. 1 Camp. 360. 2 Chit. Pl. 782, *n.* Hutchins v. Lathrop, decided in Washington Co., Mar. T., 1845, [8 Law Rep. 82.] Hitchman v. Walton, 4 M. & W. 409. 2 Greenl. Ev. § 655, (note 2.) Hastings v. Perry, 20 Vt. 272. In a tenancy at will there is no legal presumption of a determination of the tenancy for the wrongful act of the tenant. The tenancy ceases, in such case, at the election of the landlord; and until the election is shown, the tenancy is presumed to continue. 3 Co. Lit., note 379, Title, Tenant at Will. Atkyn's Case, 1 Burr. 112. The same rule is applicable to a tenancy in mortgage, pending the equity of redemption; and if the mortgagee in the present case might have elected to treat the tenancy as at an end, and if by doing so he might have brought trespass, the fact, that he brought the action on the case, shows, that he chose to regard the tenancy as still subsisting,

and he has interest therefore as reversioner. Woodf. on Land. & Ten. 456, sec. 2.

3. The defendant was also liable on the count in trover. The plaintiff was, at law, owner of the estate, and owner of the trees, when severed, and consequently is entitled to recover for their conversion. Morey v. McGuire, 4 Vt. 327. Lull v. Matthews, 19 Vt. 322. Hastings v. Perry, 20 Vt. 272.

*210 *4. The motion to dismiss is in the nature of a dilatory plea, and not having been made at the first term of the court, it could not be received afterwards.

The opinion of the court was delivered by

REDFIELD, J. The question to be determined in the present case is, whether the mortgagee, after condition broken, and before foreclosure, can maintain either an action on the case, in the nature of waste, against the mortgagor in possession, for cutting timber and selling it, or trover for the timber.

First and last I have entertained a good deal of doubt upon this point; but none of the court have ever had any difficulty upon any other point in the case. Upon this point, if the case were entirely new, perhaps a majority of the judges would incline against the action. But it is certain, that no English case can be found directly against the action, and none any where, except the one from 15 Johns. And on the other hand this court, in the case of Hutchins v. Lathrop, certainly did sustain an action on the case, under circumstances almost precisely similar,—this particular point not being raised; and in Hitchman v. Walton, 4 M. & W. 409, the court of exchequer, upon very full argument and consideration, seem to me to have decided, that the action is maintainable upon either count.

I consider, too, that the case of Morey v. McGuire, 4 Vt. 327, in the opinion of the court delivered by HUTCHINSON, Ch. J., and the case of Lull v. Matthews, 19 Vt. 322, in the very turning point of the case, are full authority in favor of sustaining the count in trover. And although I think a court of equity is manifestly the most appropriate place for redress of an injury of this kind, I hardly feel at liberty, under the circumstances, to insist, that the mortgagee shall have no remedy, in such a case, at law. Perhaps, under the state of precedent produced, he ought to be allowed redress upon both counts,—but clearly upon the count in trover.

And of this decision the defendant, the mortgagor, has no just ground of complaint, perhaps, as he may at any time defeat the plaintiff's action, by paying the mortgage debt, which it is always his duty to do, and tendering the costs. And if he will not do that, but suffer the estate to go upon the debt, the mortgagee is justly entitled to his judgment. Judgment affirmed.

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*211 *JAMES HARVEY v. CALEB B. HALL.

(*Rutland*, Jan. Term, 1850.)

An infant, under the age of twenty one years, cannot be specially authorized to serve mesne process, by the magistrate signing it.†

†See Barrett v. Seward, ante, page 176.

Form of a sufficient plea in abatement, in such case.

Trespass for assault and battery and false imprisonment. The writ was made returnable to the county court, and was signed by F. W. Hopkins, Clerk, and was directed to John F. Knight, Jr., to serve and return, and was served by him. The defendant pleaded in abatement, as follows. "And now comes the above named defendant, by Foot & Hodges, his attorneys, and prays judgment of the writ in the above entitled cause, and says, that the same ought to abate, because he says that the said writ was served upon him on the tenth day of August, 1847, by John F. Knight, Jr., a person authorized to serve and return the same by F. W. Hopkins, as clerk of this court, and the authority who signed said writ, by delivering to this defendant an attested copy thereof;—without this, that the said writ was served by any other person, or in any other manner. And the said defendant farther says, that the said John F. Knight, Jr., so authorized as aforesaid, was, at the time of the service thereof as aforesaid, a minor, within the age of twenty one years, and, as such, incompetent by law to make service or return thereof. Wherefore he prays judgment of the said writ, that it may be quashed, and for his costs." To this plea the plaintiff demurred. The county court, November Term, 1847,—HALL, J., presiding,—adjudged the plea insufficient. Exceptions by defendant.‡

S. H. Hodges and *S. Foot* for defendant.

The writ should abate, having been served only by a minor, specially appointed by the magistrate signing it. A person thus appointed is thereby created an officer, independent of all other authority, and is alone responsible for his proceedings. For many of *them an infant could *212 not be holden,—as for the avails of property sold upon a writ, when the defendant recovers in the action. Tyler v. Tyler, 2 Root 519. Abbott v. Kimball, 19 Vt. 551. An infant cannot hold an office, which concerns the administration or execution of justice, and the appointment is void; 5 Com. Dig., Tit. Officer B 5; Lilly's Rep. 39, cited in 2 Mass. 122; nor one of responsibility and trust; Claridge v. Evelyn, 5 B. & A. 81, [7 E. C. L. 55;] Cuckson v. Winter, 2 M. & R. 313, [17 E. C. L. 713;] nor one which requires the taking of an oath; 3 Com. Dig., Tit. Infant C 1; Rex v. Carter, Cowp. 220; March 92, cited 3 Bac. Abr. 585. As to the form of the plea see Evarts v. Georgia, 18 Vt. 15.

Thrall & Smith for plaintiff.

The plea admits the fact, that the special deputation was made by the clerk, who is the officer of the court, and in this acts for and as the court. The authorization was a judicial act of the court; the general qualification and the peculiar fitness of the person, to whom the writ was directed, for

‡A trial was subsequently had upon the general issue, at the April Term, 1849, of the county court, and exceptions were taken, which were fully argued by counsel in the supreme court; but as the case was determined upon the plea in abatement, it is unnecessary to state them.

this particular case, and the necessity of the occasion were all judicially passed upon, and the matter cannot be afterwards or elsewhere traversed, or questioned. Rev. St. 180, § 7. Kelly v. Paris, 10 Vt. 263. Kellogg ex parte, 6 Vt. 509. The plea is defective. It does not show, that service was not made by John F. Knight, Jr., by copy &c., after he became of age. The writ and return are not referred to by the plea. 9 Vt. 349.

The opinion of the court was delivered by

REDFIELD, J. The first question in this case is, whether an infant is a competent person to be deputed, by the authority signing a writ, to serve it? It is certain, that such person is not competent to perform any judicial office, which it might sometimes be necessary for him, in such case, to do. It is clear, too, I suppose, that such person is not liable to the defendant for any injury he might sustain, either for misfeasance, or nonfeasance, for a false return, or for not keeping the property with care, or for refusing to take bail, &c. In such a case he has no principal to be made liable for his default in these particulars. Hence, although we are aware, that such a practice may, to some extent, have prevailed *213 in the state, *perhaps, at some periods, we are inclined to regard it as against good policy and sound principle, and to hold, that such person is not competent to execute such an appointment, and, of course, that the justice cannot appoint him. It is beyond the limit of his discretion.

The form of the plea is good. It is alleged, that it was served by a person, naming him, who was an infant, without this, that it was served by any other one, or in any other manner. This is equivalent to denying, that there was any other service. This makes it unnecessary to inquire into any other part of the case.

I should myself have preferred to hold it within the discretion of the justice, whether, or not, he would appoint an infant to serve a writ. Knowing very well, that, in practice, such an extension would not be attended with any serious evil consequences, and believing, that the difference between a service, made by an infant, when specially deputed by the sheriff,—which this court have held sufficient,—and by the authority signing the writ, is really one of form, more than of substance, and one which common minds, and the unprofessional, will fail fully to appreciate, I should greatly have preferred, that both questions should have received the same determination; but I am not insensible to the force of the technical reasoning, which is deemed invincible by my brethren.

Judgment reversed, and judgment that the writ abate.

ROLLIN ROBINSON v. ENOCH CONE.[1]

(*Rutland*, Jan. Term, 1850.)

In order to sustain an action for the negligence of the defendant, whereby the plaintiff is alleged to have sustained injury, it must appear, that the injury did not occur from any want of ordinary care on the part of the plaintiff, either in whole, or in part.

But all that is to be required of the plaintiff, in such case, is, that he exercise care and prudence equal to his capacity.

Although a child of tender years may be in the highway through the fault, or negligence, of his parents, and so be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from his redress. If the defendant know, that such a person is in the highway, he is bound to a *proportionate *214 degree of watchfulness,—to the utmost circumspection,—and what would be but ordinary neglect, in regard to what he supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger.†

Trespass for an assault and battery. Plea, the general issue, and trial by jury, September Term, 1847,—HALL, J., presiding. On trial the plaintiff gave evidence tending to prove, that at the time of the injury complained of he was about three years and nine months of age; that his father resided at the summit of a hill, about one fourth of a mile northerly from the centre of the village in Pawlet; that during the winter of 1844-5 he attended a school, which was kept near the centre of the village, southerly from the foot of the hill, and that in going to and returning from school he necessarily passed along the public highway leading down the hill; that on the tenth day of February, 1845, a short time before one o'clock in the afternoon, he was sliding down the hill, in the travelled path of the highway, very near to the west side, on a small sled, lying on his breast upon the sled, with his feet and legs projecting behind the sled, and his left leg hanging over the left side of the sled, and with his head inclined towards the western bank; that while he was thus situated, and when near the lower end of the hill, the defendant came upon the brow of the hill from the north, with a load of bark, drawn by two horses on a traverse sleigh, driving with great force down the hill upon a smart trot, on the west side of the road; that the plaintiff was then on the west side of the road, two or three feet from the western bank,—which rose abruptly from the surface of the travelled part of the road,—attempting to push himself and his sled, on which he was lying, toward the outward and westerly side of the travelled path; that the travelled path was there twenty two feet and *some inches wide; and *215 that when the plaintiff was within two or three feet of the bank, still lying on his breast, with his head towards the westerly side of the road, his left leg, which hung over the sled, was caught by the right runner of the rear traverse of the defendant's sleigh, and so broken and lacerated as to require amputation, and that his shoulder

[1] See note at end of case.

† See Birge v. Gardner, 19 Conn. 507, where the defendant had set up a gate upon his own land, by the side of a lane, through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, was accustomed to pass, and the plaintiff, in passing along the lane, without license from any one, put his hands on the gate and shook it, in consequence of which it fell upon him and broke his leg, and the defendant was held liable for the injury, under instructions to the jury very similar to those given in the case of Robinson v. Cone, above reported.

was dislocated and other injuries received.

The plaintiff also gave evidence tending to prove, that the length of the road upon the hill was 410 feet, and its ascent, in the same distance, about 433 inches; that there was sufficient room for the defendant to have passed the plaintiff upon the easterly side, with ordinary care; and that the road, where the plaintiff was injured, was travelled over the whole surface from the western bank to the eastern side and was smooth from use. The plaintiff also proved, that the defendant said, after the injury, that as he came over the brow of the hill he saw something in the road, which he supposed was a dog; that he was coming down rather on the west side of the road, and when he saw it was a boy, he thought he would have wit enough to get out of the way, until he came near; that his horses were well broke, and he held them hard, so that they did not raise their feet from the ground, but they could not hold the load, so as to stop it suddenly; that as soon as he saw, that the horses could not hold the load, and that he must pass over the boy, if he went directly forward, he turned to the east, and the horses and the forward traverse passed the boy without touching him, but the rear traverse did not track after the forward one and ran over him; and that the hill was always swarming with children, and he never drove into the village, without finding the hill alive with them. The plaintiff also gave evidence tending to show, that the place, where the defendant said he was, when he first saw the plaintiff, was distant from the plaintiff about ten rods, and that the surface of the road was depressed in the middle not more than four inches. The defendant gave evidence tending to prove, that the plaintiff, with other boys, was, at the time of the injury, sliding on the hill for amusement, and that the other boys were at the foot of the hill, drawing back their sleds; that the road upon the hill was narrow and very slippery and icy from the travel on it and its *216 use by the *boys for sliding; that he resided three or four miles distant, and had no knowledge of the size and age of the boy, until near him; that the boy was near the centre of the travelled path, which was at that place from eight to twelve inches lowest in the middle; that when he was three or four rods from the boy, and at the earliest moment he had reason to apprehend there was danger, that the boy would not get out of the road, he held his horses hard, but seeing, from the icy and slippery state of the hill, that the horses could not seasonably check the impulse of the load, he turned them suddenly to the east side of the road, and approached it as near as it was possible to do, without going over the bank, and by that means the horses and forward traverse passed the boy safely, but that, from the inclination of the road at that place towards the centre, the after traverse slipped towards the centre of the road, and thereby struck the plaintiff's leg; that the surface of the hill was undulating: and that he was on a steep point of the hill, when he discovered the boy, trotting slowly, and driving at the usual and ordinary rate of speed, at which prudent men drive with such a load at such a place. The defendant requested the court to charge the jury,—1. That if the injury arose from any neglect, or want of care, on the part of the plaintiff, he cannot recover. 2. That if the plaintiff was in the exercise of ordinary care, and the injury was the result of unavoidable accident, the plaintiff cannot recover. 3. That if the plaintiff was of so tender an age, as not to be capable of observing and avoiding travellers, it was gross negligence on the part of his parents to permit him to be in the street, and no recovery can be had, unless the defendant was grossly negligent, or the injury was voluntary on the part of the defendant. 4. That the law of the road reqiures, that those on foot should yield the road to teams; and that the supposition is, that they will do so. 5. That persons, who use the highway for games and amusements, not connected with travelling, do so at their peril, and cannot call on a traveller for damages for an injury, unless the traveller were grossly negligent. 6. That as the plaintiff was bound to yield the road to the defendant's team, and did not, he must suffer the consequences, even if he were not in fault, (as if blind, or deaf,) unless the injury resulted from the gross neglect of the defendant. 7. That the care and diligence, which the defendant was bound to exercise, was the ordinary care *and *217 diligence used by persons of common prudence in like circumstances. 8. That the defendant, on discovering that the plaintiff was not about to get out of the road, was not bound to adopt the best possible means of avoiding the injury, but is excusable, if he acted with ordinary care and prudence under the circumstances. 9. That gross negligence is more than mere inattention, and is such a degree of rashness, or wantonness, as evinces a willingness, that the act complained of should be done.

But the court charged the jury, that the law of the road, applicable to injuries sustained by travellers coming in contact with each other, is, that both should be held to the exercise of common care and prudence in the use of the road; that if both are equally negligent, no recovery can be had for such injury;—that the defendant, in this case, would not be liable, if the injury to the plaintiff happened, while the defendant was in the exercise of ordinary care and prudence; and farther, that if the defendant were not in the exercise of ordinary care and prudence, he would not be liable, provided the injury would not have happened, but for the want of ordinary care and prudence on the part of the plaintiff;—that ordinary care and prudence was such, as would commonly be used by persons in the situation and under the circumstances, in which the parties were, in this case, and that whether they were in the exercise of such care and prudence was a question for the jury, to be ascertained and determined by them from the evidence;—that they should first inquire, whether the plaintiff was in the exercise of ordinary care and prudence, at the time of the injury, and if they found he was not, and that the injury would not have happened, but for the want of such care and prudence on his part, it would be their duty to render their verdict

for the defendant, whether he was in the use of such care and prudence, or not;—that in determining the amount of care and prudence required of the plaintiff, they need not measure it by the rule, that would be applicable to an adult, but might consider, that he was a child, about four years of age, from whom a less degree of care and prudence might be expected; that if they believed, the plaintiff acted on that occasion, as a child of his age and capacity would be expected to act, they might consider his want of the care and prudence of an adult as no objection to his recovery;—that it was claimed on the part of the defend-
*218 *ant, that the court should charge them, that if the boy was of so tender an age, as not to be capable of discovering and avoiding travellers, it was gross negligence in the parents to permit him to be in the street, and that he could not recover, unless the defendant was guilty of gross negligence, or the injury was voluntary on the part of the defendant,—and that the court acceded to the principle of law, as claimed by the defendant; but that it was a question for the jury, how far the principle of law was applicable to the facts of this case; that if the boy were of so tender years, as to be absolutely incapable of observing and avoiding travellers, it might be gross negligence in the parents to permit him to be in the street,—and in such case the defendant would not be liable, unless he were also guilty of gross negligence; but that if the plaintiff were an active boy, of sufficient age to attend school, and was attending school, and if children of his age and capacity would ordinarily be allowed and expected to attend school and be in the street, as he was, then there would be no gross negligence on the part of the parents, though the boy might not have the prudence and capacity of a man, to avoid danger, and the defendant could derive no advantage from the principle of law before stated. The jury were farther instructed, that if, under the directions already given, they should not find a want of care and prudence on the part of the plaintiff, it would then be their duty, to inquire into the alleged negligence of the defendant;—that the defendant, in driving his team down the hill, should be held to the exercise of common, or ordinary, care and prudence,—such care and prudence, as a man of common prudence would be expected to exercise, under the circumstances of the case;—that in determining the question, whether the defendant had been guilty of negligence, or not, they should take into consideration the size and character of the defendant's load, the condition of the road, the steepness of the hill, the speed of the driving, the usual amount of travel upon the road, and the fact, especially, if they should find it was known to the defendant, that the hill was commonly used by boys for sliding: that in such a case more care would be required, than in a place less frequented, and where the person driving would not expect to meet, or overtake, any one;—that if, under the directions before given, they should be of opinion, that the defendant was in
*219 the exercise of such *common care and prudence, as, from all the circumstances, ought reasonably to be required of him, and the injury was unavoidable, they ought to excuse him from liability;—but that if they found, that he was driving in a careless and negligent manner, without the exercise of common care and prudence, and that the injury occurred by reason of his carelessness and neglect, their verdict should be against him. The jury returned a verdict for the plaintiff. Exceptions by defendant.

C. B. Harrington for defendant.

In actions of this kind the plaintiff cannot recover, if his own negligence, or want of ordinary care and prudence, have in any manner contributed to the injury, of which he complains. Bridge v. Grand Junction Railway Co., 3 M. & W. 244. Pluckwell v. Wilson, 5 C. & P. 375, [24 E. C. L. 612.] Luxford v. Large, 5 C. & P. 421, [24 E. C. L. 636.] Lack v. Seward, 4 C. & P. 106, [19 E. C. L. 429.] Washburn v. Tracy, 2 D. Ch. 128. Rathbun v. Payne, 19 Wend. 399. Butterfield v. Forrester, 11 East 60. Barnes v. Cole et al., 21 Wend. 188. 2 Hall 151. Brown v. Maxwell, 6 Hill 592 And when a party, by his own want of common care and prudence, or by his gross negligence, brings an injury upon himself, he cannot claim to recover upon the ground, that he has less capacity, either physical, or intellectual, than the party from whom he seeks to recover. An infant is liable for torts committed by him; and his want of capacity to understand the consequences of his acts was never considered a legal justification for his trespasses, or other wrongful acts, except in criminal cases. Humphrey v. Douglass, 10 Vt. 71. Sikes v. Johnson, 16 Mass. 389. Fitts v. Hall, 9 N. H. 441. Homer v. Thwing, 3 Pick. 492. 2 Kent 241. Bullock v. Babcock, 3 Wend. 391. The case of Lynch v. Nurdin, 1 Ad. & E., N. S., 29, [41 E. C. L. 422,] is not analogous in principle. It was decided upon the ground, that the defendant was guilty of the "most blameable carelessness" in leaving his horse loose and unattended in the street of a populous town, or, in other words, that the defendant was guilty of gross negligence. Lord DENMAN bases his opinion upon the analogy between that case and the case of Illidge v. Goodwin, 5 C. & P. 190, [24 E. C. L. 520.] Dixon
*v. Bell, 5 M. & S. 198. In the case of *220 Hartfield v. Roper, 21 Wend. 615, the whole question is discussed by COWEN, J., and the doctrine established, that when a child, even of such tender years as not to be capable of using sufficient discretion to avoid danger, is permitted to be unattended in the highway, and is there injured by a traveller, he cannot recover, either in an action of trespass, or case, unless the defendant have been guilty of gross negligence. The true rule is, that the parent, or guardian, is responsible for the exercise of ordinary care and prudence, until the infant arrives at years of discretion, sufficient to enable him to exercise ordinary care and prudence for himself; and at the point, when the parent's responsibility ceases, then commences the responsibility of the infant. Brown v. Maxwell, 6 Hill 592.

D. Roberts, Jr., for plaintiff.

Ordinary care was all, that could be required of the plaintiff, to avoid the injury

which happened in this case. Washburn v. Tracy, 2 D. Ch. 128. Although the plaintiff may himself have been guilty of negligence, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. Broome's Legal Max. 169, 170. PARKE, B., in Bridge v. Gr. Junc. Rail. Co., 3 M. & W. 248,—recognized in Davies v. Mann, 10 M. & W. 546. Marriott v. Stanley, 1 Scott's N. R. 392; S. C., 1 M. & G 568, [39 E. C. L. 911.] Lynch v. Nurdin, 1 Ad. & El., N. S., 29, [41 E. C. L. 422.] 6 Cow. 191. 2 Pick. 621. 12 Pick 177. The court below recognized the doctrine of the case of Hartford v. Roper, 21 Wend. 615, that the negligence, if any, of the plaintiff's parents is to be regarded as his own The jury have found, that the plaintiff was an active boy, of sufficient age to attend school, and was attending school, and that children of his age and capacity would ordinarily be allowed and expected to attend school, and be in the street, as he was. There was, then, no want of ordinary care on the part of the parents. Even a paralytic has a right to walk in the carriage way, even at night, though there be a foot path. Boss v. Litton, 5 C. & P. 407, [24 E. C. L. 628.] Neither was there any such want of care on the part of the child, as will preclude him from a recovery. The jury have found, *221 that *he acted with at least that degree of care, which would be expected from a child of his age and capacity. To require of the plaintiff a greater degree of caution, than was suited to his age, and at the same time greater than he possessed, would be to require an impossibility. *Lex non cogit ad impossibilia.* Negligence is a fault; but it cannot be predicated of him, who acts with as great a degree of care, as he may be able, and as could be expected from a person of his age, under the same circumstances. *Lex spectat naturæ ordinem.* The defendant was bound to the exercise of ordinary care in his driving. The charge of the court required that, and no more; but what is ordinary care in a particular case is to be determined upon reference to all the attendant circumstances. The jury found, that the defendant did not exercise that ordinary care. The law, or usage, of the road is no criterion of negligence. Wayde v. Carr, 2 D. & R. 255. [16 E. C. L. 84.] Ld. ELLENBOROUGH, in Clay v. Wood, 5 Esp. R. 44.

The opinion of the court was delivered by

REDFIELD, J. The general principles of law, applicable to the subject of actions for negligence, are well settled, no doubt, and familiar to the profession. They are, perhaps, sufficiently well expressed by Ld. ELLENBOROUGH, Ch. J., in Butterfield v. Forrester, 11 East 60: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action,—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it, on the part of the plaintiff." This is substantially the formula, which, since that time, has been followed, in charging juries in road cases; and, as a general rule, it is unobjectionable.

But in its application to the multiplicity of cases which occur, and the almost endless variety of incidents attending injuries of this character, it is not uncommon, that perplexing doubts will spring up, which this general formula is wholly insufficient to solve. Hence, this case has been somewhat questioned, perhaps it may be said, criticised certainly, in the later cases, both English and American. See Marriott v. Stanley, 39 E. C. L. 911, 913, n. *a.* But the remarks of the learned judge, as applicable to the case before *him, (and *222 we have, perhaps, no right to give them any other application,) are most unquestionably sound. The conduct of both the parties, in that case, was certainly very singular, and the case hardly a precedent for any other. But the principle stated by the learned judge is of universal application to similar cases. In order to sustain the action on the case for negligence of the defendant, it must appear, that the injury did not occur from any want of ordinary care on the part of the plaintiff, either in whole, or in part. In other words, if ordinary care on the part of the plaintiff would have enabled him to escape the consequences of the defendant's negligence, he has no ground of complaint. He may be said, in such a case, to have been himself the cause of any injury, which he may have sustained under such circumstances. Hence we notice, in the trial of this class of cases by the English judges, at *nisi prius*, the question is stated in that form, and the jury are directed first to say, whether the injury occurred from the misconduct of the plaintiff. If so, the defendant has a verdict, of course. If not, the jury are, where any such doubt arises, required to say, whether the injury occurred from inevitable accident, or the negligence or misconduct of the defendant. Cotterill et ux. v. Starkey, 8 C. & P. 691, [34 E. C. L. 965.] And the rule holds, that the plaintiff cannot recover, if his want of ordinary care in part contributed to produce or to enhance the injury. Marriott v. Stanley, above cited. The English books are full of cases to this point. So, too, where the proof leaves the case merely doubtful, whether the injury is fairly attributable to the defendant's wrong or to that of the plaintiff, the case is not made out.

The case of Bridge v. Grand Junction Railway Co., 3 M. & W. 244, seems to us not to have essentially qualified the rule laid down by Ld. ELLENBOROUGH in Butterfield v. Forrester. It is, indeed, in this case expressly decided, that a plea, alleging that the injury was the joint result of carelessness in the agents of both railways, in managing each of the trains which came in collision, is no bar to the action. Lord ABINGER, it is to be observed, assigns no reason, why he considers the plea bad, in substance. So, too, the other barons assign no reasons, except PARKE, B., who does say, "That unless he (the plaintiff) might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is *entitled to recover." In Davies v. *223 Mann, 10 M. & W. 546, the same court expressly decide, that the fact, that the plaintiff was somewhat in fault, is not sufficient to preclude a recovery on his part, and reiterates the same declaration by PARKE,

B., that "The negligence, which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence."

These cases seem to me correctly decided; but the language of PARKE, B., may be, perhaps, liable to some degree of criticism. I should hesitate to say, that if it appeared that the want of ordinary care on the part of the plaintiff, at the very time of the injury, contributed either to produce or to enhance the injury, he could recover; because it seems to me, that is equivalent to saying, that the plaintiff, by the exercise of ordinary care at the time, could have escaped the injury. The defect, in substance, in the plea in Bridge v. Grand Junction Railway Co., seems to be, that there was no allegation of any misconduct on the part of the plaintiff or his agents; for *non constat*, that the engineers and conductors of the train, on which the plaintiff was conveyed, were so situated in regard to the plaintiff, that he was to be affected by their misconduct. No doubt, if the collision occurred altogether through the misconduct of the conductors of the train, upon which the plaintiff was conveyed, the defendants are excused, although they might have, at the time, been guilty of some degree of negligence, which did not contribute to the injury. But I am not prepared to say, that in the ordinary case of a collision, on a railway, by the misconduct of the agents and servants of both roads, the passengers are compelled to resort to that company, upon whose railway they are conveyed. But one would not be ready to say, confidently, such is not the rule of law, without more consideration than I have been able to give the subject. But we can readily suppose cases, where no such rule could possibly obtain, and, for aught appearing in the report of the case, that was such a case. So that, it seems to me, the words of PARKE, B., are altogether beyond the scope of the case, and, as I think, too general and require qualification.

But the case of Davies v. Mann seems to me to merit a different consideration from that of Bridge v. Grand Junction Railway Co. In that case the beast, which was run over by the defendant's team,
*224 *was, of course, incapable of exercising care or prudence. The only question, which could be made in the case, is in regard to negligence on the part of the plaintiff,—whether it was ordinarily safe in him to suffer the animal, a donkey, to be in the road fettered. Lord ABINGER says, It does not appear but "the ass was lawfully in the highway,"—and if it did "it would make no difference, for, as the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." This brings this case within the principle of those cases, which have been decided, in regard to setting spring guns, sharp knives, &c., on one's own grounds, for the protection of game, where persons, having no reason to suspect such weapons were so set, have, by trespassing on such grounds, been seriously injured, and have, notwithstanding their own misconduct, been suffered to recover damages of the owner of the gounds,—for the reason, perhaps, that such acts were esteemed gross negligence in the land owners.

And this seems to us to be carrying the rule farther, than is necessary to entitle the plaintiff to retain his verdict in the present action. Here the jury have found, that the plaintiff was properly suffered by his parents to attend school at the age and in the manner he did, and that the injury happened through the ordinary neglect of the defendant; or, if not properly suffered to go to school, then that the defendant was guilty of gross neglect; for the Judge put the case in the alternative to the jury, and they have found a general verdict for the plaintiff. And we are satisfied, that although a child, or idiot, or lunatic, may, to some extent, have escaped into the highway through the fault or negligence of his keeper, and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress. If one know, that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect, in regard to one whom the defendant suposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger. Boss v. Litton, 5 C. & P. 407, [24 E. C. L. 628.]

The only remaining inquiry is, whether a plaintiff, of the tender age of this plaintiff, is bound to the same rule of care and diligence *on his part, in avoiding or *225 escaping the consequence of the neglect of others, which is required of persons of full age and capacity, in order to maintain his action for redress? In Lynch v. Nurdin, 1 Ad. & E., N. S., 29, [41 E. C. L. 422,] the question came directly under review before the Queen's Bench, and was very learnedly discussed and fully considered, and that court very fully determined, that no such rule of diligence can be applied to an infant plaintiff of very tender years. Lord DENMAN, Ch. J., after citing the opinion of Lord ELLENBOROUGH in Butterfield v. Forrester, says, "Ordinary care must mean that degree of care, which may reasonably be expected of a person in the plaintiff's situation, and this would evidently be very small indeed in so young a child." The whole case goes upon the ground, that all, which is to be required of the plaintiff, is care and prudence equal to his capacity. We see no reason, whatever, to doubt the perfect soundness of the decision. Indeed, any other rule would be wholly impracticable, and must ultimately be abandoned by courts, because juries could not be made to act upon any such artificial and arbitrary rules of determination.

What is reasonable skill, proper care and diligence, &c., can only be determined, as matter of fact, by the jury. It is impossible to establish any general rule upon so indefinite a subject; and it is impossible to make juries, or merely practical men any where, determine these matters except upon the circumstances of each particular case. It is true, no doubt, that the defendant, in

such cases, is to be allowed a favorable construction of his own conduct, with reference to what he had reason to expect of the other party, at the time. One might possibly injure a deaf or blind man, without fault, through ignorance of his infirmity, expecting him to conduct differently from what he did. But in the case of a child four years old, there could be no doubt, the defendant was bound to the utmost circumspection, and to see to it, that he did not allow his team to acquire such impetus, after he saw the child, that he could not check them, or avoid injury to the child.

We have not felt bound to go into an extended review of the case of Hartfield v. Roper, 21 Wend. 615; for the facts in that case and the finding of the jury in this case have made so wide a difference in the two cases, that one is no guide to the de-
*226 termination of the *other. The case of Hartfield v. Roper is, so far as it has any application to the present case, altogether at variance with that of Lynch v. Nurdin, and far less sound in its principles, and infinitely less satisfactory to the instinctive sense of reason and justice.

Judgment affirmed.

NOTE.

NEGLIGENCE—INJURIES TO INFANTS.—Negligence cannot be predicated of the act of a creature devoid of reason, and governed wholly by its instincts, and there is no presumption of law that an infant of six years is capable of even that slight degree of care and prudence, the absence of which in the adult would be the grossest negligence. Mackey v. City of Vicksburg, (Miss.) 2 South. Rep. 178. The rule is that in an action for an injury, founded upon negligence, contributory personal negligence cannot be attributed to a child of very tender years, although the injury would not have happened without his concurring act, and although that act, if committed by an adult, would be a negligent one. Kunz v. City of Troy, (N. Y.) 10 N. E. Rep. 442.

Where a child, six years old, while crossing a street in front of an advancing team, stooped to pick up a bundle after seeing the team, and after she had heard a person cry to the driver to stop, it was held that the question as to whether the child was negligent should go to the jury. Mattey v. Machine Co., (Mass.) 4 N. E. Rep. 575. Where a child of tender years gets upon a railroad track, the employes of the company have no right to act upon the presumption that it will leave the track in time to avoid an approaching train. Railroad Co. v. Pitzer, (Ind.) 10 N. E. Rep. 70. And it was held that although a child injured while playing upon the turn-table of a railroad company had sufficient intelligence to know that it was wrong to trespass upon the property of the company, he could not be said to have been guilty of contributory negligence, if he did not know it was dangerous or unsafe to play upon the turn-table. Railway Co. v. Dunden, (Kan.) 14 Pac. Rep. 501. But where a boy of average intelligence, about ten and one-half years old, who had been told by his father not to play upon a certain railway turn-table, who knew that it was dangerous to do so, and that the railroad company had forbidden children to play on the turn-table, nevertheless engaged, with other boys, in swinging upon it while in motion, and was injured, it was held that he was guilty of contributory negligence, although he might not have understood the full extent of the danger. Twist v. Railroad Co., (Minn.) 39 N. W. Rep. 402. So a boy of 11 years is guilty of negligence, who goes upon a railroad track to play. Masser v. Railway Co., (Iowa,) 27 N. W. Rep. 776. Likewise a boy of 12 years, who steals a ride upon a freight train. Ecliff v. Railway Co., (Mich.) 31 N. W. Rep. 180.

Upon the question as to whether the negligence of the parent or person standing *in loco parentis* will be imputed to the infant, so as to bar a recovery by him for injuries caused by the negligence of another, the authorities are in conflict. In *Minnesota*, the supreme court holds that the negligence of the parent is so imputable. Fitzgerald v. Railway Co., 13 N. W. Rep. 168. In *New York*, the court holds that parents and guardians are required to use reasonable care to protect infants in their charge, and any lack of such care will be imputed to the child. Kunz v. City of Troy, 10 N. E. Rep. 442. The duty of protection which a father owes to his minor child is the more imperative in proportion to the indiscretion and helplessness of the child. Iron Co. v. Brawley, (Ala.) 3 South. Rep. 555. It is held to be negligence for a father to permit a child about seven years old to go on the track of a railroad to get coal at a place where trains are constantly passing. Id. But although a parent may be guilty of contributory negligence who allows a child of very tender years to be about railroad trains or upon railroad tracks, evidence that such a child was seen upon the track, and that it was seen by its father going towards the track, is not sufficient to take the question of contributory negligence from the jury. Johnson v. Railway Co., (Wis.) 14 N. W. Rep. 181. Where a child about 15 months old went upon a railroad track and was injured, it was held that the question as to whether the parents were negligent in not keeping the child upon their premises, and in suffering it to wander away therefrom, unwatched and unattended, was for the jury. Payne v. Railroad Co., (Iowa,) 31 N. W. Rep. 886. Where a mother set a cup of bread and milk before a child 16 months old, and went into an adjoining room, and in her absence the child wandered out of the house upon a railroad track and was injured, the question as to whether the mother was negligent was for the jury. Reilly v. Railroad Co., (Mo.) 7 S. W. Rep. 407. See Hoppe v. Railway Co., (Wis.) 21 N. W. Rep. 227. It is not negligence, as a matter of law, to permit a boy about five years old to go upon a public pier to meet his father, Ahern v. Steele, 1 N. Y. Supp. 259; nor to permit a child of four and one-half years to play upon the sidewalk with her brother six years of age, in a thickly populated portion of a city, Birkett v. Ice Co., (N. Y.) 18 N. E. Rep. 108; nor to permit a child four years old to go upon the streets in charge of his sister, eleven years old, Collins v. Railroad Co., (Mass.) 7 N. E. Rep. 856; nor to send a child a year and ten months old out upon the street for air and exercise in charge of his brother eight years old, Bliss v. Inhabitants of South Hadley, (Mass.) 13 N. E. Rep. 352. It is not negligence *per se* to permit children to play in the street. Kunz v. City of Troy, (N. Y.) 10 N. E. Rep. 442. Permission to a child three years old to play in the street, accompanied by another child several years older, is not such negligence as will prevent recovery for an injury. Stafford v. Rubens, (Ill.) 3 N. E. Rep. 568. It is not negligence, as a matter of law, for a mother to leave her child of four years on the door step of her house, in a city, in charge of its brother of thirteen years, while she goes out to purchase family supplies. Dohl v. Railway Co., (Wis.) 22 N. W. Rep. 755. Where a parent permitted his son of eleven years to drive a team at night, accompanied by a younger brother of nine years, and the latter was killed through the upsetting of the wagon at a place where there was an excavation in the road, it was held to be a question for the jury whether the father was negligent in permitting the younger son to go with his brother. Parish v. Town of Eden, (Wis.) Id. 399.

But in *Nebraska*, it is held that, when the infant himself is the plaintiff, the negligence of the parent or guardian is not to be imputed to him. Huff v. Ames, 19 N. W. Rep. 623. It is so held in *Pennsylvania*. Railway Co. v. Schuster, 6 Atl. Rep. 269. Where an irresponsible child is exposed to peril, without an attendant, by the negligence of the parent or guardian, the question of contributory negligence is not involved in an action for an injury. Bisallion v. Blood, (N. H.) 15 Atl. Rep. 147.

JEREMIAH C. POWERS AND ARTEMAS C. POWERS v. MARTIN LEACH, JR.

(*Rutland*, Jan. Term, 1850.)

To entitle the plaintiff, in an action of trespass *quare clausum fregit*, to recover full costs, under the statute of this state, when the costs exceed the damages, the plaintiff's right of title, or right of possession, must be brought in question upon the trial.

But if, from the permanent nature of the erections made by the plaintiff upon the land, it is obvious, that he committed the acts, which proved to have been a trespass upon the plaintiff's right of possession, under a claim of right of title, and the plaintiff, upon trial, prove his own title and possession, the court will intend, that the defendant required the plaintiff to prove his case upon all points,—possession, as well as fact of trespass,—and will allow the plaintiff his full costs. It makes no difference, in this respect, whether the defendant require the plaintiff to prove his own title and possession, or set up a counter claim of title, or right of possession, in himself.

Quære, Whether the attempt, on the part of the defendant, to show license from the plaintiff to do the acts complained of, is to be regarded as bringing in question the plaintiff's right of possession. This, per REDFIELD, J., must depend upon the question, whether the trespass complainted of was an unequivocal act of possession on the part of the defendant.

Trespass *quare clausum fregit*. Pleas, the general issue, and license and the plea of license was traversed. Trial by jury, September Term, 1849,—HALL, J., presiding. On trial the plaintiffs proved their title to the premises described in the declaration, and gave proof of possession under that title. It appeared, that the defendant had entered upon a portion of the land and had erected a stone wall, inclosing part of the land, and had cut three apple trees, &c.,—which were the trespasses complained
*227 *of. It also appeared, that the defendant, subsequently to the erecting of the wall, &c., and previous to the commencement of this suit, claimed title to the land inclosed, and insisted, that the wall was upon the true boundary line between his land and that of the plaintiffs. The defendant introduced no testimony controverting the plaintiffs' evidence of title, but gave evidence, which he insisted tended to show, that he had license from the plaintiffs to erect the wall; and the defendant requested the court to charge the jury, that the plaintiffs could recover damages only for the original trespass in entering and erecting the wall,—he having had the adverse possession, since that time, of the portion enclosed. But the court instructed the jury, that, if the license was not proved, the plaintiffs were entitled to recover damages for the original trespass, and such farther sum, as would be required to remove the wall from the plaintiffs' land. The jury returned a verdict for the plaintiffs, for three dollars and eighty seven cents damages. The defendant then insisted, that the plaintiffs were entitled to recover no more costs than damages;—but the court decided, that the plaintiffs were entitled to recover full costs. Exceptions by defendant.

S. H. Hodges and *S. Foot* for defendant.

The language of the Rev. St.,—chap. 106, sec. 22,—restricts the plaintiffs from recovering more costs than damages, unless their title to the premises, or right of possession, is affected by the result. One of these must come in question; and by this we understand, it must be brought in jeopardy,—not merely made the subject of incidental inquiry. Forsaith v. Clogston, 3 N. H. 401. Bishop v. Seeley, 18 Conn. 389. The plea of license does not relieve the case from the operation of the statute. It sets up no adverse claim of right, but mere matter of excuse,—and in fact admits title in the plaintiffs. Chandler v. Duane, 10 Wend. 563. Otis v. Hall, 3 Johns. 450. Ex parte Coburn, 1 Cow. 568. Pugh v. Roberts, 3 M. & W. 458. Tidd's Pr. 966. Peddell v. Kiddle, 7 T. R. 659. Purnell v. Young, 3 M. & W. 288. Thomas v. Davies, 8 A. & E. 598, [35 E. C. L. 749.] The evidence, that the defendant had claimed title to the premises, was inadmissible. Nor is it sufficient, to show that the title *had previously *228
been in controversy; it must have been brought in question in the action.

M. G. Everts for plaintiffs.

The case shows, that the trespasses proved were committed upon land inclosed by the defendant, and held by him adversely, and that he had held exclusive possession of the *locus in quo* from the time the trespasses were committed, claiming title to the same. This put the title in question. The plaintiffs could sustain no action against the defendant, without showing title, or a rightful possession, at the time the trespasses were committed. The defendant could sustain this action against all the world, except the legal owner of the land; his acts were acts of possession. Sawyer v. Newland, 9 Vt. 383. Doolittle v. Linsley, 2 Aik. 155. The plaintiffs were in law and in fact compelled to show title, and did actually show title and possession, and neither of these facts was admitted on trial. The defendant, on trial, claimed and received the benefit of his adverse possession, in avoiding all the acts of trespass except the first. This he did, by showing himself in possession, claiming title,—by putting the right of title and possession in issue. If the general issue be pleaded with a justification, the plaintiff must show title. 9 Vt. 193. A plea of license must be considered in reference to the act complained of; the defendant was in possession, and if he can prevail by his plea, it must be by virtue of his right of possession.

The opinion of the court was delivered by

REDFIELD, J. The only question in this case is, whether the plaintiffs are entitled to full costs, irrespective of the damages. This is claimed upon the ground, that the "right of title or possession of the land" was brought "in question;" and that is the question to be determined. We suppose it may be fairly said, that the right of title, or possession, is "concerned," that is, involved, in every case of trespass *quare clausum fregit*. The action could not properly be denominated "trespass upon the freehold," if no realty were "concerned." But it is obvious, that the right of title, or possession, is not properly "in question," in every case. The case *might go by *229
default; and then no right whatever

would be brought in question: or the case might be disputed, upon the point of the defendant having done any act, which amounted to trespass,—or whether any trespass had been committed. and if so, by whom. If the case turned upon these, or similar inquiries, then the legislature intended, that, to the extent of twenty dollars. they should be tried before justices, the same as other mere personal controversies, where no matter of the realty was concerned. But if the right of title, or the right of possession. of the land was to be brought in question in the trial of the action. it was the plaintiff's right to bring the action at once to the county court. It is true. the plaintiff could not know certainly in advance, how this would be; but he could well enough conjecture. If the amount of the injury were insignificant, and it was not done under a claim of right, no suit should be brought. If done under a claim of permanent right, the suit should be brought before the tribunal having the general jurisdiction, in such cases, to determine the right; and if the action were contested upon these grounds, and the plaintiff prevail, he will have full costs. If not contested at all, or merely in regard to the fact of the trespass, as the statute stands, we do not see, but that the plaintiff must take only such costs, as will be equal to his damages.

But in the present case it is very obvious, that, from the permanent nature of the erections made by the defendant, he did the acts, which proved to have been a trespass upon the plaintiffs' right of possession, under a claim of right of title. And in the trial of the case the plaintiffs were required to show both title and possession, or did show this; and we think it is not to be presumed, that the defendant did not require them to make out their full case, upon all points—possession, as well as the fact of trespass. And if so, we think their right of possession was as effectually brought "in question," as if the defendant had attempted to prove freehold in himself, or a lease from the plaintiffs for life, or years. The only inquiry is, did the defendant bring in question the plaintiffs' right of possession of the land, that is, the right of possession, at the time the trespass was committed, as against the defendant. If the defendant would avoid effectually the contingency of liability to full costs, in case the plaintiffs do recover, he must make no ques-

*230 tion in *regard to the plaintiffs' right, either of title, or possession. If the plaintiffs are required, in the trial of the action, to adduce proof, either of their title, or possession, it is presumed, they will desire to come so prepared, as to prevent all liability to any contingency of failure, which must defeat their recovery in future actions, and virtually transfer the title, and right of possession, to the defendant. This makes the trial upon these points important, and in many instances expensive; and the statute provides, in terms, and it was the intention of the legislature, we believe, that the plaintiff should recover all reasonable costs, incurred in adducing proof in regard to his title, or right of possession. They have therefore provided, that in all actions of trespass *quare clausum fregit*, when the "right of title, or possession," is brought, or comes, "in question," the plaintiff may recover full costs, if he prevail. This, we think, may be done by putting the plaintiff upon proof of his own title and right of possession, or by attempting to show a counter title, or right of possession in the defendant. The former was certainly done in this case.

How far the attempt to show license under the plaintiffs to do the acts complained of is to be regarded as bringing in question the right of possession, it is perhaps not necessary to determine. I should be inclined, at present, to believe, that it must depend upon the nature of the act complained of, whether an attempt, on trial, to show license from the plaintiffs would fairly be said to bring "in question" the plaintiffs' right of possession. If the act complained of as a trespass were an unequivocal act of possession, then I could hardly conceive, how an attempt to show license from the plaintiffs to do the act could be said not to bring in question the right of possession in the plaintiff at the time. And if the act were merely passing over the land, or doing any other thing, with no claim of right to possession, either for a longer or shorter period, it is not easy, perhaps, to see, how the plaintiffs' right of possession is brought in question. But I am aware, that there is a view of the case, which makes any act, under claim of right, even by license from the plaintiffs, sufficient to carry full costs.

Judgment affirmed.

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*JESSE PAUL v. FRANCIS SLASON, *231
WILLIAM PELKEY AND CHARLES H. SLASON.

(*Rutland*, Jan. Term, 1850.)

An officer cannot be held liable as a trespasser *ab initio*, for using personal property attached by him, unless the property have been injured, or have been used by him for his own benefit, or for the benefit of some one other than the debtor.

Where an officer attached a horse, wagon and harness, and immediately put them to use in removing other personal property of the debtor, attached by him at the same time, and it appeared, that they were not thereby injured, it was held, that for such use he was not liable as a trespasser *ab initio*.[1]

And where it appeared, that the officer, on the next day subsequent to the attachment, was seen driving the horse and wagon in the highway, and it did not appear, for what purpose he was using them, it was held, that the jury might infer, from the time and circumstances, that he was removing them for the purpose of securing them in a convenient place for keeping them, while subject to the attachment.

Where an invasion of a right is established, though no actual damage be shown, nominal damages will be given. This applies to cases, where the unlawful act might have an effect upon the right of the party, and be evidence in favor of the wrong doer, if the right ever came in question. So nominal damages will be given, when one wantonly invades another's rights for the purpose of injury, though no actual damage be done. But no damages will be given for a trespass to personal property, when no unlawful intent, or dis-

[1] As to when an officer becomes liable as a trespasser *ab initio*, see Heald v. Sargeant, 15 Vt. 506.

turbance of a right, or possession, is shown, and when the property sustains no injury.

An officer, who had attached certain hay and grain, made use of a pitchfork, belonging to the debtor, in removing the same, and, when he had completed the removal, left it where he found it, and it was received by the debtor, and was in no way injured. *Held*, that the officer was not liable in trespass for such use of the pitchfork.

Application of the maxim, *de minimis lex non curat*.

The original record of a judgment rendered by the supreme court is competent evidence in the county court, for the purpose of proving such judgment.

The county court have no power, upon a trial, to permit a sheriff to amend his return upon an execution, which has been returned by him to the clerk's office, for the purpose of rendering such execution competent evidence in the case.

But the judgment of the county court will not be reversed, for such error, if it appear, that the result of the trial was in no way affected by it.

*232 *An officer cannot be made a trespasser, for attaching property upon mesne process, by reason of any irregularity in the proceedings of another officer in selling the property upon execution.

Trespass for taking two cords of wood, two baskets, two pitchforks, two horses, one harness, and one wagon. Plea, the general issue, with notice, that the defendant Charles H. Slason attached the property by virtue of a writ, which he was legally deputised to serve, in favor of one Langdon against the plaintiff, and that the other defendants aided him in so doing, at his request. Trial by jury, September Term, 1848,—HALL, J., presiding. On trial it appeared, that on the twenty sixth day of September, 1844, the defendant Francis Slason commenced a suit in the name of Benjamin F. Langdon against the plaintiff, and that the defendant Charles H. Slason, who was legally deputized to serve the writ, which was returnable to the county court, attached the property in question, except one pitchfork, and that the defendant Pelkey assisted in removing the property. It also appeared, that on the same day Charles H. Slason and Pelkey made use of the horse, wagon and harness, part of the property attached, in removing grain and other property, which was attached at the same time, on the same writ, and upon the same farm, and continued to use them for this purpose through the day; and that on the next day Charles H. Slason was seen driving the same horse and wagon, with the harness, in the highway in the vicinity,—but upon what business did not appear. It also appeared, that the defendants took a pitchfork belonging to the plaintiff, and used it during the day, on which the attachment was made, in removing the grain &c. The defendants offered in evidence the files and record of the supreme court, in the suit in favor of Langdon against the plaintiff, in which the property in question was attached, for the purpose of proving, that judgment was rendered therein in favor of Langdon;—to which evidence the plaintiff objected; but it was admitted by the court. The defendants then offered in evidence an execution, purporting to have been issued upon the judgment in the supreme court above mentioned, dated February 21, 1848;—to the admission of which the plaintiff objected, insisting, that an exemplified copy of the judgment should be produced, before the execution could be *given in evi- *233 dence, and that the execution, and the issuing thereof, could be shown only by a certified copy of the record of the judgment; —but the objection was overruled by the court.

The defendants then offered in evidence the return of one Edgerton, as sheriff, upon the said execution, to show that the wagon in question was sold thereon and the proceeds applied in payment of the debt. To the admission of this evidence the plaintiff objected, upon the ground, that from the return it appeared, that the property was sold two days after the sheriff received the execution for service, as shown by his indorsement upon it. The counsel for the defendants then suggested, that there was a mistake in the return, in stating the day of the sale, and moved the court, that the sheriff have leave to amend his return in that particular. To this the plaintiff objected; but the court permitted the sheriff to amend his return, so as to state the day of sale to have been one month later than stated originally in the return. The defendants then offered in evidence the return, as amended; to which the plaintiff objected,—but the objection was overruled by the court. The defendants then offered in evidence the return of the sheriff upon the original writ in favor of Langdon against the plaintiff, showing an appraisal of the horse and some other property attached, and that the plaintiff had furnished security to the sheriff and received possession of the property. It appeared, that the money had not been paid on the security, and no application of the property had ever been made upon the execution by the sheriff, or by any other person. The defendants also proved, that one McCune had executed a receipt to the sheriff for a portion of the property attached, and that the property, except the wagon which was sold upon the execution, went into the possession of the plaintiff. The plaintiff requested the court to charge the jury,—1. That the defendants could not justify the taking of the property in question under the writ in favor of Langdon, if the property attached, or any portion thereof, were put to use by the officer who had attached it. 2. That property attached must be considered as in the custody of the law, and the attaching officer has no authority to put it to use; and if, in this case, they found, that, upon the property being attached by Charles H. Slason, he put the horse, wagon and harness, to use, and continued to use them, during the greater part *of the day, *234 in removing the other property attached, he rendered himself a trespasser *ab initio*, and could not justify taking the property, or any part thereof, under the attachment. 3. That if the officer could justify the taking of the property under the attachment, if he so used any part of it, he could not justify the taking of the horse, wagon and harness so used; but, as to the property so used, the authority was rendered void by the abuse. 4. That the use of

the horse, wagon and harness, on the next day after the attachment, was unjustifiable, and rendered the officer a trespasser *ab initio*. 5. That the application of the plaintiff to have the property appraised, under the statute, in order to regain the possession of it, and giving security to the sheriff, was not a waiver of the right of action against the defendant for the trespass; but that the plaintiff was entitled to recover the amount thus secured by him. 6. That if a portion of the property were delivered to the receiptor, the plaintiff was entitled to recover its value, unless it had come to his possession. 7. That if the jury found, that the defendants took the plaintiff's pitchfork and used it during the day, without right, he was entitled to recover its value, unless it were returned,—and that, if returned, he was entitled to recover nominal damages. 8. That the sale of the wagon and the application of its proceeds upon the execution in favor of Langdon could have no effect upon the amount of damages in this suit. But the court charged the jury, that, from the testimony, the attachment and disposition of the property attached was a justification for the defendants, unless they had been guilty of such an abuse of the property, as to make them trespassers *ab initio;*—that whether the defendants were trespassers *ab initio* depended upon the character of the use of the property by them, after the attachment;—that the use of the horse, wagon and harness, in removing and securing other property of the plaintiff, attached the same day, on the same writ and on the same farm with the horse, wagon and harness,—the use being for a part of the day only,—would not necessarily be such an abuse of the officer's authority, as to make the defendants trespassers *ab initio;* but that if they found, either that such use of the property by the defendant was wanton, and with a design to injure the plaintiff, or that the property was injured by it so as materially to diminish its value, the defendants would be trespassers
*235 *in the original taking and be liable in this action;—that whether the driving of the horse and wagon by the officer, the next day after the attachment, was an abuse of his authority depended upon the purpose and business, for which they were driven; that if the jury found, that the officer was using the horse and wagon for other purposes than that of removing and securing them in a convenient place for keeping, under the attachment, the defendants would be liable; but if for such a purpose, they would not be liable. In regard to damages, the court instructed the jury, that, the property having either been sold and applied on the execution, or delivered to the plaintiff on security furnished by him, the plaintiff would not be entitled to recover the full value of it; but that the measure of damages would be the amount, which the property had been diminished in value by the defendants' abuse of it. In regard to the pitchfork the court charged the jury, that if they believed, from the evidence, that the defendants took and carried it away, they should give the plaintiff its value; that if it was used and left upon the premises, so that the defendant received it again, and it was injured by the use, the plaintiff would be entitled to recover the amount of the injury; but that if they found, that it was merely used for a portion of a day in removing the plaintiff's property, there attached, and was left where it was found, so that the plaintiff had it again, and that it was not injured by the use, they were not bound to give the plaintiff damages for such use. The jury returned a verdict for the defendants. Exceptions by plaintiff.

M. G. Evarts and *Thrall & Smith*, for plaintiff, cited Lamb v. Day, 8 Vt. 407; 3 Stark. Ev. 1108; 1 Chit. Pl. 171; 5 Bac. Abr. 161; Strong v. Hobbs, 20 Vt. 185; Hart v. Hyde, 5 Vt. 328; Orvis v. Isle La Mott, 12 Vt. 195; Fletcher v. Pratt, 4 Vt. 182; and Brainard v. Burton, 5 Vt. 97.

E. Edgerton, for defendants, cited 2 Greenl. Ev. § 253; Ib. 283, § 276, n. 5; 1 Stark. Ev. 151, § 33; Mickles et al. v. Haskin, 11 Wend. 125; Lamb v. Day, 8 Vt. 407.

*The opinion of the court was delivered by *236

POLAND, J. The first question, arising in this case, is in relation to the charge of the county court to the jury as to the use of the horse, wagon and harness by the defendants, in removing the other property of the plaintiff, which was attached at the same time. The jury were charged, that if they were only used in removing the other property, and were not injured or lessened in value thereby, such use would not make the defendants trespassers *ab initio*.

It was an early doctrine of the common law, that when a party was guilty of an abuse of authority given by the law, he became a trespasser *ab initio*, and lost the protection of the authority, under which he originally acted,—as, if beasts, taken *damage feasant*, or distrained for rent, were killed, or put to work, by the party taking them, he might be sued in trespass as for an original wrongful taking. This doctrine has fully obtained in this country, and, was acted upon by this court in the case of Lamb v. Day et al., 8 Vt. 407, where it was held, that the defendants, who had attached the plaintiff's mare (one being creditor and the other officer) and worked her for several weeks in running a line of stages, without the plaintiff's consent, became trespassers *ab initio*. The doctrine has, to our knowledge, never been extended to any case, except where there has been a clear, substantial violation of the plaintiff's rights, and of such a character as to show a wanton disregard of duty on the part of the defendants. Were the acts of the defendants, in using the horse, wagon and harness under the circumstances and for the purpose mentioned in this case, such an abuse of the property and of the authority under which it was taken, as ought to deprive them of the benefit of its protection?

It was the duty of the officer to remove the property, in order to make his attachment effectual, and the expense of such removal must be borne by the debtor; and instead of the plaintiff being injured by the

use of the property, he was really benefited by it. The doctrine, for which the plaintiff contends, goes the extent of saying, that any use of the property makes the officer a trespasser;—so that if an officer attach a horse and wagon, and use the horse for the purpose of drawing away the wagon from the possession of the debtor, he becomes a tort feasor. We are wholly unable to satisfy ourselves, that the law has ever gone to so unreasonable an *237 extent, or *has ever been applied to any case, except those where the property has been injured, or has been used by the officer for his own benefit, or for the benefit of some one other than the debtor. This was the rule laid down by the county court, and we are fully satisfied of its correctness.

2. The next question arises upon the charge to the jury in relation to the driving of the horse and wagon by the officer on the next day after the attachment. The case states, that the officer was seen driving the horse and wagon in the highway, but upon what business did not appear. The jury were charged, that if they found, that the officer was using the horse and wagon for other purposes, than that of removing and securing them in a place for conveniently keeping them, while under the attachment, the defendants would be liable,—otherwise not.

The officer, no doubt, had the right to drive the horse and wagon for the purpose suggested in the charge; but the plaintiff claims, that the legal presumption should be, in the absence of express proof as to the object and purpose of driving the horse and wagon, that it was for an unlawful purpose. But in our opinion this would be contrary to the ordinary rule of legal presumption in relation to all persons, and especially persons acting under legal authority. *Omnia præsumuntur rite acta* is a maxim, which is always applied to the conduct of persons acting under the authority of law. Although there was no direct evidence as to the object and purpose of driving the horse and wagon, the jury might well infer the object from the time, circumstances and direction of the driving; and we think it was properly left to them to determine. We think, it was upon the plaintiff to show the act of the officer to be unlawful; and if he had it left to the jury to decide, even without any evidence to prove it, we do not see, that he has any ground of complaint.

3. Another question is also raised upon the charge to the jury in relation to the use of the pitchfork by the defendants. Under the charge the jury must have found, that the pitchfork was used by the defendants only in moving the plaintiff's property, that it was left where they found it, that the plaintiff received it again, and that it was in no way or manner injured. They were told by the court, that if they found all these facts proved, they were not obliged to give the plaintiff any damages for the fork.

It is true, that, by the theory of the *238 law, whenever an invasion of *a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrong doer. This last applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrong doer, if his right ever came in question. In these cases an action may be supported, though there be no actual damage done,—because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done; the law presumes damage, on account of the unlawful intent. But it is believed, that no case can be found, where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right, or possession, is shown, and when not only all probable, but all possible, damage is expressly disproved.

The English courts have recently gone far towards breaking up the whole system of giving verdicts, when no actual injury has been done, unless there be some right in question, which it was important to the plaintiff to establish. In the case of Williams v. Mostyn, 4 M. & W. 145, where case was brought for the voluntary escape of one Langford, taken on mesne process, and it was admitted, that the plaintiff had sustained no actual damage, or delay, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff for nominal damages. But, on motion, the court directed a nonsuit to be entered, saying that there had been no damage in fact or in law. So in a suit brought by the owner of a house against a lessee, for opening a door without leave, the premises not being in any way weakened, or injured, by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say, whether the plaintiff's reversionary interest had in point of fact been prejudiced. Young v. Spencer, 10 B. & C. 145, [21 E. C. L. 70.] Mr. Broome, in his recent work on Legal Maxims, lays down the law in the following language,—"Farther, there are some injuries of so small and little consideration in the law, that no action will lie for them; for instance, in respect to the payment *of tithes, the principle which *239 may be extracted from the cases appears to be, that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud, or intention to deprive the parson of his full right."

If any farther authority is deemed necessary, in support of the ruling of the county court on this point, we have only to refer to that ancient and well established maxim, —*de minimis non curat lex*,—which seems peculiarly applicable in this case, and would alone have been ample authority upon this part of the case; for we fully agree with Mr. Sedgwick, that the law should hold

out no inducement to useless or vindictive litigation. Sedgwick on Dam. 62. This disposes of all the questions raised upon the charge.

4. The remaining questions in the case arise upon the admission of the original files and record of the case Langdon v. Paul. The plaintiff objected to the introduction of the original record, and claimed, that the judgment could only be proved by an exemplified copy of the record. But we think the objection not well founded. If the clerk of the supreme court were willing to bring the original record into court, we think it might well be used. He probably could not be compelled to do so, and might have required the party to procure a copy of the same: but when the original record is brought into court, we think it would be very difficult to give any substantial reason, why it is not evidence of as high a character, as a copy of the same record would be. The practice of receiving original records as evidence has been universal, as we believe, in this state, and is often much more convenient than to procure copies. Nye et al. v. Kellam, 18 Vt. 594.

In relation to the amendment of the execution by the officer, it is very clear, that the county court had no power to permit any such amendment: but we cannot perceive, that the case was in any way affected by it. If the officer, who held the execution, was guilty of any irregularity in his proceedings in the sale of the wagon upon the execution, it could not have the effect to make these defendants trespassers, who took the property rightfully, and were in no way responsible for the act of the sheriff, who had the execution.

We find no error in the proceedings of the county court, and their judgment is affirmed.

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*240 *JOHN S. HALE v. AUGUSTUS H. BARROWS AND PHILIP EDGERTON.

(*Rutland*, Jan. Term, 1850.)

The owner of land, situated upon both sides of a river, conveyed, by deed with covenants of warranty, a part of the land, on the north side of the stream, upon which was situated a blacksmith's shop, with a certain privilege of drawing water, and immediately following the description of the land was this clause,—"also the privilege to remove said blacksmith shop works to the opposite bank of the river, below the grist mill, when he thinks proper." Subsequently, and after one claiming under the grantee had removed the blacksmith's shop to the place designated upon the south side of the stream, the grantor conveyed to another person the premises upon the south side, with this exception,—"excepting a blacksmith's shop, and such privileges of drawing water, as I have heretofore deeded to" the grantee in the former deed, naming him. *Held*, that those claiming under the grantee in the first deed had title in fee to the land, on the south side of the stream, occupied by the blacksmith's shop, and that their right was not affected by the removal of the shop and the discontinuance of the business at that place.

Ejectment for certain land in Brandon, described as situated upon the south side of a certain river. Plea, the general issue, and trial by jury, April Term, 1849,—HALL, J., presiding. On trial the plaintiff gave in evidence a deed from Salmon Farr to Thomas G. Farr and Daniel P. Fales, dated December 15, 1837, conveying certain premises upon the north side of the river mentioned in the declaration, described as being the premises upon which "the old blacksmith's shop formerly stood," with the privilege of drawing water sufficient to carry the former works in said blacksmith's shop, and also "the blacksmith's shop, or pocket furnace, standing on the south side of said river, below the grist mill;"—also deeds from Thomas G. Farr to Daniel P. Fales, and from Daniel P. Fales to the plaintiff, conveying the same premises by the same description,—the latter deed bearing date July 2, 1841. And the plaintiff gave evidence tending to prove, that Salmon Farr, and those claiming under him, including the plaintiff, had occupied a building, known as the trip hammer shop, or blacksmith's shop, standing on the premises in question, for more than twenty years previous to the commencement of this suit. The defendants then gave in evidence a deed from Ebenezer Childs to Daniel Rowley, dated December 25, 1809, conveying the *premises *241 upon the north side of the river, specified in the deed, above mentioned, from Salmon Farr to Thomas G. Farr and Daniel P. Fales, and described as including "the blacksmith's shop and works," and containing also this clause,—"and also the privlege to remove said blacksmith's shop works to the opposite bank of the river, below the grist mill, when he thinks proper;"—and also deeds from Rowley to Charles Johnson, from Johnson to Jesse Hinds, from Hinds to the above named Salmon Farr and John Dean, and from Dean to Salmon Farr, all conveying the same premises,—the latter deed bearing date May 19, 1817. The defendants also gave evidence tending to prove, that the building described as the blacksmith's shop &c. in the deeds introduced by the plaintiff, and occupied by Salmon Farr and his grantees, was the same with the blacksmith's shop mentioned in the deed from Childs to Rowley and the subsequent deeds; and that Salmon Farr, while he occupied it, claimed to hold it under the above deeds; and that it was destroyed and removed in 1841 and had not been replaced. The plaintiff then gave in evidence a deed from the said Ebenezer Childs to Stephen Avery, dated May 18, 1820, conveying the premises owned by Childs upon the south side of the river, but with this exception,—"excepting a blacksmith's shop and such privileges of drawing water, as I have heretofore deeded to Daniel Rowley, and now owned by Salmon Farr;"—also, several deeds, conveying the same premises, from Avery through several intermediate grantees, to the defendants. The defendants requested the court to charge the jury, that Rowley, and those holding under him, including the plaintiff, took, under the deeds above mentioned, only an easement, or privilege of having the blacksmith's shop stand on the premises, while it existed; and that whatever estate, or interest, they had in the land on the south side of the stream, by virtue of said deeds, terminated, when the blacksmith's shop was destroyed and removed; and that the plaintiff could not recover the demanded premises. But

the court instructed the jury, that, under the said deeds and the evidence in the case, the plaintiff was entitled to recover. Verdict for plaintiff. Exceptions by defendants.

*242 *S. H. Hodges and S. Foot for defendants.

The deed from Childs to Rowley amounted to nothing more than a license (whether irrevocable, or not, is immaterial) to occupy the premises, with the blacksmith's shop, while it stood; or, at most, to a conveyance of such interest in them, as was necessary for that purpose. Jackson v. Babcock, 4 Johns. 418. King v. Horndon, 4 M. & S. 565. Harrison v. Parker, 6 East 154. Worcester v. Green, 2 Pick. 425. Stockwell v. Hunter, 11 Met. 448. And see Co. Lit. 4. The word "premises," in the *habendum* and covenants, imports the interest previously conveyed; not the land. Smith v. Pollard, 19 Vt. 272. Sumner v. Williams, 8 Mass. 162. As to the operation of the deed from Childs to Avery;—the expression "now owned by Salmon Farr" must be taken together with the expression, "as I have heretofore deeded to Daniel Rowley," and applied exclusively to the words "such privileges of drawing water." It has no reference to the blacksmith's shop. If it had, by "blacksmith's shop" must be intended merely the building, not the land it stands on,—as that would best correspond with the actual interest of the parties. As a concession of one grantor, this was not admissible in evidence against us. Carpenter v. Hollister, 13 Vt. 552. Hines v. Soule, 14 Vt. 99. Neither could it bind the defendants by way of estoppel, for want of mutuality. Salmon Farr, who then owned the plaintiff's interest, was no party to the deed, nor in any way affected by it. Co. Lit. 277 *a*. Ib. 352. Ib. 363 *b*. 4 Com. Dig., Estoppel C. Doe d. Brune v. Martyn, 8 B. & C. 497, [15 E. C. L. 246.] Hudson v. Robinson, 4 M. & S. 475. Gaunt v. Wainman, 3 Bing. N. C. 69, [32 E. C. L. 42.] Worcester v. Green, 2 Pick. 425. Green v. Clark, 13 Vt. 158. Whether Farr had gained a title by possession was a question for the jury; and the court ought not to have decided it,—if, indeed, they undertook it. That his occupation could not give him a title, see 2 Phil. Ev. by Cow. & H. 365; Roe d. Pellatt v. Ferrars, 2 B. & P. 542; Atkins v. Bordman, 2 Met. 457; Luce v. Carley, 24 Wend. 451; Zeller's Lessee v. Eckert et al., 4 How. 289.

E. N Briggs and *C. L. Williams* for plaintiff.

The bill of exceptions and accompanying deeds show, that both parties derive their title from Ebenezer Childs; and the

*243 question *presented is, which has the better title from him. See Brooks v. Chaplin, 3 Vt. 281. The defendants derived no title whatever to the land in dispute from the deed from Childs to Avery. Allen v. Scott, 21 Pick. 25. The exception of the brick factory, in that case, was in nearly the same words with that of the blacksmith shop in the deed to Avery; and it was there held, that the exception extended both to the land, upon which the factory stood, and the water privileges appurtenant. A consideration of the deed from Childs to Rowley, and of the objects evidently intended to be conveyed, can lead to no other conclusion, than that he intended to deed a site for a shop upon the south side of the stream,—for it was the "works," which he might remove. The shop itself, a site for its works upon the opposite bank from where it then stood, and a privilege of water to carry its works, were prominent objects in the grant; and if the enjoyment of these by the grantee was intended to have been limited to the time, during which the building might stand, and the grantor supposed he reserved a right and expected to re-possess himself of the site and privilege, upon the destruction or decay of the building, such limitation and right could and would have been clearly expressed in the deed itself. The fact, that it was the "blacksmith shop works," which Rowley might remove, shows, that his right upon the south side was not dependent upon the existence, or even removal, of the building itself. In construing a deed, the usage of the parties under it is proper to be considered. See Livingston v. Ten Broeck, 16 Johns. 14-23.

The opinion of the court was delivered by

POLAND, J. This is an action of ejectment for a small piece of land in Brandon, upon the south side of a certain stream, upon which formerly stood a blacksmith's shop. In 1809 one Ebenezer Childs was the owner of the land upon both the north and south side of said stream, and on the twenty fifth day of December, 1809, he sold and conveyed a piece of land upon the north side of the stream, upon which was a blacksmith's shop and works, and also the right to draw water from his flume above to carry said works, to Daniel Rowley. In the deed to Rowley, and immediately following the description of the premises upon the north side of the stream, was the *following clause,—"Also the privilege to *244 remove said blacksmith shop works to the opposite bank of the river, below the grist mill, when he thinks proper." The plaintiff showed a regular chain of conveyances from Daniel Rowley, through various persons, to himself, of the premises described in the deed from Childs to Rowley. In May, 1820, Ebenezer Childs conveyed, upon the south side of the stream, to Stephen Avery; and immediately following the description of the premises conveyed is the following exception.—"Excepting a blacksmith's shop, and such privileges of drawing water, as I have heretofore deeded to Daniel Rowley, and now owned by Salmon Farr." The defendants show a regular line of conveyances from Stephen Avery to themselves, of the premises conveyed by Childs to Avery. It appears from the case, that at some time previous to the date of the deed from Childs to Avery, Salmon Farr, who then owned the premises deeded by Childs to Rowley, had removed the blacksmith shop to the south side of the stream, where it remained until 1841, when it was destroyed.

The present suit is brought to recover the piece of ground on the south side of the stream, where the shop formerly stood; and the whole question depends upon the construction of the above mentioned clause in

the deed from Childs to Rowley. The plaintiff contends, that, by a proper construction of that deed, Childs conveyed to Rowley a piece of land on the south side of the stream, upon which he might remove his blacksmith shop works, so that he became the owner thereof in fee simple. The defendants, on the other hand, insist, that the deed amounted to more than a mere license to Rowley, to remove his blacksmith shop upon the south side of the stream, and that, when he ceased to occupy it for that purpose, he had no further right.

The question is, of course, one of mere intent,—to be gathered from the language of the deed, the apparent object of the parties, which may, perhaps, be aided by their acts and conduct under it. From the peculiar phraseology of the deed we are inclined to believe, that it was not contemplated by the parties, that Rowley was to remove the very shop, which then stood upon the north side of the stream, unless he chose to do so; he was to remove, when he thought proper, —rather implying, that he might choose to occupy the old shop upon the north side of the stream for some time.

*245 *Again, the language of the deed, as it seems to us, gives some countenance to this idea. It does not speak simply of a removal of "the shop,"—as if they had reference to the one particular building,—but of "his works,"—as though they had reference rather to the business generally, and to any proper erections for its purposes. In short, we are satisfied, that the parties expected and intended, that Rowley might remove the old shop, or build a new one upon the south side, and he might build one of as permanent and durable a character, as he chose.

Under these circumstances it is hardly reasonable to believe, that the parties understood it to be a mere license, or permission, to Rowley, to occupy, Childs still remaining the owner of the land. Again, it seems to us, that if the intention of the parties had been to give a mere license for occupation, they would have introduced some words of limitation into the deed, that he should occupy so long as a particular building should stand, or so long as he should carry on the business of a blacksmith; but the deed contains no such words, but is unlimited as to time, or any other circumstance. This circumstance, taken in connection with the fact, that the deed is one conveying an estate in fee, in which this grant is found, can scarcely be reconciled with the idea, that the intent of the parties was for a mere license. Again, it seems to us, that the reservation in the subsequent deed from Childs to Avery favors the idea, that this was intended to be a fee; as the words of the reservation are such, as would naturally be used, if such were the fact;—and this, we suppose, may fairly be considered, in reference to this question, as an act of one of the parties to the conveyance, in relation to the same subject matter, —which evidence is always admissible to show intent.

Although it can hardly be said to be clear, from the deed, what the parties intended, we are all of opinion, that the most reasonable construction of the deed is, that the parties intended to convey the fee, instead of a mere license, or permission. The authorities cited by the counsel for the defendants are all cases, where, from the grants themselves, it was clear, that only a license was given; and the discussion in those cases is rather as to the effect of a license than upon the nature of the grant.

The judgment of the county court is therefore affirmed.

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*JOHN F. KNIGHT v. EPHRAIM BERRY. *246

(*Rutland*, Jan. Term, 1850.)

If the justice of the peace, before whom a writ is made returnable, be absent, at the return day, from the place set for trial, a regular continuance of the suit by another magistrate, pursuant to the statute, constitutes a sufficient entry of the action.

And if the office, at which the writ is made returnable, be closed, it is sufficient, if another magistrate go to the door, within two hours after the time specified for the trial, having the writ in his possession, and decide to continue the case, although he do not go within the office, and do not make an audible call of the suit and the parties, nor audibly declare the case continued, and do not make the entry of the continuance upon the writ at the door of the office, nor within the two hours.

Audita querela. The plaintiff alleged in his declaration, that the defendant Berry sued out a writ against him, made returnable before Martin G. Everts, a justice of the peace, at his office in Rutland, on the eighth day of June, 1846, at one o'clock in the afternoon, and that the said justice was not present at his office at any time on the return day of the writ, whereby the suit was discontinued; but that the plaintiff, on the twenty ninth day of June, 1846, procured the said justice to render a judgment against the complainant, and to issue execution thereon; and that the execution so issued was in the hands of a sheriff for service. Plea, the general issue, and trial by jury, April Term, 1848,—HALL, J., presiding. On trial it appeared, that a suit was commenced, in favor of Berry against the complainant, as alleged in the declaration, and that the justice, who signed the writ, was absent from his office during the entire day, on which the writ was made returnable, and that the office was locked. It farther appeared, that E. L. Ormsbee, a justice of the peace, having the writ in his possession, went to the door of the office, within two hours after the time specified in the writ for the trial, for the purpose of continuing the suit, and found the door locked, and that he said nothing there, but went into another office, in another building near, and there made an entry upon the writ, in due form, that the suit was continued to the twenty ninth day of June, 1846, at one o'clock in the afternoon,—but that this *entry *247 was made about fifteen minutes after the expiration of the two hours. It did not appear, that the complainant knew of this continuance at the time, or in any manner assented to it; but it did appear, that the entry upon the writ was made in the office of an attorney, who had been employed by the complainant to see whether a regular continuance of the suit was obtained, and who had notice, that such entry was made

at that time. Judgment was rendered against the complainant, in the original suit, by default on the twenty ninth day of June, 1846, and execution was issued. The court charged the jury, that if the justice of the peace, who undertook to make the continuance, went to the door of the office, where the writ was returnable, within two hours after the time specified in the writ for trial, for the purpose of continuing the suit, and did then decide to continue it, the suit was thereby legally continued, although the door of the office remained locked during the two hours, and although the case was not actually called, at the door, and although the entry of the continuance was not made upon the writ until after the expiration of the two hours, and then at another office. Verdict for defendant. Exceptions by plaintiff.

Thrall & Smith for plaintiff.

E. Edgerton for defendant.

The opinion of the court was delivered by

POLAND, J. The plaintiff in this *audita querela* insists, in the first place, that the action of Berry v. Knight was never properly entered, and that the writ should have been returned to the justice, who signed it, on or before the return day of the writ.

It would probably be sufficient to say, upon this point, that no such question appears, by the exceptions, to have been made upon the trial in the county court; but if made then, we think it would be entirely without legal foundation. The statute,—Rev. St., chap. 26, sec. 41,—provides what must be done, in order to make a valid entry of an action before a justice of the peace,—which is, first, that the justice, who signs the writ, shall be present, with *248 the writ, at the *place appointed for the trial, within two hours after the time set in the writ for trial, or, second, that the suit shall be continued by some other justice, as provided in section nineteen. If the latter requirement of that section were complied with, that was all that was necessary, to make an entry of the action.

The plaintiff also claims, that the cause was not properly continued by Justice Ormsbee, in the absence of Justice Everts, who signed the writ; and, upon the facts which must have been found by the jury, under the charge of the court, three objections are made to the regularity of the continuance of the suit Berry v. Knight,—1. That the justice only went to the door of the office, where the trial was appointed, and did not go within the office;—2. That the justice did not make a formal call of the suit and the parties, and did not audibly declare the suit continued;—and, 3. Because the entry of the continuance upon the writ was not made at the door of the office, where the trial was set, and not until after the two hours had expired.

In support of the first of these objections the plaintiff relies upon the case of Crawford v. Cheney, 12 Vt. 567;—and that case is, in many of its circumstances, like the present, and particularly in the fact, that the justice, who attempted to continue the cause, went to the door of the office, where the trial was set, and found it locked, and did not go into the office. But an examination of that case will show, that not only was there no stress laid upon that fact, but there was no allusion to it, even, in the supreme court. The case was decided entirely upon the ground, that the evidence did not show, that the justice, who attempted to continue the cause, had the writ in his possession, when he went to the place appointed for the trial,—which the court held to be necessary under the statute of 1832, which was in most respects like the nineteenth section of the present justice statute. We think, that what was done by the justice in this case was a substantial compliance with what the statute requires, that is, that it shall be "at the place appointed for the trial." If this was to be held insufficient on this ground, we do not see, why the justice might not be required to take some particular location within the office, or even to seat himself in the magisterial chair, to have his acts legal and valid.

*As to the second objection, it ap- *249 pears to us, that when neither the parties to the suit or any other person is present at the place appointed for the trial, the law requires no such ludicrous absurdity, as that the justice should make a formal call of the suit, or proclamation of the continuance; his doing so could be productive of no benefit to any one, and his omission to do it could work no injury.

The plaintiff relies upon the case of Crawford v. Cheney to support his third objection; but that case is unlike this in this particular also. That case shows, that the justice did not continue the case "at the place," &c., but went away to the tavern, to find the defendant's agent, and after he declined having any thing to do with the case, the justice then called the case and continued it. In this case the continuance was at the proper place, though the justice went into the office of the present plaintiff's attorney, to enter it upon the writ. The statute does not require the justice to enter the continuance upon the writ "at the place appointed," &c., nor within the two hours; and we think it not necessary, in order to make the continuance legal.

It is very evident, from the facts found, that there was no injustice done to the party in this case, and that he lost no right, or opportunity, except by his own mere captiousness; and, as we think, all the proceedings were in substantial compliance with the statute.

The judgment of the county court is affirmed.

PETER STRONG v. WILLIAM G. EDGERTON.

(*Rutland*, Jan. Term, 1850.)

The requirement of the statute,—Rev. St. c. 28, § 28,—that a writ of *scire facias* against bail shall be brought within one year after the rendition of the judgment against the principal, is not to be regarded as a statute of limitation upon the plaintiff's remedy to enforce a right already due from the surety, but as a condition, which the plaintiff must perform, in order to create a claim against the surety.

Quære, Whether such writ of *scire facias* must not only be made and signed, but served upon the surety, within the year.

*But if the writ be made and signed within *250 the year, but be made returnable at such a

time, that it cannot be legally served within the year, it is not a compliance with the statute.†

Therefore, where the writ was made and signed within the year, and was made returnable before a justice of the peace more than sixty days after the expiration of the year, it was held not a compliance with the statute.

Scire facias against the defendant as bail, upon mesne process, of one McKinney. The defendant pleaded *nul tiel record*, and also pleaded, that this writ of *scire facias* was not brought within one year after the plaintiff recovered judgment against McKinney in the original suit; and both pleas were traversed, and issue joined. Trial by the court, November Adjourned Term, 1847,—HALL, J., presiding. On trial it appeared, that the plaintiff recovered judgment against McKinney, in the suit in which the defendant became bail, on the twenty fourth day of February, 1845; that this writ of *scire facias* was signed by Silas H. Hodges, a justice of the peace, on the nineteenth day of February, 1846, and was made returnable before said Hodges May 18, 1846; that on the twenty sixth day of March, 1846, the defendant accepted service upon the writ; that, less than sixty days before the return day, the writ was again presented to the justice by the plaintiff's attorney, and the justice, at his request, indorsed thereon an authorization to one Ditson to make service of the writ, and also a direction to the officer to deliver to Jacob Edgerton, the father and natural guardian of the defendant, a copy of the writ. After this an alteration was made in the writ, without the knowledge of the defendant, or of the justice, by which the judgment, which was originally described in the writ as having been rendered before E. F. Hodges, was stated to have been rendered
*251 *before S. H. Hodges. The writ was subsequently served, May 6, 1846, by the person authorized. Upon these facts the court rendered judgment for the defendant. Exceptions by plaintiff.

Thrall & Smith for plaintiff.

The statute,—Rev. St. c. 26, § 12,—which provides, that a justice writ of summons, or attachment, shall not be served more than sixty days before the time therein appointed for trial, has no application to the question involved in this case. The "justice writ" of that section is the "ordinary process" within justice jurisdiction, mentioned in Rev. St. c. 28, § 1. A writ of *scire facias* is not a writ of summons, or attachment, but may, by statute, issue as such. Rev. St. c. 28, § 21. This is a judicial process, and not subject to the provisions applicable to original or ordinary process. Walsh v. Haswell, 11 Vt. 85. Rev. St. c. 28, § 21. The prohibtion has no reference to the relative time between the date and the return day of the writ, but only to the service and return day. The bail is a surety; his liability is fixed, as such, by the proceedings mentioned and the law. Rev. St. c. 28, § 27; and the provision of chap. 28, sec. 28, is but a statute of limitation, and should receive the same construction as other statutes of like kind. The making and signing the writ is the issuing or bringing of the writ, within the statute. Day v. Lamb, 7 Vt. 426. McDaniels v. Reed, 17 Vt. 674. Newell v. State, 2 Conn. 38. The particular phraseology of different statutes of limitations is of no importance; they all mean the same thing,—the issuing of the writ. For different forms of expressing the same thing see Rev. St. 183, § 28; Ib. 184, §§ 37, 38; Ib. 305; St. 66, §§ 29, 30. Neither the amendment of the writ, nor the indorsement of the authorization for service, nor the inserting an order to deliver a copy to the father of the defendant, had any effect upon the issuing of the writ.

M. G. Everts and *E. Edgerton* for defendant.

The defendant, by indorsing his name upon the back of the original writ, assumed a conditional liability,—to become absolute in case the plaintiff should perform certain acts, one of which is, that he shall, within one year, and not after, bring his writ of *scire* **facias*. Rev. St. c. *252 28, §§ 27, 28. If the plaintiff fail to do either of these acts, the bail does not become liable. The writ, in this case, was not brought within the year. The service of the writ must be considered the commencement of the action. Seaver v. Lincoln, 21 Pick. 267. The suit cannot be commenced by the making of a writ, which cannot be legally served. The writ should have been made and served, or at least been capable of legal service, within the year; the plaintiff cannot be said to have brought his suit, while the writ remains a nullity. Nelson v. Denison, 17 Vt. 73. McDaniels v. Reed, Ib. 674. Hall et al. v. Peck, 10 Vt. 474. As between bail and principal, there must be a time, when this relation shall cease; and this should be at the end of the year from final judgment in the original action, in case no notice of the *scire facias* is brought to the bail.

The opinion of the court was delivered by

POLAND, J. The first consideration in the present case is in relation to the character of the provision in the Revised Statutes, chap. 28, sec. 28, requiring writs of *scire facias* against bail on mesne process to be brought within one year after the rendition of the judgment against the principal. Is it to be regarded as a statute of limitation, narrowing and curtailing the plaintiff's remedy to enforce a right, or duty, already due from the surety, and which is already fixed and absolute upon him,—as claimed by the plaintiff? Or is it to be looked upon as a condition upon the part of the plaintiff, which he is required to perform, as one step towards perfecting and maturing a cause of action against the surety, which as yet is but contingent and defeasible? We are disposed to regard it

†In Hutchinson v. Fisher & McLaughlin, decided by the supreme court in Windsor Co., Mar. T. 1851, which was an action upon a promissory note, the writ was made and signed before the demand was barred by the statute of limitations, but was made returnable before a justice of the peace more than eight months after the statute would have run, if the writ had not been issued, but within the official year of the justice who signed it, and was served less than sixty days before the return day; —and it was held, that the operation of the statute of limitations was thereby avoided.

in the nature of a condition, and required to be done, in order to create and establish a claim against the surety, rather than as an act of vigilance, to prevent the loss of a right already existing.

The liability of the surety is wholly collateral, and is primarily an obligation merely for the appearance of the principal, or that he shall be forthcoming within the life of the execution, if one is properly issued. Even after the writ of *scire facias* is duly and seasonably served upon him, and all the preceding conditions have been complied with by the plaintiff, the liability of the surety is only contingent and conditional, liable to be defeated by a sur-
*253 render of the *principal on the return of the *scire facias*, or by showing the death, or insanity, of the principal. Viewing the case in this light, the inquiry then arises, whether this condition has been performed by the plaintiff.

The defendant claims, that the plaintiff is required not only to have his writ of *scire facias* made and signed within the year, but that he should also have the same served on the surety within the year. Upon this question the several members of the court, who have heard the case, are not fully agreed; and as a decision of that point does not become necessary, to determine the case, it is left undecided. In this case the year, within which the plaintiff was required to bring his writ against the surety, expired on the twenty fourth day of February, 1846. The plaintiff procured his writ of *scire facias* to be made and signed by the justice on the nineteenth day of February, 1846, and it was made returnable on the eighteenth day of May, 1846, nearly three months after the expiration of the year. The defendant accepted service upon the writ on the twenty sixth day of March, 1846.

The twelfth section of chapter twenty six of the Revised Statutes expressly prohibits the service of writs, returnable before justices of the peace, more than sixty days before the time therein appointed for trial. And in the case of Nelson v. Denison, 17 Vt. 73, it was decided by this court, that when a writ, returnable before a justice, was served, more than sixty days before the return day, by attaching property, it was wholly void and inoperative, and that the officer serving the same acquired no right whatever to the property, as against another officer, who subsequently attached the same property, although the defendant in the suit made no objection to the service and suffered a judgment by default. The plaintiff insists, that inasmuch as this writ of *scire facias* is a judicial writ, it does not come within the requirement of this statute; but we entertain no doubt on this point; it is within the very words of the statute, as well as within its spirit and intent.

This brings us, then, to consider, whether the taking out a writ of *scire facias* within the year, which could not be legally served until nearly a month after the year expired, and which would be wholly inoperative and void, if served within the year, is a compliance with and performance of this condition by the plaintiff.

*In the case of Sea yer v. Lincoln, 21 *254 Pick. 267. it was decided, that where a writ was taken out and put into the hands of an officer, before the cause of action was perfected by a demand upon the defendant, with instructions not to serve the same, until after demand made, the action could not be considered as commenced, until the demand was made; and the objection of the defendant, in that case, that the action was premature, because the writ was made out and delivered to the officer before demand was made, was not allowed to prevail. The same doctrine has been held in this state, in the case of Hall et al. v. Peck, 10 Vt. 474, and in McDaniels v. Reed et al., 17 Vt. 674. It appears to us to be very clear, that the taking out of a writ within the year, which the law absolutely prohibited the service of, for a month after the year would expire, could with far less propriety be considered as the commencing, or bringing, of a suit, than in the cases above referred to, where the service was delayed merely by direction of the party, and that to hold the taking out of this writ by the plaintiff, under these circumstances, to be a legal commencement of a suit within the year, would be a gross violation of the language of the statute, as well as of its evident object and intent.

The surety is considered as having the custody, or the right to the custody, of the principal, so long as his liability continues; and he has the right at any time, by the aid of a bail piece and warrant, to commit the principal to jail and detain him, for the purpose of a surrender in his own discharge. It was the evident object of the legislature, to limit the creditor's right to call upon the surety to a fixed and certain time, and to as short a period, as was consistent with a due regard to the creditor's right, that the surety might be under no embarrassment as to the extent or duration of his contingent liability, or as to the time, when he might, with safety to himself, cease to look after his principal, or discharge him from custody, if he were so held.

It is apparent that if the doctrine of the plaintiff in this case is to prevail, the entire and express object of this requirement upon the creditor would be defeated, and the surety be in a worse condition, than he would be in without any limit to the time, when the creditor should bring his writ of *scire facias*: for if the creditor may hold the surety, by taking out his *scire facias* and putting his court day three *months after the year expires, we see *255 no reason, why he may not extend it to six months, or a year, or even to a longer period, provided he is willing to risk the danger, that the justice, who signs his writ, may die or go out of office before the return day: and thus the liability of the surety would be extended to any indefinite length of time, at the pleasure of the creditor.

Neither can we discover, that this construction of the statute can work any injury to the rights of the creditor, or deprive him of any advantage, which the statute intended to give to him, or that it can ever be necessary for him to set the time for the return of his writ of *scire facias* more than

sixty days beyond the expiration of the year, unless it be for the purpose of entrapping the surety, or to obtain some unfair and illegal advantage over him, which the law would not encourage, or assist.

This view of the case renders it unnecessary for us to consider what effect the alterations, made in the plaintiff's writ after the expiration of the year, had upon the liability of the surety.

The judgment of the county court is therefore affirmed.

EDWARD H. AIKEN AND DANIEL AIKEN, *qui tam*, v. WILLIAM PECK.

(*Rutland*, Jan. Term, 1850.)

In order to estop a party from proving a fact, because the fact had been found against him in a former suit, it must appear clearly, that the precise question was adjudicated in such suit. If the record relied upon leave this in doubt, there can be no estoppel.

In a *qui tam* action, brought by a creditor against one who has been party to a fraudulent conveyance of property of the debtor, to recover the penalty given by statute, the admissions of the debtor, who is not party to the suit, made previous to the alleged fraudulent sale, may be given in evidence by the plaintiff, for the purpose of establishing the fact of the debtor's indebtedness to him; but it is not competent for the plaintiff to prove, for the purpose of establishing such indebtedness, any declarations made by the debtor subsequent to the time of the sale.†

*256 *This was an action to recover the penalty given by statute,—Rev. St., chap. 95, sec. 20,—for receiving and justifying a fraudulent conveyance of property. The plaintiffs, who sued as well for themselves, as for the county of Addison, alleged in their declaration, that on the eighteenth day of February, 1845, one Harvey Briggs was indebted to them upon a promissory note, previously executed, and also upon other accounts, and was also largely indebted to other persons, and that, upon the same day, at Cornwall in the county of Addison, the said Briggs, in order to defraud the plaintiffs of the sums in which he was so indebted to them, and to avoid his debts to others, sold and delivered to the defendant, and the defendant, with the intent to enable Briggs so to avoid his debts, purchased and received from Briggs two horses, with blankets, halters, &c., and one sleigh,—all of the value of $378; and that the defendant afterwards, upon the same day, justified the said sale and purchase to have been made *bona fide*, and upon good consideration. Plea, the general issue, and trial by jury, September Term, 1848,—HALL, J., presiding. On trial the plaintiffs, to prove the indebtedness to them from Briggs, gave in evidence a promissory note payable to them, executed by Briggs, dated February 19, 1845, for $722,60. The plaintiffs then gave in evidence the deposition of Charles M. Aiken,—who testified, that he was present, on the nineteenth day of February, 1845, when Edward H. Aiken presented to Briggs a note for $725, which was not then due, and Briggs agreed to substitute for it a new note, payable on demand, if Aiken would deduct the interest, and that a new note was accordingly executed by Briggs, for about $722, and that Briggs then admitted, that the first note was given for several smaller notes, some of which would have been due some time previous, and that those notes were given for property, which he purchased of E. H. & D. Aiken, excepting one note, which was given upon a settlement of book accounts between them. The plaintiffs also called one Colburn as a witness, whose testimony tended to prove, that Briggs admitted, on the nineteenth of February, 1845, that he had previously owed the plaintiffs debts, which he had included in the note above mentioned. To all this evidence the defendant objected; but the objection was overruled by the court.

*The plaintiffs then gave evidence *257 tending to prove, that on the eighteenth day of February, 1845, or previous thereto, Briggs was in possession of the property described in the declaration, and was indebted to various persons to a large amount, and that the sale and purchase of the property were made on the same day, or a short time previous, in the manner and with the intent alleged in the declaration, and that the defendant, being privy thereto, justified the same to have been made in good faith and for a good consideration. The defendant introduced testimony tending to disprove the allegation of fraud on his part. The defendant also offered in evidence a copy of the record of the county court for the county of Rutland, September Term, 1847, in a suit in favor of the plaintiffs against Briggs, in which the defendant was summoned as trustee of Briggs, and also the disclosure of the defendant,—from all which it appeared, that the defendant disclosed in that suit, that he purchased the property in question of Briggs, in good faith, February 11, 1845, and received it into his possession a few days after, and that subsequently the property was attached and taken from his possession, as the property of Briggs, and was sold by the attaching officer and the proceeds applied upon the execution against Briggs; that the plaintiffs then filed their allegations, averring that the trustee had in his possession, at the time of the service of the trustee process upon him, the property described in the declaration in this suit, and that he held the same by virtue of a conveyance, which was fraudulent and void, as against the creditors of Briggs; that issue was taken upon these allegations; and that the court adjudged the trustee not chargeable. And the defendant now insisted, that, as the facts contested by him in this suit were included in the allegations, and a judgment was rendered thereon in his favor, the plaintiffs were concluded, by that judgment, as to all the facts averred in the allegations. To the admission of this evidence the plaintiffs objected, and it was excluded by the court. The court charged the jury, that in actions of this character the rule of evidence is the same, as in criminal cases, and that the facts averred in the declaration must be established by full proof and beyond a reasonable doubt;—that the deposition of Charles M. Aiken and the testimony of Col-

† See Gilson, Adm'r, v. Gilson, 16 Vt. 464.

burn, if believed, furnished sufficient
*258 proof *of the indebtedness of Briggs to the plaintiffs, as stated in the declaration. and that no other proof of such indebtedness was necessary, to entitle the plaintiffs to maintain this action;—that if the jury should find, that Briggs was indebted to the plaintiffs, as stated in the declaration, and that the conveyance of the property by Briggs to the defendant was made and received with a fraudulent intent, on the part of both, to avoid the debts, which Briggs owed to the plaintiffs, or to his other creditors. and should also find, that the defendant subsequently justified the conveyance to have been made in good faith, and upon a good consideration, they should return a verdict in favor of the plaintiffs, for the value of the property at the time of the conveyance. Verdict for plaintiffs. Exceptions by defendant.

L. C. Kellogg and *R. Pierpoint* for defendant.

The proof of the indebtedness of Briggs to the plaintiffs, at the time of the alleged fraudulent sale, is the basis of the plaintiffs' right to maintain this action;—Rev. St. 432, §§ 19, 20;—and it should be as full and perfect in character, as the evidence is required to be upon the other material allegations in the declaration. The deposition of Charles M. Aiken and the testimony of Colburn only furnish evidence of the admissions of Briggs, made after the alleged sale, that such indebtedness existed. The note offered in evidence bears a date subsequent to the sale, and could not, of itself, furnish evidence of an indebtedness existing previous to or at the time of the sale. The admissions of Briggs should not have been received against the defendant, because he was a living and admissible witness, a stranger to the suit, and because they were made after the defendant had acquired a separate right in the subject matter. Warner v. McGary, 4 Vt. 507. 1 Greenl. Ev. §§ 180, 187. Washburn v. Ramsdell, 17 Vt. 299. Ellis v. Howard et al., Ib. 330. Hines et al. v. Soule, 14 Vt. 99. The reason of the rule, as stated in 2 Stark. Ev. 740, by which, in an action against a sheriff for an escape, the debtor's acknowledgment of the debt is receivable, as against the sheriff, has no analogy or application to this case; and the rule itself is limited to the admission of acknowledgments made by the debtor before the escape. Rogers v. Jones, 7 B. & C. 86, [14 E. C. L. 49.] 1 Greenl. Ev. § 187. Phillips v. Eamer, 1 Esp. R. 357.

*259 *The allegations of the plaintiffs, in the trustee suit, that the title of the defendant to the property was void as to the creditors of Briggs, are identical with their averments in this case, as to the same subject matter. An issue was joined upon those allegations, and judgment rendered in favor of the defendant. It was a judgment between the same parties, upon the same subject matter; it is therefore conclusive evidence. Gray v. Pingry, 17 Vt. 419.

C. L. Williams for plaintiffs.

When the indebtedness of a third person is necessary to be proved, the only practicable rule of evidence is, to require such proof, as would be sufficient to establish the debt in an action against the debtor himself. This is the rule in actions against sheriffs for escapes on mesne process; Williams v. Bridges et. al., 2 Stark. R. 42, [3 E. C. L. 309;] Rogers v. Jones, 7 B. & C. 86, [14 E. C. L. 49;] Sloman v. Herne, 2 Esp. R. 695; 1 Saund. Pl. & Ev. 555; 2 Stark. Ev. 1340; 2 Greenl. Ev. § 584; so, too, in case of false return; Kempland v. Macauley, Peake 65. The deposition of Charles M. Aiken shows, aside from the admissions of Briggs, the existence of a previous note, for which the note in evidence was given—a fact of itself sufficient to establish the plaintiffs' case upon this point. The judgment in the trustee suit could operate against the plaintiffs only as an estoppel; as such, it should have been pleaded, and, not having been, it is to be considered as waived. 9 Vt. 31. 12 Vt. 692. Gray v. Pingry, 17 Vt. 419 19 Vt. 148. Vooght v. Winch, 2 B. & A. 662. 2 C. M. & R. 316. 1 Salk. 276. 4 Bing. N. C. 782. 2 Smith's Lead. Cas. 438. The record showed no adjudication of any question litigated in this suit. To have had a conclusive effect, if properly pleaded, it should have appeared, that the judgment was upon the question of fraud in the defendant. This does not appear. It does appear from the disclosure, that the property in question in that case was taken from the trustee's possession by attachment; and if it is possible, that that was the ground of the judgment in favor of the trustee, in that suit, the record had no conclusive, or even *prima facie*, bearing upon any question tried in this suit.

*The opinion of the court was deliv- *260
ered by

HALL, J. The first question to be considered is, whether the record of the trustee proceeding was properly excluded by the county court.

It is not claimed in behalf of the defendant, that the whole subject matter of this suit,—the right of the plaintiffs to recover the penalty,—has been inquired into and passed upon in the former suit,—but that a question necessarily arising in this case, and which must be determined in favor of the plaintiffs, in order to entitle them to recover, viz., the question, whether the sale from Briggs to the defendant Peck was in fraud of the plaintiffs, as creditors of Briggs, was in controversy in that suit, and was decided in favor of the defendant. For this reason it is insisted, that the record offered ought to have been admitted and held to be a bar to the plaintiffs' recovery.

In order to estop a party from proving a fact, because the fact had been found against him in a former suit, it must appear, that the precise question was adjudicated in such suit. It is not a matter to be left to conjecture. If, from the record, (when the record alone, as in this case, is relied upon,) it should appear possible, that the question was left undecided, then there would be no estoppel; for an estoppel, in the language of Lord Coke, "must be certain to every intent." From an examination of the record offered it seems quite clear, that it can, at most, be but matter of conjecture, that the question of fraud was adjudicated. It does indeed appear from the record, that the plaintiffs claimed, that the defendant

was trustee, for the alleged reason, that he held the property by a sale fraudulent as to them, and that the defendant denied that he so held it. But this was not the only issue. The defendant also claimed, that he was not trustee, for the reason that the property, with which he was sought to be charged, had been taken from his possession and disposed of on attachments against Briggs, and that therefore he was not liable on the process. Both these issues were before the court, and upon them the court rendered a general judgment, that the defendant was not trustee,—but upon which of them it was founded does not appear. There being no certainty, therefore, that the question of fraud was passed upon by the court, we think, the record could not constitute a bar to this suit, and that it was properly excluded. The effect of the record having been thus deter-
*261 *mined, the several other objections, which were taken in the argument to its admissibility, have not been considered.

The remaining question in the case is, whether the plaintiffs, in order to prove that they were creditors of Briggs at the time of the alleged fraudulent sale, were entitled to give in evidence the admissions of Briggs to that effect.

It is claimed by the plaintiffs that the testimony was admissible under the rule of evidence, that, when the issue is substantially upon the mutual rights of third persons at a particular time, such evidence is admissible, as might have been legally introduced in an action between the parties themselves. On consideration we are of opinion, that the present action does come within that class of cases.

Our principal ground of doubt has been, not whether the admissions of Briggs might be competent evidence, but whether those made subsequent to the sale ought to have been received. The rule, on which the plaintiffs rely, has generally been applied in actions for false returns, and for escapes, against sheriffs, where proof of the plaintiff's debt is necessary; or where, in actions by or against assignees in bankruptcy, proof is required of the petitioning creditor's debt. In these cases the admissions of the debtors, though not parties to the suit, have been held to be competent evidence. In some of the cases little attention appears to have been given to the time, when the admissions were made; and there is some confusion in them on that subject. The more recent cases, however, limit the admissions of the debtor, in actions against the sheriff, to those made previous to the act, by which his liability was incurred. And in bankrupt suits all admissions, made by the bankrupt after his act of bankruptcy, are excluded. Hoare v. Coryton. 4 Taunt. 560. Smallcombe v. Bruges. 13 Price 136. Taylor v. Kinloch, 1 Stark. R. 175. [2 E. C. L. 74.] Williams v. Bridges, 2 Stark. R. 42. 1 Greenl. Ev. 181.

This distinction we think a sound one. After other persons have acquired separate rights and interests in regard to the debt, the admissions of the debtor become liable to the suspicion of collusion, and should, on principle, be excluded. But while the debtor and creditor are alone to be affected by the character and extent of the indebtedness, their declarations in regard to it are not open to such suspicion, and may, perhaps, be regarded, in reference to the indebtedness, as part of the *res gestæ*. We think, the plaintiffs are entitled in this suit to the benefit of all the evidence, of which they might have availed themselves, at the time of the alleged fraudulent sale, in an action for the debt, against Briggs,—but that they can make no use of any admissions of Briggs, made subsequent to such sale. This decision would exclude, not only the admissions of Briggs testified to by Colburn, but also all the matter embraced in the deposition of Aiken, except the mere fact, that the note introduced in evidence was substituted for a previous note surrendered. Whether the note surrendered was a genuine note of Briggs, executed by him for a real debt, should have been found by other evidence, among which might have been the admissions of Briggs, made prior to the alleged fraudulent sale.
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It was claimed, in argument, by the counsel for the defendant, that all admissions of Briggs ought to have been excluded, under the rule in Warner v. McGary, 4 Vt. 507, that, where a person is himself a competent witness, his admissions are in general incompetent. But we think the admissions of the debtor, in actions like the present, do not come within the principle of that case and the subsequent decisions in this state in accordance with it, and that such admissions should be received in evidence, without reference to the question, whether the debtor would himself be a competent witness

The result is, that the judgment of the county court is reversed and a new trial granted.

JOHN PROCTOR AND ABNER MEAD v. REUBEN R. THRALL, WILLIAM WHEELER, SIMEON WRIGHT AND MARTIN LEACH. (In Chancery.)

(*Rutland*, Jan. Term, 1850.)

Where the grantee of a mortgagor, being about to sell the mortgaged premises, procured the mortgagee to execute to the purchaser a bond, conditioned that the said grantee should save the purchaser harmless from all cost and damage in consequence of any previous incumbrance upon the premises, it was held, that the effect was, to release the land from the incumbrance of the mortgage.

*The court of chancery will not interfere to correct, or restrain, the effect of contracts between parties, upon the ground that the effect is entirely different from what the parties intended at the time they made the contract, except in cases where the contract might still operate in the manner and to the extent, which the parties intended, when they made it, and its farther and different operation, which was not contemplated by them, be restrained. If the different operation of the contract, beyond what was intended, is merely a legal result from what they did intend, so that relief cannot be obtained, except by annulling the very contract understandingly and intentionally made, the court will not interfere.
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A. mortgaged land to B., and then conveyed the land, subject to the mortgage, to C. C. conveyed the land, by deed with covenants of warranty, to D., and D., by deed with similar covenants,

conveyed the land to E. But before E. completed the purchase, D. procured B. to execute a bond to E., conditioned that D. should save E. harmless from all costs and damages in consequence of any incumbrance upon the land,—the parties understanding, and so intending at the time, that this would discharge the land, in the hands of E., from the mortgage to B., but would leave B. the right to pursue his remedy against A., for his debt, and also to hold C. and D. upon their covenants of warranty, and to prosecute suits thereon in the name of E., but for his own benefit. *Held*, that the effect of the bond was, to discharge the land from the incumbrance of the mortgage, and consequently to release C. and D. from all obligation upon their covenants of warranty, so far as the mortgage was concerned, and that the court of chancery could grant no relief against this result.

Appeal from the court of chancery. On the nineteenth day of January, 1828, Simeon Wright mortgaged certain land to Francis Slason, to secure the payment of five hundred dollars, specified in two promissory notes. On the eighteenth day of August, 1829, Wright mortgaged the same land to Reuben R. Thrall, to secure the payment of a note for $482,70; and subsequently Wright conveyed to Thrall his equity of redemption in the premises. Thrall subsequently conveyed the land, by deed with covenants of warranty, to William Wheeler; and Wheeler, in July, 1840, conveyed the land, by deed with warranty, to Martin Leach. But Leach refused to complete the purchase, unless he could have the land free from the incumbrance to Slason; and thereupon Slason, at the procurement of Wheeler, executed a bond to Leach, conditioned that Wheeler should save Leach harmless "from all cost and damage in consequence of any incumbrance" upon the land. On the twenty seventh day of January, 1842, Slason assigned his mortgage and the
*264 *notes from Wright to the orators.

And the orators alleged, that it was understood and agreed, between Slason, Wheeler and Leach, at the time the bond was executed, that the bond was to have only the effect to secure Leach in the possession of the land, but that Slason was to have the benefit of the personal responsibility of Wrght, Thrall and Wheeler, and of the covenants in the deed from Thrall to Wheeler, and in the deed from Wheeler to Leach, and the right to pursue any proper remedy thereon, either in his own name, or in the name of Leach; and the orators alleged, that Wright and Wheeler had become poor and unable to pay the debt. The orators prayed, that Leach might be decreed to permit them to have the benefit of the covenants of warranty in the deeds from Thrall and Wheeler, and that Wright, Thrall and Wheeler might be decreed to pay the debt to the orators, or, in default thereof, that the defendants might be placed under such equitable conditions, as to the chancellor should seem proper, and that they might be foreclosed of all equity of redemption in the premises, under proper equitable stipulations. Wheeler, in his answer, admitted, that the bond was executed by Slason under the circumstances and with the understanding and intent alleged in the bill. Leach, in his answer, denied, that there was any understanding, other than that he was to have the land, released from any claim under the mortgage to Slason. Thrall and Wright demurred to the bill. Testimony was taken, upon both sides, as to the existence, at the time the bond was executed, of any such understanding as that alleged in the bill,—the substance of which is stated in the opinion delivered by the court. The court of chancery dismissed the bill; from which decree the orators appealed.

E. L. Ormsbee, for orators, cited Mower et al. v. Hutchinson, 9 Vt. 242, and Beardsley v. Knight, 10 Vt. 185.

Thrall & Smith and *R. Pierpoint*, for defendants, insisted, that the effect of the bond executed by Slason was to discharge the land from the incumbrance of the mortgage,—citing Paddock v. Palmer, 19 Vt. 585;—that this effect was in fact intended by Slason, and that the true object of the bill was to obtain relief, for the reason *265 *that Slason made the contract without understanding its legal consequences, which is not a sufficient reason for granting relief,—citing 1 Story's Eq., sec. 111-137, Storrs v. Barker, 6 Johns. Ch. R. 169, Wheaton v. Wheaton, 9 Conn. 96, Pettes v. Bank of Whitehall, 17 Vt. 445, and Shotwell v. Murray, 1 Johns. Ch. R. 512; and that the understanding, alleged in the bill, was not proved,—but that if it were, the orators could have no remedy upon the covenants of warranty, for the reason, that the release of the mortgage had prevented there being a breach of those covenants.

The opinion of the court was delivered by

POLAND, J. The history of this case is substantially the following. On the nineteenth day of January, 1828, the defendant Wright was the owner of a certain farm in Pittsford, and on that day he executed a mortgage of the same to Francis Slason, to secure the payment of two notes, both amounting to the sum of five hundred dollars. On the eighteenth day of August, 1829, Wright executed another mortgage of the same land to Reuben R. Thrall, to secure the payment of a note of $482,70; and at some subsequent time, which is not stated in the papers, Wright conveyed the same premises to Thrall by an absolute deed. Subsequently (but at what time the case does not show) Thrall conveyed the same premises, by deed with warranty, to William Wheeler; and in July, 1840, Wheeler conveyed the same by deed with warranty to the defendant Leach. At the time of the conveyance from Wheeler to Leach, Slason executed to Leach a bond, in which he covenanted to save him harmless against all cost and damage in consequence of any previous incumbrance upon said farm. Slason afterwards, on the twenty seventh day of January, 1842, assigned to the orators his mortgage deed and notes from Wright.

The orators concede, that the effect of the bond given by Slason to Leach was, to release the land from the burden of his mortgage; and we have no doubt, but such must be its operation. It is much like the case of a covenant not to sue, which has always been held equivalent to a release, or discharge; for the law would countenance no such absurdity, as to allow one man to

maintain an action to recover lands, or damages, and then permit another suit to recover back the same thing; it therefore allows the defence to be made in *266 *the first instance, to avoid circuity of action. 1 U. S. Digest 678. 7 Mass. 155. 15 Ib. 112. 16 Ib. 24. 17 Ib. 628. 1 Cow. 122. 8 Johns. 45.

It is, however, insisted by the orators, that at the time the bond in question was executed and delivered by Slason to Leach, the parties to it did not understand, what the legal effect of the bond would be upon Slason's mortgage; and they allege in their bill, that at the time of the execution of the bond by Slason to Leach, it was understood and agreed between them, that Slason was to have the full benefit of the covenants in the deed of Thrall to Wheeler, and in the deed from Wheeler to Leach, and to have the right to pursue any proper remedy, either at law, or in equity, in his own name, or that of Leach, to enforce said covenants.

It might admit of serious doubt, perhaps, whether, upon the evidence in this case, the fact of such understanding and agreement was established between Slason and Leach, inasmuch as Leach directly denies in his answer, that there was any such understanding between them, and his answer is only contradicted by the testimony of one witness, and that of the admissions of Leach merely. Wheeler, in his answer, says, there was such an agreement; but that, of course, cannot be used as evidence against the other defendants in the case. The manner in which the business was done has some tendency, however, to support the belief of what the orators claim to have been the understanding of the parties to the bond, at the time of its execution, and in deciding the case we are disposed to consider the case as proved in favor of the orators, upon this point.

The orators admit, that Slason intended, when he executed the bond to Leach, to release the land, in Leach's hands, from the incumbrance of his mortgage, and to discharge Leach from any liability to him; and that Leach, relying upon Slason's bond, purchased the farm of Wheeler, which otherwise he would not have done; and it is not now insisted, that the bond has any other or different effect, so far as the defendant Leach is concerned, than was intended by Slason himself; and neither is it claimed, that the court of chancery ought to interfere, as between Slason and Leach. The orator's claim is, that, by the agreement between Slason and Leach, at the time the bond was executed, Slason was to *267 retain all *his rights against the previous parties, and was also to have the benefit of Leach's remedy against Thrall and Wheeler, upon the covenants in their respective deeds.

It may not be improper to consider for a moment, what rights either Slason, or Leach, had, as against the previous parties in the chain of title. Slason had his mortgage and notes against Wright, and he might pursue the mortgage upon the land, or he might look to Wright personally upon his notes, without regard to the mortgage. His only right, or remedy, as against the subsequent parties, Thrall, Wheeler, or Leach, was by virtue of his mortgage upon the land,—being a pre-existing incumbrance, and to be satisfied out of it, before their title could be good and perfect. His whole claim, however, was upon the land; and whatever might operate to release the land from his lien by virtue of his mortgage would entirely destroy all his rights, as against all the previous parties except Wright. What then were the rights of Leach, or what would they have been rather if Slason had not executed the bond in question? He had no claim or right of action against Wheeler or Thrall except as connected with the land. If he were disturbed in his title or possession of that, he might then seek a remedy against them upon their covenants. He could maintain no action upon his covenants, at least for the recovery of anything more than mere nominal damages, until he had either been evicted from the land, or had been compelled to remove the incumbrance upon it. His rights upon the covenants of Wheeler and Thrall were merely to be indemnified in the title and possession of the premises. The bond of Slason to him having effectually released the land in his possession from the mortgage, and thus placed him out of danger of any eviction under it, his claim upon the covenants of Wheeler and Thrall is also discharged, and he has no right remaining against them, which can be enforced either by himself, or Slason.

It is undoubtedly true, that courts of chancery do often interfere, for the purpose of correcting agreements and contracts of almost every description, when the legal effect of the contract is entirely different from what the parties intended at the time it was made; and this, too, in cases, where the mistake of the parties was in relation to the effect merely, and so might be said to be rather a mistake in relation to the law, than of fact. Such was the case of *Mower et al. v. Hutchinson, 9 Vt. *268 242, cited by the orators. But we apprehend, that the courts of chancery have never interfered to correct or restrain the effect of contracts between parties upon this ground, except in cases, where the contract might still operate in the manner and to the extent the parties intended, when they made it, and its farther and different operation, which was not contemplated by them, be restrained. In the case of Mower et al. v. Hutchinson the parties intended their quit claim deeds to have the operation merely to divide a farm, which they before owned jointly; but the effect of Mower's deed was to cut off a right, which he had, to flow a portion of the same farm. The court restrained the operation of the deed beyond what the parties intended by it; but the effect intended by the parties remained.

In the present case Slason intended to release his lien, by virtue of his mortgage, to Leach, and did so. Leach acted upon it and purchased the farm, which otherwise he would not have done. The legal effect of this release to Leach was, to discharge all claim upon the land, and upon the covenants of Wheeler and Thrall to Leach,—as their liability depended entirely upon the mortgage remaining as a subsisting lien up-

on the land, and thus enforced against Leech.

The orators do not claim, that there is any ground for setting aside the bond, as against Leech, because it has the very effect, as to him, which Slason intended. Unless it is set aside as to Leech, the orators can have no relief against the other defendants, —as his claim against them must be through Leech alone, who is discharged; so that in this case the different operation of the contract, beyond what was intended, is merely a legal effect, or result, of what they did intend; and the court cannot interfere to relieve the party, except by annulling the very contract understandingly and intentionally entered into by the one party and received and acted upon by the other. It is believed, that no case can be found, where the court of chancery have ever gone to that extent; and we do not see, that there was any sufficient ground to justify such a call upon the chancellor in the present case.

The decree of the chancellor is affirmed, with additional costs, and remanded to the court of chancery to be carried into effect.

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*269 *JAMES PORTER v. JIRAH VAUGHAN AND REUBEN R. THRALL. (In Chancery.)

(*Rutland*, Jan. Term, 1850.)

An appeal lies from a decree of the chancellor, ordering a decree to be amended, so as to correspond with the docket minutes.

The court of chancery have power, upon petition, to order such amendment to be made.

In this case the docket entry was, that the decree be dismissed, with costs, and the decree, as written at length and signed by the chancellor, stated, that it was agreed by the parties, that the bill should be dismissed upon its merits, and that thereupon it was ordered, that the bill be dismissed "upon its merits," with costs; and it was held, that the court of chancery, upon petition, might order the decree to be amended, by erasing the words "upon the merits" and the statement of the agreement, and thus leave the parties to their rights, as affected by the dismissal of the bill without any agreement respecting it, —it not being satisfactorily shown, that any such agreement was made.

This was a petition to the court of chancery, April Term, 1847, in which the petitioner alleged, that heretofore he preferred his bill in chancery against the petitionees, and that, at the September Term, 1840, of the court of chancery, it was decreed, that the bill be dismissed, with costs; but that it was stated in the decree, as written by the solicitor and signed by the chancellor, that the bill was dismissed "upon the merits," with costs;—and the petitioner prayed, that the decree might be amended, by erasing therefrom the words "upon the merits." The decree in the original suit, which was made September Term, 1840, as written at length, and signed by the chancellor, after stating the bringing of the bill, the answers of the defendants, the taking of testimony, &c., proceeded as follows,— "at which term the said cause being called to be heard upon the merits, as aforesaid, Robert Pierpoint, Esq., solicitor for the orator, appeared and declined a hearing of said cause and requested, consented and agreed, that said bill be dismissed upon the merits, and the said court did thereupon order, adjudge and decree, and it is ordered, adjudged and decreed, that said bill be dismissed upon the merits, with costs," and that the orator pay to the clerk the costs within a *time stated. The docket entry of the *270 case, September Term, 1840, was in these words,—"Decree that bill be dismissed, with costs." From the affidavit of the chancellor, who made the decree, it appeared, that the entry made by him upon his docket, September Term, 1840, was in these words,—"Bill dismissed, with costs." For the purpose of showing, that the petitioner had early knowledge of the form, in which the decree was drawn, the petitionees gave in evidence the records and files in the suit at law in favor of Vaughan against the petitioner,—reported 16 Vt. 266,—from which it appeared, that Vaughan, in that suit, in 1841, pleaded the decree in bar to a recovery by Porter upon a plea of set off, filed by him; and it also appeared, that the decree had been pleaded in bar to another suit in chancery, subsequently commenced by Porter, and that Porter claimed, in answer thereto, that there were other and different matters stated in that bill from those adjudicated upon in the former suit. Affidavits were filed in support of the petition, and also counter affidavits. The court of chancery, September Term, 1848,—HALL, Ch.,—ordered, that the decree mentioned in the petition be amended by striking therefrom, after the words "Robert Pierpoint, Esq., solicitor for the orator, appeared and declined a hearing of said cause," the following words, viz., "and requested, consented and agreed, that said bill be dismissed upon the merits,"—and also by striking from the decree the words "upon the merits" next after the word "dismissed,"— without costs to either party. From this decree the petitionees appealed.

S. H. Hodges and *S. Foot*, for petitioner, cited Scales v. Cheese, 12 M. & W. 685; Rev. St. 150, § 20; Daniel's Ch. Pr. 1215-1217, 1226, 1233-1235; Newland's Ch. Pr. 186; 2 Smith's Ch. Pr. 2, 6.

Turall & Smith, for petitionees, cited 2 Daniel's Ch. Pr. 753, 754, 930, 1184, 1199, 1200, 1231; Story's Eq. Pl. § 793; Pelton v. Mott, 11 Vt. 150; Leitch v. Cumpston, 4 Paige 476; Rogers v. Rogers, 1 Paige 188; Mead v. Arms, 3 Vt. 152.

*The opinion of the court was deliv- *271 ered by

HALL, J. This was a petition to the court of chancery, praying for an amendment of a decree, made between the parties at the September Term of that court in 1840,—the petition having been filed at the April Term, 1847. On the hearing of the petition, that court ordered the amendment to be made, and from such order the defendants have appealed.

It is objected by the petitioner, that the amendment was wholly within the discretion of the chancellor, and that no appeal lies from his decision ordering it to be made. It is to be observed, that the statute allowing appeals is very comprehensive in its terms,—its language embracing all final orders and decrees, except in certain

enumerated cases. Revised Statutes 150, sec. 18. We might not perhaps be entirely agreed in regard to the extent of this right; but without undertaking to determine the question, we have concluded to treat this case as properly before us.

The amendment, for which the petitioner prayed, and which was ordered to be made by the chancellor, was to strike from the decree so much of it, as stated, that the dismissal of the bill was, by agreement, upon the merits. The amendment was claimed on the ground, that the decree, as recorded, did not, in that respect, conform to the decision, which had been made by the chancellor. It is objected, that such an amendment cannot properly be made on petition, —that the remedy for the error, if there be one, is only by bill of review.

It may be true, that in England, after a decree has been signed and enrolled, it can ordinarily be amended only on bill of review. But even there, errors apparent upon the face of the decree, such as require no proof by affidavit, may be amended after enrollment; Daniel's Ch. Pr.; Goldsmith's Equity 190; and it is by no means clear, that an error, which appeared to be such by the minutes for the decree, might not in England be amended on petition, or even on motion. But whatever may be the rule in England, we think such an amendment might well be made here.

In England decrees are drawn up with great care, by an officer of the court, as a part of his official duty. When the decision of the chancellor is made, minutes for the decree are taken down by the registrar, and by him delivered to the several par-
*272 ties to the suit. *The minutes being settled, which is done by the counsel of the several parties attending before the registrar, on a day appointed for that purpose, the decree is drawn up, and delivered to the party, in whose favor it is made, and an office copy of it is taken by the opposite party. After the decree has thus been submitted to the examination of counsel on both sides, a day is fixed for passing it, when all objections to it are heard and considered; and if the registrar's decision is unsatisfactory, an appeal may be made to the chancellor. After the decree is settled, it is signed by the registrar and entered, that is, copied at length into a book in his office. This completes the decree for all purposes of its execution by the court; but it does not become technically a record, so that it may be pleaded as such, until it is signed by the chancellor and enrolled. In practice the enrollment appears to be very generally omitted, until some use of the decree as a record renders the enrollment necessary.

In this state the decree is drawn by the solicitor of the party, in whose favor it is made, he certifying to its correctness, is signed by the chancellor without examination, upon the faith of the solicitor's certificate, and then recorded. The writing and recording of the decree is wholly an *ex parte* proceeding, and as there is no rule requiring it to be shown to the opposite party, there is no opportunity for him to notice any mistakes in the decree, until after it becomes matter of record. Under such circumstances it would be unreasonable, to put a party, complaining of a mere clerical error in the decree, to the tedious and expensive remedy of a bill of review. A bill of review, indeed, seems an inappropriate remedy. The party does not complain, that there is error in the decision of the court, by which he has been injured; but that the decision has not been correctly recorded. He complains, in effect, of a misprision of the clerk, by which a decree may be enforced against him, which the court never made. In such case we think, the party ought not to be put to the expense and delay of again trying his cause upon a bill of review, but should be entitled to have the matter examined upon petition.

It is objected to the order of the court of chancery in this case, that it ought not to have been made after such a lapse of time, and that the facts shown did not warrant its being made.

It is undoubtedly true, that the delay and other circumstances *shown in *273 this case would ordinarily form very strong objections to allowing an amendment. But the words in the decree, which are complained of, are peculiar. They are not usually inserted in a decree. A decree, which is made upon a hearing and manifestly upon the merits, is not usually stated in terms to be so. The effect of the decree is left to be determined by the state of the pleadings and the circumstances, under which it was made. In the present case all the proceedings previous to and attending the dismissal of the bill are stated in detail. If a dismissal, under the circumstances, would operate as a decision upon the merits, (upon which we express no opinion,) then there was no need of any insertion of the statement, that it was dismissed on the merits. If, under the circumstances, the dismissal would not be on the merits, then it should not have been so stated, unless upon the solemn agreement of the parties in writing, as in the case of Pelton v. Mott, 11 Vt. 148, cited in the argument, or upon such agreement made in court and entered upon the docket at the time. It is not necessary to question the correctness of the affidavit of the party, who drew up the decree. I see no reason to doubt, that he states what took place, as he understands it. But an agreement of such a character should not be suffered to remain in recollection. If the party, in whose favor a decree was made, designed to have it operate as a record estoppel, by force of an agreement of the parties to that effect, he should have seen to it, at the time of the making of the agreement, that it was not suffered to rest alone on slippery memory. There being no written evidence of such an agreement, and no docket minutes of it, we think, the decree was properly amended, by erasing from it the statement of the agreement.

The decree of the court of chancery is affirmed.

*274 *ISAAC McDANIELS v. FLOWER BROOK MANUFACTURING CO.

HENRY COGGILL AND CHARLES J. COGGILL v. ISAAC McDANIELS AND FITCH CLARK. (In Chancery.)

(*Rutland*, Jan. Term, 1850.)

The pledgee of stock in a private corporation is not regarded as so far the owner of the stock, as to be entitled to notice of the meetings of the corporation.

Every reasonable intendment is to be made in favor of the regularity of the proceedings of a private corporation in their corporate acts.

Where the by-laws of a corporation required the meetings to be held at the counting room of the corporation, and it appeared from the records, that a meeting was held at the dwelling house of the general agent and clerk, without stating, that it was at the counting room of the corporation, and there was no other evidence in reference thereto, it was held, that the court would presume, that their counting room was, for the time being, at that place.

After the Revised Statutes of this state came in force,† the Flower Brook Manufacturing Co., a private corporation, at a meeting regularly held, voted, that "the agent be instructed" to execute a mortgage of the real estate of the corporation to a creditor. One William Wallace was then the general agent of the corporation and executed the deed in question in pursuance of the vote. The granting part of the deed was in these words,—"that the Flower Brook Manufacturing Co., by William Wallace, their agent, a corporation" &c. "in consideration" &c. "do give, grant" &c.; all the covenants were in the name of the corporation; the *testimonium* clause was in these words,—"In witness whereof we have hereunto set our hand and seal" &c.: and the deed was signed "William Wallace, Agent for Flower Brook Manufacturing Co." And it was held that this sufficiently appeared to be the deed of the corporation, and to be executed in the name of the corporation.

And the certificate of the acknowledgment of this deed being in these words,—"Personally appeared William Wallace, agent of the Flower Brook Manufacturing Co., signer and sealer of the above written instrument, and acknowledged the same to be his free act and deed,"—it was held, that it sufficiently appeared, that the acknowledgment was made by Wallace on the part and behalf of the corporation.

*275 *Under the Revised Statutes of this state it is not essential to the validity of the deed of the real estate of a corporation, that it should recite the vote of the corporation, authorizing their agent to execute the deed.

A private corporation being indebted by note, which was also signed by one C. and several other individuals, as sureties, and which was secured by a mortgage of the real estate of the corporation, C., in consideration of the assignment to him of certain stock by the other signers of the note, agreed with them, that he would pay the said note, and all other debts of the corporation, upon which they were liable as sureties; and it was held, that, as between the corporation and C., the relation of principal and surety still existed, and that, upon payment of the mortgage note by one who subsequently became surety to the payee for C., such surety became subrogated to the rights of the mortgagee, as C. would have been, had the payment been made by him, and that such surety, or his assignee, would thereby acquire the right to enforce the mortgage, as against the corporation, and a priority, as against creditors of the corporation attaching the estate subsequent to the execution of the mortgage.

And the rights of such surety, or his assignee, as against a subsequent attaching creditor, will not be affected by the fact, that the creditor has levied his execution upon the mortgaged premises, without regard to the mortgage, believing that C. was the real debtor, and that the mortgage note, as to the corporation, was extinguished;—he must be affected with notice of all those facts, of which he had the means of obtaining knowledge.

Appeal from the court of chancery. Isaac McDaniels preferred his bill, at the April Term, 1846, of the court of chancery, against the Flower Brook Manufacturing Company, a corporation constituted by the legislature of this state, in which he alleged, that the corporation, on the fifteenth day of December, 1842, was indebted to Lewis H. Delano in the sum of $7395,81, specified in three promissory notes,—the third note being for $2957,34, and made payable to Delano, or order, in ten and a half months from date; that to secure these notes, the corporation mortgaged to Delano certain real estate in Pawlet, by deed of that date, duly executed, acknowledged and recorded; that on the eleventh of December, 1845, Delano, in consideration of $2353,85, paid to him by Fitch Clark, assigned to Clark the last mentioned note and the mortgage, and Clark, on the nineteenth day of January, 1846, assigned the same to the orator; and that $2353,85 of the last note, with interest from December 11, 1845, remained due to the orator;—and the orator prayed for a decree of foreclosure and for general relief. *On the twenty seventh of *276 July, 1846, the corporation answered denying that any such deed of mortgage was properly and legally executed and acknowledged; and averring, that it became the duty and legal obligation of one John M. Clark to pay the notes described in the orator's bill, and that, for so doing, the said John M. Clark had a valuable consideration, and that he received a sufficient amount of the property of the corporation, wherewith to pay the notes; and that the notes, as this defendant was advised and believed, were, so far as the corporation is concerned, fully paid and discharged, either by the property of the corporation, or of John M. Clark, or by the property of persons who were the sureties of John M. Clark, and not the sureties of the corporation, nor requested by the corporation to pay the debt; and that John M. Clark had repeatedly represented to the corporation, and to others interested in the notes, that the notes were paid, and that the mortgage no longer constituted a lien upon the real estate of the corporation. This answer was traversed. At the April Term, 1847, Henry Coggill and Charles J. Coggill filed their cross bill against Isaac McDaniels and Fitch Clark,—in which they alleged, that in 1845, the corporation became indebted to them for wool, &c., and they caused the real estate in question to be attached in a suit in their favor against the corporation, and that they recovered judgment in that suit, at the April Term, 1846, of the county court, for $4346,94, and, for want of other property, caused their execution to be levied upon the same real es-

†By which it is enacted, that "any public or private corporation, authorized to hold real estate, may convey the same by an agent appointed for that purpose." Rev. St. c. 60, § 8.

tate, without regard to the mortgage; and averring that in fact no such incumbrance existed, and requesting to be permitted to defend the suit in favor of McDaniels against the corporation, and adopting the answer filed by the corporation; and farther alleging, that nothing was due to McDaniels,—that he paid nothing for the assignment of the mortgage,—that no good and valid mortgage deed was ever executed by the corporation to Delano, and, at the time the attachment was made by these orators, no debt was due from the corporation to Delano, or to any other person, upon the mortgage notes, but so far as the corporation was concerned, these notes had been paid and discharged,—that a large portion of the amount due to Delano from John M. Clark and Fitch Clark was paid from money derived from the property furnished by these orators to the cor-
*277 pora*tion, and that such avails have gone to the use and benefit of Fitch Clark, to pay debts for which he was personally liable, which had ceased to be the debts of the corporation,—and that for a long period of time John M. Clark and Fitch Clark carried on business, as partners, in the name of the corporation;—and they prayed, that the mortgage might be decreed to be surrendered to be cancelled, and the defendants be enjoined from asserting title under it.

The defendants in the cross bill answered, averring, that the corporation continued to do business until April 1, 1843, after which time, until the autumn of 1845, the business was conducted by John M. Clark, in his own behalf; that the corporation did not, in 1845, become indebted to the orators in the cross bill, and that their attachment, in October, 1845, was made with a view to defraud the corporation and its creditors, and that their judgment was recovered against the corporation by fraud and collusion, and that, at the time of their levy, they well knew of the mortgage to Delano; that the mortgage was valid, and also the assignment to Fitch Clark, and from him to McDaniels, and that all the matters, alleged in the original bill, are true, as therein set forth; that no part of the money due to Delano was paid from the property furnished by the orators in the cross bill to the corporation, and none has gone to the benefit of Fitch Clark, or to pay any debt, for which he was liable, and that they did not furnish any wool to the corporation in 1845, but did furnish wool to John M. Clark, which was manufactured by him on his own account; that Fitch Clark was not associated with John M. Clark as a partner, nor did he, at any time, carry on the business; and that the assignment was made to McDaniels for a full consideration, specifying it. This answer was traversed. Testimony was taken upon both sides, and the facts appeared substantially as follows. The by-laws of the corporation provided for the appointment of a clerk and agent, and made it the duty of the agent, or clerk, to call meetings of the stockholders, on application of two or more stockholders, by giving notice, either personally, or in writing, "that such meeting will be held, at a time to be fixed by said agent, or clerk, at the counting room of the corporation, within three weeks from the time such application be made." At the annual meeting, held on the fourth day of January, 1842, William Wallace was *elected clerk and *278
agent. The corporation was indebted to Lewis H. Delano; and it appeared from the records, that on the fourteenth day of December, 1842, on application of John M. Clark, Sheldon Edgerton and Jacob Edgerton, a meeting of the corporation was called at the house of William Wallace, for the purpose of discussing the expediency of mortgaging to Delano, and, on motion, it was resolved, that the agent be instructed to execute the mortgage,—and it was stated upon the records, that "a majority of the stockholders, viz., Sheldon Edgerton, John M. Clark, Jacob Edgerton, Jr., and William Wallace were present and voted in the affirmative." There were two stockholders, who were not present at that meeting; but they testified, that they had notice of the meeting, and were consulted as to the propriety of giving the mortgage, and that they assented to it, both before and after its execution. Elisha Allen, Nathan Allen and Dan Blakely were also shown by the records to have been stockholders at that time; but it appeared, that the stock, which stood in their names, had been transferred to them by Jacob Edgerton, Jr., and William Wallace, as collateral security for having signed certain notes for them, as sureties. On the fifteenth day of December, 1842, the mortgage in question was executed to Delano, conditioned for the payment of three promissory notes, all dated December 15, 1842, and made payable to Delano, or order, one for $1523,25, payable in three months, one for $2915,23, payable in seven and a half months, and one for $2957,34, payable in ten and a half months. Each of these notes was signed by William Wallace, as agent for the corporation, and by William Wallace, John M. Clark, Sheldon Edgerton, Ozias Clark, Joshua D. Cobb and Jacob Edgerton, Jr. The granting part of the mortgage deed was in these words,—"that the Flower Brook Manufacturing Company, by William Wallace, their agent, a corporation established," &c., "for the consideration," &c., "do give, grant," &c.; and the covenants were in the name of the corporation. The *testimonium* clause was in these words,—"In witness whereof we have hereunto set our hand and seal, this fifteenth day of December, A. D. 1842." The deed was signed "William Wallace, Agent for Flower Brook Manufacturing Co.," and sealed. The corporation had no corporate seal. The certificate of acknowledgment was in these words,—"Personally appeared William Wal*lace, agent of the Flower *279
Brook Manufacturing Company, signer and sealer of the above written instrument, and acknowledged the same to be his free act and deed," &c. Immediately following this certificate was a signature in these words,—"Flower Brook Manufacturing Co., by William Wallace, their agent,"—which was witnessed by two witnesses. This signature was appended to the deed on the sixth day of April, 1843,

by William Wallace, by the direction of John M. Clark, who was then the acting agent of the corportion; and following this signature was a certificate of acknowledgment, dated April 6, 1843, in these words, —"Personally appeared William Wallace, within named to be the agent of the within named Flower Brook Manufacturing Co., and acknowledged the within written instrument to be the free act and deed of the said Flower Brook Manufacturing Co." There were two certificates of the town clerk upon the deed, one showing it to have been received for record and recorded December 14, 1842; and the other showing it to have been received for record and recorded April 6, 1843. It appeared from the records, that John M. Clark was elected agent of the corporation April 8, 1843.

On the eighth day of February, 1843, John M. Clark became the owner of all the capital stock of the corporation; and on that day he executed an agreement, in which, after reciting, that the corporation owed various debts, for which Jacob Edgerton, Jr., Sheldon Edgerton, William Wallace, Ozias Clark and Joshua D. Cobb were liable as sureties, either collectively, or separately, and that those individuals and one Fitch Clark had transferred to him all their shares in the capital stock of the corporation, he agreed, in consideration of said transfer, with said Jacob, Sheldon, William, Ozias and Joshua, that he would pay all the debts of the corporation, for which they, or either of them, or any two or more of them, were sureties, or in any manner liable, and would save them harmless from all costs and damages therefrom. On the sixth day of December, 1843, Delano called upon John M. Clark for payment of the third note, for $2957,34, above mentioned; Clark desired an extension of the time of payment, and proposed to take up that note and execute a new note for the amount, with sureties; Delano was willing to receive a new note as collateral security, but declined to surrender the former note, *280 saying that *he should hold on upon that and the mortgage for ultimate payment; Clark thereupon procured and delivered to Delano a new note, for $3175,00, dated December 6, 1843, payable October 29, 1844, at the Atlantic Bank, Boston, signed by himself, and by Ozias Clark, Fitch Clark and Joshua D. Cobb; and Delano received this note, and thereupon executed and delivered to John M. Clark a receipt, acknowledging that he had received from the corporation the note for $3175, as collateral security for the note for $2957,34, and agreeing, that if he should obtain the note for $3175 discounted, so that he should receive the money thereon, he would delay collection of the other note until November 1, 1844, but providing, that, if he should return the note for $3175 to the makers, he might enforce collection of the other note. On the fourteenth of November, 1844, John M. Clark paid $1000 upon the note for $3175; and the residue of that note was paid by two notes, one for $1000, and the other for $1298,49, dated November 15, 1844, one payable in seven months and the other in one year, both payable to Delano, or order, and signed by John M. Clark, Fitch Clark and Ozias Clark, and the note for $3175 was surrendered by Delano. Judgment was obtained upon the note for $1000 at the September Term, 1845, of Rutland county court, and the amount, being $1028,75, was paid by Fitch Clark to the attorney of Delano.—Fitch Clark at the time claiming, that he should assert the right to be subrogated to all the rights, which any of the parties had against the corporation upon the original note and mortgage. The note for $1298,49 was put in suit November 19, 1845, and an arrangement was made between the attorney of Delano and Fitch Clark, in pursuance of which Delano delivered to Fitch Clark, January 19, 1846, the original mortgage note for $2957,34, dated December 15, 1842, the mortgage executed to secure the same, above described, and an assignment of that mortgage to Fitch Clark, executed by Delano in due form, and dated December 11, 1845,—and Fitch Clark, January 19, 1846, paid the amount due upon the note for $1298,49, amounting, with the costs, to $1319,89. McDaniels was present, when this payment was made; and Fitch Clark, on the same day, assigned the mortgage, in due form, to McDaniels, and delivered to him the mortgage note for $2957,34. John M. Clark and Ozias Clark became insolvent September 4, 1845, and remained so.

*Henry Coggill and Charles J. Cog- *281
gill, the orators in the cross bill, on the twenty eighth of October, 1845, sued out a writ in their favor against the corporation, and caused the real estate, described in the mortgage to Delano, to be attached thereon; and at the April Term, 1846, they recovered judgment against the corporation, in said suit, for $4334,71 damages, and took execution, which they caused to be levied upon the same real estate, April 27, 1843, by metes and bounds, without regard to the mortgage to Delano. There was considerable testimony in reference to the question, whether this was properly a debt, for which the corporation was liable, or whether it was really a debt against John M. Clark. The master, to whom it was referred to ascertain the sum due to McDaniels upon the mortgage note for $2957,34, above described, reported, that there was due $2783,42. The court of chancery, September Term, 1848, decreed, that the corporation pay to McDaniels the amount reported by the master, with costs, by a time specified, and that, in default thereof, the corporation, and all persons claiming under them, be foreclosed of all equity of redemption in the premises;—and that the cross bill be dismissed, with costs. From this decree an appeal was taken.

D. Roberts, Jr., for plaintiff.

Mortgagees of stock are not entitled to notice of the meetings of the corporation. Ang. & Am. on Corp. 98, 99. The meeting of Dec. 14, 1842, was a legal, corporate meeting. This is to be presumed, certainly, against the corporation, in the absence of proof to the contrary. Ang. & Am. 269, 270. There is no evidence, that there was any place, known as the counting room of the corporation, or that the house of Wallace might not have been accustomed to be used for that purpose, or that this was an

unusual or improper place for such a meeting. Ang. & Am. 458. The deed was duly executed. The vote of Dec. 14 empowered Wallace to execute it. The grant is in the name of the corporation, by Wallace, their agent, and so are all the covenants. The corporation had no corporate seal, and so used a private seal, described as being their seal, affixed by them. The signature is that of the corporation, and is described as their hand, set by them. Wilks v. Back, 2 East 142. REDFIELD, J., in Roberts
*282 v. Button et al., 14 Vt. 204. *DAVIS, J., in Isham v. Bennington Iron Co., 19 Vt. 259. Magill v. Hinsdale et al., 6 Conn. 464. The acknowledgment is sufficient. It shows, that Wallace appeared before the magistrate and made the acknowledgment, as agent. But, without acknowledgment, or record, the deed would be good against the corporation, and all others, except *bona fide* purchasers, or creditors. Marshall v. Fisk, 6 Mass. 24. Pond v. Wetherbee, 4 Pick. 312. Rev. St. c. 60, § 6. The execution of the deed of April 6, 1843, was also sufficient. It is perfect in form. The vote of December 14, 1842, may be construed, as if Wallace had been designated by name, instead of his character as agent. His special authority, then, would continue, until fully executed, unless previously revoked. This execution was directed by John M. Clark, who was then the clerk and agent of the corporation, and the owner of all the stock. The retention of the consideration by the corporation, and the availing itself of the credit acquired by giving the mortgage, amount to a subsequent corporate ratification of the mortgage. Despatch Line &c. v. Bellamy M. Co., 12 N. H. 205. Gordon v. Preston, 1 Watts 385. Ang. & Am. 216. 1 Pick. 372. The orator, as assignee of Fitch Clark, is entitled to enforce the mortgage against the corporation. Upon the mortgage notes the corporation was principal, and John M. Clark and the other signers were mere sureties. Either one of them, paying the debt, was entitled to the benefit of the mortgage security against the corporation, without any formal assignment. The contract of February 8, 1843, did not vary this relation of John M. Clark to the corporation; that is a contract with his co-sureties, to which the corporation was a stranger. If, then, John M. Clark had paid the mortgage notes, he would have been entitled to have kept the mortgage on foot for his own security; hence Fitch Clark, having paid the balance of the last note, whether we regard him as surety for John M. Clark, or for the corporation, is entitled to that security. The orators in the cross bill are not *bona fide* creditors, as against the mortgage, and can stand in no better position than the corporation.

*283 *C. B. Harrington* for defendants.

The meeting of December 14, 1842, was not held in pursuance of such notice, as the by laws required. The records do not show, that any notice was given to the stockholders. If, then, the meeting was not legally organized, the vote authorizing the agent to convey was a nullity. Rex v. Theodorick, 8 East 543. Warner v. Mower et al., 11 Vt. 385. Gordon v. Preston, 1 Watts 385. Three stockholders, Elisha Allen, Nathan Allen and Blakely, were not present and had no notice of the meeting. The execution of the mortgage was defective. The vote authorizing the conveyance should be recited; otherwise it would not appear of record, after the registration, that the agent had authority to do what he attempted to do. It is like the execution of a power at common law. Rev. St. 315, §§ 24, 25. The name of the corporation is not signed to the mortgage; if a deed be not signed and sealed by the grantor, it is no execution of the deed. Rev. St. 311, § 4. Isham v. Bennington Iron Co., 19 Vt. 251. The deed is acknowledged by William Wallace, and not by the corporation. The addition to the name of Wallace is merely descriptive. Ang. & Ames 159. 13 Petersd. Abr. 510. Savings Bank v. Davis, 8 Conn. 191. Spencer v. Field, 10 Wend. 87. Taft v. Brewster, 9 Johns. 334. The second attempt to execute and acknowledge the deed gave it no vitality; Wallace was not at that time, April 6, 1843, the agent of the corporation; when he was removed from the agency, and John M. Clark was appointed, then Clark was the agent designated by the vote. There could be no ratification of the mortgage, without some direct vote of the corporation, sanctioning the act of the agent, or distinctly recognizing the execution of the mortgage. Essex Turnp. Co. v. Collins, 8 Mass. 292. Wheelock v. Moulton et al., 15 Vt. 519. The assignee of Fitch Clark can take no equities, by virtue of the assignment to him, except such as Fitch Clark had at the time; and he had none, as against the corporation. The relation of principal and surety does not subsist between the corporation and Fitch Clark;—he did not sign the notes to Delano. Although John M. Clark was originally surety on the mortgage notes, yet on the eighth of February, 1843, the relation of surety ceased, by his own voluntary contract, and he became the principal. He executed his own
*note for the balance due upon the *284 mortgage notes: and Fitch Clark signed that note, as surety, not for the corporation, but for John M. Clark. The orators in the cross bill are *bona fide* attaching creditors, and are entitled to hold the estate against the mortgage.

The opinion of the court was delivered by

REDFIELD, J. It is first to be determined, whether the mortgage deed, in this case, was so executed, as to convey the title of the corporation. Every member of the corporation is shown to have had the requisite notice of the meeting, at which it was voted to deed, unless the Allens and Blakely, who had had a small number of shares conveyed to them, by way of security for signing notes for the company, and who had not attended the meetings of company, or not generally, are to be regarded as entitled to notice. And we think, the pledgee of stock is not, for the purpose of notice of meetings, to be regarded as the owner of the stock. This is no doubt the general understanding and expectation in such cases, and has been decided so, whenever the question has arisen, as far as we know. Angell & Ames, 98, 99. Merchants' Bank v. Cook, 4 Pick. 405. See, also, Barker ex parte, ex

relatione Mer. Ins. Co., 6 Wend. 509. Ex parte Willcocks, 7 Cow. 402.

There is no objection to the form of the notice, or to the time, or other circumstances attending the call of the meeting, except the place. In regard to this, it must be borne in mind, that every reasonable presumption is to be made in favor of the regularity of the proceedings of such a corporation, as is done in regard to judicial and other proceedings, coming up for revision in courts of justice. It is always incumbent upon the party, attempting to impugn them, to adduce positive proof. The requisite notice, in the case of proceedings in the probate court, where none appeared of record, was presumed, in Corliss v. Corliss, 8 Vt. 373; and perhaps the same rule should apply to the proceedings of private corporations. But clearly in regard to the place of holding a meeting, which the statutes required to be held at the counting room of the corporation, and which appeared to have been held at the dwelling house of the general agent and clerk, without stating, that it was at the counting room of the corporation, it would, we think, in *285 the absence of all *proof, be more reasonable to presume, that that was their counting room for the time being, than to avoid the proceedings by a contrary presumption, without proof. This, then, makes out a sufficient vote of the corporation.

As to the form of the deed, we think it is sufficient. It purports to be the deed of the company, by William Wallace their agent, in the grant, and in the covenants. And even the first execution, "William Wallace, agent for the Flower Brook Manufacturing Co.," in connection with what goes before, must be understood to be an execution in the name of the company. This form is considered sufficient in the leading case of Wilks v. Back, 2 East 142, and in the Vermont cases, cited in argument. And I think no well considered case has held the contrary. But all the cases undoubtedly hold, that a deed, executed under a power, is always required to be executed in the name of the principal. This is indispensable to its validity.

In the case of Isham, Adm'r, v. Bennington Iron Co., 19 Vt. 230, the manner of execution, in this particular, was very different from the present. In that case the name of the company was not in any manner subscribed to the deed, except in the description of the person of Hammond, but the signature of Hammond was merely an official signature, the affix being as clearly a mere *descriptio personæ*, as it is possible to conceive. And in that case there was no pretence of any meeting or vote of the corporation whatever, but sole reliance was made upon the efficacy of affixing the seal of the corporation merely,—which was sufficient in New York, where the deed was made, but not sufficient in this state, where the land lay.

I should have very little doubt, if it were necessary to resort to the second execution of this deed, for the purpose of sustaining it, that the vote might, with propriety, be so construed, as to confer upon William Wallace a personal power, to be executed on behalf of the corporation, which would not be revoked by the appointment of another agent for the general purposes of the company. And especially should I esteem it reasonable, to give this construction to the power delegated to him, if it were necessary to uphold the deed, in favor of a *bona fide* mortgagee, after he had attempted to execute the power and the second execution was a confirmation merely. But we do not esteem this necessary.

*As to the form of certifying the ac- *286
knowledgment of a deed, executed by an agent, I am not aware, that it is essential, if it be intelligible, and clearly appear to be intended to be the deed of or on behalf of the constituent. And taking the first acknowledgment, as it stands subjoined to the deed, we think no reasonable doubt can be entertained, that Wallace did make the acknowledgment, on the part and behalf of the corporation.

In regard to the necessity of the deed reciting the vote of the corporation, we can only say, that as the statute, in force at the time of the execution of this deed, did not require that formality, we should certainly not be prepared to require it, as essential to the validity of the deed. It is no doubt true, that such is the general practice, in regard to deeds executed under a power; but we do not esteem it essential to their validity, upon general principles. And while these private corporations are required to keep records of their proceedings, and are only authorized to convey land, by the vote of the corporation, through an agent appointed for that purpose, a deed executed in the manner this was, without reciting the vote of the corporation, will sufficiently indicate, where the power is to be looked for.

This, then, disposes of all the objections to the deed, as to its original execution, and validity, in favor of Delano. And whether the plaintiff can claim to set it against the company depends upon the source of his title. If John M. Clark, upon paying the mortgage, could claim to keep it on foot against the company, so as to give him a priority against subsequent attaching creditors, then could his surety, Fitch Clark, and his assignee, the plaintiff.

As John M. Clark was originally a mere surety for the corporation upon this mortgage note, he could, no doubt, upon paying the note, claim to be subrogated to the rights of Delano. This has been repeatedly held in this state,—Payne v. Hathaway, 3 Vt. 212,—and is a familiar doctrine of the English chancery, derived from the civil law. The right of John M. Clark to keep this mortgage on foot will, no doubt, depend, then, essentially, upon the effect of the contract, by which he undertook to pay the debts of the corporation, and this among them. If this made the debt essentially his own debt, as between himself and the corporation, so that he became principal and they but sureties, then upon paying it, either by him*self, or sureties, he *287
could not set it up, or keep it on foot, against his sureties.

But we are not prepared to say, that the contract of the eighth of February, 1843, can or ought to be so construed, as to have

such effect. It seems, in terms, and in fact, to be nothing more than an arrangement among the sureties, by which John M. Clark, in consideration of the assignment of certain stock from the other sureties, undertook to save them harmless from all their liabilities on behalf of the corporation. After this, upon payment of the note, he clearly could not set it up against them, or their property, had that been mortgaged for the payment; nor could his surety, or the assignee of such surety. But as to the corporation he was still but a surety. He had received no consideration from them to pay this debt, nor had he bound himself to pay it for them. If he had suffered the real estate to go upon the mortgage to Delano, the company could not complain; and having paid it, he may now keep it on foot, and so may his surety, or the plaintiff, who stands in his place. It is clear, then, that the plaintiff may recover against the corporation. And if against the corporation, then equally against subsequent attaching creditors, or subsequent purchasers, with notice. This is the only advantage, which a surety can ever realize by being subrogated to the rights of the creditor, upon payment of the debt of the principal. And we do not see, how the defendants Coggill can claim to stand in any better light than that of subsequent attaching creditors, with the means of obtaining notice of all the facts in the case,—which is equivalent to notice. And that they might have believed Clark to be the real debtor will not justify them in so treating him, unless that were the fact, or unless he have done something to induce such a belief. We are not inclined to call in question their right to stand in that light, for they have no pretence to stand in any superior light, and that is not sufficient to give them priority over the plaintiff.

The decree of the chancellor is affirmed, with costs in this court, and remanded to the court of chancery to be carried into effect.

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*288 *COUNTY OF BENNINGTON.

FEBRUARY TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. DANIEL KELLOGG,
HON. HILAND HALL,
HON. LUKE P. POLAND, ASSISTANT JUDGES.

AUGUSTUS BELKNAP v. SAMUEL L. GODFREY, JR.

(*Bennington*, Feb. Term, 1850.)

Payment of a debt, after a suit has been commenced and costs incurred, will not preclude the the plaintiff from afterwards recovering judgment for nominal damages and his costs, unless the claim for costs have been released, or waived.

But where a creditor, who resided in New York, commenced an action upon book account against his debtor in this state, and afterwards saw the debtor in New York, and demanded of him payment of the debt there, and threatened to commence a suit against him there, unless he complied, and denied, that the suit in this state was commenced by his direction, or authority, and thereupon the defendant paid the amount, which the plaintiff claimed, and the plaintiff executed and delivered to him a receipt in full of accounts, it was held, that these declarations of the plaintiff were equivalent to an express waiver of his claim for costs in the suit in this state.

*Book account. Judgment to ac- *289
count was rendered, and an auditor was appointed, who reported, that after this suit was commenced and entered in court, the defendant being in New York, where the plaintiff resided, the plaintiff threatened to sue him upon the account there, and denied, that he authorized, or directed, the bringing of a suit in this state; and that thereupon the defendant paid to the plaintiff fifty five dollars, and received from him a receipt in full of accounts;—but the auditor found, that this suit was authorized by the plaintiff. The county court, June Term, 1849,—HALL, J., presiding,—accepted the report and rendered judgment thereon in favor of the defendant, for the costs incurred by him subsequent to the payment. Exceptions by plaintiff.

——— for plaintiff, insisted, that the plaintiff was entitled to judgment for nominal damages and his costs,—citing Stevens v. Briggs, 14 Vt. 44; 1 Camp. 559; 3 Ib. 331.

T. W. Park for defendant.

The opinion of the court was delivered by

POLAND, J. The general doctrine, that, after a suit is brought upon a debt and costs incurred, the defendant cannot bar the plaintiff's suit by paying the debt merely, without also paying the costs, is well settled. And when such payment is made, the plaintiff will generally be entitled, in such case, if the costs are not paid, to take a judgment for nominal damages and his costs.

Whether, in a case, where, during the pendency of a suit, the plaintiff accepts the amount of his debt and gives a full release, or discharge, of the same, he can afterwards proceed and take a judgment for nominal damages and costs, it is not necessary now to decide. It is no doubt competent for a party, who has commenced an action, to receive the amount of his debt, and waive his claim for costs; and in a case, where costs were so waived, either in express terms, or by fair inference from the circumstances attending the transaction, the plaintiff would not be permitted to proceed with his suit for the recovery of costs, but would be subjected to pay costs, if he persisted in farther prosecution of his suit. In the present *case it appears *290
from the auditor's report, that after this suit was commenced in this state, the plaintiff called upon the defendant in the state of New York to pay the debt, and threatened him with a suit there, unless he paid the debt, and then disavowed, that this suit was brought by his authority, or direction. The defendant thereupon paid the amount of the debt to the plaintiff, and took a discharge of the same; but it does not appear, that he paid any costs, or that the plaintiff claimed any; neither does it

appear, that the plaintiff in terms waived the payment of costs.

If the plaintiff, with a knowledge that a suit had been brought and costs incurred, consented to accept the amount of his debt, without making any claim for costs, it would be a strong circumstance, tending to show he intended to relinquish his claim to costs,—but perhaps not alone sufficient to prevent the plaintiff from afterwards insisting upon costs. In the present case, however, the plaintiff stands upon much less favorable ground; he not only made no claim to costs, but, on the contrary, denied all connection with, or responsibility for, the suit, which had been brought,—although the auditor has found, that such statement was false, and that the suit was brought by his direction. The defendant had a right to rely upon his statement; and when the plaintiff not only denied having authorized this suit, but threatened to commence another for the same debt, the defendant might well suppose, the plaintiff would never call upon him to pay the costs of such unauthorized suit, and that he would be fully absolved from all claim of the plaintiff, by paying the debt.

The assertion of the plaintiff to the defendant, at the time he paid the amount of the plaintiff's debt, was fully equivalent, in our estimation, to an express waiver of any right to call upon him to pay costs in the suit; and having by such statements induced the defendant to pay him the amount he claimed as his debt, he ought not to be permitted to afterwards turn round and prosecute his suit merely for the recovery of a bill of costs.

Judgment affirmed.

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*291 *EZRA EDSON v. TOWN OF PAWLET.

(*Bennington*, Feb. Term, 1850.)

The plaintiff, who was a physician, contracted with the overseers of the poor of the town of P., that he would render medical services to a pauper, who was then chargeable to P., and that, if the town of P. should, in a contemplated order of removal, succeed in establishing the legel settlement of the pauper to be in the town of S., he should receive from P. a reasonable compensation for his services, but if P. failed to establish the settlement of the pauper to be in S. he should receive nothing for his services;—and it appeared, that P. did succeed, upon the order of removal, in establishing the settlement to be in S. *Held*, that the contract, so made between P. and the plaintiff, was not invalid, as between them, but that the plaintiff might recover from P. the value of his services, notwithstanding it had been adjudged, that, as between the towns of P. and S., the contract was so far against the policy of the law, that no recovery could be had by P. for expenses for the services so rendered.

The overseers of the poor have authority to bind the town by such a contract,—since in no event was the plaintiff to receive more than a reasonable compensation for his services.

Evidence, in such case, that the overseers of the poor of P. agreed between themselves, before making the contract with the plaintiff, that the only contract which they would make with him should be one different in its terms from those above stated, is not admissible, for the purpose of proving, that such different contract was made.

The case of Pawlet v. Sandgate, 19 Vt. 621, considered and explained.

Book account. Judgment to account was rendered, and auditors were appointed, who reported the facts as follows. The plaintiff's account was for services rendered by him, as a physician, in attending upon a pauper, who was chargeable to Pawlet. One of the three overseers of the poor of Pawlet employed the plaintiff to make his first visit to the pauper; and at that time a contract was made, between the overseer and the plaintiff, that the plaintiff should continue to attend upon the pauper, and that, if Pawlet should, by a contemplated order of removal, succeed in establishing the legal settlement of the pauper to be in the town of Sandgate, Pawlet would pay the plaintiff a reasonable compensation for his services; but that, if Pawlet should fail in establishing the settlement of the pauper to be in Sandgate, the plaintiff should receive nothing. The plaintiff's services, charged in his account, were rendered in pursuance of this contract. On the twenty fourth day of November, 1841, an order was made, under the statute, that *the pauper remove to Sandgate, and an appeal *292
was taken, and the legal settlement of the pauper was adjudged by the supreme court, September Term, 1844, to be in Sandgate. The other overseers of the poor of Pawlet assented to and ratified the contract so made with the plaintiff. The pauper was not removed until November 19, 1844, but was supported by Pawlet until that time. The defendants insisted, before the auditors, that the contract between the overseers of the poor and the plaintiff was, that the plaintiff should attend upon the pauper, and should receive from Pawlet whatever Pawlet should recover of Sandgate for such services,—but that, if Pawlet recovered nothing from Sandgate for the plaintiff's account, then the plaintiff should receive nothing;—and for the purpose of proving this, the defendants offered to prove, that the overseers of the poor of Pawlet, previous to making any contract with the plaintiff, agreed between themselves, that such a contract, and none other, should be made. To this evidence the plaintiff objected, and it was excluded by the auditors. The auditors reported, that there was due to the plaintiff $127,74. Exceptions were filed to the report; and the county court, June Term, 1849,—HALL, J., presiding,—accepted the report, and rendered judgment thereon for the plaintiff, for the amount found due by the auditors. Exceptions by defendants.

F. Potter for defendants.

The contract, under which the services were performed by the plaintiff, was a wagering contract, and therefore void. The compensation of the plaintiff depended upon an uncertain event, to wit, the place of the pauper's settlement. Collamer v. Day, 2 Vt. 144. Danforth v. Evans, 16 Vt. 538. Howson v. Hancock, 8 T. R. 575. It was against public policy, and a fraud upon Sandgate, and therefore void. Holman v. Johnson, Cowp. 341. Smith v. Bromley, 2 Doug. 695. Langton v. Hughes, 1 M. & S. 593. Dixon v. Olmstead, 9 Vt. 310. Woodruff v. Hinman, 11 Vt. 592. Pingry v. Washburn, 1 Aik. 264. This very contract has

been declared to be void in Pawlet v. Sandgate, 19 Vt. 621. The overseers of the poor of Pawlet had no authority to make this contract. Aldrich v. Londonderry, 5 Vt. 448. The implied authority of an overseer of the poor is only to make a contract
*293 in *the ordinary and usual manner. If he do more, he becomes personally liable, and does not bind the principal. Ives v. Wallingford. 8 Vt. 224. Ives v. Hulet, 12 Vt. 314. The auditors erred in rejecting the evidence offered by the defendants.

D. Roberts, Jr., for plaintiff.

The plaintiff was in no event to receive more than a reasonable compensation for the services rendered by him, and the overseers of the poor might well agree to pay such amount. It was not, then, a gambling, or immoral, contract. Considerations of public policy, applicable to the case of Pawlet v. Sandgate, 19 Vt. 621, have no application here. The evidence offered by the defendants was too remote from the issue, to be admissible.

The opinion of the court was delivered by

HALL, J. It is insisted, in behalf of the defendants, that the contract between the plaintiff and the town was a wagering contract, and for that reason should be held illegal and void. Since the case of Collamer v. Day, 2 Vt. 146, the doctrine has been considered as settled in this state, that all wagers are illegal, and that therefore the winning party to a wager will in no case be allowed to recover of the loser for the money or property won. If in this case the plaintiff is to be considered as suing for the recovery of a wager, there can be no doubt the defence should be held sufficient.

It may, perhaps, be difficult to give a legal definition of a wager. In ordinary acceptation, a wager is the placing of something valuable, belonging in part to each of two individuals, in such a position, that it is to become the sole property of one, upon the result of some unsettled question. Each of the parties risks something, which he may lose, and each may gain something, beyond what he risks. If he merely hazard the loss of something, without any expectation, in any event, of having more in return than he ventures, it would not seem to be a wager.

It does not appear to us, that the present was what can be properly termed a wagering contract. The plaintiff may be said to have risked his compensation upon
*294 the event of the pauper being found *to have a legal settlement in Sandgate. But he was in no event to have more than he ventured; the most he was to receive was a reasonable compensation for his services. It is merely a case, where a party performs a service, for which he is entitled to compensation, but which he agrees to relinquish upon the happening of some future event. It properly belongs to the class of "no cure no pay cases," upon the expediency of which we are not called upon to express an opinion; but which we find no ground for declaring to be illegal.

The case of Pawlet v. Sandgate, 19 Vt. 621, is much relied upon by the counsel for the defendants. That was an action by Pawlet to recover of Sandgate compensation for the expenses of Pawlet in supporting the pauper, in which Pawlet claimed to recover for the services of the present plaintiff; but the court held the town of Sandgate not liable for such services. The decision was not on the ground, that the contract between Edson, the present plaintiff, and the town of Pawlet was illegal, as between them; but because the court thought, it would be against sound policy to allow one town to recover compensation of another under such circumstances. The court did not undertake to decide, that Pawlet might not be liable for those expenditures, but only that they were to be considered, as not having been made by Pawlet in good faith towards Sandgate. We agree, that sound policy requires, that one town should not be allowed to charge such contingent expenditures to another; but that is quite a different question from that now under consideration,—whether the town, which contracts for such expenditures, shall be bound to pay for them.

The other objections, which the counsel take to the decision of the county court, we think are also untenable. The overseers of the poor had authority to bind the town of Pawlet to pay a reasonable compensation for the support of the pauper; and as that was the extent to which they undertook to bind the town, we do not perceive any ground for saying they exceeded their authority. The fact, that the overseers had agreed among themselves not to make such a contract with the plaintiff, as the auditors find they did afterwards make, was properly excluded. It was but the offer of a party to prove his own declarations in his own favor; which were clearly inadmissible. The judgment of the county court is affirmed.

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*SAMUEL BISHOP v. HUGH BABCOCK. *295

(*Bennington*, Feb. Term, 1850.)

Where, for the purpose of ascertaining the division line between land of the plaintiff and land of the defendant, it became necessary to ascertain the true south west corner of the town of Readsboro, and the parties agreed, in writing, that a certain line should be the boundary between them, provided a corner, which they supposed to be the true south west corner of the town, should not be moved "on proper and lawful authority and manner," and that, if the true corner should ever be established to be in any other place, the boundary line between them should be located in accordance therewith, it was held, that the parties must have intended to refer to such a tribunal, for ascertaining the true corner of the town, as the law had invested with authority to decide the question.

And the parties having farther agreed, that, if the location of the corner of the town should ever be changed, and the division line between them be changed accordingly, the party, who should, in pursuance of this contract, have occupied land, which in fact was owned by the other party, should pay rent, after a rate agreed upon for each acre, for the land so occupied, it was held, that this did not create between them the relation of landlord and tenant, and that, upon the true location of the division line being ascertained, the party owning land in the occupancy of the other, under the agreement, might sustain ejectment against the occupant, without giving six months notice to quit.

But it was held that the agreement between them was a sufficient license to the occupant to continue in possession of the land, while the contract continued unrevoked, and that no action could be sustained by the owner of the land against him, without first giving reasonable notice of his intention to commence such suit.

The act of the plaintiff, in such case, in turning his cattle upon the land previous to the commencement of the suit,—he having subsequently erected his portion of the division fence, as required by the contract,—cannot be considered notice of a revocation of the contract.

Judgment of the county court for the plaintiff, upon a report of referees, reversed in this court, and judgment rendered for the defendant.†

Ejectment for land in Readsboro. The action was referred, under a rule from the county court, and the referee reported the facts as follows. The plaintiff and defendant, being owners of the north half of Lot No. 1 in Readsboro,—the defendant
*296 owning one fourth from *the westerly side, and the plaintiff owning the residue, and the lot being bounded on the west by the west line of the town,—agreed between themselves, in writing, July 17, 1844, that a certain line should be the permanent boundary between their respective land, "provided that the corner, understood by Erastus Hall, Otis Phillips and others to have ever been and still to be the established south west corner of Readsboro, shall not be moved on proper and lawful authority and manner, either to the eastward or westward of its present location;" but that, if the south west corner of the town should be established either eastward or westward of what was then supposed to be the corner, then the north half of said Lot No. 1 should be divided between them by a competent surveyor, in the proportions respectively owned by them, and the westerly one fourth should belong to the defendant; and that, in such event, the defendant would pay to the plaintiff $1,50 per acre, as rent for the year ending July 1, 1845, and $1,00 per acre for every ensuing year, for all the improved land found to belong to the plaintiff, and pay all taxes thereon; and that after January 1, 1845, on reasonable notice, a lawful fence should be erected between their respective portions, as divided at the time of the contract between them. This agreement was signed by the parties, but was not sealed, or acknowledged. The defendant was in possession of the land sued for, under this agreement, at the commencement of this suit;—but it appeared, that the plaintiff had claimed, since the execution of the agreement, that the land in controversy belonged to him, and had turned his cattle upon it, but had subsequently erected his share of the division fence upon the line specified in the agreement. The plaintiff insisted, before the referee, that the agreement executed July 17, 1844, was void, for the reason that no person, or tribunal, was therein designated to ascertain the true south west corner of Readsboro;—but the referee decided, that the parties, by their agreement, must be understood to have referred to such a tribunal, as the law had invested with authority to decide the question, and that a court of law was the proper tribunal. The defendant insisted, that an action of ejectment could not be maintained, unless six months notice to quit had been given; but the referee decided, that no notice to quit was necessary. The referee found, that the ancient and established south west corner of Readsboro was twenty *rods west of the corner un- *297 derstood by Erastus Hall and Otis Phillips to be the south west corner of the town, and decided, that the plaintiff was entitled to recover the seisin and possession of the land described in his declaration. The county court, June Term, 1849,—HALL, J., presiding,—accepted the report, and rendered judgment thereon for the plaintiff. Exceptions by defendant.

J. L. Stark, Jr., for defendant.

The contract of July 17, 1844, was a sufficient legal instrument as a lease between the parties for one year; and if the defendant remained in possession thereafter, he held in accordance with the provisions of that contract, and became a tenant from year to year, requiring notice to quit, before the action could be sustained. 2 Pick. 71, note. 1 Ib. 332. 2 Aik. 240. Flower v. Darby, 1 T. R. 159. Wood v. Salmon, 4 Wend. 327. Schuyler v. Leggett, 2 Cow. 660. The agreement for the possession was for an uncertain period, and until the happening of the event mentioned in the contract; even if the contract is void as to duration, it creates a tenancy from year to year. Kline v. Rickert, 8 Cow. 226. 5 T. R. 471. 8 T. R. 3. Chit. on Cont. 319. 323. It was at least an agreement for a lease, such as a court of equity would enforce; and when possession has been taken under such an agreement, notice to quit must be given, before ejectment can be maintained. Lewis v. Beard, 13 East 210. 3 Taunt. 148. 2 T. R. 436. Campbell v. Bateman, 2 Aik. 177. The parties evidently intended, by their contract, that the south west corner of Readsboro should be "established," so that the towns, and all persons, should be concluded by it. They did not intend, that this should be done by arbitration, or by suit between themselves; for all controversy was settled between them by the contract.

T. W. Park for plaintiff.

The agreement cannot operate to pass the title to the land, because such was not the intention of the parties, and the instrument was not under seal. If the parties contemplated a decision of the question of title by a court of law, the report of the referee is right. *It would *298 be absurd to hold, that a court of law was the tribunal intended to determine the true line, and yet that a restriction was imposed upon the parties against resorting to such tribunal. No notice to quit was necessary, as the relation of landlord and tenant did not exist. The agreement was never intended as a lease, and had none of the requisites of a lease. The defendant claimed to hold in his own right, and not as lessee of the plaintiff. If the defendant had license to occupy, it could be revoked at any time by the plaintiff. The act of entering on the land operated as a revocation. Wood v. Leadbitter, 13 M. &

† See Vanderburg et al. v. Clark, ante page 185.

W. 837. The agreement was void, because made under the belief, that there existed a tribunal, other than a court of law, by which the true corner of the town might be ascertained.

The opinion of the court was delivered by

KELLOGG, J. This was an action of ejectment for a piece of land, being part of lot number one in the town of Readsboro. The case was referred, and the referee submitted a report detailing the facts found and the decisions by him made upon the facts. The county court having rendered judgment for the plaintiff upon the report, the case comes here for revision upon exceptions by the defendant. It appears, that the defendant was the owner of the west quarter of the north half of lot number one, and the plaintiff the owner of the remaining three quarters. The controversy between the parties was in relation to the division line between them. To ascertain where that was, it became necessary to ascertain the west line of the lot, which was also the west line of Readsboro. The south west corner of the town being ascertained, there is no difficulty in determining the correct line between the parties. The referee finds the south west corner of Readsboro to be twenty rods west of where it was supposed to be by Hall and Phillips, and consequently that the division line temporarily established by the parties is too far east by the same number of rods, and that the plaintiff is the owner of the land, for the recovery of which the suit is brought. These facts cannot be controverted here, but must be assumed to be correct.

It was insisted before the referee, and has been urged here, that the written agreement of the parties is void, inasmuch
*299 as it does not *designate any person, or tribunal, to ascertain the south west corner of Readsboro; but we think the referee was correct in holding, that it was not void, and that the parties must have intended to refer to such a tribunal, as the law had invested with authority to decide the question. Such tribunal is a court of competent jurisdiction. Indeed, we know of no other having such authority, unless it be a board created by the voluntary act of the parties. It is also insisted, that the plaintiff is not entitled to recover, inasmuch as he did not give the defendant six months notice to quit. This objection is based upon the assumption, that the written agreement of the parties constituted the relation of landlord and tenant, and consequently that the defendant was entitled to the usual notice to quit. This objection, however, in the judgment of the court, is not well founded. It is not the ordinary case of a lease of land. By the settled law in relation to landlord and tenant, the tenant, by taking a lease, admits the title of his landlord. But in this case both parties claimed title to the land in question, and the agreement was made for the purpose of defining, for the time being and until the original south west corner of Readsboro should be established, the respective possessions of the parties, and providing the amount that should be paid by the defendant, if any portion of the premises so occupied by him should ultimately be found to belong to the plaintiff.

The referee decided, that the defendant was not entitled to the usual notice to quit, and farther, that he was not entitled to any notice.

The agreement of the parties was clearly sufficient authority to the defendant to occupy the premises. It was, at least, a license to him to occupy the land; and while it remained in force and unrevoked, he could not, for such occupancy, be regarded as trespasser. To hold him a trespasser under such circumstances would be most unreasonable and without precedent. The defendant, being in possession of the premises by the license and permission of the plaintiff, was at least entitled to reasonable notice of the plaintiff's intention to institute a suit to settle the disputed line. We therefore think, the referee was wrong in holding that the defendant was not entitled to any notice to quit.

It has been urged, that the act of the plaintiff in turning his cattle upon the land, was a revocation of the license, and that from that *time the defendant *300 should be held a trespasser. We do not think, the facts in the case will justify such an inference. For after the plaintiff had turned his cattle upon the premises, he still went on and erected his share of the fence stipulated in the contract, thereby showing that he regarded the agreement still in force. There is no evidence in the case, showing a revocation of the license, or any notice to the defendant, prior to the commencement of the suit, of the plaintiff's intention to institute a suit to ascertain and establish the original south west corner of Readsboro. In the absence of such or some equivalent proof, we think the plaintiff was not entitled to recover. Consequently the judgment of the court below must be reversed, and judgment entered upon the report for the defendant.

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*COUNTY OF WINDHAM. *301

FEBRUARY TERM, 1850.

PRESENT:

HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG,
HON. HILAND HALL,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

GATES PERRY v. FRANCIS SMITH.

(*Windham*, Feb. Term, 1850.)

By the law of this state, the obligation of the maker of a promissory note for a sum certain, payable in specific property at a day named, when payment is not made at the day, is not a liability in damages for the non-fulfilment of the contract, but a mere duty to pay money.

And the amount due upon a note of this description, after the day of payment has passed without delivery of the specified property, may be recovered by the payee in an action for money had and received.

*Where controversy was had between the par- *302
ties, upon trial, in reference to the quality

of certain wool, and a witness was called, by the defendant, to testify as to the quality of certain wool which was shown to him by a third person, in whose care the wool in question was, and it appeared, that the only knowledge, which the witness had, that the wool seen by him, was the wool in controversy, was founded upon the declaration of such third person to him, that such was the fact, and no other testimony, to prove the identity, was offered, it was held, that the witness was properly excluded by the county court.

A promissory note, payable in "half blooded merino wool," is not answered by the delivery of wool, of which a portion is of a less degree of fineness than half blooded merino, and an equal portion is of a greater degree of fineness than the standard, so that the whole quantity, taken together, would be of the average degree of fineness required. All the wool delivered must be at least of the degree of fineness required by the contract.

Indebitatus assumpsit for money had and received, money paid, and money lent. The defendant pleaded the general issue, and also pleaded in bar the delivery of certain wool for the plaintiff at Paine's factory in Northfield,—which latter plea was traversed, and issue was joined. The plaintiff, in his specification, claimed to recover the interest, from April 1, 1847, to April 1, 1848, upon a note for $500, hereinafter described. The writ was dated June 6, 1848. Trial by jury, April Term, 1849,—KELLOGG, J., presiding. On trial the plaintiff gave in evidence the note described in his specification, which was signed by the defendant, dated November 18, 1839, and was in these words.—"For value received of Gates Perry, I promise to pay him, or his order, five hundred dollars, to be paid in half blooded merino wool, in good order, to be delivered at Paine's Factory in Northfield, Vermont, at two shillings and six pence per pound, and to be paid by the first day of April, 1850, with interest annually, the interest to commence the first day of April next." There were indorsements upon the note, showing the payment of the interest to April 1, 1847. To the admission of this evidence the defendant objected, on the ground that it did not support the declaration, and that the plaintiff should have declared specially upon the contract; but the objection was overruled by the court. The defendant then introduced testimony tending to prove, that on the first day of April, 1848, he delivered,
*303 at Paine's factory in *Northfield, to one Smith, the clerk at the factory, wool corresponding in quantity, quality and condition with that described in the note, and that it was weighed and put in sacks by Smith, and the name of the plaintiff marked upon the sacks, and that it was left at the factory for the plaintiff. Testimony was given upon both sides as to the quality of the wool so delivered. Among other testimony the defendant offered James Currier as a witness, to prove, that he had examined the wool, when exhibited to him by Smith at the factory, and to show its quality. To this witness the plaintiff objected, on the ground that it was incumbent upon the defendant, by other evidence than the declarations of Smith to Currier, to prove the identity of the wool so exhibited to Currier with the wool delivered by the defendant;—and the court sustained the objection and excluded the witness. After the jury had retired to consider of their verdict, they returned into court, and requested instructions, whether, if they found, that two or three fleeces of the wool delivered were coarser, and other fleeces to an equal amount finer, than half blood merino, it was to be deemed a compliance with the contract; and the court instructed them, that the delivery of such wool would not be in conformity with the contract. Verdict for plaintiff. Exceptions by defendant.

W. C. Bradley for defendant.

The defendant contends, that the action was misconceived. Wilson v. George, 10 N. H. 445. Burnap v. Partridge, 3 Vt. 144. Lee v. Merrett, 8 Ad. & E., N. S., [55 E. C. L.] 820. The testimony of James Currier should have been received, and have been considered by the jury. The charge should not have been, that if the jury found two or three fleeces coarser and an equal amount finer than half blood merino, it would not satisfy the contract; but it should have been, that if they found, that the whole, taken together, was equal to half blood merino, it would satisfy it, and otherwise not;—for the contract is not respecting fleeces of wool, as such, but a certain amount of half blood merino wool, in good order: and the term "half blood" is not here descriptive of race, but of quality in all respects, when taken collectively; and what amounts to this is not a question of law, but of fact, for the jury.

C. J. Walker and *G. W. Kellogg* for *304 plaintiff.

Originally the use of the money counts was much more restricted, than at present. Although under the count for money lent it is laid down, that money must actually be loaned to the defendant by the plaintiff, yet it has been held, that a due bill in these words,—"Due A. B. $80 on demand,"—sustains the action; Hay v. Hide, 1 D. Ch. 214. So, to sustain a count for money paid, it is said money must have been paid by the plaintiff; Chit. on Cont. 591; yet where a surety has given a note in satisfaction of the principal debt, he may recover under this count; Lapham v. Barnes, 2 Vt. 217; Pearson v. Parker, 3 N. H. 366. So, where the surety has paid the debt in land; Ainslie v. Wilson, 7 Cow. 662; Randall v. Rich, 11 Mass. 498. To sustain a count for money had and received, it is said the defendant must have received money, as cash,—not merely money's worth; Chit. on Cont. 602; yet where promissory notes have been received by the defendant, this count has been sustained, although they have not been converted into money; Willie v. Green, 2 N. H. 333; Floyd v. Day, 3 Mass. 403; Clark v. Pinney, 6 Cow. 297; so, where an attorney has received a deed of land in satisfaction of his client's execution; Beardsley v. Root, 11 Johns. 464; Miller v. Miller, 7 Pick. 136. The principle of these decisions is well stated in Wheat v. Norris, 13 N. H. 178. Where anything is received under such circumstances, that, as between the parties, it is to be deemed as money, the action may be maintained; Ib.; Burnap v. Partridge, 3 Vt. 146. Thus an account stated is evidence under a count for money had and received; Filer v. Peebles,

8 N. H. 230. Thus an action for money had and received may be maintained for money due upon a note, or bill; Chit. on Bills 580; Hughes v. Wheeler, 8 Cow. 77; and this even between the indorsee and indorser; Tenney v. Sanborn, 5 N. H. 557; State Bank v. Hurd, 12 Mass. 172; Ellsworth v. Brewer, 11 Pick. 320; Dimsdale v. Lanchester, 4 Esp. 201; Wilson v. George, 10 N. H. 446; and this upon the legal presumption, that at each indorsement, a pecuniary consideration passes; 4 Esp. R. 201; 11 Pick. 319. Sometimes this has been put upon the ground, that the note furnishes evidence, that it is founded upon a pecuniary consideration; Hughes v. Wheeler, 8 Cow. 77; Saxton v. Johnson, 10 Johns. 420. The sounder reason ap-
*305 pears to be, because the note *shows, that there is a sum of money due from the maker, which may well be considered money in his hands to the use of the payee, or indorsee; Wilson v. George, 10 N. H. 446; Young v. Adams, 6 Mass. 189; Payson v. Whitcomb, 15 Pick. 216; Pierce v. Crafts, 12 Johns. 93; Smith v. Van Loan, 16 Wend. 660. It is for this reason, that our courts hold, that if a contract contain nothing special, except as to the time and mode of payment, and the time have expired, there is no necessity of declaring specially; Way v. Wakefield, 7 Vt. 228; Stevens v. Talcott, 11 Vt. 29; Mattocks v. Lyman, 16 Vt. 118. And accordingly it has been held, that notes payable in specific articles may be treated, so far as the declaration is concerned, as promissory notes, although otherwise at common law; Dewey v. Washburn, 12 Vt. 580; Wainwright v. Straw, 15 Vt. 219; Denison v. Tyson, 17 Vt. 549. In Brooks v. Hubbard, 3 Conn. 58, it was held, that a note for $250, payable in specific articles, was the acknowledgment of a debt for that sum, with an option in the promissor to pay it in a particular way; and he having failed to take advantage of it, the promise was to be regarded as a naked agreement to pay money. Sedgw. on Dam. 242. Pinney v. Gleason, 5 Wend. 393. Chip. on Cont. 34. Denison v. Tyson, 17 Vt. 549. And in the following cases it has been held, that a note payable in specific articles may be given in evidence under the money counts; Smith v. Smith, 2 Johns. 235; Saxton v. Johnson, 10 Ib. 418; Walrad v. Petrie, 4 Wend. 575; Crandal v. Bradley, 7 Ib. 311; Young v. Adams, 6 Mass. 189; Wainwright v. Straw, 15 Vt. 219. The fact, that the sum sued for is the interest upon a larger sum, not then due, cannot affect the principle of pleading; Wilson v. George, 10 N. H. 446. The testimony as to the declarations made by Smith to Currier was clearly hearsay. 1 Greenl. Ev. §§ 99, 113, 123, 124. The charge was correct. Wool coarser than half blood merino could not answer upon a contract for half blood merino.

The opinion of the court was delivered by

POLAND, J. The general doctrine, that money due upon a promissory note, whether principal or interest, may be recovered under a general declaration in *assumpsit* for money had and received, is too well settled at the present day, to admit of any
*306 doubt, or to require *any discussion. The defendant insists, that this doctrine does not obtain in the case of notes payable in specific articles, which are not negotiable, and are not considered as technical "promissory notes." In England, where these contracts for the payment of specific articles are placed by the courts upon the footing of mere special contracts, and are not considered as partaking in any sense of the nature of "promissory notes," this position might with great propriety be maintained. There it has always been held, that the declaration upon such written instruments must be special; and the plaintiff is held bound to set forth the particular consideration, upon which the same was executed, and, upon trial, to prove the same, even though the instrument contain the words "for value received."

In this country, and especially in this state, notes of this character have received an entirely different consideration. The form of declaring upon them is the same as upon negotiable notes for the payment of money; and the words "for value received" are treated as furnishing the same *prima facie* evidence of a sufficient consideration, as in actions on negotiable notes. So, too, when the payee of a note of this character indorses it in blank, the law implies a liability of the same character, and to the same extent, as upon a blank indorsement of a negotiable note.

In short, by an uninterrupted series of decisions in this state, notes payable in specific articles of property, after the time of payment has elapsed, seem to stand in much the same condition, as notes payable in money, except in their lack of negotiability. After the time of payment mentioned in the note has elapsed, or, to use the common and uniform phrase of the community, after the note has "run into money," it is considered purely as an obligation for the payment of money alone, and a fixed and determinate sum; and in no sense is such a note considered as merely evidence of a special contract for the delivery of a certain quantity of specific property, or the holder's right and interest in it as a mere claim, or right, to recover damages of the maker for not having delivered it, agreeably to the contract. Before such a note falls due by its terms, the maker is considered as having an option to pay it in the particular currency, or property, mentioned; after it becomes due, this option is gone, and it has become an absolute engagement for the payment of money. The maker of such a note, which has become due by its *own terms, has *307 the same right to make a tender of the amount, either before or after suit brought, or to bring money into court upon it, as in the case of a note originally payable in money. The following are some of the cases, in which the law in relation to this class of notes has been settled in this state. Meed v. Ellis, Brayt. 203. Brooks v. Page, 1 D. Ch. 340. Dewey v. Washburn, 12 Vt. 580. Aldis et al. v. Johnson, 1 Vt. 136. Way v. Wakefield, 7 Vt. 228. Wainwright v. Straw et al., 15 Vt. 219. Denison v. Tyson 17 Vt. 549.

The defendant in this case, in order to establish the position, that a note payable in specific articles cannot be recovered under

the general money counts, relies mainly upon the case of Wilson v. George, 10 N. H. 445. The action in that case was *assumpsit* for money had and received. The plaintiff sought to recover the amount of a note, signed by the defendant, for eleven dollars and twenty two cents, payable in wheelwright's work, on demand. The plaintiff proved a demand of the work, and that the defendant had neglected to deliver it. The court decided, that the action could not be sustained; and the case is a full authority for the defendant in this case. The opinion of the court was delivered by Ch. J. PARKER, and is a lengthy and learned argument upon the question involved. The whole argument is based upon what is assumed to be the doctrine in that state, in relation to notes payable in specific articles, that, after the time of payment has elapsed, the obligation of the maker is not a mere duty to pay money, but a liability in damages for the non-fulfilment of his contract. Admitting this to be the correct view of the rights and liabilities of the parties to such a note, we should find no difficulty in arriving at the same conclusion with Ch. J. PARKER; for no principle is better settled, than that damages for the breach of a special contract cannot ordinarily be recovered under the general money counts. But, as already stated, an entirely different doctrine has obtained in this state in reference to this class of notes, and has been too long and too well settled, to be now departed from.

In some of the cases, where it has been decided, that money due upon a promissory note may be recovered under a count for money had and received, the reason given is, that the note furnishes evidence, that it is founded upon a pecuniary consider-
*308 ation; in others *the reason given is that the note shows, that there is a sum of money due from the maker, which may be treated as money in his hands, to the use of the payee. In either view we are unable to see, why the note in the present case would not support the declaration. The note itself furnished the same evidence of consideration, as is furnished by a negotiable note; and after the maker had neglected to pay the wool, according to its terms, it became an absolute obligation for the payment of a certain sum of money.

In the state of New York, where the distinction between negotiable notes and those for the payment of specific articles is still kept up to a far greater extent than in this state, repeated decisions have been made, allowing notes payable in specific articles to be recovered under the general counts. Smith v. Smith, 2 Johns. 235. Saxton v. Johnson, 10 Ib. 418. Crandal v. Bradley, 7 Wend. 311. In the state of Massachusetts, also, in the case of Young v. Adams, 6 Mass. 182, it was decided, that *assumpsit* for money had and received might be maintained upon a note payable in foreign bills. That such a note is not negotiable, and stands upon the same ground as a note for any other specific property, see Jones v. Fales, 4 Mass. 245; Collins v. Lincoln, 11 Vt. 268.

In relation to the exclusion of the evidence of the witness Currier, who was offered by the defendant, it appears by the exceptions, that the witness was called to testify as to the quality of a quantity of wool, shown to him by one Elijah Smith. It was necessary for the defendant, in order to make this evidence available, to show, also, that the wool shown the witness by Smith was the very wool, which the defendant had tendered upon the note, and about which the parties were in litigation. This fact, it seems, the witness did not know, and the defendant had no other proof to establish it, except the declaration of Smith to the witness. This, of course, was mere hearsay, and could not be received as evidence; and as the defendant furnished no other proof of the identity, we think the evidence was properly excluded.

The defendant's objection to the instructions of the court to the jury, in answer to their inquiry, seems to us to be founded in a misconception of its purpose and meaning. It is assumed, that the jury were instructed, that, in order to enable the defendant to pay his note, according to its terms, he must have delivered fleeces of wool
*of precisely and exactly the same *309 quality and fineness,—which, it is argued, would be impossible for him to do, and that all that the defendant was bound to do, was to furnish wool, which should fairly and reasonably answer the description and quality called for by the note, viz., "half blooded merino wool."

If the instructions to the jury had been such, as are assumed, and the duty of the defendant narrowed to such a strict limit, we should by no means be prepared to sustain them; but on a careful inspection of the exceptions in this respect, we do not find such a rule to have been given to the jury. Their inquiry was based upon the supposition, that a portion of the wool tendered did not fairly and reasonably answer the quality and fineness required by the note, and an equal amount of the wool was of a finer and better quality, than the note required. The jury inquired, whether, in case they found such to be the state of facts, they could average the quality of the wool, and the court told them, they should not, and that all the wool must be of the quality, which the defendant had contracted to pay. We think the soundness of the answer given to the jury, to their inquiry, cannot be at all doubted, and that to hold otherwise, and say, that the defendant might discharge his contract in part by a species of property, which the plaintiff had not contracted to receive, if the defendant were willing to pay the residue in property which was better than he contracted to pay, would be trifling with terms and stipulations, which the parties themselves have chosen to make. The judgment of the county court is affirmed.

JUSTUS H. DIX AND PRESCOTT LATHROP v. SCHOOL DISTRICT NO. 2 IN WILMINGTON.

(*Windham*, Feb. Term, 1850.)

The plaintiffs proposed to sell to the defendants, who were a school district, certain land, upon which a school house was to be erected, with the restriction, that the front of the school house, when erected, should be upon a line with the front of a certain meeting house, and that no building should be erected upon the land, in front of the school house and meeting house. This proposition was made in school meeting, and the dis

trict thereupon voted to instruct their prudential committee to purchase the land. The
*310 purchase was made accordingly; and in the deed, executed by the plaintiffs to the defendants, the restriction was expressed to be, that no erections should be made upon said land between the school house and the highway. In the declaration in an action of *assumpsit*, brought by the plaintiffs to recover the price, which the defendants agreed to pay for the land, this restriction was expressed in the words used in the deed. *Held*, that there was no variance between the contract declared upon and that proved.

At the time the proposal for the sale was made to the district, the land had been unenclosed for some years, and open for the public, and one restriction, imposed by the plaintiffs in their proposal, was, that the land should be kept open. In the deed it was expressed, that the land should remain as a public common. And in the declaration the restriction was expressed as in the deed. *Held*, that this difference constituted no objection to the plaintiffs' recovery,—that the deed only imposed upon the district the obligation to keep the land open, as it then was.

Held, also, that the plaintiffs, in such suit, were properly allowed by the county court to prove the terms, upon which they so offered to sell the land to the district.

And where it appeared, in such case, that the selectmen of the town, in pursuance of a vote of the district, had located the school house upon the land in question, and that the district voted "to instruct the prudential committee to purchase the land designated by the selectmen for the location of a school house,—at the price of $100," and that the prudential committee had purchased the land at the specified price, but in the deed, which was accepted by the prudential committee, certain restrictions were expressed, viz., that the district should hold the land for the purpose of erecting a school house thereon, and that the school house should be so located, that the front should be upon a line with the front of a meeting house standing near, and that no erections should be placed upon the land, between the school house and the highway, but the land should remain as a public common, it was held, that these restrictions did not defeat or impair the object of the purchase, and that the prudential committee had power to accept a deed containing such restrictions, and that the plaintiffs might recover from the district the price of the land, under a general count for land sold.

And such deed being executed with covenants of warranty, it was held no defence to such action, that there was a defect in the plaintiffs' title to the land.

Where a district does not own land, on which to erect a school house, and one article in the warning of a meeting is, "To see what measures the district will take in relation to building a school house," it is competent for the district, at such meeting, to vote to purchase land for that purpose.

*311 **Assumpsit.* The plaintiffs declared, in the first count in their declaration, that, on the second day of December, 1846, in consideration that the plaintiffs would sell and convey to the defendants a certain piece of land, describing it, whereon to erect a school house, and whereon the selectmen had located such school house, subject to certain restrictions, to wit, that the district should hold the land for the purpose of erecting a school house thereon, that said school house should be so located, that the west end thereof should be as far west as the front end of the Congregational meeting house, that no erections should be made thereon between said school house and the highway, and that the land should remain as a public common, the defendants promised to pay the plaintiffs one hundred dollars therefor on demand; and the plaintiffs averred, that they did sell and convey the land to the defendants, by a good and sufficient deed with such restrictions as above mentioned. There was also a general count in *indebitatus assumpsit* for land sold and conveyed. Plea, the general issue, and trial by the court, September Term, 1848,—KELLOGG, J., presiding. It was conceded upon trial, that the defendants were a school district, duly organized, and were a legal corporation at the time the contract, described in the declaration, was made, and for a long time previous had been and still continued to be. The district was duly notified, by warning dated October 28, 1846, to meet on the fourth of November, 1846, to act upon the following matters, among others;—1. To choose officers for the year ensuing: 3. To see if the district will reconsider all votes heretofore passed in relation to building a school house: 4. To see what measures the district will take in relation to building a school house. The district met, November 4, 1846, and chose, among other officers, Horace Hastings prudential committee, and adjourned the meeting to November 5, 1846, —at which time they met and adjourned to November 10, 1846. On the tenth of November the district met and passed the following votes;—To reconsider all votes heretofore taken in relation to building a school house;—To build a school house upon the plan adopted on the eighteenth and twenty sixth of March last;—That the prudential committee be requested to call on the selectmen to locate a school house. The meeting was then adjourned to November 17, 1846. Between the tenth and seventeenth of November the select-
*men, pursuant to the application of *312 the district, located the school house upon land belonging to the plaintiffs and one Stanley,—being the same land described in the declaration. On the seventeenth of November the district met, and voted "to instruct the prudential committee to purchase the land designated by the selectmen for the location of the school house, at the price of $100." The plaintiffs offered to prove the proposal made by them to the district, at the meeting of the seventeenth of November, and previous to the vote last mentioned, as to the terms and conditions, upon which they would convey the land to the district. This was objected to by the defendants, but admitted by the court. It was then proved, that Lathrop, one of the plaintiffs, at that meeting, and before the vote to purchase was passed, proposed to the district, that they should have the land for $100, subject, however, to these conditions,—that the school house should be placed so far back upon the land, that the front should be upon a line with the front of the Congregational meeting house,—that no building should be erected upon the land in front of the school house and Congregational meeting house, —and that the land should be kept open;—and it appeared that the same proposition was made to the district at a previous meeting, and before they voted to have the se-

lectmen make the location. It also appeared, that the prudential committee, in pursuance of the vote of the seventeenth of November, contracted with the plaintiffs for the purchase of the land, agreeably to the instructions of the district, at the price of $100, and, on the second of December, 1846, received from the plaintiffs a deed of the premises, with covenants of warranty, and accepted the same. By the terms of this deed, the conveyance was made subject to these restrictions,—"that said district are to hold said land for the purpose of erecting a school house thereon, and that said school house is to be so located, as that the west end thereof shall be as far west as the front end of said meeting house, and that no erections are to be upon said land, between said school house and the highway, but said land is to remain as a public common." The price of the land was not paid. It also appeared, that the selectmen, in June, 1846, had located the school house on other land, and that, after the district had purchased the land in question of the plaintiffs, the district again caused a location to be made by the selectmen upon such other land, and subsequently *erected their school house *313 there. It appeared, that the land purchased of the plaintiffs had previously laid open for six or seven years. The plaintiffs also gave in evidence a deed of the premises in question from Stanley to themselves, dated December 5, 1846.

The defendants gave in evidence the warning and record of a meeting of the district, held December 7, 1846, at which they voted to reconsider the vote to purchase the land in question,—to instruct the prudential committee not to pay for said land,—and to reconsider the vote to build upon that land;—also, the warning and record of a meeting of the district, held February 4, 1848, at which they voted to purchase other land, and to request the selectmen to locate the school house upon it;—also the warning and record of a meeting of the district, held March 12, 1846, at which they voted to build the school house the ensuing season, and to sell the real estate then belonging to the district, and to choose a committee to propose a plan for a school house;—also the record of a meeting held March 18, 1846, at which the district voted to accept the plan submitted to them by their committee;—and also the record of a meeting held March 26, 1846, at which the district voted to amend, in some respects, the plan previously adopted by them for their school house. The defendants also gave in evidence a deed of the premises in question from Parker Hastings and Lawson Smith, "as agents for the Congregational Church and Society in Wilmington," to the plaintiffs and Stanley, dated March 2, 1841, and purporting to convey the premises in question; but this deed was signed by Hastings and Smith in their own names, and purported to be sealed with their seals, and was acknowledged by them. The records of the town showed no title in the plaintiffs and Stanley to the land in question, except by virtue of this deed from Hastings and Smith; but it appeared, that the plaintiffs claimed to own the land. Upon these facts the county court rendered judgment for the plaintiffs. Exceptions by defendants.

O. L. Shafter for defendants.

W. C. Bradley and *A. Keyes* for plaintiffs.

*The opinion of the court was de- *314 livered by

KELLOGG, J. The bill of exceptions contains a statement of the facts, upon which judgment was rendered in the court below; and to that judgment several objections have been urged in this court, which are now to be considered.

1. It is said, that the plaintiffs are not entitled to recover, by reason of a variance between the contract proved and the one set forth in the declaration.

If a variance, of a substantial character, is found to exist between the contract proved and the one declared upon, it must be conceded, it would be fatal to a recovery upon the special count. But we are not able to discover any variance of that character. The declaration sets forth a contract to convey the land, subject to the following reservations and restrictions,—that the district should hold the land for the purpose of erecting a school house thereon,—that the school house should be so located, that the west end should be as far west as the front end of the meeting house,—that no erections should be made upon the land between the school house and the highway,—and that the land should remain a public common.

The case finds, that the plaintiff Lathrop proposed to the district, at their meeting on the seventeenth of November, and before the vote was passed, authorizing the prudential committee to buy the land, to sell it, subject to the following restrictions, —that the school house should be placed so far back upon the land, that the front part of it should be upon a line with the Congregational meeting house,—that no building should be erected upon the land in front of the school house and the Congregational meeting house,—and that the land should be kept open. The vote of the district, authorizing the purchase, was passed immediately upon receiving the plaintiff's proposition. It is therefore a reasonable and natural inference, that the district authorized the purchase upon the terms proposed by the plaintiffs.

The only difference between the restrictions proved and those alleged in the declaration is, that in the former the district are restrained from making erections in front of the school house and meeting house, while in the declaration and in the deed the restriction is limited to the school house. We think, it is no ground of complaint by the district, that the land was obtained by their agent *upon *315 terms more favorable to the district, than they had authorized. The restrictions imposed upon them must be confined to those expressed in the deed; and these are found to correspond with those set forth in the declaration.

Again, it has been urged, that there is a variance between the proof and the declaration, as to the location of the school house; but we are unable to perceive it.

The terms used in specifying the restrictions, it is true, are not precisely the same in both, but they express the same idea, and impose the same obligation. In both, the restriction requires the school house to be placed so far back, that the west end shall not be farther west than the line of the meeting house. Again, it is objected, that while by the contract the land is only required to be kept open, yet by the deed the land is to remain as a public common. The proof shows, that, at the time of the purchase, the land was, and had been for some years, unenclosed and open to the public; and the deed, we think, only imposes upon the district the obligation to keep the land open, as it then was. It contemplates nothing more.

2. It is insisted, that the court erred in admitting the evidence showing the terms, upon which the plaintiffs offered to sell the land to the defendants. This evidence was proper, to show the circumstances, under which the vote of the district was passed, authorizing a purchase of the land, and the terms and conditions, which the plaintiffs would require upon a sale of it. It was intimately connected with the vote of the seventeenth of November, and it may well be supposed, that this induced the vote, and that the vote was passed with reference to those proposals. We think the evidence was properly admitted.

But even if it were admitted, that there is such a variance, as is contended by the defendant, and if the evidence of the proposals made by Lathrop to the district were laid out of the case, still we are inclined to think, the plaintiffs might well recover, upon the general count. The object of the district was, to purchase land whereon to erect a school house; and although the vote of the district, authorizing the purchase, was general in its terms, yet we think the prudential committee, to whom the general power was delegated, might well purchase upon the terms he did, inasmuch as the restrictions in the deed in no manner defeat
*316 or impair the object *of the purchase. The district did, indeed, limit the prudential committee as to the particular land to purchase, and the price to be paid for it. Beyond this they did not undertake to restrict the committee: for we think the language of the vote does not necessarily import, that the purchase should be made free of all restrictions. Doubtless the purchase should be such as not to defeat the object of the grant, or prejudice the district in the enjoyment of it. Those objects were fully attained, and in a manner satisfactory to the agent of the district.

3. It is objected, that the deed of the plaintiffs does not convey to the district any interest in the premises, inasmuch as the plaintiffs derived their supposed title from the Congregational Society, through Hastings and Smith, describing themselves as agents of the society. It is deemed a sufficient answer to this objection, that the deed was satisfactory to the agent of the district, and was by him accepted. The district are presumed to have known the title of the plaintiffs; for it appeared of record. The district must have contemplated the purchase to be made of the plaintiffs. The agent procured a deed with the usual covenants of warranty, which he accepted; and by that acceptance the district is bound. If the title is defective, the district have their remedy upon the covenants in the deed.

4. It is urged, that there was no legal notice to the inhabitants of the district, that the subject of the purchase of land, on which to erect the school house, was to be acted upon at the meeting, and consequently that the vote was invalid.

The statute requires, that the time, place and object of the meeting shall be stated in the notice. The warning contained an article in these words,—"To see what measures the district will take in relation to building a school house." This was sufficient notice to the inhabitants, to justify the meeting in acting upon all matters, and adopting all measures, which should be deemed necessary and proper for the erection of a school house. If the district had no land, on which to erect the house, it would be as necessary to procure it, as it would be to provide materials for the building; for the house could not be built without land, on which to erect it. The evidence in the case shows, that the subject of building a school house and fixing its location had been the occasion of frequent meetings of the district, during the season
of 1846. In March of *that year the *317 district directed the sale of their real estate; and it does not appear, that they had any land at the time of the purchase of the plaintiffs. In June of the same year they procured a location to be made by the selectmen, which was subsequently changed. This clearly shows, that the district had land to purchase, as well as a house to build; and of this the district seem to have been fully aware. We think, the notice was amply sufficient to apprise the inhabitants of the district, that at the meeting all necessary measures were to be taken for the building of a school house, and as necessarily incident to that was the purchase of land on which to erect it.

This disposes of all the objections raised, and we discover nothing to justify us in disturbing the judgment of the court below. Consequently the judgment of the county court is affirmed.

TOWN OF WHITINGHAM v. ALFRED BOWEN AND OTHERS.

(*Windham*, Feb. Term, 1850.)

A pent road is a highway, within the meaning of the Revised Statues.

Upon a petition to the county court for the laying out of a highway, that court have power to lay out and establish a pent road.

Petition for a writ of *certiorari*. Bowen and others, the petitionees, had preferred their petition to the county court, that that court would cause to be surveyed and laid out a public highway in the town of Whitingham. Commissioners were appointed, who reported, that a pent road should be laid out. And the county court, April Term, 1849, accepted the report, and ordered a pent road to be established and constructed. And the town now insisted, that, under a petition to lay out a high-

way, the county court had no authority to lay out a pent road.

The opinion of the court was delivered by

REDFIELD, J. The only question in this case, is whether a pent road is to be construed to be a highway, within the meaning of the Revised Statutes. By the Rev. St., chap. 20, sec. 3, it is provided, *318 *that "the selectmen may also lay out cross roads, or lanes, as pent roads." Section five provides, that "all cross roads, or lanes, shall be deemed highways." This evidently shows, that, in terms, the legislature have made pent roads highways; and we think such was their intention. This statute was revised long after the decision of Warren v. Bunnell, 11 Vt. 600, and that case had virtually made such roads highways, under the former statute; and unless the legislature had intended, that they should so continue, they would not have in such express terms so declared them. The statute now, in regard to certifying the opening of roads by the selectmen, only extends to highways; and the case of Warren v. Bunnell expressly extends that provision to pent roads, and, by consequence, gives the party, through whose land such highway is laid, the right to claim damages of the town. Those highways, which are permitted to be pent, are as much public highways, as any others,—free to all persons, who may have occasion to pass along them. The twenty ninth section in terms gives an appeal to the county court, in all cases where the selectmen refuse to lay out "a highway," that is, any highway, open or pent, which it is competent for them to lay out. This is perhaps the reason of the case. If one is fairly entitled to a pent road, and the selectmen refuse to lay it out, and he has no appeal, on that application, he certainly should have an open road.

We denied this writ in a similar case in Addison County, in 1849; but this point was not urged.

The motion is denied, with costs.

DAVID CHANDLER v. JOHN SAWTELL AND JAMES TOWER. (In Chancery.)

(*Windham*, Feb. Term, 1850.)

When an execution is levied upon land, the title will become absolute in the creditor, unless the debtor, or his legal representative, tender and pay to the clerk, or justice, who issued the execution, the amount due upon the execution, with the costs of levy, within the six months allowed by the statute for redemption. It is not sufficient, that the money is tendered to the creditor personally, and not accepted by him.

*319 *Appeal from the court of chancery.

Edward R. Campbell held a note, for $550, against the defendant Tower, dated April 29, 1837, which was secured by mortgage upon certain land, which Tower owned in fee, subject to a life estate in a third person; but before the mortgage was recorded, the defendant Sawtell attached the land, upon two writs, as the property of Tower. The mortgage was assigned by Campbell to the orator, August 29, 1841. Sawtell recovered judgment in his suit against Tower, April Term, 1841, and took out execution. On the sixth day of May, 1841, Sawtell levied one of his executions upon nine undivided twelfth parts of the land, subject to the above mentioned incumbrance of the life estate, appraised at $516,25; and on the eleventh day of May, 1841, for the purpose, as the orator alleged in his bill, of preventing Campbell, or the orator, from redeeming the land, so levied upon, he caused his remaining execution to be levied upon ten undivided twenty fifth parts of the same nine undivided twelfth parts of the land, appraised at $256,14. On the fifth day of November, 1841, the orator tendered to Sawtell, personally, the full amount due upon the first execution, which was levied upon the land, with the costs of the levy; but Sawtell refused to receive the money. The orator prayed, that the defendants be decreed to pay to him the amount due upon the mortgage note, or, in default thereof, be foreclosed of all equity of redemption in the premises. The court of chancery dismissed the bill; from which decree the orator appealed.

A. Keyes and *C. I. Walker* for orator.

W. C. Bradley and *L. Adams* for defendants.

The opinion of the court was delivered by

REDFIELD, J. By the bill in this case the plaintiff, for those whom he represents, seeks to be restored to the title of land, upon which a creditor has twice levied executions, in succession, to the full extent of the fee simple, the second levy being intended doubtless to reach his right of redeeming the first levy. Upon the first levy, within six months from date, the debtor made a tender of the amount to the creditor in person, but not to "the clerk of the court, or justice," as the statute requires. If the title of the levying creditor *became *320 absolute, by reason of this defect in the mode of the tender, the bill was correctly dismissed, and the effect of the second levy becomes unimportant.

Upon this subject the court are inclined to abide by the terms of the statute. That provides, that the debtor, in such cases, may "tender and pay to the clerk of the court, or justice," "the sum, at which the estate was appraised, and interest," and take from such clerk, or justice, "a certificate thereof;" and this, being recorded "in the town or county clerk's office, where the execution was recorded, shall forever defeat any title to such estate" by means of the levy. Without this provision, the title would, at once, become perfected in the creditor. This is the only mode, which the law provides for defeating the title. It is simple, certain, easy to be understood and to be followed; and it is not for the parties, or the court, to say, that other modes are equivalent. Doubtless, if the creditor had accepted the money, and attempted to retain the money and the land, or had in any other way induced the debtor to forego the mode of tender required by the statute, courts of equity would recognize it, as a fraud of a character to be redressed by them, and very likely by requiring a reconveyance of the land. But nothing of the kind appears in this case.

Many conjectural reasons might be as-

signed, why a tender to the creditor, in person, would be less satisfactory, than to have the money paid into the clerk's office. And if we depart in one particular, we know not how far we might be driven to go. We might next be asked to say, that a tender at the dwelling house, or place of business, of the debtor is sufficient. The subject matter, which is now so well understood, and so practicable, would thus become embarrassed and complicated, to a very unreasonable and a very unnecessary extent.

The decree of the chancellor is affirmed, with additional costs.

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*321 *COUNTY OF WINDSOR.

MARCH TERM, 1850.

PRESENT:

HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. DANIEL KELLOGG,
HON. HILAND HALL,
ASSISTANT JUDGES.

STATE v. FRANKLIN RIGGS AND WILLIAM W. REED.

(*Windsor*, March Term, 1850.)

A grand juror's complaint, alleging that the respondents did break and disturb the public peace by ringing and causing to be rung and tolled a certain church bell, and, well knowing that one P. was then living, did report and aver, that said P. was dead and was to be buried on the next succeeding day, and did ring the said bell with intent to have it believed, that the said P. was then dead, and with intent to annoy, harrass and vex the said P., and his family and friends, is insufficient, and judgment thereon will be arrested, upon motion.

*322 *This was a grand juror's complaint; and the case came to the county court by appeal. It was alleged in the complaint, that the respondents, at Ludlow, on the fourteenth of April, 1848, with force and arms, did break and disturb the public peace by then and there ringing and causing to be rung and tolled a certain church bell, and, well knowing that Zachariah Parker, Jr., of said Ludlow, was then living, did report and aver, that the said Parker was dead, and was to be buried on the next succeeding day, and did ring the said bell with intent to have it believed, that the said Parker was then dead, and with intent to annoy, harrass and vex the said Parker and his family and friends. After a verdict, that the respondents were guilty, a motion was filed in arrest of judgment, for the insufficiency of the complaint. The county court, November Term, 1849,—KELLOGG, J., presiding,—overruled the motion and rendered judgment upon the verdict. Exceptions by respondents.

H. E. Stoughton and *J. F. Deane* for respondents.

In order to constitute an offence at common law, the act charged must be unlawful, or a particular bad intention must accompany the act. 1 Chit. Cr. Law 232. State v. Lovett, 3 Vt. 110. But in the case at bar the acts charged are not criminal, and no sufficient criminal intent is alleged. The attempt to make the public believe a falsehood is not indictable; neither is the attempt to annoy a person, without success, indictable. It is not alleged, that the respondents were successful in accomplishing their intent.

S. Fullam for state.

The offence charged is a disturbance of the public peace, by reporting the death of a citizen known to be alive, and tolling the bell for his death. This is clearly an offence. It disturbs that peace, which the citizens of this state have a right to enjoy. It tends to provoke quarrels and excite tumult, and it is manifestly highly immoral and sacrilegious.

The opinion of the court was delivered by

REDFIELD, J. This is certainly a case of the first impression. It seems to us very clear, that the acts charged in the complaint do not constitute an offence against the statute defining the ordinary *modes of committing a breach of the *323 public peace "by tumultuous and offensive carriage, threatening, quarrelling, challenging, assaulting, beating, or striking." The offence there defined is that of assault and battery, together with other kindred acts, of the nature named in the statute, and calculated to put one in fear of bodily harm, and disturbing that quiet and repose, which constitute essentially the comfort and rest of social life,—as was held in State v. Benedict, 11 Vt. 236.

But the misconduct here charged, testing its character by the rules of the common law,—and we have no other guide in cases wholly novel,—is either a libel, or a species of profanity, or perhaps partaking somewhat of both qualities. So far as the offence against the individual is concerned, it seems to be more a libel than any thing else, by attempting to bring him into contempt and ridicule and public scandal. The means resorted to, although novel, are not perhaps very different from pictures, effigies and pantomime, and other scenic and dramatic exhibitions, by way of caricature, which have been regarded as modes, in which one might be libelled. But to constitute an offence of this character, it is necessary, that the complaint should contain something more, than the mere acts. It should also contain averments, that the defendants did the acts for the purpose and with intent to bring the person aggrieved into public scandal, and that such was the nature and effect of such actions and conduct, as described in the complaint. The complaint is wholly deficient in these particulars. And whether it is possible to so frame a declaration, or bill, as to make such acts amount to any ground of action, or criminal proceeding, I would certainly not be prepared to say. The acts complained of are to my mind more like libel, or slander, perhaps, than a breach of the peace, by putting in fear of bodily harm.

Viewed as an unseemly jest, and an attempt to turn a very serious matter into heartless levity and unfeeling merriment, it would no doubt, by some, be regarded as a shocking profanity. For however the hour

of one's death, and the passing knell, and the solemn order of a funeral, may seem to us, in health and spirits, such matters certainly are fraught with the gravest, the most awful importance to all sober men. And in a Christian community any attempt to make one a mark for ridicule through such instrumentalities would ordi-
*324 *narily be regarded as an unwarrantable proceeding, a species of profanity. But the statute having made one kind of profanity punishable in a summary way, and defined blasphemy as a substantive offence, we are not aware, that it has ever been supposed, that other kinds of profanity, not defined in any statute, are punishable criminally.

Judgment of the county court reversed, and judgment arrested.

JAMES M. McKENZIE v. DANIEL RANSOM, and GALEN PEARSONS AND WILLIAM H. H. SLAYTON, Trustees. GAIUS PERKINS, BILLY BROWN, JOHN S. PARKER, JOHN LAKE AND C. D. PERKINS, Claimants.

(*Windsor*, March Term, 1850.)

One who was admitted to enter as claimant, in a suit commenced by trustee process, cannot plead in abatement.

The fact, that a trustee process is served by the same person, who is recognized to the defendant and trustee for the costs, he being specially authorized to serve the writ by the magistrate who signed it, is mere matter of abatement, and can only be objected to by plea.

The omission of the officer, in serving trustee process, to indorse upon the copy of the writ, which he delivers to the trustee, a copy of his return also, is, as to the trustee, mere matter in abatement, which, if not pleaded by him at the first appearance, is waived.

But such omission does not affect the validity of the attachment of the property of the principal debtor in the hands of the trustee.

When property is attached by leaving a copy of the writ in the town clerk's office, the want of a return, or a defective return, upon the copy so left, will render the attachment ineffectual, for the reason, that the return is all that constitutes the attachment, and without the return it is impossible to determine what property was intended to be attached. But when a suit is commenced by trustee process, the writ itself designates the property to be attached, and the delivery of a copy of the writ to the trustee is notice to him of the sequestration of the property in his hands, and sufficiently makes him party to the proceedings to render the attachment effectual, as against those subsequently acquiring title to the property, although the officer's return may not be indorsed upon the writ.

The case in Nelson v. Denison, 17 Vt. 73, considered.

*325 *This was an action upon a promissory note, and was commenced by trustee process. The writ was dated October 11, 1848, and was made returnable before a justice of the peace, October 20, 1848. John McKenzie, 2d, recognized to the defendant and the trustees, as sureties for costs, in the form required by statute, and he was also specially authorized to serve the writ, by the justice who signed it; and it appeared from his return upon the writ, that he served the writ upon the trustees, October 11, 1848, "by delivering to each of them a true and attested copy of the same." At the return day of the writ judgment was rendered against the principal debtor by default, and the trustees appeared and disclosed that they were indebted to the principal debtor, at the time of the service of the trustee process upon them, and that they received notice, October 12, 1848, that the respective debts due from them had been assigned by the principal debtor to the claimants. The claimants also appeared, and were admitted by the justice as party to the suit, pursuant to the statute; and they pleaded, that the writ should abate, as to the trustees, for the reason that the officer who served it had recognized for the costs, and also pleaded, that a legal service, by a copy of the writ with the officers return thereon, was not made upon the trustees previous to their receiving notice of the assignment to the claimants. Judgment was rendered by the justice, that the trustees were chargeable;—from which judgment the claimants appealed. In the county court the claimants pleaded, that the trustees should not be held chargeable, for the reason, that the effects and credits in their hands, set forth in their disclosures, became the property of the claimants by a legal assignment from the principal debtor, for valuable consideration,—that notice of such assignment was given to the trustees by the claimants October 12, 1848,—and that the said effects and credits were never legally attached in the hands of the said trustees, for the reason, that the trustee process was served upon them by John McKenzie, 2d, who was interested in the suit by being recognized for the costs. The claimants also pleaded, setting forth their title by assignment and notice as in the first plea, and averring, that the effects and credits in question were never legally attached in the hands of the trustees, for the reason, that it did not appear by the officer's return upon the writ that there was, *and there was not in *326 fact, any legal service of the writ upon the trustees, by an attested copy of the writ with the officer's return thereon, as required by statute; and that no other service was made, than appeared from the return. To these pleas the plaintiff demurred. The county court, November Term, 1849,—KELLOGG, J., presiding,—adjudged the claimants' pleas insufficient, and rendered judgment for the plaintiff. Exceptions by claimants.

Washburn & Marsh for plaintiff.

The subject matter of both pleas is, as to the principal debtor and trustees, mere matter of abatement. The claimant is only a party to the suit, so far as it respects his title to the goods, &c., and he may only allege and prove material facts. Rev. St. 191, § 17. His position in reference to the suit, in this respect, is analogous to that of a subsequent attaching creditor. Acts of 1845, p. 17. He cannot, then, plead in abatement. But the claimants seek, by plea in bar, to take advantage of the fact, that the authorized officer was recognized for costs. The statute—Rev. St. 171, § 22—empowers the justice to "authorize any suitable person;" and this is not controlled by Rev. St. 180, § 7. See June v. Conant, 17 Vt. 656. In exercising this duty the magistrate acts judicially, and his decision cannot

be re-examined. Kellogg ex parte, 6 Vt. 510. Kelly v. Paris, 10 Vt. 261. Ingraham v. Leland, 19 Vt. 307. Dolbear v. Hancock, 19 Vt. 391. The claimants cannot take advantage of the defect in the service, in not indorsing the officer's return upon the copies left with the trustees. They stand as subsequent attaching creditors, and the service made created a lien against them, upon the authority of Newton v. Adams, 4 Vt. 437. When real estate is attached, notice must be given to the public, and to the defendant. The notice to the public is given by leaving a copy in the town clerk's office, with a return upon it describing the estate attached. If there is no return upon the copy so left, there is no notice of the attachment;—this was the defect in Cox v. Johns, 12 Vt. 65. When personal property is attached, the notice to the public is given by taking the custody of the property. But in serving a trustee process, no notice to the public is required. Hence there is no analogy between this

*327 *and the attachment of either real or personal estate. It is analogous only to the notice, which is required to be given to the defendant, in each of those cases. If the proper process is sued out, and notice in fact is given, any defect in the service will render it voidable merely, but not void. This, as a general rule, applies to all cases, where notice to an individual merely is required; a defect in the form of the notice, if notice in fact be given, is mere matter of abatement; but if a possessory title is sought to be established to property, with notice to the public, all the requisitions of the statute must be complied with. Thus in Nelson v. Denison 17, Vt. 73, Kelly v. Paris, 10 Vt. 261, and Ross v. Fuller, 12 Vt. 265, a possessory title to personal property was sought to be established in one who had not even the form of authority conferred upon him. While in Holmes v. Essex, 6 Vt. 47, where a defect in the notice to the party was set up, it was held, that the correction must be by plea in abatement; and so in Evarts v. Georgia, 18 Vt. 15,—which is saying, that the service was not void, but voidable; and the defect set up in those cases was interest in the officer, as in this case. And see Spaulding et al. v. Swift, 18 Vt. 218, and Gilman v. Thompson, 11 Vt. 643. And in Newton v. Adams, 4 Vt. 437, and Judd v. Langdon, 5 Vt. 231, it was expressly held, that a subsequent attaching creditor, or purchaser, could not take advantage of such defect. And the decision in Sewell v. Harrington, 11 Vt. 141, is to the effect, that such an objection, going to notice, renders the service voidable merely.

E. Hutchinson for claimants.

The claimants' title is admitted to be good, unless defeated by the plaintiff's attachment, and we insist, that that attachment was bad, for the reasons set forth in the pleas demurred to, and that consequently the plaintiff has acquired no title to nor lien upon the effects in the hands of the trustees, as against the claimants. The statute is, that a person, authorized by a justice to serve a writ, "shall have all the power of a sheriff, in the service and return of such precept," &c. Rev. St. 171, § 23. A sheriff cannot serve a writ, in which he is either a party, or interested. Evarts v. Georgia, 18 Vt. 15. Holmes v. Essex, 6 Vt. 47. An attachment made by an officer, not authorized by law to make the service, is, *as to the property attached, *328 a mere nullity; and neither the creditor, nor the officer, acquires any right to or lien upon the property. Nelson v. Denison, 17 Vt. 73. Ross v. Fuller, 12 Vt. 265. Kelly v. Paris, 10 Vt. 261. A trustee writ is a mere writ of attachment of the effects of the debtor in the hands of the trustee. Rev. St. 190, § 3. The statute prescribes a particular mode of service in the attachment, upon mesne process, of land, hay and grain in the straw, and effects in the hands of trustees, which is, in all those cases alike, by an attested copy of the writ and the officer's return thereon. Rev. St. 190, § 7; Ib. 180, §§ 12, 13. If the writ be not so served, the plaintiff acquires no lien by his attachment, as against a subsequent *bona fide* purchaser. Cox v. Johns, 12 Vt. 65. In Barney v. Douglass & Tr., 19 Vt. 100, the court examined the record carefully, to see that the plaintiff's writ was so served. A writ of summons cannot be served by reading, without copy. Chase v. Davis, 7 Vt. 476. Leaving the copy is the act of attaching. Putnam v. Clark, 17 Vt. 87. These objections to the service are not, as between these parties, mere matters of abatement, which either have been, or could be, waived by the principal debtor, or the trustees. The statute permits the claimants to be made "parties to the suit," and to "maintain their rights," and, "so far as it respects their title to the goods, effects, or credits, in question, to allege and prove any material facts." The legality, or illegality, of the plaintiff's attachment, in the present case, would seem to be a material fact. It goes to the merits of the whole controversy between these parties. The principal debtor, or trustees, may, so far as they are concerned, waive any objections to the service; but the statute confers upon neither of them any power to waive rights for the claimants. Nelson v. Denison, 17 Vt. 73. Aiken v. Richardson, 15 Vt. 500. Kelly v. Paris, 10 Vt. 261. In Ross v. Fuller, 12 Vt. 265, it was decided, that a service by an officer, who had not authority to serve the precept, though good (if not objected to) for the purpose of the judgment in that suit, was good for nothing as an attachment of property, even as against the defendant, and after judgment by default.

*The opinion of the court was de- *329 livered by

REDFIELD, J. The fact, that the person, who was deputed to serve the writ in this case, was also recognized for costs to the defendant, would, I apprehend, be esteemed sufficient reason, why he should not have been appointed to serve the writ, and probably might have been made the basis of a plea in abatement, by the principal defendant in the suit,—possibly by the trustee; but it was very clearly mere matter of abatement, and, being matter *dehors* the record, could only be objected to by plea. This right is also claimed by the claimant.

But we do not think it was the purpose of the legislature, to give to the claimant, who is called into the suit in this collateral manner, the opportunity of bringing forward mere dilatory pleas. We think such a right in no sense essential to the determination of the real interests involved in such a controversy; and it would certainly be attended, in many cases, with manifest vexations and needless delays. And it seems to us, that the language of the statute, in express terms, excludes the right to bring forward any such plea by the claimant. The words are, "may be admitted a party to the suit, so far as respects his title to the goods," &c. This seems to us sufficiently explicit. And we think, the questions raised by the claimant must be confined within these limits.

But another view of the case has been urged by the counsel, for the claimant, with great fairness and ability, and has presented some analogies to cases already determined by this court, not entirely free from difficulty. It is said, the copy left in this case with the trustees not containing the officer's return, as is required by statute in the service of such process, the service was so defective, as to constitute no attachment. And that, as it is not competent for the trustee to waive the rights of other claimants interested in the effects, the title of the claimants is, in truth and right, prior to that of the attaching creditors. This depends upon the question, whether the service constituted any attachment of the effects in the hands of the trustee.

This omission, in the service of the writ, of the copy of the officer's return, is manifestly, so far as the trustee is concerned, mere matter in abatement, and, if not pleaded at the first appearance, is waived.

So, too, if the trustee suffer default,
*330 it is waived, and the *judgment fixes the trustee, and the title of the goods is, certainly as to all having notice of the suit, fixed also.

But it is said, that still the attachment is so defective, as not to prevent a subsequently acquired title by contract, and, by parity of reasoning, I suppose, by attachment. This is argued from analogy to those cases of attachment of real estate, and hay and grain and other articles of personal property, where the attachment is made solely by copy. And if the copy is defective, as in the present case, the attachment has been held ineffectual. But we think, there is an important distinction in the two classes of cases. In the one the return of the officer is all that constitutes the attachment. Without that, it would be impossible to determine, what property was intended to be attached. It is the return of the officer, which effects the sequestration of the property. But in the other case the writ itself effects, in one sense, the sequestration, and the copy is left for notice to the trustee. The writ designates what property, viz., all that is in the hands of certain persons, naming them, as trustees, is to be attached; and when the trustee is notified of this sequestration by the writ, the attachment becomes perfect. Of this he is fully notified, by having a copy of the writ; this makes him a party to the proceeding; this informs him of the time and place of hearing; and the copy of the officer's return is a matter wholly personal to himself.—a matter not important for purposes of notice, even, and which is only required for the purpose of authentication, which is sufficiently done by the officer delivering the copy in person, (as was done in the present case,) and which is probably required by the statute, chiefly on account of those cases, where the copy is left at the abode of a defendant, in his absence. But being a statute requisite, the trustee may insist upon it, at the proper time and in the proper form. But we think he is so far made a party to the proceeding, by having a copy of the process delivered to him, by any officer, general, or special, that he is not at liberty to treat it as no attachment. And if he cannot, certainly others should not. Whenever such proceedings are taken, as to make him a party to them, the attachment, for the time being, is effected. If it be informal, or defective, in particulars affecting the trustee only, he alone can insist upon such informality.

But in the case of attachment of
real estate, and the like, if the *copy *331
left at the clerk's office be sufficient to designate the estate attached, it has never, that I can find, been regarded essential to the legality of the attachment, that even that copy should contain every statute requisite. No doubt, if the entire return were omitted, the attachment would be incomplete, and inoperative, as not designating the estate attached; and this it is, which constitutes the attachment. Such a proceeding would be, in effect, no attachment. Cox v. Johns, 12 Vt. 65. But where the return is only defective in form, the attachment has been held valid. Huntington v. Cobleigh, 5 Vt. 49, and Herring v. Harmon, cited by WILLIAMS, J., in the opinion in the last case.

So, too, it has always been held, that, in the attachment of personal property in possession, if the officer took the custody of the property, by virtue of a valid process, the attachment was valid, for the time, notwithstanding the process, or the service, might be so informal, as to be liable to be abated, on a proper plea by the debtor, or defendant. Newton v. Adams, 4 Vt. 437. So, too, the attachment of personal property in possession dates from the time the officer takes possession, and he may deliver the copy at any time, sufficient for notice to the defendant, or the defendant may wholly waive the copy. Pearson v. French, 9 Vt. 349. See, also, Judd et al. v. Langdon, where the defect of service was precisely the same, as in the present case.

We entertain no doubt, that the trustee, in this species of attachment, may waive the officer's return, or the copy, or, after being notified of the process, may do what is called "accepting service." In short, whatever is sufficient to create and to continue the trustee a party to the proceeding, is sufficient for the purposes of the attachment.

The argument, by which it has been attempted to liken this to the case of Nelson v. Denison, 17 Vt. 77, and to that of Kelly

v. Paris, 10 Vt. 261, perhaps in both of which cases the attachments were held void for defects, which, if not pleaded in abatement, in cases of mesne process, might probably be considered as waived, does not, we think, apply to a case like the present. In those cases it was considered by the court, that there was an absolute want of authority, in the officer making the attachment. So that he was in fact a trespasser, a mere intermeddler, as much so, as if he had
*332 *acted wholly without process. I have always thought myself, that the case of Nelson v. Denison was decided upon too narrow grounds, and that the defect in the process, being only as to the time of service, might with more propriety have been treated as something personal to the defendant, and which, if not pleaded in abatement, was waived, and which could only be taken advantage of by the defendant. But the court regarded the writ, as conferring no authority upon the officer more than sixty days before the return day, as the statute requires, that justice writs shall not be served more than sixty days before the return day. And by parity of reasoning, a justice writ, if served less than six days before the return day, would confer no authority, the officer would be a trespasser, and the party, perhaps, might treat the proceeding as a nullity,—although this would not necessarily follow. I think there is a case in Wheaton, or Dallas, where it is held, that in service of a writ of summons, the notice being too short is no ground of plea in abatement, even, but is waived by appearance; but that case has not been followed. Such defects have been regarded good causes of abatement when pleaded at the first appearance But the case of Nelson v. Denison is, I think, the first case, which has gone the length of wholly avoiding the attachment and treating the officer as a mere trespasser, in consequence of any defect of this character. An inferior tribunal could hardly have made such a decision, with a good grace. But the ground upon which the case is put by the court, a want of authority in the officer, shows that it has no just analogy to the present. I do not object to the case of Nelson v. Denison, as not being good law to the extent it goes; but the case stands alone, and unsupported by authority, or analogy, and is certainly in no sense like the present, and the principle of that case should not be extended. Judgment affirmed.

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*333 *CARY ALLEN, Administrator of SYLVESTER EDSON, v. BUSHROD W. RICE.

(*Windsor*, March Term, 1850.)

Where a claim against an estate represented insolvent was exhibited to the commissioners and allowed, while the statute, of 1821, in reference to the "settlement of estates," was in force, and the administrator filed objections to the claim, in the probate court, pursuant to section ninety four of that statute,† the effect was, to vacate the allowance of the claim; and, if no farther proceedings were had, the claim would be barred.

And if an offset to the claim against the estate were filed by the administrator and allowed by the commissioners, and a balance reported due to the claimant, the allowance of the offset, as well as of the principal claim, would be vacated by the filing of objections to the principal claim, under that section.

The commissioners have no jurisdiction of claims in behalf of the estate, except as offsets to adversary claims; and if those claims are abandoned by the claimant before final judgment, the offset cannot become the basis of a separate judgment.

Debt upon a judgment of commissioners. The action was originally brought against Rice, Asaph Fletcher and Grover Dodge; but Fletcher deceased, during its pendency in the supreme court, and Dodge was discharged upon a plea of bankruptcy. The plaintiff alleged in his declaration, that commissioners were duly appointed, June 27, 1839, upon the estate of Edson, of which the plaintiff was appointed administrator; that on the eighteenth of December, 1839, the defendants presented before the commissioners a claim against the estate, upon a promissory note, and the administrator then presented, as an offset, certain
claims in favor *of the estate against *334
the defendants; that the commissioners allowed to the defendants, upon the claim presented by them, $1408,09, and placed the same in one column of the report, which they were preparing for the probate court, and allowed to the plaintiff, as administrator, upon the offset presented by him, the sum of $696,07, and placed the same in another column of their report, and placed the difference between those two sums in a third column, as the balance due from the estate to the defendants, being $712,02; that the commissioners made their report to the probate court, March 19, 1840, showing the allowances above named, and on the twenty fifth day of March, 1840, the plaintiff, as administrator, filed before the probate court his objections, in writing, to the claim allowed by the commissioners in favor of the defendants, upon the note presented by them, of which objections due and legal notice was given to the defendants, in compliance with an order made by the probate court to that effect; and that the defendants wholly failed to prosecute their claim, upon their said note, at the then next ensuing term of the county court, or at any other term thereof, after the objections were filed;—by reason of which the plaintiff alleged, that the claim of the defendants upon their note had become barred, and the allowance by the commissioners in favor of

†By which it was enacted "That if any claim, exhibited to such commissioners, shall be allowed in favor of or against the estate, which ought not to be allowed, or for a greater sum, than was justly due, the party aggrieved may, at the time the commissioners shall return their report to the probate court, or within twenty days afterwards, if such sum allowed amount to twenty dollars file objections thereto, in writing, in the probate court; and shall notify the claimant in such manner as said court shall direct. And, if such claimant shall fail to prosecute such claim, at the next stated session of said supreme court, on a declaration thereon, there to be produced and entered, in the same manner as is directed in case of a claimant's appeal in the preceding section of this act, then the claims allowed and objected to shall be forever barred; but if the same, or so much thereof, as was allowed by the commissioners, be allowed by the judgment of the supreme court, the claimant shall recover cost." Slade's St. 354.

the plaintiff, as administrator, upon the claims presented in offset, remained in full force, as a judgment; and the plaintiff claimed to recover the amount thereof, as a debt. The defendants demurred to the declaration. The county court, May Term, 1843,—HEBARD, J., presiding,—adjudged the declaration insufficient. Exceptions by plaintiff.

T. Hutchinson for plaintiff.

There is no similarity of principle between this case and a suit at common law, where an offset is pleaded and a nonsuit entered before trial. In such a case either party may sue again; but not so in the present case. When the defendants presented their claim before the commissioners for allowance, that gave them jurisdiction over all the mutual claims on both sides, and, if the defendants could oust that jurisdiction before a trial, by withdrawing their claim, they surely could not do it after a hearing and decision upon the merits, and after the decision had become a matter of record in the probate court. That record con-
*335 cludes all parties, until reversed *or altered in some way pointed out by statute. The defendants, after objections had been filed by the plaintiff, did not prosecute their claim in the county court, and of course it became barred. They did not file any objections to the claim allowed to the plaintiff, and of course that remains in as full force, as it ever was. The object of the statute, in requiring these allowances to be placed in different columns was to keep them distinct, so that none should pass to the appellate court, that were not objected to. In a civil suit, the offset may affect the bill of cost; but in cases appealed from the probate court costs are in the discretion of the court.

Tracy, Converse & Barrett for defendant.

This case is governed by the statute of 1821. St. St. 352-354. Sec. 89 of that statute provides for the appointment of commissioners to "receive, examine and adjust all claims." Sec. 93 provides for an appeal from the judgment of commissioners, when they disallow claims to the amount of $20. An appeal under this section vacates the judgment of the commissioners. Campbell v. Howard, 5 Mass. 376. Probate Court v. Rogers et al., 7 Vt. 198. Love v. Estes, 6 Vt. 286. Bates v. Kimball, 2 D. Ch. 83. Keen v. Turner, 13 Mass. 265. 2 Vt. 521. The filing of objections under sec. 94 operates as an appeal, the same as under sec. 93; this is fully sustained by the case of Probate Court v. Rogers et al. By the neglect of the defendants to prosecute their claim, that claim has become barred; but if this revived the judgment of the commissioners, or if their judgment was never vacated by the appeal, then the entire judgment is revived, and remains in force. The judgment of the commissioners was for the balance found due, after deducting one claim from the other; the offset does not constitute the judgment, nor the claim of the opposite party. The filing of an offset is not a distinct suit; it is a mere mode of defence, allowed by statute. Olcott v. Morey, 1 Tyl. 212. The commissioners have no jurisdiction of the offset in favor of the estate, except in connection with claims presented against the estate. The judgment of the commissioners being vacated by the appeal, the plaintiff is remitted to his original cause of action. The offset cannot remain in court, after a disposition of the principal suit; any thing which operates a discontinuance of the principal suit necessarily puts the defendant out of court.

*The opinion of the court was de- *336
livered by

REDFIELD, J. In this case the defendant and two others, who have gone out of the suit, presented a claim against the estate, which the plaintiff represents, to which the plaintiff replied in offset, and the commissioners allowed both claims. The plaintiff filed objections to the defendant's claim under the statute of 1821. The defendant took no farther proceedings; and the plaintiff has now brought this action of debt upon the allowance of his claims on behalf of the estate, claiming that in consequence of his filing objections to the defendant's claim, and no farther proceedings being had, the defendant's claim is barred, and that the allowance of the offset still remains in force.

It is not denied, that the filing of objections in the probate court did have the effect to vacate the allowance of the defendant's claim, and, there being no farther proceedings, that that is barred. But it is claimed, that the allowance of the claim, on the part of the estate, is to be regarded as a separate, independent adjudication, and, as such, that it remains in full force. If this be so, it is different from the common case of an offset, which ordinarily falls with the principal action. In this particular class of cases, the commissioners have no jurisdiction whatever of claims on behalf of the estate, except as offsets to adversary claims. If these claims are abandoned by the claimant before judgment, most undoubtedly the offset cannot become the basis of a separate judgment. After a judgment by the commissioners, and objections filed, which is virtually an appeal as to the principal claim, the entire doings of the commissioners, as to these parties, are to be considered as vacated, or else the claim of the estate is fixed in the probate court, and could not be pleaded in offset in the county court, if the plaintiff desired it. But this was never so considered under that statute; nor was it deemed necessary for any thing more to be done, than was done in the present case, to vacate the judgment of the commissioners on both sides. This is consistent with the cases referred to. Probate Court v. Rogers, 7 Vt. 188. Bates v. Kimball, 2 D. Ch. 83.

It does not occur to me, that the substance of the statute of 1821, in regard to this subject, is essentially different from the present Revised Statutes. In either case the filing of objections to the allowance of a claim and giving notice of the same to the adverse *party is substantially *337
the appeal. In either case the claimant files his declaration in the county court. If he omitted to do this, his claim was barred in both cases. The principal difference, which I notice, seems to be, that under the Revised Statutes the appellant, in all cases, enters the appeal, and by the old statute,

when objections were filed, the claimant entered the appeal in the county court, or by omitting so to do, his claim became barred; and there seems to be no provision for the party filing objections to obtain costs, unless the claimant takes farther proceedings.

But whether the claimant stops, upon the filing of objections, or at any other stage in the proceedings, before, or after, his claim is barred, and the offset, on the part of the estate remains, as if no such claim had ever been presented to the commissioners, to be pursued in the ordinary mode, and not liable to be encountered by any offsets. Judgment affirmed.

Solomon Downer v. Horace Dana.

(*Windsor*, March Term, 1850.)

The effect of a discharge in bankruptcy will not be avoided by the omission of the bankrupt to state, in his schedule, the debt, in bar of which the discharge is pleaded, unless such omission were fraudulent.

In an action of debt upon a judgment rendered by the supreme court, the record, produced for the purpose of proving the judgment declared upon, should either recite, or state, enough of the previous proceedings, to show that the parties were properly in court and that the subject matter of the suit was within the cognizance of the court.

The supreme court cannot make a final decree in a suit in chancery, but must remand the case to the court of chancery, to be there proceeded with according to the mandate of the supreme court. Hence an action of debt cannot be sustained upon a judgment of the supreme court, that a bill in chancery be dismissed, with costs, but the costs must be taxed in the court of chancery, and the final decree taken there.

Debt upon judgments. In the first count of his declaration the plaintiff declared upon a judgment, alleged to have been rendered in his favor against the defend-
*338 ant by the supreme court for the *county of Orange, March Term, 1845, for $72,49, costs of suit. In the second count he declared upon a judgment rendered by the supreme court for Windsor county, February Term, 1841, for $8,00, costs of suit. The defendant pleaded *nul tiel record*, and also pleaded a discharge in bankruptcy. The pleas were traversed, and issue joined. Trial by the court, November Term, 1849,—Kellogg, J., presiding. On trial the plaintiff gave in evidence a copy of a record of the supreme court for Orange county, March Term, 1845, in which it was recited, that at a term of the court of chancery for Orange county, held in June, 1844, the plaintiff, Downer, obtained a decree against the defendant, Dana, and Chester Baxter, reciting it, and that it was ordered, as part of said decree, that Dana pay the plaintiff's costs in that suit; that the defendants in that suit appealed from that decree; and that, at the March Term, 1845, of the supreme court that decree was affirmed, with additional costs, allowed at the sum of $72,49. This evidence was received by the court, subject to objection. The plaintiff also gave in evidence an execution which issued from the supreme court upon this judgment, with the sheriff's return thereon of *nulla bona*. The plaintiff also gave in evidence the record of the judgment described in the second count in his declaration. The defendant then gave in evidence his certificate of discharge in bankruptcy, dated May 6, 1843. It appeared, that neither of the judgments declared upon in this suit was mentioned in the defendant's schedule of debts, filed in the course of the proceedings in bankruptcy; but the cause of the omission did not appear. The county court decided, that the record offered in support of the first count in the declaration was insufficient, for the reason that it did not state the previous proceedings in chancery, upon which it was based, and that the discharge in bankruptcy barred the plaintiff's right to recover upon the second count, and rendered judgment for the defendant. Exceptions by plaintiff.

W. C. French for plaintiff.

The statute requires, that, in case of appeal from the decree of a chancellor, the papers shall be transferred to the supreme court; but there is nothing requiring the clerk of the supreme court to *re- *339
cord the bill, answer, &c. It is sufficient, if he make a concise statement of the case and the decision of the supreme court thereon. Davidson v. Murphy, 13 Conn. 213. The rule, which is applied in some cases, where actions are brought to enforce decrees in chancery, that the previous proceedings should be shown, does not apply to a case of this kind. Under the plea of *nul tiel record* the judgment, or decree, only, need be shown; it is not necessary to show the previous proceedings. Jones v. Randall, Cowp. 17. Gardere v. Columbian Ins. Co., 7 Johns. 514. Rathbone v. Rathbone, 10 Pick. 1. Ferguson v. Harwood, 7 Cranch 408, [2 U. S. Cond. R. 548.] The plaintiff, in this case, does not declare upon the decree, but upon the judgment for costs. Story v. Kimball, 6 Vt. 541. Blodget v. Jordan, Ib. 580. 17 Vt. 518. The certificate in bankruptcy should not be held a bar to the plaintiff's claim. The presumption of law should be that the defendant fraudulently omitted to mention this debt in his schedule. It is incumbent upon him, to show that it was omitted by mistake.

O. P. Chandler for defendant.

The record offered in support of the first count is defective. If the action counts upon the judgment, the whole of the previous proceedings must appear. In this case it does not even appear, that service was made on the defendant, or that the court had any jurisdiction over him. 1 Greenl. Ev. 621, § 511. To avoid the discharge in bankruptcy, the omission must appear to have been fraudulent.

The opinion of the court was delivered by

Redfield, J. A question is made, in the present case, whether the effect of a discharge in bankruptcy is avoided, by showing, that the matter in suit was not contained in the bankrupt's schedule. But we think that matter too well settled, to require discussion. If the omission is accidental, or from any other cause, not involving the petitioner in fraudulent concealment, the omission will not in any manner avoid, or hinder, the effect of the discharge. A contrary rule would not only be attended with great hardship, but be liable to great abuse, in numerous ways.

The question as to the sufficiency of the

record of the decree in chancery is, in our judgment, free from all difficulty.

*340 *Taking it for granted, that the supreme court have final jurisdiction in all matters in equity, not only to hear and determine, but to make and enrol final decrees, it should at least appear, that the matter was properly before the court, so that jurisdiction was fairly and formally obtained. Strong presumptions will usually be made in favor of the decrees and judgments of courts of general jurisdiction. But enough of the previous proceedings should either be recited, or stated, to show that the parties were properly in court, and that the general nature of the subject matter came within the cognizance of the court. For this purpose it is not necessary, as is sometimes done, to copy the antecedent process; but a mere statement of the defendant being summoned, or attached, with the common form, *taliter processum est*, is ordinarily regarded as a sufficient preface to the statement of the judgment. And here, as the supreme court obtains jurisdiction only by means of that of the court of chancery, in the first instance, it is as necessary to state the proceedings before that court, as if the record were of a decree, made final in that court. But in the present record it is only stated, that the party obtained a decree in the court of chancery, from which an appeal was taken to the supreme court.—whether with, or without antecedent process is not stated or implied, unless in the negative, from the unusual silence of the record upon this point, when the common form justifies the expectation, that something positive will appear, if the facts will warrant it.

But there is another fatal defect in the transcript of record offered in evidence. It purports to be the record of the final decree of the court of chancery in the supreme court, which, as our courts are at present arranged, is only a court of law, and has no chancery jurisdiction whatever, strictly speaking. It is true, that this court is made a court of appeal for the final hearing of cases in equity; but whether the decree of the chancellor is affirmed, or reversed, the case is always remanded to the court of chancery, where the final decree is ultimately recorded, or enrolled, which is the only record of the decree of the court of chancery. So that in England, the court of chancery is not strictly denominated a court of record. The decree, or judgment of the court of chancery, can only be shown by the original decree, or a copy of the enrollment; which is always in the court of chancery, and never in the supreme court.

*341 *Viles et al. v. Moulton, 11 Vt. 470. Morse et al. v. Slason et al., 13 Vt. 296. Austin v. Howe, 17 Vt. 654. The Revised Statutes, chap. 24, § 21, are explicit upon this point,—"When an appeal shall have been so heard and determined, all the proceedings, together with the judgment, decree, or order, of the supreme court therein and all things concerning the same, shall be remitted to the court of chancery, where such proceedings shall be thereupon had, as may be necessary to carry such judgment, &c., into effect." So that whether we regard the statute, in its terms, or the practical construction, which it has received, the copy given in evidence in this case is nothing more than the docket minutes of the clerk, in the supreme court, and in no sense the copy of the enrollment of the final decree in the court of chancery.

Judgment affirmed.

GEORGE C. PRATT v. ASA JONES.

(*Windsor*, March Term, 1850.)

This was debt upon judgment, and the defendant pleaded, that the plaintiff had caused the amount of the judgment, and all interest, costs and charges, to be levied, and fully satisfied of the lands and estate of the defendant, and this plea was traversed and issue joined. *Held*, that this issue did not involve any inquiry as to the validity of the levy, which appeared to have been made, but only whether the execution appeared to be satisfied, by a levy regular upon its face.

An action of debt will not lie upon a judgment, which appears of record to be satisfied by a levy of execution upon real estate, regular upon its face. The record must be held conclusive, until, by some proceeding, brought to operate directly upon the record itself, the levy is avioded.

Debt upon judgment. Pleas,—1. *Nul tiel record*;—2. Payment;—3. That the plaintiff had caused the amount of the judgment, and all interest, cost and charges, to be levied and fully satisfied of the lands and estate of the defendant. These pleas were traversed, and issue joined. Trial by the court, September Adjourned Term, 1849,—KELLOGG, J., presiding. It appeared, that the plaintiff recovered judgment against the defendant, April 18, 1843, *342 as described in his declaration, and that the execution, which issued thereon, was returned satisfied by a levy upon land of the defendant, in Woodstock, September 16, 1843, and was duly recorded. The return was regular in form, and the land levied upon was described by metes and bounds. At the time of the levy there was, upon record in the town clerk's office in Woodstock, a mortgage, executed by the defendant to Simon Warren, dated August 7, 1827, duly executed, which included, with other land of the defendant, the land levied upon by the execution above mentioned; and at the time of trial a bill to foreclose this mortgage was pending in the court of chancery. There was no evidence tending to prove, that this mortgage had ever been discharged. Upon these facts the county court rendered judgment for the plaintiff. Exceptions by defendant.

Tracy, Converse & Barrett for defendant.

The satisfaction of the judgment appears of record. The levy and return are conclusive between the parties, until set aside in the manner provided by law. Hurlbut v. Mayo, 1 D Ch. 387. Swift v. Cobb, 10 Vt. 282. Adm'rs of Royce v. Strong, 11 Vt. 248. Hence the rule has ever been, that, where the defect did not appear of record, neither *scire facias* nor debt would lie. REDFIELD, J., in Hyde v. Taylor, 19 Vt. 599. Lawrence v. Pond, 17 Mass. 433. The levy must first be vacated by a direct proceeding for that purpose. Rev. St. c. 42, §§ 39, 43. Acts of 1842, p. 85. If the case comes within chap. 42 of the Rev. St. the plaintiff cannot vacate the levy. The levy was in 1843, and he must have proceeded by petition within two

years. His title has become absolute to the debtor's interest in the estate. The plaintiff cannot impeach this levy, nor treat it as void. The mortgage was on record, without indorsement of satisfaction, at the time of the levy. The plaintiff is therefore chargeable with a knowledge of the incumbrance, and he cannot now repudiate the title which he has taken.

*343 *O. P. *Chandler* for plaintiff.

It would seem beyond question now, that a levy upon a part of land included in a previous mortgage, describing the premises by metes and bounds, is void, and that the statute of 1837, relating to informal levies, will not apply to such a levy. Rev. St. 244, § 43. Swift v. Dean et al., 11 Vt. 325. Bell v. Roberts, 15 Vt. 741. S. C. 13 Vt. 585. The same doctrine was recognized in Morris et al. v. Lull, decided by this court in Windsor Co., February Term, 1848. Debt is the proper remedy; for here the whole levy is void, which, of course, leaves the debt unsatisfied. Section 39 of chap. 42 of the Revised Statutes does not apply to this case. That relates to a levy upon property, of which the debtor had no ownership. Here the debtor had an interest in the land, which might have been levied upon, viz., the right to redeem it. If the statute define the rights of the parties in a given case, it cannot be held to exclude any common law remedies in a different case, even by implication. The statute, in the case therein provided for, furnishes a cumulative remedy; the right of suing the judgment, at common law, still remains. In the case at bar the debtor owned an interest in the land, but it was an incorporeal right; the land was in such condition, that it could not be set off by metes and bounds on a judgment against any person. The mortgagor had an equitable right, which, as such, could be levied upon,—the mortgagee had a lien, which could not be levied upon in any event. Then a levy by metes and bounds was necessarily void: the mode of levy was wrong, and not a failure of title.

The opinion of the court was delivered by

REDFIELD, J. There are some questions, in regard to the form of the issue, and the sufficiency of proof, to show that the mortgage was a subsisting security at the date of the levy, which we shall not stop to discuss at length. It seems to me, that the issue does not in fact involve any inquiry as to the validity of the levy, but only whether the execution appeared of record to be satisfied, or, in other words, was satisfied of record. If the plaintiff wished to show, by matter *dehors* the record, that the execution was not in fact satis-
*344 fied, *and if such a showing could avail the plaintiff, in this form of action, it should, I think, be distinctly so pleaded. A stranger to these pleadings would not understand the plaintiff to claim, that the levy made was invalid, by reason of the debtor having only a mortgage interest in the land, but would conclude, that the plaintiff would undertake to show, that no levy whatsoever was made. This form of pleading would doubtless be well enough, where the defect was apparent upon the levy itself. And in such a case the action of debt is manifestly the appropriate remedy, and this the proper form of pleading. And the fact, that the plaintiff's counsel so felt the incongruity of the thing, as to decline the attempt to amend the record, by alleging matter, *in pais*, *dehors* the record, shows a lurking consciousness, that the case required a departure from the usual course; and hence this form of pleading might have been adhered to, in order to escape the consequences of encountering a demurrer.

The same remarks, substantially, apply to the matter of proof offered in the county court. There was no positive proof, whatever, that the mortgage remained a subsisting security upon the land. And as the date of the mortgage was more than fifteen years prior to the levy, and almost twenty five years prior to the time of trial, the natural and legal presumptions would concur in its being paid off.

But in regard to the question, involved in the very foundation of this action, and which has been chiefly discussed at the bar, whether an action of debt will lie upon a judgment, which appears of record to be satisfied by levy of execution upon real estate, regular upon the face of it, we have given to it all the consideration, which the time would allow, and we entertain no doubt, that the case, upon that point, is clearly with the defendant.

This is a question, which attracted the attention of the profession, and came to be considered by the courts, at a very early day; and the traditionary learning has certainly been altogether adverse to any such remedy. The subject certainly came before this court, as early as the case of Baxter v. Tucker, 1 D. Ch. 353, and was somewhat extensively examined and discussed by one of the ablest courts, who have ever occupied these seats,—and to say this is not to disparage others. That was *scire facias* to obtain a new execution, where the former one had been levied upon an estate, not belonging to the
*debtor, which remedy is given by *345
our statute. Ch. J. CHIPMAN, in giving judgment, says,—"The plaintiff could not have the common law remedy either of debt, or *scire facias*. By the return of the execution the judgment appears on record to be satisfied. To a plea of this in bar, the plaintiff could in such case make no sufficient replication; so that he was at common law without a remedy." "This remedy is given by the statute." This determination certainly covers the present case in all its parts. For the only defect in the present case, complained of, is, that the debtor did not own the estate levied upon, but a lesser estate. And this decision being made almost forty years ago, and having been fully acquiesced in by all, and our legislation conformed to it, by giving the creditor a remedy to obtain a new execution by petition to this court, we should, at this late day, feel reluctant to depart from it, if there were serious doubt of its soundness upon common law principles, which we think there is not. This case decides, too, that it is incumbent upon the creditor, seeking a new execution upon the ground of defect of title in the debtor to the estate

levied upon, to show by positive evidence, *prima facie*, that such defect existed, and that he cannot for this purpose call upon the debtor to show his title affirmatively. This will apply to the matter of proof, in the present case, after a presumption against the continuance of the mortgage is raised, by lapse of time. The same view of the law upon this subject was taken by this court, in Royce v. Strong, 11 Vt. 248, and in Hyde v. Taylor, 19 Vt. 599. And in Dimick v. Brooks, 21 Vt. 569, it was attempted to be shown, that debt upon record cannot be aided by averment of matter *in pais*, *dehors* the record. To what is there said I could add nothing here.

We think, then, in conclusion, that the record, and the record only, must be held conclusive, until, by some proceeding brought to operate directly upon the record itself, the levy is avoided. This was done, in Hurlbut v. Mayo, 1 D. Ch. 387, by *audita querela*, and may now always be done by petition to this court, under the statute. The case of Lawrence v. Pond, 17 Mass. 433, conforms to the view here taken.

Judgment reversed, and judgment for defendant, upon the issue joined, and the facts found by the county court, unless the plaintiff elect to become nonsuit.

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*346 *JESSE STEDMAN v. EPHRAIM INGRAHAM.

(*Windsor*, March Term, 1850.)

One who has recognized for costs in a suit cannot, after judgment has been rendered against his principal and *scire facias* has been brought upon the recognizance, defend against the *scire facias* by showing an irregularity in obtaining the judgment against the principal.

Scire facias upon a recognizance by the defendant for costs in a suit in favor of Herrick Ingraham against this plaintiff,—judgment by nonsuit being averred to have been rendered in that suit. The defendant pleaded *nil debet*, and also pleaded, that Herrick Ingraham died during the pendency of the former suit, that H. E. Stoughton was appointed his administrator, that the administrator neglected to enter and prosecute the suit, and was cited, after two terms had elapsed, to prosecute the suit, and that, the administrator neglecting then to appear, the judgment of nonsuit was obtained. To these pleas the plaintiff demurred. The county court, November Term, 1848,—KELLOGG, J., presiding,—adjudged the pleas insufficient. Exceptions by defendant.

L. Adams for plaintiff.

H. E. Stoughton for defendant.

The opinion of the court was delivered by

REDFIELD, J. The facts material to the determination of the present case are, that one Herrick Ingraham brought a suit against the plaintiff, for the prosecution of which the defendant became recognized. Herrick Ingraham died, and H. E. Stoughton was appointed his administrator,—and after two terms had elapsed, the plaintiff caused Stoughton to be cited to prosecute the suit. He made no appearance and the county court gave judgment against the estate, as of nonsuit.

The only question is, whether that judgment is to be regarded as so irregular, that it may be avoided by the conusor, by plea. Not to intimate any opinion, how far the administrator might have de*fended against the proceeding,—which is, *347 in our opinion, somewhat questionable,—we feel no hesitation in saying, that the judgment, while it remains in force, must conclude every defence of this character. The defendant is to be regarded as so far privy to the judgment, that he cannot be allowed to attack it in this collateral manner. Judgment affirmed.

SOLOMON DOWNER v. CHRISTOPHER C. ROWELL.

(*Windsor*, March Term, 1850.)

The plaintiff delivered to the defendant certain sheep, and the defendant executed a receipt therefor, in which he agreed to keep the sheep, or cause them to be kept, "the full term of three years, and return the same, or others in their place as good as they are." *Held*, that this was not a sale of the sheep to the defendant, nor a bailment with power to sell, but that it was a bailment of the property for a certain period, with a stipulation for its return at the expiration of the bailment; and that the property in the sheep would not vest in the bailee, until he had performed his part of the agreement by returning to the plaintiff other sheep of equal quality; and that, for a conversion of the sheep, the plaintiff could sustain an action of trover.

Trover for one hundred and eleven sheep and five hundred pounds of wool. The action was originally brought against Rowell and one Jabesh Hunter, who deceased during its pendency. Plea, the general issue, and trial by jury, May Term, 1848,—REDFIELD, J., presiding. On trial the plaintiff gave in evidence a receipt, signed by the defendants, dated November 1, 1840, which was in these words,—"Received this day of Solomon Downer one hundred and eleven sheep, which are about an average flock with flocks in general, they being the best sheep in the flock which the said Downer bought of Bani Udall except sixteen fat wethers and nine lambs; said sheep we agree to keep, or cause to be kept, the full term of three years, and return the same, or others in their place as good as they are, to the said Downer;—said sheep to be delivered at the expiration of the three years, on the premises where we now live. We also agree to deliver to the said Downer fifty five and one half pounds of wool, on said premises, in the month of June *next, and also the same quantity in *348 June, 1842 and 1843; said wool to be good merchantable fleece wool, such as may be the product of said above mentioned flock of sheep. There is not to be delivered but five lambs with said sheep to the said Downer." It was conceded, that on the day of the date of the writ in this suit, and before service, the plaintiff demanded of the defendants the sheep and wool, which by the contract belonged to him, and that the defendants did not deliver either. The plaintiff also proved the value of the sheep and wool specified in the contract. The defendants gave evidence tending to prove, that the wool for the first year had been paid to the plaintiff, at the

time it became due, and that they delivered to the plaintiff, in the course of the summer or autumn of 1841, all the sheep which they then had, and, among them, most or all of the sheep which they received from the plaintiff. The plaintiff then gave evidence tending to prove, that he paid the defendants, in money, at the time of the delivery, for all the sheep he received from them, and that he did not receive from them any of the same sheep specified in the above contract. Upon this evidence the court decided, "as matter of law," that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendants. Exceptions by plaintiff.

Tracy & Converse and *W. C. French* for plaintiff.

At the time the defendants received the sheep, the title to them was in the plaintiff, and the contract shows, that the title was to remain in him; the defendants were to keep the same sheep the full term of three years, and yearly deliver to the plaintiff a stated portion of their product. It was not the intent of the parties, that the plaintiff should part with his general property in the sheep, until the defendants had returned other sheep in their place. The mere fact, that the receipt is in the alternative, to return these sheep or others as good, does not pass the title in these sheep to the defendants. Sibley v. Story, 8 Vt. 15. Smith v. Niles, 20 Vt. 315. The returning of other sheep, by the terms of the contract, was a condition precedent, which must have been performed, before the general title in those sheep would pass to the defendant. In this state the doctrine of conditional sales has been carried much farther, than by the courts of some of the neighboring states. See Minot's Dig. *349 626; *Hussey v. Thornton, 4 Mass. 405; Marston v. Baldwin, 17 Mass. 606; Haggerty v. Palmer, 6 Johns. Ch. R. 437; Russell v. Minor, 22 Wend. 661. We think this case much stronger, than many of the cases of conditional sales, which have been sustained in this state. See Grant v. King et al., 14 Vt. 367; Bradley v. Arnold, 16 Vt. 382.

J. Barrett for defendant.

We assent to the law of the cases touching the rights and liabilities of parties to conditional sales,—as West v. Bolton, 4 Vt. 558, and Bigelow v. Huntley, 8 Vt. 151; and of the cases of bailments with terms of sale superadded,—as Grant v. King et al., 14 Vt. 367, and Bradley v. Arnold, 16 Vt. 382; and of cases of bailment of chattels for a specific time and purpose, where the bailee, within the time, puts the thing to a different use from that for which it was bailed,—as Swift v. Moseley et al., 10 Vt. 208. To sustain trover, the plaintiff must have the right to some identical or specific goods. 1 Chit. Pl. 147 The receipt does not give the plaintiff any title, or interest, in any specific wool, but contains only an independent agreement to deliver a certain quantity and quality of wool, without defining what particular wool. The contract does not hold the defendants accountable for the same sheep, but only for the same number of sheep; at the end of the three years any other sheep would have answered the contract, even if the defendants at the same time had the receipted sheep in their own possession. The agreement to keep the sheep for three years had reference merely to the time, for which the contract was to run, and not to the identity of the sheep. It was not designed to oblige the defendants to keep the same or any other sheep;—this is evident from the fact, that the contract provides for the return of others; and hence the contract contains no provision as to the manner of keeping the sheep, nor as to their increase. The cases decided in this state differ in essential features from this; there is, in all of them, an express reservation of title, or manifest intention to retain title, as security for fulfilment on the part of the defendant. The case of Hurd v. West, 7 Cow. 752, is directly in point. So, also, Jones on Bail. 102, Ed. of 1796, p. 142; 2 Kent, 4th Ed., 589; Story on Bail., 3d Ed., 440; Holbrook v. Armstrong, 10 Maine 31; 3 Mason 478; 21 Wend. 85. *The case shows no actual *350 conversion. Upon the ground assumed by the plaintiff, he should have shown actual conversion of the sheep, within the three years, or a demand, at the end of that time, at the place specified, and refusal to deliver,—and, as to the wool, actual conversion of the respective annual amounts to be paid, before the time of payment, or demand at the time and place specified and refusal to deliver. The demand was insufficient; the property should have been specified, and, not having been so, the neglect to deliver any sheep, or wool, was no evidence of conversion.

The opinion of the court was delivered by

KELLOGG, J. This is an action of trover for certain sheep and wool. The plaintiff, to prove his title to the property, gave in evidence a receipt executed by the defendants to the plaintiff, and also evidence of a demand of the defendants for the property and of their failure to deliver the same. Upon the evidence, the court below decided, as matter of law, that the plaintiff was not entitled to recover; and the correctness of that decision is now the subject of enquiry.

Whether the decision of the county court is sustained, or not, must depend upon the construction, that is given to the receipt, or contract, referred to in the bill of exceptions. If it is to be construed as a sale of the property to the defendants, or even a bailment with the power to sell the same, (and such the defendants insist is the legal effect of the contract,) then the decision of the county court was undoubtedly correct.

It is a well settled rule in the interpretation of contracts, that the intention of the parties shall prevail and be carried into effect, provided it can be done consistently with the rules of law. Hence the inquiry arises, was it the intention of the parties, that the plaintiff, by the contract, should be divested of the ownership of the property, and the same be vested in the defendants? Or was it a bailment of the property for a certain period, with a stipulation for its return at the expiration of the bailment? We are inclined to think, that the latter was intended by the parties, and that this

is apparent upon the face of the contract. The defendants, in express terms, agree to keep the sheep for the period of three *351 years; which is inconsist*ent with the idea of an absolute sale of the property. If the parties had intended a sale, we can hardly believe, they would have inserted such a stipulation in the contract. The plaintiff could have had no motive for requiring it, and the defendants would not have been likely to have submitted to it.

But it is said, that by the contract the defendants were allowed "to return the same sheep, or others in their place as good as they were:" and this has been urged as giving the defendants an unqualified right to dispose of the same. But the fact, that the obligation of the defendants in relation to the return of the sheep is in the alternative, does not necessarily determine the character of the contract and convert it into a contract of sale. Such a contract is not inconsistent with the continued ownership of the property by the plaintiff. It was so held in Smith v. Niles, 20 Vt. 315. That was a lease of cows for three years, with a stipulation by the lessee to return the same cows, or those worth as much, and it was held not to be a sale of the cows, or to give the bailee a right to sell; that it was simply a provision, in the event that any of the cows were lost under such circumstances, as to render the bailee liable, that he might replace them with other cows of equal value. So in the case of Grant v. King et al., 14 Vt. 367, it was held that where cattle were leased, with a provision in the contract, that the lessee should return the cattle at the expiration of the term, or pay a certain sum in lieu thereof, if did not amount to a sale of the property. These decisions are founded upon the supposition, that the parties, by the terms of the contracts, intended a bailment and not a sale.

We are aware, that the case of Hurd v. West, 7 Cow. 752, cited at the argument, is opposed to the view, which we take of the case before us. There the court seem to consider, that the alternative words in the contract determine its character,—that the right of the party to return other sheep of equal value makes the contract operate as a sale,—that such is the legal effect of the contract, and that upon the delivery of the property it vests in the bailee, or vendee. This decision is admitted to be in direct conflict with the case of Seymour v. Brown, 19 Johns. 44,—which last case is said to be overruled. Which of the two cases is the better law, I do not deem it necessary to inquire, as I think the *352 case at bar must be *controlled by the decisions of our own court. It is analogous to the case of Smith v. Niles, and I think, in principle, cannot be distinguished from it.

It may be asked, if the property at the time of the bailment does not pass, when does it vest in the bailee? We answer, certainly not until the bailee performs his part of the contract, by returning other sheep of equal goodness. That sufficiently secures to the bailor a return of the property bailed, and affords to the bailee all that he could claim, upon the most liberal construction of the contract. This construction of the contract is most beneficial to the defendant, and carries into effect, we think, the obvious intention of the parties.

Judgment of the county court reversed.

DUDLEY WILLIAMS v. ZIBA BASS.

(*Windsor*, March Term, 1850.)

The plaintiff, to prove his title to land, offered in evidence on office copy of a deed in his chain of title, which contained no appearance upon its face, that the original deed was sealed by the grantor, and it did not appear, that possession of the land had ever been taken under the deed. *Held*, that the copy was not competent evidence.

The antiquity, alone, of a deed, apparently defective, is not sufficient to justify the presumption of its due execution.[1]

Neither can such presumption be raised from the fact, that the deed was acknowledged and recorded,—the record showing only an imperfect deed.

Trespass *de bonis asportatis* for taking certain logs from land of the plaintiff in Braintree. Plea, the general issue, and trial by jury, May Term, 1849,—KELLOGG, J., presiding. On trial the plaintiff, to prove his title to the land in question, offered in evidence, among other testimony, a copy from the office of the town clerk of Braintree, of a deed from Elijah French to Ezra Weld, dated February 3, 1795, purporting to convey the same land. The deed contained a condition, that it was to become void, upon the payment of a specified sum of money by the grantor to the *grantee, within three years and six months *353 from the date of the deed. There was no mark, or writing, against the name of the grantor, upon this copy, to indicate that the original deed was sealed by him. The *testimonium* clause was in these words, —"In witness whereof I hereunto set my hand and seal, this third day of February, A. D. 1795." The certificate of acknowledgment was in these words,—"Personally appeared the within named Elijah French and acknowledged the within written instrument, by him subscribed, to be his free act and deed," &c. From the certificate of the town clerk it appeared, that the deed was received by him and recorded February 16, 1795. There was no evidence, that the plaintiff, or those under whom he claimed, had ever been in the actual possession of the premises. The defendant objected to the admission of this deed, for the reason that it did not appear to have been sealed, and that it did not appear, that the condition of defeasance had not been performed; but the objection was overruled by the court, and the evidence admitted. Many other questions were raised in the course of the trial, and were argued by the counsel in the supreme court; but as they were not decided by the court, they need not be stated. Verdict for plaintiff. Exceptions by defendant.

Washburn & Marsh for defendant.

The deed from French to Weld was inadmissible to support the chain of title. No presumptions can be made in its favor, such as pertain to ancient deeds, when it is

[1] See note at end of case.

not pretended, that the plaintiff ever had any possession of the land conveyed by it. 1 Stark. Ev. 65. 1 Phil. Ev. 477. 3 Ib., Cow. & H. Notes, 1310. 3 Johns. 292. 9 Ib. 170. This being a deed of mortgage only, and to become void on the payment of a certain sum, and the plaintiff never having been in possession of the land, if the court are to presume any thing, they will presume, that the condition of defeasance was duly performed, or they will require the plaintiff to produce the original deed, or some evidence, tending to satisfy the court, that the condition had not been performed. Cases are found, where deeds have been given in evidence, without proof of their execution, after a lapse of thirty years; but in such cases the original deeds were produced, and were found among the title papers of the owners. 7 Wend. 371.

*354 *Tracy & Converse* for plaintiff.

It is by no means certain, that the deed from French to Weld had no seal. The acknowledgment and record are evidence of due execution. Williams v. Wetherbee, 2 Aik. 329. 1 Stark. Ev. 343. The seal cannot be recorded; and there is no necessity, that the copy should contain the seal or any representation of one. The deed purports to have been signed, sealed and delivered, and, after this lapse of time, it is to be presumed, that it was duly executed. Mayor &c. of Beverly v. Craven, cited in 1 Greenl. Ev. 174, note. Every intendment is to be made in favor of its due execution. Stevens, Adm'r, v. Griffith et al., 3 Vt. 448. This was merely a conditional deed; the whole contract was contained in the deed; and if the deed is to be avoided, on the ground that the condition has been performed, the defendant must prove the performance, precisely as much as though a note had been given for the sum named in the condition and that note produced by plaintff. Hull v. Fuller, 7 Vt. 106.

The opinion of the court was delivered by

KELLOGG, J. This was an action of trespass for taking and carrying away certain mill logs from the plaintiff's land in Braintree. The plaintiff, to prove his title to the premises, gave in evidence, under objections, an office copy of a deed from Elijah French to Ezra Weld, dated February 3, 1795. To the admission of this deed two objections are urged;—1. That the copy contained nothing indicating that the original was sealed;—2. That the deed was conditional, and subject to be defeated upon the payment of a sum therein specified, and there being no evidence in the case tending to show that the condition had not been performed.

It is insisted by the plaintiff, that the court, in favor of a deed so ancient, should presume, that the original was duly sealed, and that the seal was accidentally removed, or that the town clerk, in recording the deed, had inadvertently omitted to indicate upon the record, that the deed was sealed. This is ordinarily indicated by a scroll; but no such representation appears upon the copy. There are cases, unquestionably, where presumptions of this character may be raised,—cases where even grants and the surrender of grants are presumed; but these are ordinarily made in favor of long continued *possession, and for *355 the purpose of quieting that possession. And to justify these presumptions in aid of ancient possessions, it is not necessary, that the triers should believe, that any such fact ever existed, as is supposed. It is what is termed in the books a "conclusive presumption of law." But in the present case neither the plaintiff, nor any of those under whom he claims title, were ever in the actual possession of the premises, and the inquiry arises, do the facts in the case warrant the presumption, that the original deed was properly sealed? For it is quite clear, that without either actual or presumptive proof, that such was the fact, the deed of French conveyed no title. The seal being wanting, the deed was not conformable to the statute.

The case of the Mayor of Beverly v. Craven, 2 M. & R. 140, is cited as an authority to justify the presumption. We are not furnished with the case, but have only been able to refer to a brief note of it, given by Mr. Greenleaf in his treatise on evidence. It however appears, that the question arose upon an ancient document, purporting to be an exemplification, produced from the proper place of deposit, having the usual slip of parchment, to which the great seal is usually appended, but no appearance, that any seal was ever affixed to this; and it was held, that it was to be presumed, that the seal was once there and had been accidentally removed. Whether there were other circumstances in the case, to corroborate the presumption, we are not advised. It will be remarked, that in that case the original document was produced; and in that respect it differs from the case at bar, in which a copy is offered. I have not been able to find any other case, which goes to the same extent. Had the deed of French been followed by possession, it would seem from the authorities, there could be no doubt, but the presumption of its due execution would be fully warranted. It has sometimes been supposed, that possession was indispensably necessary to warrant the presumption; but at the present time the balance of authority seems to be the other way; 1 Greenl. Ev., sec. 144, and note; and that the presumption may be raised, when sufficiently corroborated by other circumstances. Is there any thing in the case at bar to aid the presumption? Neither the grantee of French or those claiming under him were ever in the actual possession of the land. Nor is there any evidence in the case, upon which to base the pre- *sumption, that the deed contained *356 a seal, but its antiquity; and this, we think, the current of authority upon that subject will hardly justify.

It is said, that the acknowledgment and record are evidence of the due execution of the deed; and Williams v. Wetherbee, 2 Aik. 329, is cited, as supporting this principle. That case decides, that the record of a deed to a third person, and not to the party, is *prima facie* evidence of the due execution of the deed and its contents; but by this is to be understood a perfect record, as is said by the court in Ex'rs of Booge v. Parsons et al., 2 Vt. 458. In that case there was no

attestation of the recording officer upon the record; but the book of records was produced and the particular record was shown to be in the hand writing of the then town clerk,—a circumstance tending to corroborate the presumption, that the deed was properly recorded. It was held, that the attestation of the recording officer was evidence of the record, but not a part of it, but that it was not the only evidence, which could be received to support the record.

In the case under consideration, the court would by no means intimate, that the omission of the scroll upon the record is conclusive against the validity of the deed. It may be satisfactorily explained, so as to raise a presumption of its due execution. At present, however, no such explanation appears.

From these remarks it will be seen, that the judgment of the court below must be reversed; and consequently it becomes unnecessary to pass upon the remaining questions in the case.

Judgment of the county court reversed.

NOTE.

EVIDENCE—ANCIENT INSTRUMENTS. Where any document purporting or proved to be 30 years old is produced from its proper custody. it is presumed that the signature, and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting. Bell v. Brewster, (Ohio,) 10 N. E. Rep. 679. This rule applies not only to instruments of a formal character, such as wills, bonds, and other deeds, but also to receipts, letters, entries, and all other ancient writings. Id. A deed more than 30 years old, which has been acted upon, and under which the purchaser took possession, is admissible in evidence without proof of execution. Dodge v. Briggs, 27 Fed. Rep. 160. A deed defective in execution, and never recorded, is admissible as evidence of title 40 years afterwards, on being produced from the possession of the heirs of the grantee, and the grantee and his heirs having been in possession of the land under claim of title. Boyd v. Bethel, (Ky.) 9 S. W. Rep. 417. Testimony of an attorney that he and the clerk have searched the records with diligence, and cannot find the papers under which a sheriff's deed was executed 40 years before, together with evidence that they were withdrawn by a firm of lawyers, one of whom had moved away, and the other disclaimed all knowledge of them, warrants the court to whose records the papers belong in admitting the sheriff's deed as an ancient instrument, without further proof of the sheriff's authority to make it. Ruby v. Von Valkenberg, (Tex.) 10 S. W. Rep. 514. Where the title to land was claimed under a bounty warrant more than 46 years old, such warrant having been produced from the proper custody, and being free from suspicion on account of anything appearing on its face, was held admissible in evidence without proof of its execution. Shum v. Hicks, (Tex.) 4 S. W. Rep. 486. And the fact than an affidavit was made, that certain words had been fraudulently inserted, but by a person who had no knowledge of the instrument on which a reasonable belief that it was not wholly genuine could be based, was held not to alter the the rule. Id.

The genuineness of such instruments may be shown by other facts than that of possession. When proof of possession cannot be had, it is within the very essence of the rule to admit the instrument, when no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it. Applegate v. Mining Co., 6 Sup. Ct. Rep. 742. A deed is admissible as an ancient instrument without proof of possession under it of the parties offering it, or of those under whom they claim, where it appears that it is 60 years old, that it was produced from among the papers of the grantee in the custody of his heirs, and that he and his heirs had paid taxes upon the land down to the time of bringing the action. Fulkerson v. Holmes, Id. 780. Under a statute providing that a deed more than 30 years old, having the appearance of genuineness, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence without proof of execution, a deed which meets the other requirements is admissible, though possession is not proved, where it is admitted by both parties that the land was wild and unoccupied until shortly before the commencement of the suit. Prigden v. Green, (Ga.) 7 S. E. Rep. 97.

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*ISRAEL P. BROWN v. ALBERTUS EDSON AND THE TOWN OF PLYMOUTH. *357

(*Windsor*, March Term, 1850.)

An entry upon a tract of land under a survey bill, or record, giving a definite and certain extent to such land, and the occupation of a part of the land, if there be no evidence to limit and restrict the possession, will be regarded as extending the possession constructively over the entire tract included in the survey; but this constructive possession may be restricted by the acts and declarations of the occupant, showing that he does not make his claim of title equally extensive with the survey.

In this case, which was ejectment, the plaintiff claimed the land described in his declaration under a series of deeds from one R., who, without title from the original proprietors, surveyed, in 1787, a tract of land, which included the demanded premises, and placed his survey bill upon record, and in 1790 entered into possession of a portion of the tract so surveyed; and it appeared, that R. and his grantees, including the plaintiff, had continued in possession of that part of the tract, of which possession was first taken, until the trial of this suit; but it appeared, that R., when he entered upon the lot, and during his occupancy, never claimed any part of the demanded premises, as part of that lot, that he designated to different individuals a line, as the boundary of his survey, which did not include the land in dispute, that he ever after claimed that line as his boundary, and that all the grantees of R., including the plaintiff, recognized that line as the boundary of the survey, until 1844; and it was held, that this limited the title, based upon constructive possession, to the line thus designated.

Ejectment for land in Plymouth. Plea, the general issue, and trial by jury, May Term, 1848,—REDFIELD, J., presiding. On trial the plaintiff, to show title in himself to the land described in his declaration, gave in evidence the charter of Plymouth, dated July 6, 1761, by which it appeared, that one John Grimes was an original proprietor of said town. He then gave in evidence a deed from David Baldwin, administrator of the estate of Thomas Kendall, to Jonathan Wilder, dated April 24, 1786, and a deed from Jonathan Wilder to Luke Rice, dated March 6, 1787, conveying the undivided right of John Grimes in said Plymouth. He then gave in evidence a survey bill, duly recorded, dated September 12, 1787, of one hundred and fifteen acres upon the right of John Grimes, described by courses and distances; and also a series of deeds, conveying to the plaintiff the land described in the survey bill. But the plaintiff gave no evidence tending to prove, that *Thomas Kendall, *358 or David Baldwin, ever owned the

right of John Grimes. The land in controversy was situated at the southerly end of the tract included within the survey. The plaintiff farther gave evidence tending to prove, that Luke Rice went into possession of the land described in the survey bill about the year 1790, and that he and those claiming under him, including the plaintiff, had ever since continued in possession thereof, and that the land in controversy was included within the survey. The plaintiff claimed the land in controversy as part of the tract included within the survey, and the defendants claimed it as part of the "Minister's Right," in Plymouth. The land in controversy was wild until since October 1, 1844, at which time the selectmen of Plymouth leased it to the defendant Edson, who soon after commenced cutting the timber thereon; and no question was made, but what the defendants would hold the land, if not included within the survey. The defendants gave in evidence the survey and allotment of the town of Plymouth, made between the years 1793 and 1796, which tended to show, that the land in controversy was a part of the "Minister's Right" in said town. They then gave evidence tending to prove, that Luke Rice, as early as 1793, claimed to a line, as the southerly line of the land described in the survey bill, which did not include any part of the land in controversy, and that Rice never claimed any part of the land in controversy, and that those claiming under Rice had at all times recognized said line, as the southern boundary of the survey, until since 1840, when the plaintiff discovered, that his easterly and westerly lines were not of the length which they were described to be in the survey bill; and that the plaintiff then claimed a part of the land in controversy; and that this suit was commenced in October, 1846, and, after a verdict for the plaintiff and a review entered by the defendants, the plaintiff, at the November Term, 1847, of the county court obtained leave of the court and amended his declaration, so as to include the whole of the land in controversy. The defendants requested the court to charge the jury, that if the land in controversy was part of the land described in the survey bill, yet if Luke Rice, as early as 1793, had claimed, as the southern boundary of his land, the line to which the defendants now claimed as their northern boundary, *359 and Rice and those claiming *under him had from that time recognized said line as their southern boundary and acquiesced in it as such, until 1840, and made no claim farther south than that line, the plaintiff could not recover. But the court instructed the jury, that such a recognition and acquiescence would not preclude the plaintiff from claiming all the land, which Luke Rice originally surveyed, inasmuch as the land in controversy, during all the time of such recognition and acquiescence, had been in a wild state, and no one had been in actual possession of it; and that the plaintiff would have the right so to extend his land southerly to the south line of the original survey, until some one had been in the possession of said wild land for the term of fifteen years. The jury returned a verdict for the plaintiff, for the whole of the land in controversy. Exceptions by defendants. After verdict the defendants proposed to enter a review of the cause; but the court decided, that the defendants, having once reviewed, could not review again, although but part of the land now recovered was included in the declaration, at the time the review was entered. To this decision the defendants also excepted.

S. Fullam and *Tracy & Converse* for defendants.

In order to acquire title by constructive possession, which is all the plaintiff claims he had in this case, it is necessary, not only that he have actual possession of a part of the land covered by the deed, but that he claim title to the whole for at least fifteen years. 7 Vt. 100. 5 Vt. 209. 10 Vt. 33. 11 Vt. 129. 1 D. Ch. 92. 11 Vt. 521. Doolittle v. Linsley, 2 Aik. 155. A person withdrawing his claim to land, to which he has a title, loses his constructive possession, and the constructive possession of another may commence at the same time. Crowell v. Bebee, 10 Vt. 33. The presumption of law, that a person, who takes possession of a tract of land under a deed, claims all covered by the deed, is merely *prima facie*, liable to be rebutted by proof. If the plaintiff, who has no title except by possession, did not possess or claim possession of the premises for fifteen years, he has acquired no title, whether his neglect were the result of mistake, or inadvertence, or any other cause. If, as against an individual proprietor, the plaintiff, by his survey and previous possession of a part, had gained a prior occupancy of *the whole tract, *360 which, by fifteen years continuance would become a title, such could not be the effect in this case, as it seems conceded, that the premises are included in the Minister's Right, against which the statute of limitations will not run. University of Vt. v. Reynolds et al., 3 Vt. 542. Propagation Soc. v. Pawlet et al., 4 Pet. 480. The defendants' application for a review was improperly refused. The defendants have not had a review of their cause, but only of part of it.

Washburn & Marsh for plaintiff.

1. The land in controversy was not in the actual possession of any one, unless of the plaintiff or his grantor, until October, 1844; and all the lands adjoining it upon the south were vacant lots. Hence there was no occasion, until that time, for the plaintiff, or his grantor, to point out with precision his southern boundary, or even to determine for himself where it was. The law had extended the constructive possession of Luke Rice, in 1790, to the true southern boundary of his lot,—which included the land in controversy; and until an adjoining proprietor should encroach upon his lot, or make claim of title to its southern portion, or some trespasser should intrude, it was useless for Rice, or for the plaintiff, to attempt to define, for himself, or for others, the point to which the law was thus extending his possession. The plaintiff and his grantor have always claimed all that was included in the survey bill. The jury have established the fact, that the land in controversy was thus included. Hence, when Luke Rice entered into possession of a portion of the lot in 1790, the law extended his constructive posses-

sion over all the land included in the survey bill,—and consequently over the land in controversy. All that is assumed by the defendants, in their request to the court to charge, is, in effect, that Rice was mistaken in the extent, to which the law was thus extending his constructive possession, and that his grantees continued under the same mistake, until the claim made by the defendants afforded a motive for examination. Neither the defendants, nor any third person, were injured by that mistake. It is clear that neither Rice, nor his grantees intended to withdraw their claim to any portion *361 of the land covered by the sur*vey bill;—because, before any claim was asserted by any person, examination had been made, and the error discovered. It would be unjust to give to the plaintiff's mistake an effect, which neither he nor his grantors intended, and which was not known to the defendants, and upon which neither the defendants, nor any other person, ever acted. In Crowell v. Bebee, 10 Vt. 33, it was decided, that "an admission, by a party, of a mistaken boundary line for the true one has no effect upon his title;" and the *dictum* of the court in that case, as to its effect upon his constructive possession, must be taken with reference to the facts in that case. 2. The defendants were not entitled to the review claimed. If the action remained the same after the amendment, that it was before, they had had one review;—if it was made a different action by the amendment, they should have excepted to the allowance of that amendment; and not having done so, this court will presume, that the amendment was properly allowed,—and so the action remained the same.

The opinion of the court was delivered by

KELLOGG, J. Two questions are raised by the bill of exceptions; but only one was much relied upon in the argument, and that relates to the instructions given to the jury by the court below; and it is the only question necessary to be considered in disposing of the case. The plaintiff, at the trial, attempted to deduce a title to the land in question from John Grimes, who was shown to have been an original proprietor of the town of Plymouth. He, however, failed to establish such title, and was driven to the necessity of relying upon a possessory title. The case shows, that as early as 1787 Luke Rice caused a survey to be made of the lot in question, and that in 1790 he went into the possession of a portion of the land described in his survey bill, and that he and those claiming under him, including the plaintiff, have ever since possessed the same. No part, however, of the piece of land in controversy was ever in the actual possession of any one, until since 1840. It farther appears, that as early as 1793 Rice claimed to a line, as the southerly line of the land described in his survey bill, which did not include any part of the land in question, and that Rice never claimed any part of *362 the *land in controversy; and that those claiming under Rice had at all times recognized that line, as the southern boundary of the land described in the survey bill, until since 1840; and that between the years 1793 and 1796 an allotment of the town was made, by which it appears, that the land in controversy was included in what is commonly called the Minister's Right.

Upon these facts the plaintiff claimed, and the county court, in their charge, evidently proceeded upon the supposition, that Rice, by his entry upon the land under his survey, acquired a constructive possession of all the land included in the survey, and that, by the continuance of that possession, he acquired a title to the land in controversy; for the plaintiff did not claim to have shown any title to this portion of the land, but a title resulting from a possession by construction.

It has been repeatedly held by this court, that if a person enters upon a tract of land under a deed, or pitch, giving a definite and certain extent to such land, his possession of any part will be construed as a possession of the whole, and as co-extensive with the claim of title. Hull v. Fuller, 7 Vt. 100. Beach v. Sutton, 5 Vt. 209. Crowell v. Bebee, 10 Vt. 33. But we know of no instance, in which a possession by construction has been held to extend beyond the claim of title. We readily grant, that an entry under a survey, like the one in the present case, and the occupation of a part of the land, if there be no evidence to limit and restrict the possession, will be regarded as extending the possession constructively, over the entire tract included in the survey. But we think, this constructive possession may be restricted by the acts and declarations of the occupant, showing that he does not make his claim of title co-extensive with the survey.

The fact, that Rice, when he entered upon the land and during his occupancy, never claimed any part of the land in controversy, that he pointed out a line, as the southern boundary of his survey, which did not include the land in dispute, that he ever after claimed that line, as his southern boundary, that the plaintiff, and all those under whom he claims, recognized this line as the southern boundary of the survey until 1844, in the judgment of the court limits the constructive possession to the line thus designated.

The county court seem to have attached no importance to these *facts, but to have considered, that inasmuch as the *363 land in controversy had, during all the time, been in a wild state, and no one in the actual possession of it, the plaintiff had the right to extend his land south, as far as the south line of his original survey, until some one had been in the possession of the land in dispute for the term of fifteen years. This, we think, is manifestly erroneous. As the plaintiff had neither a paper title nor a title by possession to the land in dispute, we do not see what right he had to extend his line, so as to embrace land in the possession of others, although that possession had not been continued for fifteen years.

The judgment of the county court is therefore reversed.

In re RUSSELL D. HOSLEY.

(*Windsor*, March Term, 1850.)

It is not sufficient to entitle a prisoner to a discharge upon *habeas corpus*, that he is committed upon mesne process, in an action founded on contract, issued against his body by a justice of the peace, upon the affidavit of the creditor, when he offered himself to be examined, under the statute of November 5, 1845, in regard to the grounds upon which the writ issued as a *capias*, and the justice declined to examine him.

Nor is it a sufficient reason for ordering his discharge, that the creditor had previously commenced another suit against him, for the same cause of action, and had therein attached his property to double the amount of the debt.

Habeas corpus. The petitioner alleged, that he was imprisoned in jail by virtue of mesne process, in an action of *assumpsit*, signed by a justice of the peace, in favor of Sumner S. Wheeler of Plymouth, demanding in damages the sum of $70; that when he was arrested, he gave notice to the officer, that he should forthwith appear before the magistrate, who signed the writ, and submit himself to examination on oath, upon the question whether he was about to abscond or remove from the state, and had secreted about his person, or elsewhere, money, or other property; that he caused a notice to the same effect to be served upon the creditor; that immediately thereafter, the creditor, the petitioner and the magistrate were together, and the petitioner submitted himself to examination *364 *in the matter; but that the magistrate refused to make any examination, and denied the right of the petitioner to claim such privilege; that the petitioner was a citizen of this state, and had never had any intention of absconding or removing therefrom; and that the creditor, Wheeler, had previously sued out a writ against him, for the same cause of action, returnable to the county court, and had attached thereon the personal property of the petitioner to more than double the amount of the debt. The creditor was served with notice of the pendency of the petition.

Washburn & Marsh for petitioner.

Tracy & Converse for creditor.

The opinion of the court was delivered by

REDFIELD, J. In this case the petitioner asks to be discharged, for the reason, that he is committed on mesne process, issued against his body by a justice of the peace, upon the affidavit of the creditor, when he offered himself to be examined, under the late statute, [Acts of 1845, p. 17,] in regard to the grounds, upon whch the writ issued as a *capias*, and the justice declined examining him,—and also for the reason, that the creditor has already brought suit for the same cause of action, and attached property to twice the amount of the sum due.

It seems to us, that neither of these grounds is sufficient to entitle the petitioner to his discharge. The last ground alleged is matter of abatement merely, and should be presented in a traversable form, and as a direct answer to the suit, and not in this collateral manner. We might, with almost as much propriety, be called upon to discharge one upon *habeas corpus*, committed on mesne process, because there was nothing due,—and so the suit was mere oppression.

In regard to the second ground urged,—the statute upon this subject is very broad undoubtedly, and the case of Hathaway v. Holmes, 1 Vt. 405, where the subject is very elaborately discussed by PRENTISS, J., shows, that this remedy is of very extensive application. But we are not aware, that it has ever been resorted to and sustained in a case like the present. The refusal of the justice to ex*amine the defendant *365 in the process and the other proofs, and make the proper determination of the matter, and, if favorable to the debtor, (or defendant,) give a certificate accordingly, may be, and, as the proof appears before us, would seem to be, improper. But we could not grant the certificate, because the legislature have given us no such authority: and to discharge the petitioner, upon the mere refusal of the justice to proceed to the hearing, might do injustice upon the other side. It would certainly be an unauthorized proceeding. The only effectual remedy in such case would seem to be a *mandamus*, commanding the justice to proceed in the matter. Certainly this is not the appropriate remedy.

Prisoner remanded and petition dismissed.

VERMONT CENTRAL RAIL ROAD COMPANY v. CHESTER BAXTER.

(*Windsor*, March Term, 1850.)

The commissioners need not be called upon to appraise damages for materials taken by the Vermont Central Rail Road Co., without the limits of their survey, under section sixteen of their charter,† for the construction of their road, until after the materials are ascertained.

The commissioners have jurisdiction to determine the damages for acts of the corporation, where those are such as the corporation, by their engineers, agents, or workmen, may rightfully do, by virtue of their charter, and the parties cannot agree upon the amount of damages; and it makes no difference, in this respect, whether the corporation admit or deny their liability.

The corporation have power, under section sixteen of their charter, when necessary for the construction of their road, to take stone from land contiguous to the line of their survey, and to use land for the purpose of cutting and hewing stone thereon.

*The power of the corporation to take the *366 land and other materials adjoining the line of the road, for the purpose of constructing their

†Which is in these words,—"Said company may, by their engineers, agents, or workmen, with such teams and carriages and tools, as they may find convenient, enter upon any lands contiguous to said rail road, or the works connected therewith, to dig, blast and carry away and use such stone, gravel, earth and other materials, as may be necessary for building or repairing said road; doing as little damage thereby, as the nature of the case will admit; and in case damage shall be claimed by the owner of the land thus entered upon, and for the stone, gravel and other materials carried away as aforesaid, and the owner and said company do not agree upon the sum to be paid therefor, the same shall be assessed by commissioners in the manner before prescribed in this act; and all persons, aggrieved by any decision of said commissioners, shall have the right to appeal, as herein before provided." Acts of 1843, p. 49.

road, is conferred upon them by their charter and is as necessary to exist in and be exercised by all the contractors on the road as by the corporation. This power, to be exercised within reasonable limits and in a proper manner, is necessarily delegated from the corporation to the contractor, and for this purpose the contractor is the agent of the corporation, and the corporation is liable to the land owner, for the damages occasioned by the exercise of this power on the part of the contractor.

And the liability of the corporation to the land owner, in such case, is not affected by any stipulation in the agreement between the corporation and the contractor.

The commissioners, who are called upon to assess damages in such case, may award costs to the land owner.

Petition for a writ of *certiorari* to the commissioners appointed to appraise damages for land and materials taken by the Vermont Central Rail Road Company. The petitioners alleged, that the defendant applied to the commissioners to appraise and award damages, which had accrued to him on land held by him in his own right and as administrator of Hiram Shepard, and that the commissoners, after giving due notice to the parties, had met, and, upon hearing, had made their award. The award was recited in the petition, and was, in substance, as follows;—that the corporation had contracted with Sewall F. Belknap to construct their rail road, by written agreement, a copy of which was annexed to the award; that it did not appear, that Baxter had knowledge of the provisions of this contract; that Belknap, for the purpose of procuring stone to build culverts for the road, by his servants, agents and workmen, entered upon the land of Baxter, and upon the land of Shepard, continguous to the rail road, and laid open the fields, and blasted and drew away stone, and occupied the land for hewing stone, and used the stone in the construction of the rail road, claiming to do so by virtue of the provisions of the charter of the corporation; that the corporation denied their liability to pay for the damages so occasioned, and the parties being unable to agree upon the amount of damages, the commissioners, upon the application of Baxter, after giving due notice and hearing the parties, awarded to Baxter $63,00, as his damages, viz., for stone taken from the land of Baxter $28,00,—for laying *367 open his fields and *drawing stone across his land, $10,00,—for the use of land for cutting and hewing stone, $12,00, —and for stone taken from the land of Shepard, $13,00; and that they allowed to Baxter $10,98 for his costs in the matter. It was farther alleged in the petition, that the petitioners did not authorize or direct the acts committed by Belknap upon the land of the defendant, but that Belknap, in so doing, was acting for himself, under the stipulations in the contract between him and the corporation; and the petitioners denied, that the commissioners had authority to make the award in question.

The fourteenth specification, in the contract between the corporation and Belknap was in these words,—"The price per yard for masonry shall in every case include the furnishing of all materials, and the transportation of the same to the place where wanted, the cost of all scaffoldings, centerings, &c., and the preparation of all roads and bridges that may be required, in order to transport the stone, or other materials, to the work." The seventeenth specification was in these words,—"The corporation will assure a right of way over the premises of land owners, so far as may be necessary to afford the contractors convenient access to their work; but the contractors shall be responsible for all damage done to such premises, in consequence of leaving gates or fences open, and also for all depredations upon fences, wood lots, or other property, by the workmen in their employ." By the sixth specification it was provided, that "In cases where the quantity of materials taken from the excavations in any section shall be not sufficient for the formation of the requisite embankments, the deficiency shall be supplied by materials taken from the adjacent grounds, at such places as the engineer may designate." By the fourth specification it was provided, that in case "land or gravel cannot be obtained from land holders on terms satisfactory to the corporation, then such sections shall be finished off according to such grades, as the engineer shall establish."

Peck & Colby and *Tracy, Converse & Barrett* for petitioners.

The award shows, that no such entry, or taking of materials, as the charter contemplates was made or done by the corporation. Belknap was neither engineer, agent, or workman, of the corporation, but a contractor, having no other relation to the corporation, *than such as was *368 created by the contract; and by the terms of the contract the price for masonry was to include the furnishing of all materials. The claim, or pretence, of Belknap, or his workmen, to act under the charter, conferred no authority to enter and take and use the stone, and cannot bind the corporation; third persons deal with a professed agent at their peril, and cannot charge the supposed principal by reason of ignorance or want of information in respect to the pretended agency. Nor can it be said, that the corporation have become liable to Baxter, by reason of adopting such agency and enjoying the benefit of the materials taken by Belknap. They had no knowledge, or means of knowing, that Belknap procured the materials by claiming to represent the company, nor of the fact, that he procured any of Baxter; and the ratification of the act of an agent, previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. Owings v. Hull, 9 Pet. 606. Davidson v. Stanley, 2 M. & G. 721. Bell v. Cunningham, 3 Pet. 69. Paley on Agency 172. By the fourth and sixth specifications all questions as to borrowing earth, or gravel, are deferred to the order of the corporation, and their engineer, and without such order the contractor is not authorized to take materials without the limits of the section. In regard to stone, procured off the road, the contract has no provision, subjecting the selection to the

engineer, as that, by the fourteenth specification, was to be furnished by the contractor. If, then, the corporation are liable for stone thus taken and used by a contractor, it is not by force of the contract, in its terms, but from the fact that he was contractor and had agreed to construct the road. The argument, that the corporation, by contracting with Belknap to build the road, thereby gave him the rights, which the corporation have to take property without the consent of the owner, and to render the corporation chargeable, is certainly opposed to settled and well established principles. If this be so, the corporation is also liable for the debts and acts of sub-contractors, for all materials, and even perhaps for the wages of the laborers. The inconveniences and utter impracticability of such a doctrine are ample reasons against its reception. For a class of injuries by the fault, or negligence, of a subcontractor, or his servant, the law is stringent enough; Bush v. Steinman, 1 B. & P. 409; but even the doctrine of this case *369 is *greatly shaken in Quarman v. Burnett, 6 M. & W. 499; Rapson v. Cubitt, 9 M. & W. 710. Dunlap's Paley on Ag., notes, 297. If the taking by Belknap was a tort, and he the servant of the corporation, they are not liable. Dunlap's Paley 306. Schmidt v. Blood, 9 Wend. 268. Foster v. Essex Bank, 17 Mass. 479. 6 Com. Dig. 393. The right of taking materials under the charter is a privilege in derogation of the rights of the owners of the property, and therefore not to be extended by implication; it is a right personal to the corporation, and not to be transferred. The commissioners have no authority to determine a question like this; their powers are restricted to the single inquiry, as to the "sum to be paid," and they are called upon only when the "parties do not agree" upon that question, and that only; they are not a tribunal for litigation, when the corporation deny their liability and repudiate all connection with the matter. The commissioners have no authority to award costs to the land owner.

W. C. French and *O. P. Chandler* for defendant.

The contract between the corporation and Belknap had no effect as to third persons, who had no knowledge of its provisions. Belknap claimed to enter upon the land and take the stone by virtue of the provisions of the charter. He was the general agent, for the purpose of building the road; and land owners could in no way resist his so entering upon their lands, as the charter gave him the right. His acts, as general agent for the purpose of building the road, bind the corporation, whatever may have been the private contract between him and the corporation. 2 Kent 624. No action could have been maintained against Belknap for taking the stone. Calking v. Baldwin, 4 Wend. 667. The corporation are equally liable for laying open fields and drawing stone across them and for damages in consequence of hewing the stone upon the land. It was necessary, for the purpose of enabling Belknap to construct the road. Dodge et al. v. County Com'rs of Essex, 3 Met. 380. Stevens v. Proprietors Middlesex Canal, 12 Mass. 466. Stowell v. Flagg, 11 Mass. 364.

*The opinion of the court was deliv- *370
ered by

REDFIELD, J. This is a petition to this court for a writ of *certiorari* to the commissioners of the Vermont Central Rail Road Co. for appraising land damages, to certify to us a judgment, or appraisal, which they made against the company for damages in taking stone, drawing them across land, and hewing them on land of the petitionee,—also allowing him costs.—that its correctness may be determined by this court. If their proceedings were substantially correct, we should refuse the writ. We must therefore inquire into their legality. We must be very brief, in regard to most of the points raised.

1. We think the commissioners need not be called out to appraise damages under the sixteenth section, for materials taken to build the road, out of the limits of the survey, until after the materials are ascertained. This seems to us to be the only practicable mode of proceeding in such case, if they would come at a reasonable and just determination in regard to such damages. And it is admitted such, from necessity, has been the practical construction put upon this section.

2. We think, if the company are liable at all in this case, under the facts set forth in the award of the commissioners, it is a proper case for the determination of the commissioners. As is said by Ch. J. SHAW, in Dodge v. County Com'rs of Essex, 3 Metc. 380, if the company keep "within the scope of their authority, they are not wrong doers," but are justified by their act of incorporation, and liable to pay damages in the mode there pointed out. We see no good reason, why the right to refer this question to the determination of the commissioners should depend upon the company admitting their liability, and differing only as to the amount of damages, to which the land owner is entitled. It seems to us, that such a rule would be liable to very great abuse. If the company, by their agents, or servants, have so conducted, as to be in fact liable for damages, and the parties cannot agree upon them, then the commissioners are constituted the only proper tribunal, in the first instance, to determine that question, and either party may apply to them and set their action in motion.

Of course it is not intended to say here, that the jurisdiction of *the *371
commissioners extends beyond those cases, where the company are rightfully subjected to damages, under the charter provisions, for acts which they may rightfully do, by virtue of the authority therein conferred. Beyond that, if they incur liabilities, either for torts, or by way of contract, they are liable like other persons. So that the question, how far this matter comes within the jurisdiction of the commissioners, depends upon the prior question, whether the liability is one for an act, which they had the right to do by the charter, or is a mere tort. And as it seems to be supposed on all hands, that the act

itself is clearly within the charter rights of the company, if done in such a manner, as to be the act of the company, the questions of liability and jurisdiction are identical.†

3. In regard to this question, which is the important inquiry in the case, no doubt, it does not appear to us, that a determination upon the general principles of the law of agency wholly reaches the true merits involved. If it were so, I could have no hesitation in saying, the company are not liable for the act of Belknap. One who simply lets a job of work to another is not ordinarily liable, I think, for the acts of that other, whether of tort, or contract, unless there be something in the contract, or the conduct of the work, whereby the act becomes that of the principal,—although there is, I know, some apparent conflict in the cases, not important to be here examined.

It is clear, that these stone were not taken by any express direction of the company, nor for their benefit, as between them and Belknap. And if Baxter had the legal right to resist Belknap, so that he must be considered as having acquiesced in what Belknap did, without informing himself of the nature of the contract between Bel-
*372 knap *and the company, it is, in my opinion, his own folly, and he is in the same position, as if he had notice of the contract. For he no doubt knew enough to put him upon inquiry, and is therefore affected with the notice of such facts, as he might have ascertained upon reasonable inquiry. And if it be viewed as a mere tort of Belknap, it is very questionable, in my mind, how far, upon common principles, the company could be made answerable for the act, as being in effect the act of their agent. Some of the cases, perhaps, go that length. But those entitled to the most consideration seem to stop somewhat short of that point. It would seem from some of the recent cases.—Rapson v. Cubitt, 9 M. & W. 709, and cases there referred to, and Milligan v. Wedge, 12 Ad. & El. 737,—that the relation of master and servant must exist, in order to make one liable for the torts of the other, unless there is an express or implied permission to do the act. The case of obstructions on one's premises, of the nature of nuisances, by which injury occurs to others, rests upon different grounds.

But we think the case before us is entitled to a different consideration. The power conferred upon railroad corporations, to take the land and other materials adjoining the line of the road for the purpose of constructing the road, is one in derogation of the ordinary rights of land owners, and one which could only be conferred by the legislature by virtue of the right of eminent domain, and because it is necessary to the reasonable exercise of sovereignty. And we think it is one, which is as necessary to exist in and be exercised by all the contractors on the road, as by the corporation. Indeed, it is only for that purpose that it is important. And whether the corporation construct their road themselves, or by contract with others, is unimportant. This is a power, which must go with the contract, which is indispensable to the building of the road, which must be understood to go with the contract, which is in fact never exercised by the board of directors of the company, but always by the builders, under the supervision of the engineers, and which must of course be exercised only within reasonable limits and in a proper manner. The very words of the statute show by whom it was expected this power would be exercised,—"by engineers, agents, or workmen."

This, then, being a power, which was conferred by charter upon *the *373
company, and which of necessity pertains to the contractors, as a necessarily delegated office from the company to the contractor, and which they must expect him to exercise, it is the same, as if in express terms it were stipulated, that he may exercise it. For this purpose, then, the contractor is the agent of the company. And as the proprietors of the land cannot resist the contractor, because he is clothed with the authority of the company, it would be hard, if they could be compelled to look to any and every contractor, to whom the company might see fit to turn them over. Any stipulation between the contractor and the company is of no importance to the land owners. It is merely a private arrangement between the company and contractor, as to the mode of coming at the price of the work.

This subject may be very well illustrated, by supposing that the land owners had, by contract, conferred upon the company the same rights and privileges, as to building their road, and upon the same conditions, stipulated in the charter, and the company had let the building of the road to this contractor, and he and the land owners had proceeded, in all respects, as they now have. There could be no doubt, I apprehend, that the contractor would have acquired the rights of the company, as to taking and working materials for the road, and, as between himself and the company, would be bound to pay for them; but the land owners might well claim to look to the stipulations in their own contract, and could not, without their own consent, be turned over to the contractor. This illustration, which, as far as we can see, is every way a fair one, brings the whole subject within a very narrow compass, and renders it sufficiently simple.

Costs seem to be given by the statute, and we do not see that they are unreasonable.

The petition is dismissed with costs.

†NOTE BY REDFIELD, J. Since the decision of this case, it has been somewhat questioned, by some, whether the company itself has any right to take materials for building its road, beyond the limits of the survey. That question was not made or considered by the court, in this case, and, if it be a question, is one involving constitutional considerations of a character which might require serious discussion and grave inquiry. But at present I should be inclined to suppose it must depend upon the necessity for taking such materials, and that it is therefore a question of fact mainly. But in a case like the present, where the land owners preferred the responsibility of the corporation, they would naturally decline contracting with the contractors for building the road, which would create the necessity, contemplated in the charter.

*374 *EPHRAIM J. GIBSON v. HERSCHELL DAVIS.

(*Windsor*, March Term, 1850.)

A writ of *scire facias*, to enforce a judgment rendered against a trustee, is insufficient, if it be only alleged therein, that the plaintiff recovered a judgment against the defendant, as trustee. It should appear, for what the trustee was made chargeable.

A writ of *scire facias*, for the purpose of enforcing a judgment rendered by a justice of the peace, cannot be brought before another justice of the peace. It can only issue from the court, in which the judgment was rendered.

Quære, Whether *scire facias* can be sustained, to enforce a judgment that one is chargeable, as trustee, for a specific sum of money.

Scire facias. It was alleged in the declaration, that the plaintiff, on the twenty third of January, 1846, commenced a suit before Simeon Leland, Esq., a justice of the peace, upon a promissory note, against one Clark, and therein summoned the defendant Davis as trustee of Clark; that the writ was duly served and returned, and the plaintiff recovered judgment against Clark for $15,37 damages, and $1,99 costs of suit; and that the plaintiff, by the consideration of said justice Leland, also "recovered judgment against said Davis, as the trustee of said Clark,"—without stating for what sum. The writ was signed by and made returnable before Oren Locke, a justice of the peace; and the suit came to the county court by appeal. The defendant demurred; and the county court rendered judgment, that the declaration was insufficient. Exceptions by plaintiff.

Washburn & Marsh for defendant.

H. E. Stoughton for plaintiff.

The opinion of the court was delivered by

BENNETT, J. We think the declaration is clearly insufficient. The defendant is not, as appears from the record, as set up in the declaration, fixed with any debt, duty, or obligation, as trustee, by the judgment of Justice Leland, upon which a *scire facias* could be properly grounded. All that the record shows is, that the plaintiff recovered a judgment against the defend-
*375 ant, as the trustee of Clark. *It should appear, for what the trustee was made chargeable. Without this, there can be no certainty in the judgment, or the declaration.

Besides, a writ of *scire facias* is a judicial writ, and issues only from the court, in which the judgment was rendered; and it is not regarded as an original suit, but is, in one sense, a continuation of the former action and when an execution is obtained, it is for the purpose of executing the orginal judgment. I am not aware of any statute provision, which will authorize the enforcing of a judgment rendered by one justice of the peace, by means of a *scire facias* brought before another justice; and none has been referred to by counsel, upon which they have relied.

In the case of Rice et al. v. Talmadge & Tr., 20 Vt. 378, where the trustee had been adjudged chargeable for specific articles of property, it was held, that such a determination could not serve as a foundation for a *scire facias* in favor of the creditor against the trustee, and that the only mode, in which such a judgment can be enforced, is that pointed out by the statute. We have no occasion to decide the question, whether a judgment could be enforced against a trustee by a *scire facias*, in a case where he had been adjudged chargeable for a specific sum of money,—though I apprehend, there would be found some difficulties in the way of such a proceeding.

The judgment of the county court is affirmed.

THOMAS F. HAMMOND, Assignee in Bankruptcy of SAMUEL FORD, v. JOHN BUCKMASTER.

(*Windsor*, March Term, 1850.)

The plaintiff and defendant entered into an agreement, by which the plaintiff was to manufacture into cloth for the defendant a quantity of wool, the cloth to be delivered to the defendant and to become his property as soon as it was manufactured, and the defendant agreed, that he would send the cloth to market, and cause it to be sold, and would pay to the plaintiff, for the purpose of defraying the expenses of manufacturing, one third of the money received in advance for the cloth, upom its being consigned to market, and would also pay to the plaintiff the residue of the money obtained for the cloth, after deducting *forty four cents for every *376 pound of wool so delivered by the defendant, and the interest and cost of freight. And it was held, that a breach of the contract on the part of the plaintiff, in converting to his own use a portion of the cloth manufactured, previous to a demand by him upon the defendant for the money, would not discharge the defendant from his liability to pay to the plaintiff one third of the money received in advance upon the consignment of the cloth for sale; but the defendant must recover compensation, by a cross action, for such conversion of the cloth by the plaintiff.

A contract cannot be rescinded by one party, for the default of the other, unless both parties can be placed in the same situation, in which they were before the contract was made.

Assumpsit. The plaintiff declared in substance, that Ford, the bankrupt, previous to his bankruptcy, agreed with the defendant, that he would manufacture into cloth for the defendant a quantity of wool, and would deliver the cloth to the defendant, from time to time, as it should be manufactured, and that the defendant agreed, among other things set forth in the declaration, that he would send the cloth to market, and cause it to be sold, and would pay to Ford, for the purpose of defraying the expense of manufacturing, one third of the money, which he should receive in advance upon the consignment of the cloth to market, from time to time as he should receive the same, and would also pay to Ford the residue of the money received by him for the cloth, after deducting forty four cents for every pound of wool furnished by the defendant to Ford to be manufactured under the contract, and the interest and cost of freight; and the plaintiff averred performance of the contract on the part of Ford, but alleged, that the defendant had not paid to Ford, or to the plaintiff, any part of the money received by him in advance upon the consignment of the cloth to market, nor any part of the avails of the cloth. Plea, the general issue, and trial by jury, May Term, 1849.—KELLOGG, J., presid-

ing. On trial the plaintiff gave in evidence an agreement in writing, executed by the defendant and Ford, dated September 23, 1841, which was in these words:—"This agreement, made by and between John Buckmaster of Shrewsbury in the county of Rutland and state of Vermont, party of the first part, and Samuel Ford of Woodstock in the county of Windsor and state of Vermont, party of the second part, *377 witness*eth:—That said John Buckmaster agrees to furnish and deliver to the said Samuel Ford, at his factory in Bridgewater in the county of Windsor, about 12,000 lbs. of wool, which the said John has now on hand,—said wool to be delivered from time to time at the said factory, on demand, in sufficient quantity to keep the said factory in full operation, until the whole of said wool shall be delivered. And the said Samuel Ford agrees to manufacture said wool into cassimeres as soon as possible after manufacturing wool that is now on hand; and the said Samuel doth farther agree to deliver all the cassimeres, manufactured from the wool aforesaid, to the said John, at the said factory, from time to time, when finished and ready for market; and the said Buckmaster is to take said cassimeres and send them to Boston market and have them sold, and is to pay over to said Samuel, for manufacturing the same, the balance of money obtained for said cassimeres, after deducting forty four cents for each and every pound of wool delivered as aforesaid, together with interest after ninety days from the delivery of the first load of wool, and after deducting freight on goods to market;—and said Buckmaster is to consign said goods to some responsible commission merchant to be sold any time within twelve months after the delivery of said wool, at the option and direction of said Samuel;—and the said Buckmaster shall pay to the said Samuel one-third of the advance money, received on said cassimeres, from time to time as delivered in market, for the purpose of defraying the expense of manufacturing said cassimeres;—and said Buckmaster has a right, before sending said cassimeres to market from time to time to take from the same one ninth part of the number of yards so finished, of an average quality of said cassimeres, at ninety cents per yard;—and said Buckmaster is to pay interest on all cassimeres he receives at ninety cents per yard, as aforesaid, after ninety days from the delivery of the first load of wool. And said Samuel farther agrees to manufacture for the said Buckmaster, as aforesaid, about 5000 lbs. more wool, which is now owned by Levi Finney and John and Joseph Kinsman, or either of said lots of wool, by the said Buckmaster's giving the said Samuel notice in two weeks from this date."

The plaintiff then gave evidence tending to prove a breach of the contract on the part of the defendant; and the defendant introduced rebutting testimony, and also gave evidence tending to prove, that Ford, previous to making any demand upon the defendant for the money, converted to his own use a portion of the cloth manufactured from the defendant's wool. The court charged the jury, that if they found, that Ford, previous to calling upon the defendant for the money received by him in advance upon the consignment of the cloth to market, had converted *to his *378 own use a portion of the defendant's cloth, without his consent, it would be a breach of the contract on the part of Ford, and would discharge the defendant from his liability to pay the advance money to Ford. Verdict for defendant. Exceptions by plaintiff.

Tracy, Converse & Barrett for plaintiff.

It does not appear, how much of the defendant's cloth was taken by Ford, nor that it was sufficient to meet the one third of the "advance money," and the court cannot presume it. If Ford had taken one yard of cloth manufactured from the defendants' wool, without his consent, would that have released the defendant from the payment of any advance money? Such a position cannot be sustained; yet it is believed such is the principle laid down in this case. The disposition of the cloth was not a breach of the contract; it was at most a tort, and could no more affect the contract, than the conversion of any other property. If, however, it was a breach of the contract to deliver, it was not such as exonerated the defendant from the fulfilment of the contract, on his part, to pay what was due after deducting what Ford had received. It is a general rule, that, after a partial execution of a contract, it cannot be rescinded, but the party injured by a non-fulfilment must resort to his action on the contract. 1 Sw. Dig. 400. Stevens v. Cushing, 1 N. H. 17. Luey v. Bundy, 9 N. H. 298. Cooke v. Munstone, 4 B. & P. 351. Ib. 263, notes. Hunt v. Silk, 5 East 449. 2 Kent 480. Chit. on Cont. 352 *a*.

E. Hutchinson for defendant.

The plaintiff's claim is one for special damages, requiring a special declaration; and the plaintiff has declared specially, averring Ford's performance of the contract, upon his part, and that all the cloth was delivered to the defendant, according to the contract. The whole ground of the exceptions is, that the court instructed the jury, that the plaintiff was not entitled to recover special damages against the defendant, for the non-performance of that part of his contract in reference to the payment of the advance money, without proving the allegations of performance on the part of Ford, as set forth in the declaration; or, in other words, that the defend*ant was *379 not bound to carry out the contract by making farther advances under it, after Ford had put it out of his power to fulfil on his part. We cite no authorities in support of that ruling of the county court, for it is among the first rudiments of the law of *assumpsit*, as laid down in every elementary treatise. It was the stipulation of Ford, to deliver to him, as fast as manufactured, all the cloth manufactured from his wool, which induced the defendant's promise to pay to Ford the one third of the advance money, and constituted in part and was the most material part of the consideration of that promise. They were not independent but mutual and dependent stipulations. It was not Ford's promise, but the actual delivery of the cloth, was to

bind the defendant to pay him the advance money.

The opinion of the court was delivered by

BENNETT, J. The object of this suit is to recover for a certain portion of advance money, as it is called, which had been received by the defendant under a certain written contract between Ford and the defendants, which is made a part of the bill of exceptions. It is not necessary to allude to the various provisions of this contract. In Buckmaster v. Mower et al., 21 Vt. 204, this same contract was before the court, and it was there held, that the cloth, when manufactured by Ford, became the sole property of the defendant, and that Ford's rights rested altogether in contract; and among those rights the defendant assumed to pay to Ford one third of the money, which he should receive from the consignees, in advance, upon the cloth which might be sent to them.

The plaintiff's claim was for one third of such advance money. The court, among other things, told the jury, that if it appeared, that Ford had, previous to the call for the advance money, converted to his own use a portion of the defendant's cloth, without his consent, it would be a breach of the contract on the part of Ford, and would discharge the defendant from his liability to pay advance money to him under the contract. Under this instruction, if the jury found, that Ford had failed to deliver to the defendant any portion of the cloth manufactured by him, however small, but had converted it to his own use, the defendant would have been absolved from all liability to pay over any part of the advance money, which *he might have *380 received, whatever the sum may have been in his hands.

If the charge of the court can be sustained, it must be upon the ground, that a breach of the contract on the part of Ford gave to the defendant a right to repudiate it. But it could not have that effect. The general rule of law is, that a contract cannot be rescinded by one party, for the default of the other, unless both parties can be placed *in statu quo*, as before the contract. In the present case the contract had been in part executed, and each party had received a partial benefit from the contract, and the parties could not be placed *in statu quo*. The agreement in this case must stand, and the defendant must perform his part of it; and if there has been a breach of the contract by the other party, he must seek a compensation in damages of such party, by a cross action.

Though it is probable the merits of the controversy did not turn upon this point in the charge, yet we cannot assume, upon this bill of exceptions, that this was not the ground, upon which the jury proceeded, in returning a verdict for the defendant. It might have been: and as we think there was error in this part of the charge, the judgment of the county court must be reversed.

GILBERT WHITE v. NATHANIEL MILLER.

(*Windsor*, March Term, 1850.)

The recital in a deed, of the receipt of the consideration is only *prima facie* evidence of the amount paid, and is subject to explanation by showing by parol, that nothing in reality had been paid.

The words, "the same containing about five and three fourths acres, be the same more or less," following, in a deed, the description by metes and bounds, of the land conveyed, are to be treated as part of the description merely, and not as conclusive proof against the grantee, that he had purchased and agreed to pay for the land, without reference to the quantity.

The grantee may prove by parol, in such case, that the contract was really for a certain number of acres, at a specified price for each acre, and that a mutual mistake was made in the measurement, by which the quantity was supposed to *be larger than it really was; and he may *381 recover in an action for money had and received, the amount paid by him for the land above the amount which should have been paid, according to the terms of the contract.

And it is not necessary for the grantee, in such case, to offer to rescind the contract, before bringing his action.

Indebitatus assumpsit for money had and received. Plea, the general issue, and trial by jury, November Term, 1846,—KELLOGG, J., presiding. On trial the plaintiff proved by parol testimony, which was objected to by the defendant but admitted by the court, that in September, 1844, he contracted with the defendant to purchase and did purchase of him an irregularly shaped piece of land, at the price of $25,00 per acre,—the quantity of the land being unknown to the parties; that the plaintiff and defendant went together, and, with leading lines, measured the lines of the land, and the defendant computed the contents and made the same amount to five and three fourths acres; that at the same time, and immediately after the defendant's computation, a third person, not a surveyor, at the request of the plaintiff, computed the contents, from the defendant's minutes, as the defendant had done, and with the same result; that in both computations an error occurred of one acre and a quarter,—the land, when correctly computed, amounting to only four acres and a half; and that, both parties being ignorant of the mistake in the computation, the plaintiff paid to the defendant $143,75, the price of five and three fourths acres at $25,00 per acre, and the defendant executed to the plaintiff a deed of the land, and the plaintiff went into possession, and still continues in possession. The deed, which on notice by the defendant was produced by the plaintiff, was a deed with covenants of warranty, in common form, acknowledging the receipt of $142,00 as the consideration, and describing the land as being bounded on certain other lands, without giving courses, or distances,—the description concluding with these words,—"the same containing about five and three fourths acres. be the same more or less." The court charged the jury, that upon the evidence, if believed, the plaintiff would be entitled to recover; and the jury returned a verdict in his favor for the amount of the deficiency in the land, at $25,00 per acre. Exceptions by defendant.

E. Hutchinson for defendant. *382

This is the common case of a purchase and sale of a certain specific, indivisible piece of property, where the parties, in

fixing upon a piece, have each had and improved the opportunity of inspecting and judging for himself of its value, where both have had equal facilities for forming a correct estimate, and where both, in arriving at a result, must necessarily have taken into consideration as well quantity, as any other quality, which could in any way be supposed to affect its value. No express warranty of quantity was given, or required. The policy of the law, in such cases, is *cavent emptor*. Penniman v. Pierson, 1 D. Ch. 394. Beach v. Stearns et ux., 1 Aik. 327. 4 Kent 455. Powell v. Clark, 5 Mass. 355. Boar v. McCormick, 1 S. & R. 166. Snow v. Chapman, 2 Root 99. Perkins v. Webster, 2 N. H. 287. 1 Steph. N. P. 329. 1 Ves. & B. 375, note. Williams v. Hicks, 2 Vt. 36. The plaintiff was improperly permitted to recover upon parol proof of the contract. It was a contract, which could be consummated only by deed; Rev. St. c. 60, § 4; or by a decree of a court of chancery, which is made, by statute, equivalent to a deed; Rev. St. 157, § 81. Both the parties must have understood, that it was to be consummated by deed; and the rules of law require, that the deed, when executed, should contain every condition, reservation and qualification of the grant, or of the covenants, which the grantor ever intends to insist upon, and every covenant and stipulation, which the grantee may deem material for the protection of his rights. For, when executed and delivered by the one, and accepted by the other, neither shall be permitted to aver against or add by parol to the grant, or covenants, as expressed and qualified in the deed. Reed v. Wood, 9 Vt. 288. Bradley v. Bently, 8 Vt. 243. Rich v. Elliot, 10 Vt. 211. Pattison v. Hull, 9 Cow. 747. Hibbard v. Whitney, 13 Vt. 21. M'Crea v. Purmort, 16 Wend. 473. 2 Steph. N. P. 1531, note. 3 Cow. & H. Notes to Phil. Ev. 1466, note 984. The qualifying words, added to the description in this deed, —"containing about five and three fourths acres, be the same more or less,"—constitute a condition, or rather qualification, of the grant, and, by all the authorities, amount to an unqualified stipulation, that the grantor shall not be responsible for any deficiency in quantity, but that the grantee shall take it, in that respect, wholly at
*383 his own risk. *It follows, as a necessary consequence, that the plaintiff, having the sealed contract of the defendant, still in force, relative to the subject matter of agreement in controversy, should have brought covenant, and cannot maintain *assumpsit*. 1 Steph. N. P. 237, 239. 1 Chit. Pl. 94, 95. Toussaint v. Martinnant, 2 T. R. 104. Had he brought covenant, it is true, that he must have recovered, if at all, upon some express or implied covenant contained in the deed. If no such covenant is to be found in the deed, there is not a case, of authority, to be found, that would admit of his supplying the deficiency by parol. But if it were a proper case for *assumpsit*, a recovery should not be permitted upon the common counts only. The plaintiff should have declared specially. It is similar to that class of cases, where a recovery is sought, as for a warranty of personal property; and where the decisions are, that the question cannot be tried upon the common counts, unless the bargain is wholly rescinded. Warner v. Wheeler, 1 D. Ch. 159.

Tracy & Converse for plaintiff.

That general *assumpsit* is sustainable, to recover for money, or goods, paid by mistake of matter of fact, will not probably be questioned, as a general proposition. 1 Sw. Dig. 398. 2 Ld. Raym. 1217. 1 Steph. N. P. 329, 345. Kelly v. Solari, 9 M. & W. 53. Moses v. Macferlan, 2 Burr. 1005. Bize v. Dickason et al., 1 T. R. 285. The parol testimony was properly admitted. It did not tend to contradict, or vary, the deed. There was no dispute, but that the description of the land was correct. The quantity of land was not fixed by the deed. It did not, then, vary the terms of the deed in that particular. The deed could not be conclusive as to the number of acres conveyed; if the quantity had been ten acres, and the deed had described it as forty, the metes and bounds govern. The testimony did not tend to contradict the deed in the matter of the consideration named in the deed. But the recitals in deeds, both as it regards the kind and amount of consideration, or its receipt by the grantor, are now treated as matter of form merely, and certainly of no higher grade of proof than *prima facie* evidence. Beach v. Packard, 10 Vt. 96. Lazell v. Lazell, 12 Vt. 443. 4 Kent 465. *Bullard *384 v. Briggs, 7 Pick. 533. Wilkinson v. Scott, 17 Mass. 249. Rex v. Inhabitants of Scammonden, 3 T. R. 474. Shephard v. Little, 14 Johns. 210. Morse v. Shattuck, 4 N. H. 229. Hall v. Hall, 8 N. H. 129. Bowen v. Bell, 20 Johns. 338. The plaintiff is not seeking to repudiate the trade, nor to vary the contract; but he is merely asking to be reimbursed a sum of money, which he, through mistake, paid to the defendant under the contract.

The opinion of the court was delivered by

HALL, J. The first and most important objection, that is made to the verdict is, that the parol testimony was improperly admitted, for the alleged reason, that the whole contract between the parties was merged in the deed and could not otherwise be shown than by the deed itself.

How far a contract for the purchase and sale of land is to be considered as being embraced and controlled by the terms of the deed is a question, upon which the authorities are to some extent contradictory and irreconcilable. In England the recital of the payment of the consideration money in a deed of conveyance is regarded as conclusive evidence of payment, binding the parties by estoppel; and to that effect are some of the earlier cases in this country. But the American courts now generally treat the recital of the receipt of the consideration as only *prima facie* evidence of the amount paid; and as subject to explanation, by showing, by parol, that nothing in reality had been paid, but that the sum agreed upon as the consideration for the conveyance was still due and unpaid. This is the undoubted law of this state. Beach v. Packard, 10 Vt. 96. Lazell v. Lazell, 12 Vt. 443.

The recital in the deed is not, however, much relied upon as an obstacle to the introduction of the parol testimony in this

case. But it is insisted, that the conclusion of the description of the land in the deed,—"the same containing about five and three fourths acres, be the same more or less,"—is to be taken as conclusive evidence, that, at the final consummation of the contract, the plaintiff agreed to accept of the land, and to pay the consideration for it, without reference to the quantity it contained,—that, having received the land for more or less, without reference to the quan-
*385 tity, he can *not now be permitted to show, that the contract was for a certain number of acres, and that the quantity turned out to be less than was contracted for. The question in regard to the effect of a recital of this description, in a deed, upon the contract of purchase and sale, is one of considerable difficulty, and one which does not appear to be controlled by positive authority.

The reason, why the recital of the receipt of the consideration in the deed is not now held to be conclusive, is, that the object of inserting the consideration is to give effect to the conveyance, as a legal instrument, and not to specify the contract in regard to the price paid, or to be paid, or the fact or mode of payment. The receipt of the consideration being acknowledged for one purpose, it is held to be unjust to allow it to conclude a party upon another matter, not contemplated by its insertion.

Was the statement, in the present case, of the quantity of land in the deed, with the qualification of more or less added to it, designed as a recital of the contract, that had been made between the parties in regard to the price to be paid, or was it merely intended as part of the description of the land to be conveyed? It has long been held, that the statement of a precise quantity of land, as conveyed by a deed, does not bind the grantor to make good that quantity. Thus, it was held in Beach v. Stearns et ux., 1 Aik. 325, that the words "containing thirty four acres and nineteen rods of ground," in a deed, added to a description of the land by metes and bounds, did not import an agreement, that the land should hold out that quantity. And in Powell v. Clark, 5 Mass. 355, the still stronger words—"the lot to contain two hundred acres by measure"—following a similar description of the land, were held to be alike inoperative against the grantor. The reason given, why such words—of a sufficiently affirmative character to import a covenant—should not be construed as such, is, that they were not inserted for the purpose of declaring what the contract had been between the parties in regard to the quantity of land, but merely as a part of the description of the land designed to be conveyed. If words thus made use of, positively declaring the conveyance of a precise quantity of land, are not evidence against the grantor, that he had sold that quantity, it is difficult to perceive, why words, which merely import, that the quantity may be uncertain, should be con-
*386 clusive proof against the *grantee, that he had purchased and agreed to pay for the land, without reference to the quantity. If the language is merely descriptive of the land, when the quantity is stated as certain, it would seem to be equally so, when the quantity is stated to be uncertain.

The purpose, for which the deed is made, is not, to state the contract between the parties in regard to the terms of the purchase, but to pass the title to the land. The deed is not, strictly speaking, an agreement between the grantor and the grantee. It is executed by the grantor alone, and is a declaration by him, addressed to all mankind, informing them that he thereby conveys to the grantee the land therein described. The object is to pass the title,—not to declare the terms upon which the land had been sold and the mode in which payment was to be made. And in declaring that the land described contains about so many acres, more or less, the grantor merely says, that the land included within the boundaries before stated shall pass to the grantee, whatever may be the quantity—whether it be more or less than the quantity stated. It would be a forced construction of such language, thus used, to hold that the grantor intended thereby to make any declaration in regard to the particular terms of the purchase, or the mode by which the price to be paid for the land had been arrived at between the parties.

It is not intended to say, that the terms of a contract of sale may not be recited in a deed; and when the design to do so is apparent, effect should doubtless be given to the recital. But when the language of the deed, as in the present case, is general, and the words used may have their full force, as descriptive of the land, we think they should not be construed to conclude the parties in regard to the terms of the contract.

It is not to be denied, that it would be difficult to reconcile some of the authorities cited in the argument with the conclusion to which we have come; and upon what I considered to be the weight of authority I was at first inclined to hold, that the parol testimony should have been excluded. But on farther consideration and reflection I have become satisfied, that the view we have taken is founded on the true nature and object of a deed of conveyance,—especially a conveyance by deed poll, and that any other rule, than that we adopt, would give an effect to the instrument not contemplated by the parties to it, and
would consequently operate un*just *387
ly. We are therefore of opinion, that the contract proved by parol is not to be considered as having been merged in the deed, and that the evidence was properly admitted.

It is farther objected in behalf of the defendant, that the facts proved were insufficient to authorize a recovery. It is said, that the parties having each an opportunity of ascertaining the quantity of the land, and there being no fraud in the case, the principle of *caveat emptor* applies, and that the plaintiff is to be considered as having taken the land, in regard to the quantity, at his own risk. It is undoubtedly a general rule of law, well settled in this state, that in the absence of fraud and warranty, the purchaser takes the property at his own risk, as regards its quality, and where the quantity is made the subject of estimation only, a similar rule would probably apply.

But when the quantity of the thing purchased is agreed to be ascertained by count, weight, or measure, and there is an error in the count, weight, or measure, such error must be a proper subject of correction. In the present case the price to be paid was to be determined by the quantity of the land, and the error appears to have been one of mere computation. It would seem, from the bill of exceptions, that the lines of the land were rightly measured, but the quantity erroneously computed. The parties were under a mutual mistake, by reason of which a greater amount of money was paid to the defendant, than he was entitled to by the contract. The excess, above that which the defendant was to receive by the contract, belongs in equity and good conscience to the plaintiff, and we think he may well recover it in this action.

It may be added, in reference to another objection made in argument, that this is not a case, in which it was necessary for the plaintiff to rescind the contract, or to offer to rescind it, before bringing the action; because when the money is recovered, the parties will be left in the precise situation, in which they were to be placed by the contract. Johnson v. Johnson, 3 B. & P. 162. Miner v. Bradley, 22 Pick. 460.

The result is, that the judgment of the county court is to be affirmed.

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*388 *OLIVER P. CHANDLER v. ARAUNAH SPEAR.†

(*Windsor*, March Term, 1850.)

When the statute, under which land is sold for taxes, directs an act to be done, or prescribes the form, time and manner of doing any act, such act must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with. But in determining what is required to be done, the statute must receive a reasonable construction; and when no particular form or manner of doing an act is prescribed, any mode, which effects the object with reasonable certainty, is sufficient.

By the statute of November 11, 1807, assessing a tax for building a state's prison, and directing the treasurer of the state to issue his warrants to the sheriffs in the several counties in the state, authorizing and directing them to collect the tax on all the land in the several towns and gores, in their respective counties, which had not returned their list that year, the duty of collecting the tax was added to the other duties of the sheriff, and it is no objection to the validity of a sale by the sheriff, that the warrant from the treasurer of the state was directed to him as sheriff, without naming him, and that he signed all his proceedings, and his deeds, as sheriff, and not as collector.

Nor is it any objection, that the treasurer's warrant merely named the towns and gores, in which the sheriff was directed to collect the tax, without stating, that they were within his precincts, or in what county they were, or that they were unorganized towns, and without giving any reason, why the warrant was directed to the sheriff, rather than to the first constable,—it not being shown, that there was any error in the warrant. The warrant having been issued by a public officer, under the provisions of the statute, he is to be presumed to have performed his duty, until the contrary appears.

Nor is it any objection, that in the caption of the rate bill, as appearing upon record, there is an omission, in reciting the title of the statute assessing the tax, of the word "prison,"—the identity of the tax assessed in the rate bill with that described in the treasurer's warrant appearing sufficiently, notwithstanding the omission.

Nor is it any objection, that there is an error in the rate bill, in stating the quantity of land belonging to each right, the tax assessed upon each right being in fact stated at the proper sum. It was not necessary, that the particulars of the basis of the tax should be stated in the rate bill, but only that it should clearly show the correct sums, which each proprietor was liable to pay.

*So, the omission to state the year, in the *389 date of the sheriff's certificate upon the rate bill, that it was a true rate bill, is unimportant, if the year is sufficiently certain from other parts of the instrument.

The statute, in this case, required, that the proceedings should be recorded within thirty days after the termination of the sale. The sale was made April 6, 1808, and the clerk's certificate of the record of the rate bill stated, that the record was made April 30, 1807. The statute was passed November 11, 1807, and the certificate of the record of the warrant, which immediately preceded the record of the rate bill upon the book of records, and the record of the return of sales, which immediately followed the record of the rate bill upon the same book, were both certified to have been made April 30, 1808, and the original rate bill was produced, upon which was the clerk's certificate, that it was recorded April 30, 1808, and it was held, that it was sufficiently certain, that the record of the rate bill was made in due time, notwithstanding the error in the date of the certificate. The certificate of the clerk, in such case, is but *prima facie* evidence of the time, when the record was made.

It is no objection to a sale, under that statute, of land in unorganized towns and gores, by the sheriff, that the sale was made at the court house of the county, and not in the town, in which the land is situated.

Under the statute it was necessary, that the sheriff's advertisement of his sale should be properly recorded; but it was not necessary, that the record should show, that the advertisement was properly published. That may be proved by other evidence.

Where it was stated, in the sheriff's return of his sales, under that statute, that he sold the rights, "or such parts of them as were requisite to discharge said tax and costs on each of such lots, or rights, respectively," and he sold the whole of each right in one township, it was held, that it was sufficiently shown, that the reason for the sale of the whole of each right was, that no person would pay the tax for less than the whole.

The provision in section seventeen of the statute, requiring the secretary of state to cause the statute to be published in all the newspapers in the state, immediately after the adjournment of the legislature, was directory merely, and not essential to the validity of the tax.

The principle of law in this state, that a person entering into possession of any portion of the land specifically described in a deed, claiming title to all the land so described, is constructively in the possession of the whole, applies only to cases, where the quantity of the land and the attendant circumstances reasonably induce the belief, that the land was purchased and entered upon for the ordinary purposes of cultivation and use, but has no application to a case, *where a person takes and maintains pos- *390 session of a few acres of land in an uncultivated township, for the mere purpose of there-

†This case was argued at the July Adjourned Term, 1848, but the decision of the court was pronounced at the present term.

by gaining a title to the entire township by possession, to the exclusion of the rightful owners.

The defendant gave a written license to two persons to take logs from the land of the plaintiff. One of the two died, but the other, acting by virtue of his license, and without any indication of a disposition on the part of the defendant to treat the license as revoked, subsequently took the logs. And it was held, that the license was not revoked by the decease of one of the persons to whom it was given, but that the defendant was liable, as a trespasser, for the logs so taken.

It is no objection to a deposition, taken to be used before the county court, that the place of holding the court is not stated in the caption, the county in which it is to be used and the time of holding the session being correctly stated.

Although the name of the grantor in a deed is defectively stated in the certificate of the acknowledgment, yet if it appear from the whole instrument, with reasonable certainty, that it was acknowledged by the grantor, it is sufficient.

Although the non-joinder of a part owner of a chattel may, in actions *ex delicto*, be pleaded in abatement, yet, if the defendant neglect to make such plea, he may still avail himself of a want of title in the plaintiff to the whole, for the purpose of reducing the damages.

When a judgment of the county court is found to be erroneous, and it can be ascertained by computation, what the judgment ought to have been, the correction will be made in the supreme court, without remanding the case to the county court for a new trial.

Trespass *de bonis asportatis* for a quantity of pine logs. Plea, the general issue, and trial by the jury. May Term, 1847,—REDFIELD, J., presiding. On trial the plaintiff gave in evidence the charter of the town of Norton in the county of Essex, showing that the township was originally divided into sixty five rights, or shares. The plaintiff then gave in evidence various deeds, purporting to convey to Timothy Phelps the undivided rights, or shares, of twenty eight of the original proprietors in the township; all of which were objected to, but admitted by the court. The plaintiff then gave in evidence conveyances of the same twenty eight shares, through several intermediate grantees, to Justin Ely.

The plaintiff also gave in evidence
*391 two deeds from William *Hewes, sheriff, to Justin Ely, dated April 18, 1809, purporting to convey to him fifty seven undivided shares in Norton, sold for the non-payment of a tax, assessed by the statute of November 11, 1807, entitled "an act assessing a tax of one cent on each acre of land in this state, for the purpose of defraying the expense of erecting a state's prison;" and also a deed from William Hewes, sheriff, of the same date, to Timothy Hinman, purporting to convey to him two undivided shares in Norton, for non-payment of the same tax. The plaintiff also gave in evidence the record of the warrant from the treasurer of the state, dated December 10, 1807, directed to the sheriff of the county of Essex, without naming him, directing him to collect the tax assessed by said statute of the proprietors of certain towns and gores, which were named, with the number of acres in each, among which was the town of Norton; but it was not stated, that the towns and gores therein named were unorganized. This was certified to have been recorded April 30, 1808. The plaintiff then gave in evidence the record of the rate bill, which purported to have been made by William Hewes, sheriff. The caption of the rate bill, as recorded, was in these words,—"The following is a rate bill for the collection of the tax of one cent on each acre of land in the unorganized towns and gores of land in the county of Essex, agreeable to an act entitled an act assessing a tax of one cent on each acre of land in this state for the purpose of defraying expenses of erecting a state's, passed November 11, 1807." Then followed a list of the names of the proprietors of Norton, with the number of acres belonging to each, and the amount of each one's tax; the tax against each one being stated at the same sum, but the number of acres belonging to the share being stated in some instances as 320 acres, and in others as 350 acres. Then followed a record of the certificate, dated February 10, 1808, that the foregoing was a true list, or rate bill, signed "William Hewes, sheriff." Then followed a certificate of the paid and unpaid taxes, signed "William Hewes, sheriff." And then followed the certificate of the clerk, in these words,—"Essex, ss. County Clerk's office, April 30th 1807. the foregoing rate bill was received and duly recorded;" which was signed by the clerk. The plaintiff then gave in evidence the original rate bill, the caption of which was in the words above stated as recorded, except that the word "prison" was added after
*the word "state's;" and the shares *392
were all stated upon it as 350 acres each; but the sheriff's certificate, that it was a true rate bill, was dated "February 10th," omitting the year; and the certificate of the clerk stated, that the rate bill was received for record and recorded April 30, 1808. The plaintiff then gave in evidence the original advertisements of the sale, published in the "North Star," a newspaper printed at Danville, in numbers nine, ten and eleven, dated March 7, March 14, and March 21, 1808. The plaintiff also gave in evidence the record of the advertisement, and the clerk's certificate, appended thereto, that the advertisement was received and recorded April 30, 1808, and that at the same time the several newspapers containing the same were presented and examined, and that the advertisement was found to have been published in the North Star, Vol. II, No. 9, dated March 7, 1808, No. 10, dated March 17, 1808, and No. 11, dated March 21, 1808. The plaintiff also gave in evidence the record of the return of sales, and the list of lands unredeemed. It appeared from the record, that the vendue was held at the court house in Guildhall, in the county of Essex, on the first Monday, being the fourth day, of April, 1808, and, by adjournment, on the fifth and sixth days of April, and that the whole of each proprietor's share in Norton was sold,—fifty seven shares to Justin Ely and two shares to Timothy Hinman; and in the sheriff's certificate, appended thereto, it was stated, that "all the lots, tracts and rights described in the foregoing record, or such part of them as were requisite to discharge said tax and cost on each of such lots and rights respectively" were sold to the persons named. The clerk's certificate showed, that this return was received and recorded April 30, 1808. To all

which the defendant objected, but the objection was overruled by the court. The plaintiff proved, that the "North Star" was the newspaper, which most generally circulated through the county of Essex in the years 1807 and 1808. The plaintiff also, in order to show a division and allotment of the town of Norton, offered the depostion of Azarias Williams, with the accompanying documents, which was objected to by the defendant, but admitted by the court.†

The plaintiff also gave in evidence a *393 *deed to himself from Justin Ely, dated May 13, 1833, purporting to convey the entire township of Norton.

The plaintiff also offered in evidence the deposition of Thomas Ruiter, taken November 8, 1845, to be used upon the trial of this case before the county court; to which the defendant objected, for the reason that the place of holding the court was not stated in the caption; but the objection was overruled by the court. The plaintiff also introduced evidence tending to prove, that the defendant, on the third day of November, 1842, gave to Thomas Ruiter and Freedom Rogers a written license to cut two hundred pine logs in the town of Norton; and that Ruiter and one Oliver Kinney did, in pursuance of said license, cut two hundred and forty four pine logs in said town and take them into Canada. The plaintiff also gave evidence tending to prove, that the defendant, in March, 1842, gave Kinney permission to cut a few pine trees, standing in the town of Norton, and that Kinney, in the summer of the same year, cut down the trees, and in the winter and spring following took away about forty logs, and sold them, and accounted to the plaintiff for about $11,00 therefor. The plaintiff also gave evidence tending to prove, that the plaintiff gave permission to Kinney to sell certain other logs, about one hundred in number, which had been previously cut in Norton, and that Kinney accordingly sold them to one Cleveland, and they were taken away. The plaintiff also gave evidence tending to prove, that, in addition to the written license above mentioned, the defendant gave permission to Kinney for him and Ruiter to cut all the logs, which they did cut, with an agreement that the defendant was to be paid for them. The defendant gave in evidence a deed to himself from David McKim, dated September 2, 1834, and recorded November 27, 1834, which purported to convey the entire township of Norton, and gave evidence tending to prove, that in the summer of 1835 he procured a person to cut the trees on about five acres of land in Norton, claiming that he owned and was taking possession of the whole township; that in the autumn of the same year he caused the said five acres to be cleared, and erected a house, and put a tenant thereon; and that the defendant has ever since retained the possession, and has cleared in all about forty acres of land, and has occupied the same, by his agents, during the *394 summer seasons, and some *part of the time has had a tenant residing there,—all this being for the mere purpose of keeping a possession, and the defendant ever claiming, that he was the owner of the whole township, and that he was in possession of the whole. It was also proved, that Freedom Rogers, died within a few days after November 3, 1842, and before any logs had been cut under the written license from the defendant, of that date, to Ruiter and Rogers. Kinney, who was introduced as a witness on the part of the plaintiff, testified, that he never saw any marked lot lines in the town of Norton, and never examined with that view; his opportunity for knowing any thing in regard to that, being confined to his going upon the land to cut the timber and remove it, as above named. The defendant also gave in evidence a copy of a deed from the plaintiff to Isaac Wardwell, Oliver Hale, Daniel Brown, Richard G. Bailey and Calvin Powers, dated July 6, 1835, purporting to convey all the interest, which he acquired in the town of Norton by virtue of his deed from Justin Ely. The defendant also gave evidence tending to prove, that the plaintiff had received $100,00 of Ruiter and Cleveland, under an agreement not to prosecute them for the logs which had been cut by permission of the defendant in Norton and had been carried by them into Canada, with the express understanding, that it was not to release the cause of action against the defendant or against them,—that sum being less than the value of the logs, but being all he could obtain, without commencing a suit in Canada. The plaintiff then gave in evidence a copy of a deed from Calvin Powers to Oliver Hale, David Brown, Richard G. Bailey and Isaac Wardwell, dated July 10, 1838; and also a deed from Oliver Hale, David Brown and Richard G. Bailey to the plaintiff, dated January 31, 1842: to which the defendant objected, but the objection was overruled by the court. The objections to the form of the latter deed are fully stated in the opinion delivered by the court.

The defendant requested the court to charge the jury, 1. That if the defendant entered into possession of the town of Norton in 1835, as above described, and had ever since remained in possession in the manner and making the claim, which his evidence tended to prove, his possession would extend to the entire town, and would be adverse to the plaintiff and all others claiming title to the town, and *that *395 so all the deeds offered by the plaintiff, executed subsequent to the time when the defendant thus took possession of the town, were void. 2. That the possession thus taken and claimed would operate a disseisin of the plaintiff; and therefore the plaintiff could not maintain this action for logs taken from the town by permission of the defendant subsequent to the time when the defendant thus took possession. 3. That if the effect of the defendant's actual possession was to render him a tenant in common in the possession with the plaintiff, the plaintiff could not recover in this action. 4. That there was no legal evidence, tending to show a legal division of the town of Norton. 5. That there was no legal evidence, tending to show any such division in fact, made upon the land and acquiesced in by

†The competency and effect of this evidence not being decided upon by the supreme court, no more particular statement of it is necessary.

the proprietors. 6. That if the town was in fact divided and allotted upon the land, still the defendant's actual possession, taken and continued in the manner and with the claim which his evidence tended to prove, would be a constructive possession of the entire township, and the plaintiff was not entitled to recover. 7. That if the defendant's license to Kinney to cut the trees, from which the forty logs above mentioned were cut, was a mere license to cut the trees, it would only imply a license, at most, to cut the trees and carry the logs immediately away,—for which the plaintiff could only recover by an action of trespass *quare clausum fregit;* and that, if Kinney cut down the logs and allowed them to lie so long upon the ground, as to entitle the plaintiff to treat them as personal property and bring this action for taking them away, he could only sustain the action against Kinney, and could not hold the defendant liable in an action of trespass *de bonis asportatis*. 8. That the death of Freedom Rogers, prior to any logs having been cut under the written license to Rogers and Ruiter, operated as a revocation of that license, and Ruiter had no authority to proceed afterwards under that license, either alone, or in company with Kinney, and cut logs, and enable the plaintiff to hold the defendant responsible therefor. 9. That the license from the defendant to Kinney, to sell the one hundred logs, and the sale by Kinney to Cleveland, would not entitle the plaintiff to sustain this action against the defendant, for taking away those logs,—it not appearing, that the defendant had in fact ever received any pay therefor. 10. That the court should instruct the jury as to the fact, appearing up-
*396 on the deeds, that the *plaintiff was, at the most, the owner of but four undivided fifth parts of said town;—and upon this point the court neglected to give the jury any instructions, considering that, as to a mere stranger, it was indifferent.

But the court, upon the first point, charged the jury, that such would be the effect of the defendant's possession, unless the town had been surveyed and allotted and divided into severalty, in the manner testified in Williams' deposition, and that allotment and division acquiesced in, ever since it was made, by all the proprietors of the township; but in that case the defendant's constructive possession would be limited to the lot, or lots, upon which he had entered and made a permanent possession upon some part of the same; and in that case the plaintiff's deed of the other portions of the town would not be rendered void thereby. As to the second point,—that the disseisin of the plaintiff was not more extensive than the constructive possession of the defendant, and that, if they found the survey, allotment and division in the manner above stated, the plaintiff, being the owner of four fifths of the whole town, with the exception of one or two, or a very few, rights, could not be disseised by the entry of a mere stranger upon one lot, and the making of a permanent possession there, but that such a possession would only operate a disseisin as to that lot; and that for any acts committed in regard to timber which grew upon that lot, the defendant is not liable in this action; and that if, there had been no allotment of the town by an actual survey, marked upon the land, then the defendant's possession would extend to the whole township, and the plaintiff cannot recover in this action. That the testimony in the case did not tend to show the defendant a tenant in common with the plaintiff, as to the title of any portion of the town, and certainly not as to the possession beyond those lots, upon which he had made some actual possession, and, as to this point, will not place the recovery in any different position from that already stated. That the testimony of Williams and the accompanying documents, with the other testimony above referred to, did tend to show a survey, allotment and division of the town, and such acquiescence therein, as would make it binding upon the proprietors,—explaining these several matters in a manner not excepted to by the defendant. That if the defendant gave license to others to cut timber upon lots, to *which he *397 had no constructive possession, and expected it would be cut at one time and removed at another, (as the plaintiff gave testimony tending to show was the fact,) then the defendant would be liable to this action, the same as if he had done the acts himself, in the same manner,—otherwise, not in this form of action, if he expected, that his agents and those to whom he gave license would cut and carry away the timber at the same entry upon the land. That the death of Freedom Rogers would not technically operate a revocation of the license as to Ruiter, but would so, to any one claiming right by or through, or under Rogers; and that Kinney's right to cut timber could not rest upon the license to Rogers, but upon the parol permission attempted to be proved by the plaintiff. That in regard to Kinney's sale to Cleveland, of the one hundred logs already cut, if Cleveland was in any sense induced to remove them in consequence of this sale, when he otherwise might not have done so, and Kinney had permission from the defendant to make such a sale, then the defendant was also liable, to the extent of the value of those logs, deducting in this, as in every case, what the plaintiff had received of any one, by compromise with them, after the logs were removed into Canada, as attempted to be shown; but the court told the jury, that the testimony upon this point was not satisfactory, and recommended, that they should not include any damages in regard to those logs,—but that they could do as they thought the facts required, under the rule above laid down. In regard to damages, the court instructed the jury, that the plaintiff, if he made out his case, in the manner above stated and attempted to be proved, should recover the value of the timber taken by the defendant and his agents, deducting what the plaintiff had received of Ruiter and Cleveland, and that the receiving of that sum from them, if taken in the manner above stated, would not otherwise affect this action. The jury returned a verdict for the plaintiff. Exceptions by defendant.

Washburn & Marsh, for defendant, cited 1 Chit. Pl. 55; Wilson v. Gamble, 9 N. H. 74; Pickering v. Pickering, 11 N. H. 144; Cut-

ting v. Cox, 19 Vt. 517; Skinner v. McDaniel, 5 Vt. 539: Tol. St. 268, § 2; Ib. 271, § 7; *398 Hall v. Collins, 4 Vt. 316; Rev. St. 497; Riley v. Jameson, 3 N. H. 27; Lit., sec. 417; Beach v. Sutton, 5 Vt. 209; Crowell v. Bebee, 10 Vt. 33; Putney v. Day, 6 N. H. 430.

O. P. Chandler and *Tracy & Converse*, for plaintiff, cited Marvin et ux. v. Denison, Circ. Ct. for the District of Vermont, May T. 1846; Booge, Ex'rs, v. Parsons, 2 Vt. 456; 2 Tol. St. 292; Bellows v. Elliott, Essex Co.; Kimball v. Wilson, 3 N. H. 96; Adams v. Jackson, 2 Aik. 145.

The opinion of the court was delivered by

HALL, J. The plaintiff's property in the logs depends upon his title to the land. His claim of title under the tax sale will be first considered.

The following principles, or rules, for testing the validity of tax titles, appear to be fairly deducible from the reported cases on that subject.

1. When the statute, under which the sale is made, directs a thing to be done, or prescribes the form, time and manner of doing any thing, such thing must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with. Spear v. Ditty, 9 Vt. 282. Bellows v. Elliott, 12 Vt. 574. Sumner v. Sherman, 13 Vt. 612. Carpenter v. Sawyer, 17 Vt. 124.

2. But in determining what is required to be done the statute must receive a reasonable construction; and when no particular form or manner of doing a thing is pointed out, any mode, which effects the object with reasonable certainty, is sufficient; and in judging of these matters the court is to be governed by such rational rules of construction, as direct them in other cases. Spear v. Ditty, 8 Vt. 421. Bellows v. Elliott, 12 Vt. 574. Isaacs v. Shattuck, 12 Vt. 668.

The sale, by virtue of which the plaintiff claims, was made under the statute of November 11, 1807, assessing a tax of one cent on each acre of land in the state, for the purpose of defraying the expense of erecting a state's prison. 2 Tol. St. 267. Numerous objections are made to the validity of the plaintiff's title under this tax sale, which must be examined with reference to the provisions of the statute, under which the sale was made.

*399 *1. The first objection made to the tax title is, that the treasurer's warrant is directed to the sheriff of the county of Essex, without designating him by name, and that throughout his whole proceedings he describes himself and signs his name as sheriff, and not as collector.

We think the fair intendment of the statute is, that the collection of the tax should be superadded to the other duties of the sheriff; otherwise bonds and an oath would have been required of him, as collector. A similar construction was put upon an act, assessing a tax for building a jail, in Bellows v. Elliott, 12 Vt. 569, where the first constable of the town was directed to collect the tax. It was held, that the land tax act, which required the collector to be sworn, did not apply,—the constable being a public officer. This decision could have been made upon no other ground, than that the officer collected the tax as first constable.

2. The second objection is, that the treasurer's warrant merely named the towns and gores, in which the sheriff is to collect the tax, without stating, that they were within his precincts, or in what county they were, or that they were unorganized towns, and without giving any reason, why the warrant was directed to the sheriff, rather than to the first constable. It is a sufficient answer to these objections to the treasurer's warrant, that nothing is shown to be wrong in it; and it having been issued by a public officer, under the provisions of the statute, he is to be presumed to have performed his duty, until the contrary appears. Bank of U. S. v. Tucker et al., 7 Vt. 134.

3. It is next objected to the record of the rate bill in the county clerk's office, that it is not properly designated in its caption, the word "prison" being omitted in the recital of the title of the tax act, and that some of the rights are designated as three hundred and twenty acres, instead of three hundred and fifty, and that in the date of the sheriff's certificate of its being a true rate bill the day of the month, February 10th, only, (without stating the year,) is given.

The statute,—2 Tol. St. 269, sec. 6.—directs the sheriff to assess the tax upon the several proprietors of the town, but does not specify, that he shall make a rate bill. He is, however, directed in section sixteen to leave his tax bill with the county clerk, with his other papers and proceedings, for record, which sufficiently implies, *that he is to have a rate bill. Its *400 form and requisites are, however, not prescribed; and we think all that can be required is, that it distinctly and clearly show the correct sums, which each proprietor is to pay, and for the non payment of which his right, or a sufficient quantity of it to pay the tax, is to be sold. In Brown v. Hutchinson, 11 Vt. 574, where the sale had been under the statutes of 1787 and 1788, [2 Tol. St. 276, 277,] which did not in terms require a rate bill, it was held, that though a rate bill was necessary, to show the taxes which the collector was to collect, yet that any correct statement of the tax, received and acted upon by the collector, was sufficient, though not certified by the committee.

In this case the sheriff was to make his own tax bill: and the tax bill he caused to be recorded shows, that he assessed the right sums to the proper proprietors. The leaving of it by him for record is sufficient *prima facie* evidence, that it was the rate bill he acted upon: and that also distinctly appears by the record of his certificate upon it of the paid and unpaid taxes. The omission, therefore, of the word "prison" in the caption is immaterial, as the identity of the tax assessed in the rate bill with that described in the treasurer's warrant appears with entire certainty, notwithstanding the omission.

Nor do we conceive the error, in stating the quantity of land in a portion of the rights, to be important. The quantity of

land in each right being equal, and the tax upon each right the same sum, the error would at once be discovered to be clerical, and no one could possibly be misled by it. If the quantity of land in the rights could be unequal, the objection might merit a different consideration. If the statute assessing the tax had required the particulars of the basis of the tax to be stated in the rate bill, it must doubtless have been strictly complied with. But the result is all that is necessary, to constitute a tax bill, and such result being, in the present bill, entirely correct, it should, we think, be held sufficient.

The omission of the year in the date of the sheriff's certificate upon the rate bill is unimportant, as the year is sufficiently certain from other parts of it. The sheriff's certificate upon the rate bill shows the tax to have been assessed under an act passed November 11, 1807, and that it was assessed previous to the sixth of April, 1808. The "February 10th" in the certificate could, therefore, have been no other, than in 1808. In Bellows v. Elliott, 12 Vt. *401 *569, where the collector, in his return of sales, stated his vendue to have been on a certain day in 1833, when it should have been 1834, it was held that the error was immaterial, as it appeared from other parts of his return, that it must have been in 1834. In that case there was a positive error of date; in this there is a mere omission, which other parts of the paper clearly supply.

4. It is objected, that the clerk's certificate to the record of the rate bill states it to have been recorded April 30, 1807, and that it therefore fails to show, that it was recorded in thirty days from the ending of the sale,—the sale having ended the sixth of April, 1808. Tol. St. 275, § 16.

The statute directs the recording to be made in thirty days, but does not specify how the fact of recording shall be shown. The ordinary proof, in such cases, is the certificate of the recording officer upon the record; but that has been held to be only *prima facie* evidence of the time of the recording. In Morton v. Edwin, 19 Vt. 77, it was held, that the certificate of a justice of the peace, of the time when an execution, levied upon land, was returned and recorded in his office, was but *prima facie* evidence of the true time, and that the true time might be shown by parol. And to the same effect is Carpenter v. Sawyer, 17 Vt. 121, in relation to the certificate of a town clerk of the recording of vendue proceedings. In Richardson v. Dorr, 5 Vt. 9, and Sumner v. Sherman, 13 Vt. 609, parol evidence of the fact of the recording of vendue tax proceedings was admitted and acted upon by the court.

From the evidence in this case a jury could not have found otherwise, than that the record was made April 30, 1808, within thirty days after the ending of the sale; for;—1. The certificate of the clerk, of April 30, 1807, is an impossible date, being before the passing of the act, and is evidently a clerical mistake. The record was therefore made on some other day. 2. The record of the warrant, which immediately precedes the rate bill on the record book, and of the sheriff's return of sales, which immediately follows it on the same book, are both certified as recorded April 30, 1808,—from which it may be fairly inferred, that the whole was recorded on that day. 3. The original rate bill is produced, upon which is the clerk's certificate of its being recorded April 30, 1808. From *all which it very *402 clearly appears, that the record was made in due time.

5. The next objection is, that the advertisement is of a sale to be held at Guildhall, and not in the town where the land is situated.

There is nothing in the statute requiring the land in unorganized towns and gores to be sold in the towns or gores; and to hold that the sheriff must make such sales would be requiring of him an impossibility. The warrant, in this case, embraced eight towns and three gores; and if the sheriff could designate proper places in his advertisement for the sales in towns and gores, in which were probably no inhabitants, or buildings, it would be impossible for him to make the sales, because the act requires the sales to be made on the first Monday of April, at nine o'clock in the forenoon. The legislature could not have contemplated, that the sheriff should make sales in eleven different towns at the same hour of the same day. The court house of the county, where the sale was made, seems to have been the proper place.

6. It is next objected, that the advertisement of the collector is not properly recorded 2 Tol. St. 268, sec. 5, 6, 16.

The act for the regulation of particular land taxes requires, not only that the advertisement should be recorded, but that the newspapers, in which it was published, should be left with the clerk, and a record made of the advertisement, and also of the title, volume, number and date of the several papers, in which the publication was made. The object of the legislature being, that the record should not only show the form and date of the advertisement, but also the fact of its due publication. The latter object does not seem to have been contemplated by the act in the present case. It merely directs the advertisement to be recorded, and leaves the proof of its having been posted up in the towns by the constable, and of its publication by the sheriff, to be made by other evidence, than that of the record. The certificate of the clerk, in this case, shows a proper recording of the advertisement, and if it fails to show, that it was properly published, it is immaterial, as the statute did not require that to be done. The due publication of the advertisement was shown, in this case, by the production of the original newspapers.

*7. It is farther objected, that the *403 record does not show, that the reason for the sale of the whole of each right was, that no person would pay the tax for less than the whole. Tol. St. 270, sec. 6. The sheriff's return states, that he sold the rights, "or such parts of them as were requisite to discharge the tax and costs on each of the rights,"—which, we think, is sufficient.

8. Another objection made to the regularity of the tax proceedings is the absence

of proof, that the secretary of state, immediately after the adjournment of the legislature in 1807, published the act in all the newspapers in the state, as directed in the seventeenth section.

It could not have been the intention of the legislature, that the act should become wholly inoperative and void, by the failure of a single newspaper to publish it. This provision must have been understood to be merely directory to the secretary, and not essential to the validity of the tax. In Bellows v. Elliott, in Essex County, in 1841, it appears by the record furnished us to have been held, that the publication of an act assessing a tax on the lands in the county for building a jail, by the treasurer of the county, was not essential to the validity of the sale, although the act directed such publication. See, also, Bellows v. Elliott, 12 Vt. 569. That being a local act, its publication would seem to be more necessary than in the present case. It is not shown, that the act was not duly published by the secretary of state; and if its publication were essential, the presumption would be, that the secretary had performed his duty.

These comprise all the objections taken to the validity of the tax title, and, being of opinion that neither of them is well founded, we must hold that title to be good. This result in regard to the tax title renders any examination of the plaintiff's title to a lesser quantity of the land, under the original proprietors of the town, unnecessary.

It is, however, insisted, in behalf of the defendant, that the plaintiff is precluded from deriving any benefit in this suit from his tax title, for the reason that he had parted with it by his conveyance to Wardwell and others in 1835, and had not regained it at the time of the trespass complained of; that the charge of the county court, in regard to the effect of the defendant's possession upon the reconveyance to the plaintiff in January, 1842, was erroneous; that the defendant's actual possession of five acres, with a claim of title to the whole township, gave him the constructive possession of the whole township, which constructive possession would not be limited, as charged by the court, by the fact of an actual division of the town and an allotment marked upon the land; that the court also erred, in charging the jury that there was any evidence in the case, which had a tendency to show such division and allotment of the town and that the charge of the court ought to have been, that, upon the facts shown, the deed of reconveyance was inoperative and void, under the statute, by reason of the defendant's adverse possession to the grantors at the time of its execution.

*404 *

In the view which we have taken of the case, it becomes unnecessary to inquire, whether or not there was any evidence tending to prove a division of the town and an allotment of it marked upon the land, inasmuch as we think, that, conceding there had been no division of the town, the charge was quite as favorable to the defendant, as he was legally entitled to claim.

The question on this part of the case is whether, giving full effect to the facts shown by the defendant, he was to be considered as having been in adverse possession of the whole township in 1842, so as to render the deed void, by which the land was then reconveyed to the plaintiff.

The term "constructive possession," as applicable to real estate, is scarcely to be found in the English books; though the doctrine constitutes an important branch of American law. It is indeed peculiar to the condition of things in a new country, where an important business of the inhabitants is the reduction of forest land to a state of cultivation. When the settler enters upon a lot of wild land, it is impracticable for him at once to inclose it with that unequivocal mark of possession, a substantial and permanent fence. It is of no advantage to the land, and a useless expense for him, to do so. He commences by clearing a part and erecting a dwelling upon it, and gradually extends his improvements, making such inclosures only, as may from time to time be necessary for the protection of his crops. The residue of the lot is suffered to lie open, with either nothing, or at most with but lines of spotted trees, to mark its boundaries. The law of constructive possession declares, that the deed of the lot to the settler, which may be found on record, and which describes with precision the boundaries of the land that he purchased, shall, so far as his title is concerned, be a substitute for a substantial and permanent fence around the whole; that his possession of the lot, though actual but for a part, shall, by force of his claim under the deed, be constructive for the residue.

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This doctrine, when applied to a tract of land of suitable size for purposes of individual cultivation and improvement, seems justified and demanded by the wants and interests of a people in a new country; and to tracts of such limited dimensions the doctrine has been usually, if not always, applied in this state. This is the first instance, that we are aware of, in which an attempt has been made, by means of clearing a few acres within the limits of an uncultivated township of some twenty thousand acres, to extend the possession, by construction, over the whole territory. It is obvious, that the reason, on which the doctrine of constructive possession is founded, ceases in such a case. Such an application of it is not required for the protection of *bona fide* settlers. No individual can ever want such an extensive tract of land for purposes of actual cultivation. The idea of inclosing such a tract with a permanent and substantial fence is too absurd to be gravely stated; and the descriptive boundaries of it, in a deed, could therefore never be a substitute for such an inclosure. It would also be unjust to the real owners of the several rights of land in a township, to allow them to be deprived of their title by an intrusion for a period of fifteen years upon a few acres in an obscure corner of the town, which intrusion might be either unknown to them, or not deemed of sufficient importance to deserve serious attention.

It was held by the supreme court of the state of New York, in Jackson v. Woodruff, 1 Cow. 276, that the doctrine of constructive possession did not apply in a case, where there had been an improvement of only two acres in a tract of seven hundred and eighty three acres, and that it was only applicable to such tracts, as were purchased for the purpose of actual cultivation; and the doctrine of that case has been recognized and acted upon in many subsequent cases in that state, and is the settled law of the state. See Jackson v. Vermilyea, 6 Cow. 677; Jackson v. Richards, 6 Cow. 617; Jackson v. Oltz, 8 Wend. 440; and Sharp v. Brandow, 15 Ib. 597.

*406 *It is doubtless impracticable to specify any precise quantity of land, that ought to be considered so far appendant to an actual improvement, as to be the proper subject of a constructive possession. The quantity might probably be varied by the nature of the business of the occupant, his apparent means of using and improving the land, and perhaps by the character and extent of his actual possession, and by other circumstances. It is not intended to say, that any quantity of land, which may reasonably be supposed to have been purchased and entered upon for purposes of cultivation and for use as a wood or timber lot, might not be protected by such a possession.

But the claim in the present case is altogether without the boundaries of any reasonable limit. The quantity of the land is not only too extravagantly large, to be the possible subject of individual cultivation, or use, but the defendant's own evidence tended to prove, not that he had entered upon the the land in good faith, for the ordinary purpose of settling upon it, but that all his acts upon the land had been done, in the language of the bill of exceptions, "for the mere purpose of keeping a possession." To hold that such acts upon a few acres of land should extend themselves over a whole township, to the exclusion of the title of the true owners, would be giving an effect to the doctrine of constructive possession heretofore unknown in this state,—an effect, which is as unnecessary to the protection of the rights of the actual occupant of land, as it would be unjust to the rightful owners. We have no hesitation in saying, that the defendant, in this case, is not entitled to any benefit from the doctrine of constructive possession, and that his possession must be limited to the boundaries of his actual improvement.

The logs, for which the action was brought, having been taken from other land in the township of Norton than that covered by the defendant's clearing, it would follow, that, upon the case, as thus far examined, there is no ground for disturbing the verdict.

There are, however, several other exceptions to the ruling of the county court, which remain to be considered.

It is objected, that the charge of the court in regard to that portion of the logs taken by Ruiter was erroneous, for the reason that the defendant's license should be treated as having been revoked by the death of Rogers. The evidence tended to show, that the logs *were actually *407 taken by Ruiter under and by virtue of his license from the defendant, and without any indication from the defendant of a disposition to treat the license as revoked. Under these circumstances we think the court was right in charging the jury, that the death of Rogers would not, as matter of law, excuse the defendant from liability. Under the charge of the court the jury must have found, that the logs were in point of fact taken by Ruiter under the counsel and advice of the defendant, which was sufficient to justify them in making him liable as a trespasser for Ruiter's acts in taking them.

The objection taken to the deposition of Thomas Ruiter, that the place of the holding of the court was omitted in the certificate, was, we think, properly overruled. In Clark v. Brown, 15 Vt. 658, it was held, that a deposition was admissible, though the time of the session of the court was omitted, the time of the session being fixed by a public statute. The place of the session of the court is equally fixed by public statute, and we do not perceive, why that case must not be an authority for the admission of the deposition in this.

It is objected to the deed of reconveyance to the plaintiff of Hale, Brown and Bailey, that it is not sufficiently acknowledged by Bailey, to convey his rights. In the body of the deed one of the grantors is described as Richard G. Bailey, and it is signed and sealed R. G. Bailey. The acknowledgment, after a proper designation of the state, county and town, reads thus,—"this thirty first day of January, A. D. 1842, Oliver Hale and Daniel Brown, Richard G. personally appeared and acknowledged this instrument, by them sealed and subscribed, to be their free act and deed." &c. Although the name "Bailey" is omitted in the acknowledgment, yet the statement, that Richard G., who executed the instrument, acknowledged it, does, we think, render it sufficiently certain, that it was acknowledged by Richard G. Bailey, the grantor.

The only remaining objection to the verdict is one, which we have been unable to overcome.

The plaintiff's testimony did not tend to show a sole and exclusive title in himself to the logs sued for, but only an undivided share in them, as tenant in common. The court were requested to charge the jury, that the plaintiff's damages should be estimated according to the value of his undivided portion. But the court de- *clined so to charge, and it is to be *408 taken, that the verdict was for the full value of the logs, as if the plaintiff were the sole owner

It has indeed been long settled in this state, that one tenant in common, as against a stranger to the title, may recover the whole land in ejectment. In that action the thing itself is recovered, and the recovery of the whole is allowed, because it would be unjust to the plaintiff, to be compelled to accept a trespasser upon his rights and upon the rights of all the other owners of the land as his co-tenant. In such

case the plaintiff is put in possession and holds both for himself and for the other cotenants, whoever they may be. Pomroy v. Mills, 3 Vt. 279, 410. University of Vt. v. Reynolds, 3 Vt. 553. Johnson v. Tilden, 5 Vt. 426. House v. Fuller, 12 Vt. 172.

But where the action is for a trespass to personal property, the remedy being in damages only, there does not appear to be the like reason for allowing a full recovery by a part owner. Indeed, all that a party can with any show of reason claim against one, who has trespassed upon a chattel in which he has an interest, is to be made good for the injury done to that interest. It accordingly appears to be the well settled doctrine of the common law, that although the non-joinder of a part owner of a chattel may, in actions *ex delicto*, be pleaded in abatement, yet that if the defendant neglects to make such plea, he may still avail himself of a want of title to the whole in the plaintiff, for the purpose of reducing the damages. And when one part owner has recovered for his share of the injury, the other has afterwards been allowed to sustain an action for his. Addison v. Overend, 6 T. R. 766. Sedgworth v. Overend et al., 7 T. R. 279. Bloxam et al., v. Hubbard, 5 East 407. Gould's Pl. 276. Chit. Pl. 55.

For this reason we think we must hold the judgment of the county court to be erroneous.

We have considered the question whether it is necessary to send the case back to the county court for a new trial and are of opinion that it is not. Whenever a judgment of the county court has been found to be erroneous and it could be ascertained by computation what the judgment ought to have been, it appears to have been the practice of this court to make the correction without sending the case back for a new trial. Thus it was said by Judge HUTCHINSON in Sutton v. Burnett, 1 Aik. 209, that if the judge should charge
*409 *the jury wrong in relation to the allowance of a particular item of claim, which was liquidated and certain, the court would not for that reason send the case back, but would order the sum erroneously allowed to be deducted from the verdict. And in Paris v. Vail et al., 18 Vt. 284-6, the verdict of the jury in an action of trover was ordered to be set aside for all above the sum of $1000 and interest thereon from a certain date, and the judgment on the verdict affirmed for that sum.

There is no difficulty in ascertaining by computation what the plaintiff's proportionate share of the whole damages would be, and we think the plaintiff should have judgment for that sum.

The plaintiff's vendue title, which we have found to be valid, originally embraced fifty seven of the sixty five rights in the township. These rights he conveyed away in 1835; and regained but three undivided fourth parts in each of them, by the re-conveyance to him in 1842. He is therefore entitled to three fourths of fifty seven sixty fifths of the whole damages, the $100 received of Ruiter and Cleveland to be wholly deducted from the plaintiff's portion of the damages. Upon this computation we find the damages, which are now $289, should be reduced to $155,85, for which judgment is to be entered on the verdict for the plaintiff.

Judgment reversed for the excess above $155,85, and affirmed for that sum.

DANIEL A. HEALD v. ZENAS C. WARREN.

(*Windsor*, March Term, 1850.)

The right of action, at law, to recover the price of property sold, is in the person having the legal interest in the property.

The plaintiff furnished money to be expended by S. in the purchase of flour, and S. was to repay the money, with interest, and to allow the plaintiff a barrel of flour for every one hundred barrels purchased; and the flour was purchased and invoiced in the name of the plaintiff and was to remain his until sold and paid for. *Held*, that the right of action, to recover the price of the flour, when sold, was in the plaintiff, and not in S.

*And S., in such case, having released to the *410 plaintiff all claim which he had in the suit, both to the damages and costs, and the plaintiff having released to S. all claim on account of the costs and expenses in the suit, and the attorney who commenced the suit having released his lien upon the costs for his services and expenditures, it was held, that S. was thereby rendered a competent witness for the plaintiff.

An order, drawn by a debtor in favor of his creditor upon a third person, for the amount of a debt due for property sold, it being understood between them, that the order was drawn as a matter of convenience merely, and not as an ordinary business transaction, and that the drawee had no funds of the drawer in his hands, and was under no obligation to accept the order, will not preclude the creditor from recovering the amount of his debt in an action upon book account,—nothing having been received by him upon the order.

Book account. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows. The plaintiff's account was for flour sold, to the amount of $31,25. The defendant received the flour of Owen Spalding. As between the plaintiff and Spalding the business of dealing in flour was carried on in this manner; the plaintiff furnished money for the purchase of the flour, which Spalding was to repay to him, with interest, and to allow to him one barrel of flour for every one hundred barrels purchased; the flour was purchased and invoiced in the name of the plaintiff and was to remain his until sold and paid for. Spalding was offered as a witness on the part of the plaintiff, and was objected to by the defendant. The plaintiff then produced a release, from Spalding to the plaintiff, of all interest which Spalding had in the suit, both in damages and costs,—a release from the plaintiff to Spalding of all claim against him for the costs and expenses of the suit,—and a release to the plaintiff from the attorney, who commenced the suit by the direction of Spalding, of his lien upon the costs, which might be recovered, for payment of his fees and disbursements. Spalding was then admitted by the auditor to testify. It appeared, that the defendant kept a boarding house, at Ludlow, for persons employed upon the rail road; and the boarders made their own contracts, and were alone liable for

their board. The men employed upon the rail road drew their pay the fifteenth day of each month, and it was customary
*411 for the keepers of board*ing houses to send their boarding bills each month to the contractors, and for them to reserve, from the amount due to the men in their employment, a sum sufficient to pay such bills, and to pay the keepers of the boarding houses for the board of the men. The defendant boarded some men, who were in the employment of Lingenfelter & Brewer and others, who were in the employment of John Warner, who resided at Chester. On the tenth of March, 1848, Spalding wrote an order upon Warner for the amount of the plaintiff's account against the defendant, and the defendant signed it. The order was in these words;—"Mr. Warner: Please to pay Owen Spalding $31,25 out of my board bill, for value received." It was well understood, both by the defendant and Spalding, that Warner was under no obligation to accept or pay such a draft, and that his doing so would be a mere act of courtesy, according to the custom above mentioned, and not because the drawer had any funds in his hands; and when the order was given, it was not passed as in a common business transaction, drawn against funds in the hands of a drawee, but was given and received to enable Spalding to take the pay for the above account, if he should see Warner, or his clerk, before the defendant did. Warner did not come to Ludlow, but his clerk came on the seventeenth of March to pay the men. Spalding applied to him, to learn when he would pay them, and was told, that payment would be made on the morning of the eighteenth of March. Spalding informed him, that he had the order above mentioned, but the clerk told him, that he should pay Lingenfelter & Brewer the amount due to them; but Lingenfelter & Brewer were paid on the evening of the seventeenth, and absconded that night. Spalding never received any thing upon the order, and it appeared by the declarations of the defendant, made after Lingenfelter & Brewer had absconded, that he considered he owed Spalding for the flour, specified in the above account. Upon these facts the county court, September Adjourned Term, 1849,—KELLOGG, J., presiding,—rendered judgment for the plaintiff for the amount of his account and interest. Exceptions by defendant.

*412 *S. Fullam* for defendant.

Spalding is the only person, who can sustain this action; he owned the flour, and had possession and control of it, and was alone interested in the profit and loss. Lane v. Columbus Ins. Co., U. S. Law Mag., Jan. 1850, p. 21. The plaintiff's lien upon the flour, to secure the money loaned by him to Spalding with which to purchase the flour, does not give to him the right of action for the flour actually sold by Spalding. Spalding was improperly admitted as a witness;—his release to the plaintiff does not excuse the plaintiff from accounting to Spalding for the amount recovered in this action. The receiving of the order, by Spalding, for the exact amount due, is a bar to any right of recovery in an action on book. Hutchins et al. v. Olcutt, 4 Vt. 549. Wright v. Crockery Ware Co., 1 N. H. 281. Wyatt v. Marquis of Hertford, 3 East 147. Spalding (or the plaintiff, if he have any right to sue) made the bill his own, by not presenting it immediately, or certainly on pay day, and giving notice to the drawer, if not paid.

F. C. Robbins and *Washburn & Marsh* for plaintiff.

Upon the facts found, this action is well brought in the name of the present plaintiff. Lapham v. Green, 9 Vt. 407. Hilliker v. Loop, 5 Vt. 116 Boardman v. Keeler, 2 Vt. 65. 1 Chit. Pl. 65. The fact, that Spalding was to receive a certain commission, or all the profit made on the flour above the price of one barrel in every one hundred, does not estop the plaintiff from maintaining this action in his own name. Although Spalding had an interest, yet the consideration moved from the plaintiff. Edwards v. Golding et al., 20 Vt. 30. The plaintiff being the sole owner of the flour, and Spalding having no interest, except in what was gained or lost in the purchase and sale thereof, and having assigned to the plaintiff all of that interest, and the plaintiff having released Spalding from all liability on account of the costs and expenses accruing out of this suit, Spalding has no longer any interest in this suit, and was properly admitted to testify. Edwards v. Golding et al., above cited. The order was given merely as matter of convenience to the de*fendant, and for his benefit, *413 and can in no way be considered as payment of the account of the plaintiff. Tracy v. Pearl, 20 Vt. 162. Torrey v. Baxter, 13 Vt. 452.

The opinion of the court was delivered by

BENNETT, J. It is objected by the defendant, that this action is misconceived, and should have been brought by Spalding. But by a recurrence to the facts reported by the auditor it will be seen, that the plaintiff had the legal interest in the property and Spalding only the equitable interest. It is well settled, that the person having the legal interest has at law the right of action.

In regard to the question of the admissibility of Spalding as a witness, after the execution of the releases, which are attached to the case, little need be said. The plaintiff could not be compelled to account to Spalding for any portion of the money recovered in this action, in the face of his release; neither could Spalding be compelled to pay any costs to the plaintiff, in the face of the plaintiff's release. The case in principle is the same as Edwards v. Golding et al., 20 Vt. 30.

A question has been raised in relation to the effect of the defendant's order upon Mr. Warner in favor of Spalding, requesting him to pay this account out of the defendant's board bill. Under the circumstances attending this case, this cannot preclude the right to recover. It was understood by the parties, that the drawee had no funds and was under no legal obligation to accept the order, and if he did do it, it was mere matter of accommodation. It was not given as an ordinary business

transaction, but simply that the payee might get the money of the drawee, if he should see him before the defendant did; and in this light the parties understood it, most unquestionably. After Spalding failed to get any thing on the order, the defendant admitted his liability for the flour now sued for. Upon such a state of facts there can be no merger of the account in the draft, for the best reason in the world, the parties did not so intend it. See Tracy v. Pearl, 20 Vt. 163.

The judgment of the county court is affirmed.

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*414 *SEWALL SMITH v. EPHRAIM INGRAHAM, JR.

(*Windsor*, March Term, 1850.)

To *scire facias* upon a recognizance for a review, to recover the costs occasioned by the review, the defendant pleaded, that the plaintiff caused the writ, in the suit in which the review was taken, to be served by attaching real and personal estate of the defendant in that suit, and had caused the execution, obtained by him in that suit, to be levied upon the real estate, in part satisfaction of the judgment, but had neglected to cause the execution to be levied upon the personal estate attached, although sufficient in amount to have satisfied the residue of the judgment. *Held*, upon demurrer, that the plea was insufficient.

When a plaintiff has caused personal property to be attached upon his writ, and the property has been delivered by the officer to a receiptor, and the plaintiff, after review by the defendant, has obtained a final judgment in his favor, he may, at his election, recover the costs, occasioned by the review, by bringing *scire facias* upon the recognizance for the review, or may pursue his remedies for the property attached;—and the receiptor, by paying to the plaintiff the amount recovered by him and taking an assignment of the judgment, will acquire the right to pursue the recognizor for the review, in the name of the plaintiff, to the same extent that the plaintiff might have done. The remedies against the receiptor and the recognizor being independent, the purchase of the judgment by one of them, by paying to the plaintiff its full amount, will not operate as a satisfaction of the judgment, as to the other.

Scire facias. The plaintiff alleged, that at the May Term, 1841, of Windsor county court he recovered judgment in his favor against one Charles Edmunds for $40,57 damages and $69,15 costs; that a review was entered by Edmunds, and the defendant Ingraham recognized to the plaintiff in the sum of fifty dollars, conditioned that Edmunds should prosecute his review and pay to the plaintiff all intervening damages, occasioned to the plaintiff by being delayed, with additional costs, in case the plaintiff should obtain final judgment in his favor; and that the plaintiff, at the March Term, 1845, of the supreme court for the county of Windsor, obtained final judgment in his favor for $253,53 damages and $151,29 costs, which judgment remained unsatisfied. The defendant pleaded *nul tiel record* and payment, and also a second plea in bar, in which he alleged, that the plaintiff caused the writ in his suit against Edmunds to be served by attaching real and personal estate of Edmunds, that the execution obtained by the plaintiff had been levied upon the real estate attached, to the amount of $361,34, in part satisfaction of his *judgment, that the personal property attached was amply sufficient to *415
have paid the residue of the judgment, but that the plaintiff neglected to cause the personal property, or any part of it, to be sold and applied upon the execution.

To the second plea in bar the plaintiff demurred; and the county court, March Term 1846,—REDFIELD, J., presiding,—adjudged the plea insufficient. Exceptions by defendant. Upon the pleas of *nul tiel record* and payment issue was joined. Trial by the court, May Term, 1847,—REDFIELD, J., presiding. The defendant conceded, that he recognized for the review, in the suit in favor of the plaintiff against Edmunds, in the sum of fifty dollars, and that final judgment was rendered in favor of the plaintiff in that suit, as alleged in the declaration, and that fifty dollars costs accrued in that suit after the review. It appeared, that personal property was attached upon the writ in favor of the plaintiff against Edmunds, but to what amount did not appear, and that it was receipted by Nathaniel Fullerton and Frederick E. Fullerton, and that they had paid to the plaintiff the full amount of the judgment recovered by him, under an agreement, that he would permit them to use his name in availing themselves of the security against Ingraham upon his recognizance, and of his attachment of the real estate of Edmunds, and would convey to them by deed of quit claim, the property covered by the attachment. No part of the personal property attached was applied upon the judgment, and this suit was commenced and prosecuted by Nathaniel Fullerton and Frederick E. Fullerton, in the name of the plaintiff, for their own benefit. Upon these facts the county court rendered judgment for the plaintiff, for fifty dollars. Exceptions by defendant.

H. E. Stoughton for defendant.

The second plea in bar is sufficient. To a *scire facias* against the debtor, a plea in bar, that the debt was levied by *fi. fa.*, is sufficient. Mountney v. Andrews, Cro. Eliz. 237. 2 Ld. Raym. 1072. Holmes v. Newlands, 48 E. C. L. 366, 632. Green v. Elgie, 23 E. C. L. 197. In such case the debtor is discharged from the judgment, although the sheriff do not satisfy the plaintiff. 2 Saund. R. 130, n. 1. A levy by *fi. fa.* and an attachment of personal property upon mesne process place the parties, so
far as the present defence *is con- *416
cerned, upon the same ground. In either case the officer is liable to the plaintiff for the property and may maintain trover for it, if taken from his possession. 5 Vt. 181. If a levy by the writ upon property sufficient to pay the debt would bar a *scire facias* against Edmunds, the debtor, it would of course be a bar to a *scire facias*, in the same suit, against the debtors' surety. The facts found by the court will not enable the Fullertons to maintain this suit, in the name of the plaintiff, for their benefit. It is the same to the plaintiff, whether the property attached is in the actual possession of the officer, or in the custody of some third person, in whose hands the officer has placed it. The liabil-

ity of the officer to the plaintiff is not changed, by placing the property in the hands of the receiptor, nor is the receiptor made liable to the plaintiff; his liability is to the officer. We think, then, that while there is sufficient property in the custody of the officer, or of the receiptor, to pay the debt, the plaintiff cannot have his election to pursue the property, or the debtor; and if he cannot elect to pursue the debtor, he cannot pursue the debtor's surety.

P. T. Washburn and *R. Washburn* for plaintiff.

The second plea in bar can only be sustained upon the ground, that the plaintiff was legally bound to pursue his action against the sheriff, or to take the legal steps to charge him, before resorting to his remedy upon the defendant's recognizance. But this is an obligation not imposed by law: and in Page v. Johnson, 1 D. Ch. 338, it was decided, that it was not necessary, that execution should have issued upon the original judgment, in order to charge the bail upon the recognizance. It is not averred, that the plaintiff has received satisfaction from the property attached, nor from the sheriff; and a mere unsatisfied remedy against one person cannot work an extinguishment of an independent remedy against another person, unless there have been some legal contract to that effect, or the one remedy so differs from the other in degree and time, as to operate a merger. If the facts pleaded constitute a bar to the action, they discharge the defendant from all liability, both as to additional costs and intervening damages. But the defendant's liability to pay the additional costs is absolute, by the terms of the recognizance, and cannot be discharged by such matter. Rev. St. 160, § 10. Hub-
*417 *bard v. Davis, 1 Aik. 301. Green v. Shurtliff, 19 Vt. 592. Roberts v. Warner, 17 Vt. 46. The plea, then, only sets forth a defence, if any, to a claim upon the part of the plaintiff for intervening damages occasioned by the delay. But the declaration sets up no such claim, and therefore the plaintiff can recover nothing therefor. Way v. Swift, 12 Vt. 395. Upon the issue of fact the decision of the county court was correct. The remedies, which the plaintiff had against the defendant and Fullerton, were collateral, independent of each other, and wholly dissimilar. The remedy against the defendant is based upon contract, while the remedy against Fullerton could only be enforced indirectly, if at all, by the plaintiff. The plaintiff's claim, so far as the personal property was concerned, was upon the sheriff; and the only obligation upon Fullerton was to indemnify the sheriff. Neither was there any privity between Fullerton and the defendant. The result must be, that, as to both the plaintiff and defendant, Fullerton stood as a third person, and might well become the purchaser of the plaintiff's judgment.

The opinion of the court was delivered by

BENNETT, J. The questions in this case arise upon the issue joined upon the second plea, and upon the demurrer to the third plea.

We think it is obvious, that the third plea is bad. So far as the real estate went, which was set off upon the execution, the judgment was satisfied; but an attachment of real or personal estate on mesne process cannot operate even as a *qua* satisfaction of the judgment, which may be recovered, and the plaintiff is not bound to follow the same property with his execution. The defendant became absolutely liable for the costs occasioned by the review, to the extent of his recognizance; and to charge him no execution need have issued against the principal debtor, nor any effort have been made to collect it of him. It must follow from these principles, that the plea is no good answer to the action.

On the trial of the issue of fact upon the plea of payment it appeared, that Smith had a lien by the attachment of real estate, as a security for the satisfaction of the judgment against Edmunds, and also collateral and independent remedies against the Fullertons and *this de- *418
fendant, and that the Fullertons agreed with the plaintiff to pay him the amount of his judgment against Edmunds, if he would quit claim to them the land, which had been attached and levied upon, and also give them the right to use his name in availing themselves of the security against the present defendant. The Fullertons paid Smith the amount of the judgment, and, in effect, took an assignment of it; and we see no good reason, why they may not sustain this action, in the name of Smith, against the defendant upon his recognizance.

The plaintiff, after final judgment against Edmunds, had an election, as to fifty dollars, to go against the defendant upon his recognizance for the review, or to charge the personal property in execution, which had been attached, and, if not exposed to sale on the execution, to go against the officer; and in that event the officer would have his remedy on his receipt against the Fullertons. The defendant being liable absolutely, it was not necessary, to continue his liability, that the property should have been charged in execution at all. This was only necessary, to give the plaintiff a remedy against the officer; and whether the property had been charged in execution within the thirty days from final judgment does not appear from the case itself. But suppose such was the case, I apprehend the result must be the same. The remedies of the plaintiff, as well as the liabilities of the officer and of the defendant upon his recognizance, were distinct and independent. It has never been held, that I am aware, that an attaching creditor can maintain a special action on the case against the receiptor of property attached, for a non-delivery of the property on the execution to the sheriff; and I apprehend, no such action can be sustained.

This case is not like that of Allen v. Ogden et al., 12 Vt. 9. There Blood, who bought in the judgment against Ogden and the jail bond against Ogden and Catlin, was a co-contractor with Ogden on the note; and the payment of the judgment by Blood was but the payment of his own debt. If Blood had been permitted to sustain the action by force of the assignment, treating

the claim as unpaid, Catlin, upon the payment of the demand, would have had his remedy against Blood; and to save this circuity of action, the court treated the payment of the judgment by Blood as a satisfaction, though in form a purchase. In the case before us I apprehend the
*419 *defendant could not, at law, have a right of contribution either against the receiptors of the property attached, or the officer. How it might be in chancery it is not material to consider.

We think, then, the contract between the present plaintiff and the receiptors is one, which they had a right to make, and that the purchasing in of the judgment by them does not operate, under the circumstances, as a payment of the judgment against Edmunds: and if not a payment, then the receiptors may have the same remedy against the defendant, in the name of the plaintiff, as the plaintiff could himself have had, if he had remained the owner of the claim. This is only carrying out the right in Smith to elect which he would pursue.

The result is, the judgment of the county court is affirmed.

JOHN BURNS v. JOHN P. BELKNAP.

(*Windsor*, March Term, 1850.)

Under the statutes of the state of Maine, in reference to trustee process, the writ of *scire facias*, which issues against a trustee, after judgment has been rendered against him by default in the original suit, is but a continuation of the original suit; and if the court had jurisdiction of the trustee in the original suit, and afterwards, and before judgment was rendered against him by default in that suit, he removed from the state, and had no property there, and the amount of the judgment were demanded of him, in the state to which he had removed, within thirty days after the rendition of that judgment against him, and the writ of *scire facias* were served by leaving a copy at his last and usual place of abode in Maine, a judgment against him upon the *scire facias*, by default, will charge him personally, and will be held conclusive upon him in this state, and may be enforced here by action of debt.

And in an action of debt upon such judgment, in this state, the plea of *nil debet* is insufficient, on demurrer.

Debt upon two judgments, rendered by the district court of the state of Maine, held at Alfred, in the county of York, February Term, 1847,—one for $434,91 damages, and $9,27 costs, and the other for $111,76 damages and $9,27 costs. The defendant pleaded, —1. *Nul tiel record;* upon which plea issue was joined;—2. *Nil debet;* to which the plaintiff demurred;—3. That the judg-
*420 *ments described in the declaration were rendered in actions of *scire facias*, and that the writs in said actions were severally sued out and dated on the fifth day of December, 1846, and that no service thereof was made upon the defendant, and he had no notice thereof, and the judgments were rendered against him by default, without any appearance by him in the suits, either personally, or by attorney;—4. That at the time of sueing out the writs of *scire facias*, as stated in the third plea, the defendant was not an inhabitant, or resident, of the state of Maine, nor had he been so at any time since, but that for four years previously he had been a citizen of the state of Massachusetts, and at the time of sueing out the writs he was a citizen of the state of Vermont, where he had ever since resided, and that he had at that time no property, or domicil, in Maine, and that no personal service of the writs, or either of them, was made upon him, and no property was attached thereon, and the defendant had not any notice of the pendency of said actions, or either of them, and the judgments thereon were rendered against him by default, without any appearance in the suits by him. To the third and fourth pleas the plaintiff replied, that on the seventeenth of February, 1842, he sued out a writ, in due form of law, returnable before the district court to be held at Alfred, in the county of York, at the May Term, 1842, against Francis Dougherty and John Carney, of Elliot in the county of York, and therein summoned the defendant Belknap as trustee, and caused the writ, on the same day, within the county of York, to be served upon Belknap personally, who was then a resident of said town of Elliot, by reading the same, and also caused it to be served upon Dougherty and Carney on the fourteenth of May, 1842; that the suit was duly entered in court, and such proceedings were had, that at the October Term, 1845, of said court, he recovered judgment against Dougherty and Carney for $385,90 damages, and $50,92 costs, and at the same term recovered judgment against Belknap, by default, and execution was thereupon awarded against the goods, effects and credits of Dougherty and Carney in the hands and possession of Belknap, and it was farther adjudged, that Belknap should pay, from his own goods and estate, the costs which had accrued subsequent to the term, at which the writ was made returnable, taxed at $40,31; that a writ of execution issued, in due form of law, dated October 27, 1845, against *Dough- *421
erty and Carney and against their goods &c. in the hands of Belknap, and was delivered to the sheriff of the county of York to serve and return, who afterwards, November 6, 1845, demanded of Belknap the goods &c. for which he was then liable as trustee. and the sum of $40,31 costs, for which he was personally liable,—which Belknap refused to pay, and the execution was returned unsatisfied; that afterwards execution was awarded by the court against Belknap personally for the said sum of $40,31 costs, and was issued, dated March 20, 1846, and had been in no part satisfied; that thereupon the plaintiff, on the twenty ninth of December, 1846, sued out his writ of *scire facias* against Belknap, in due form of law, returnable at the February Term, 1847, of the district court for the county of York, therein summoning him to appear and show cause, why judgment should not be rendered against him for the amount of the judgment against Dougherty and Carney, as of his own proper goods and estate, and execution be awarded accordingly; that this writ was duly served upon Belknap, January 25, 1847, by leaving a true and attested copy thereof at his last and usual place of abode in said town of Elliot, and the suit was duly entered in court, and thereupon

the same judgment, described in the first count in the declaration, was rendered. The same facts were alleged in relation to a suit in favor of the plaintiff against John McGratty and Belknap trustee, in which the judgment described in the second count in the declaration, was rendered. The defendant rejoined, that at the time the plaintiff obtained the judgments, against Dougherty and Carney and against McGratty, in the original suits, and at the time judgment was rendered against Belknap in those suits, by default, and at the time the executions were issued and returned, the defendant was not a citizen of Maine, and had neither property nor domicile there, and that the sheriff's return upon the execution stated, that he delivered to the defendant the copies of the executions, and made the demands of him, alleged in the replication, at Fitchburg in the state of Massachusetts, and that no other demand was made upon him, or notice given, except at Fitchburg, where the defendant then resided, with his family, and that he was not then and there subject to the jurisdiction of the laws of Maine, and that no demand was ever made upon him, on said executions, or either of them, as required by the laws of that
*422 state. The plaintiff *surrejoined, that when said demand was made by the sheriff, by virtue of said executions, the defendant was then and there subject to the jurisdiction of the laws of Maine, and that said demand was made upon him, upon the executions, in the manner required by the laws of that state. And issue was joined. Trial by the court, November Term, 1849,—KELLOGG, J., presiding. On trial the plaintiff gave in evidence the printed statutes of the state of Maine, and also duly certified copies of the records and files referred to in the pleadings, from which it appeared, that the writs in the original suit were served, as alleged in the replication, that judgment was rendered against the principal debtors by default, May Term, 1843, and against Belknap, by default, October Term, 1845, and executions issued, and writs of *scire facias* were sued out, and judgments were rendered thereon, as alleged in the replication, and that the demand upon the defendant was made by the sheriff of the county of York, at Fitchburg in the state of Massachusetts, as alleged in the rejoinder. It appeared, that the session of the legislature of Maine, in 1845, ended April 8, 1845. The court found the issue upon the first plea for the plaintiff, and adjudged the second plea insufficient, and found for the plaintiff upon the issue joined upon the third and fourth pleas, and rendered judgment, that the plaintiff recover the amount due upon both judgments described in his declaration. Exceptions by defendant.

W. C. French for defendant.

We contend, that the defendant was not subject to the jurisdiction of the court rendering the judgments upon the writs of *scire facias*, and that they are void and of no effect, as judgments. The courts of one state, in order to render their judgments binding in another, must have jurisdiction of the parties and of the subject matter. In order to obtain jurisdiction of the person, the party must reside or be served with process within the jurisdiction of the court, or must appear and submit to its jurisdiction. Story on the Const., ch. 29, 1297–1307. 1 Kent 260. 1 Greenl. Ev. 548, 614. Bellows v. Ingham, 2 Vt. 575. Hoxie v. Wright, Ib. 263. Fullerton v. Horton, 11 Vt. 425. Newcomb et al. v. Peck, 17 Vt. 302. Blodget v. Jordan, 6 Vt. 580. Bissell v. Briggs, 9 Mass. 462. Woodward v. Tremere, 6 Pick. 354. Cook v. Darling, 18 Pick. 393. Borden
*v. Fitch, 15 Johns. 121. Andrews v. *423 Montgomery, 19 Johns. 162. Shumway v. Stillman, 6 Wend. 447. Aldrich v. Kinney, 4 Conn. 380. By the statutes of Maine the only effect of the default of the defendant in the original suit was to make him liable for costs, which accrued subsequent to the term, to which the writ was made returnable. Rev. St. of Maine 529, § 22. If he had effects, &c., of the principal debtors, it was his duty to deliver them to the officer holding the execution; but the question, whether or not he had effects, &c., remained to be decided on the *scire facias*. Ib. 536, §§ 74, 75, 78. The writ of *scire facias* is sued out and served in the same manner as other writs, [Ib. 484, § 26,] on the return of which the trustee may appear and disclose; and if he have no effects, &c., of the principal debtor, he is discharged. Ib. 536, §§ 74–76. Previous, however, to bringing the *scire facias*, and within thirty days after final judgment, a demand must be made by the officer, holding the execution, of the trustee. In 1845 the legislature enacted, that if the trustee could not be found within the state, and had no dwelling house or place of abode within the state, a copy of the execution could be left at his dwelling house, or delivered to him, out of the state. Acts of 1845, ch. 136, p. 138. It is shown by the pleadings, that previous to the passage of this law the defendant had become a citizen of Massachusetts, and had no property or domicil in Maine. We claim, that one state has no power to enact laws to affect a citizen of another state, not residing or owning property within the state, and that no demand, therefore, was made upon the execution, which would justify the proceedings upon the *scire facias*. Starkweather v. Loomis, 2 Vt. 573. Hall v. Williams, 6 Pick. 232. It is claimed, that inasmuch as the plaintiff had notice of the original suit, he is bound to take notice of the proceedings on the *scire facias*. If this were so, there would seem to be no occasion for any service of the writ of *scire facias*.

The jurisdiction of the court and the right to render the judgment may be impeached under the plea of *nil debet*. 1 Kent 260. Thurber v. Blackbourne, 1 N. H. 242. Stoddard v. Allen, N. Ch. 24. Blodget v. Jordan, 6 Vt. 580. Hoxie v. Wright, 2 Vt. 263. If, however, the defendant were served with process, or submitted to the jurisdiction of the court, he is bound by the judgment and *nil debet* is not a good plea. Newcomb et al. v. Peck et al., 17 Vt. 302.

Tracy, Converse & Barrett for *424 plaintiff.

So far as the judgment is set forth in the declaration, as appearing of record, it is a regular and valid judgment, as against the defendant. The plea of *nil debet* is not al-

lowable in debt on judgment, except in case of a foreign judgment;—but the judgment of another American state is not a foreign judgment. Boston India Rubber Factory v. Hoit, 14 Vt. 92. 17 Vt. 302. 4 Vt. 557. St. Albans et al. v. Bush, 4 Vt. 58. Hoxie v. Wright, 2 Vt. 263. The record shows, that the demand was made as prescribed by the statute of 1845. Under the pleadings, if that demand were valid, the judgment on the *scire facias* is valid. The court had full jurisdiction of Belknap in the original suit; and therein he was subject to the incidental process of that state for all the purposes of that suit. If, therefore, it was competent for the legislature of Maine to enact the statute of 1845, the demand made on the defendant was authorized and efficacious. That statute does not provide for proceedings, in which the court thereby assume or exercise original jurisdiction, nor for the ultimate execution of final process. It provides for an incidental step, necessary to the efficacy of a lawful proceeding, in which the court had undoubted jurisdiction. But the demand is not to be treated as service of process, but as a notice, required as preliminary to the further process of the law to consummate proceedings already commenced,—as to which the place where it is made is wholly unimportant. The execution, as against the trustee, is not in the nature of an execution against judgment debtors. It is merely process against the debtors and their property,—the law only authorizing demand of the trustee for the property, and not compelling delivery. But if the issue had been made by demurrer to the replication, thus involving the question of the validity of the judgment, as affected by the matter of the defendant's special pleas, the result must have been the same. *Scire facias*, like this, is but a continuation of the original suit. 1 Chit. Pl. 269. 1 Sw. Dig. 583. 9 Johns. 259. 11 Maine 89.

The opinion of the court was delivered by

BENNETT, J. It is, it must be conceded, well settled, that a judgment of a sister state may be impeached, if the defend- *425 ant were *in no way subject to the legal process of such state, or amenable to her laws, when the judgment was rendered against him; and such, it is claimed by the defendant, was the fact in this case; and this is the important inquiry. That we may have a full understanding of this question, it may be well to recur briefly to the facts of the case.

It seems in February, 1842, the plaintiff prayed out his writ against Dougherty and Carney, of Elliot, in Maine, returnable at the May Term, 1842, of the district court for the county of York, and the present defendant, then of Elliot, was summoned as trustee; and the process was duly served upon the trustee, at Elliot, on the seventeenth day of February, 1842, and on the principal defendants on the fourteenth of May. At the May Term, 1843, the principal defendants were defaulted, and the case was continued from term to term to the October Term, 1845, when the defendant was defaulted, and the damages were then assessed against the principal debtors, and execution was awarded for the damages and costs against the goods, effects and credits of the principal debtors in the hands of the trustee. It was also adjudged, that the trustee pay, out of his own funds, such costs as had accrued after the first term, to which the writ had been made returnable, agreeably to the provisions of the statute of Maine. On the twenty seventh of October, 1845, execution issued against the estate of the principal debtors in their own hands, and against the goods, effects and credits of the principal debtors in the hands of the trustee. Upon the margin of the execution there was indorsed the amount of the costs, which the trustee was personally liable to pay. On the sixth of November, 1845, the sheriff returned a *non est inventus* as to the trustee, and that he had not any dwelling house, or place of abode, in the state, and that he found him at Fitchburg, Massachusetts, gave him a copy of the execution, and a written notice, that he was required to deliver the goods, effects and credits, for which he was liable, towards satisfying the execution, and made a demand for the costs indorsed on the margin of the execution, and the defendant refused to do either, and the execution was returned unsatisfied. A *scire facias* was issued against the trustee in December, 1846, returnable at the May Term, 1847, requiring him to show cause, why judgment should not be entered up personally against him. This was served upon the trustee by leaving a true and attested copy at his *last and *426 usual place of abode in Elliot; and the defendant not appearing, he was defaulted, and judgment was rendered against him personally at the February Term, 1847, for the amount of the judgment against the principal debtors and the costs of the *scire facias*. This is the judgment upon which this action is predicated.

When the plaintiff commenced his suit in 1842, not only the principal defendants, but also the trustee, were residents of Maine. Service of the writ was made personally upon them, and the court had the most perfect jurisdiction over them; and the important question is, did the court have jurisdiction over the trustee in 1847, when the judgment was rendered against him personally? If they had not, it must have been upon the ground, that it was lost in consequence of his removal from the state. The proceedings of the court of Maine are in strict conformity to their statute, to which we have been referred: and there is no ground, upon which the judgment in question can be impeached, unless it be for want of jurisdiction over the trustee.

If the judgment had been rendered against the defendant, as the debtor of the plaintiff in an original action, we think it quite clear, that such a judgment would be open to examination in our courts, as much so as if it had been strictly a foreign judgment. But if the *scire facias* in this case is to be treated, not as a new suit, but as a continuation of the original action, and as constituting a necessary part of it, it would seem as if a different result should follow. The original judgment, rendering the trustee chargeable, did not obligate the trustee to pay any sum to the plaintiff, except the costs indorsed on the margin of the execution; and had he

appeared and disclosed facts to show, that he was not trustee, he would then have been discharged. The principle is too well established, to need authority, that a *scire facias* upon a judgment is only a continuation of the original suit; and we think there are special reasons, why the *scire facias* in the case at bar should be so considered. If a *scire facias* issue against the bill upon a recognizance, or against bail upon mesne process, it may well be treated, in either case, as a new action; for the reason, that the defendant was in no way a party to the record in the original suit.

But in this case Belknap, in one sense, was a party to the action, when the suit was commenced, and was duly served with *427 process, *being then a resident of Maine. The judgment, which was entered against him, consequent upon his first default, was but in the nature of an interlocutory judgment, and incomplete, and in no way conclusive, except for a portion of the costs, which had accrued in the action. The statute enacted by the legislature of Maine, in 1845, provides, that when the trustee has no place of abode in the state, and cannot himself be found, the demand, made in the manner it was in this case, of the trustee, shall be deemed sufficient; and we see no good objection to the statute. It did not authorize the service of process in another state. After this demand, and a return of *nulla bona*, on the execution, the foundation was laid for farther process, by way of a *scire facias*, for ascertaining the plaintiff's rights and the defendant's liabilities.

When the defendant submitted to the first default, he was not, by the laws of Maine, subjected to any fixed liabilities to the plaintiff, except for costs; and if the default had been taken the first term, he would not have been even liable for costs. The defendant, it must be presumed, knew, that there must be farther proceedings by *scire facias*, in which he might appear and discharge himself by making his disclosure; or the plaintiff, upon his default, would be entitled to judgment against him in his own right. He knew, that he had taken the very course to render a *scire facias* necessary to a final judgment against him, fixing him with the payment of the debt; and the question is, shall he have the power to defeat the plaintiff of this right by his removal from the state? He must be taken to have understood, that the legal process issued from the courts of Maine could not follow him into another state, and that the laws of Maine authorized the service of the *scire facias* upon him only by a copy, left at his last and usual place of abode in Elliot. The statute is, that the officer may make service of the summons by reading, or giving the defendant a copy, or leaving a true and attested copy at his dwelling house, or at the place of his last and usual abode.

The defendant must have known, that, to render the proceeding of any avail against him, a *scire facias* must be issued from the courts of Maine, and that, if he left the state, no other service could be made upon him, except what was made in this *428 case. I am not *aware, that the laws of Maine make provision, in a case like this, for any other service, but the one adopted.

We think, as he was in the first instance personally summoned, and did not appear to make his disclosure, but suffered a default, it is to be taken, that he intended to disclose upon the *scire facias*, if he wished to make any disclosure,—which it seems the laws of Maine authorized. If the defendant, in the mean time, wished to remove out of the state, he should have left his agent at Elliot, to have given him notice of the service of the *scire facias*. We think this is by far more reasonable, than to hold, that, by his leaving the state, he defeated the jurisdiction of the court over him, and thereby rendered all prior proceedings abortive. It would be somewhat extraordinary, if the defendant, by removing to Massachusetts, could in effect dissolve the lien, created by the original service of the trustee process; yet such must be the effect, if he, by so doing, placed himself beyond the pale of the jurisdiction of the courts of Maine over him.

If they had not jurisdiction over him, personal notice served upon him in Massachusetts could not give it. Considering the peculiar nature of the trustee process, we think the *scire facias* was an operative part of the original action, and necessary to carry out its object, and may well be regarded as a continuation of it; and the defendant, for the purposes of carrying out this object, must be treated as subject to the jurisdiction of the courts of Maine, notwithstanding his removal to Massachusetts. The case of Adams v. Rowe, 11 Maine 89, is a full authority for the views expressed; and we think that case sound.

In regard to the plea of *nil debet*, it is clearly bad. There is nothing in the record to impeach the conclusive effect of the judgment; and it being conclusive upon the face of the record, *nil debet* is no better plea, than it would have been to an action of debt upon a judgment of a court of this state.

We think, then, the court below were right in finding the issue of fact and of law for the plaintiff, and the judgment of that court is affirmed.

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*Albert Bourne v. Lewis Merritt. *429

(*Windsor*, March Term, 1850.)

The statement in the bill of exceptions in an action of trover, that evidence was given tending to prove, that the plaintiff was owner of the property sued for, and that the jury were instructed that, if they believed the testimony in the case, the plaintiff was entitled to recover, and that a verdict was thereupon returned for the plaintiff, will not justify this court in assuming, that the plaintiff was owner of the goods.

Although the goods sued for in such case are appropriate articles for use as household furniture, yet if it do not appear from the bill of exceptions, that they had ever been used by the plaintiff for such purpose, or were intended by him for such use, this court will not assume, that they were exempted from attachment and execution.

Where it appears from the bill of exceptions in such case, that the plaintiff delivered the goods to a third person, to keep for the plaintiff, and at the same time informed him, that he might hold them, until he was indemnified by the plaintiff against a certain liability, and that the testimony of one witness tended to prove, that he understood, that such liability had been discharged,

and that no evidence was given tending to show, that such third person ever made any claim to the property, and that the jury, under instructions that, if they believed the testimony, the plaintiff was entitled to recover, returned a verdict for the plaintiff, this court cannot assume, that such third person had not a special property in the goods, as against the plaintiff. The question, whether, or not, such special interest existed, should have been submitted to the jury, for them to decide.

The general owner of goods cannot sustain trespass, or trover, when there is an outstanding possession in another, accompanied with a special property.

Trover for two beds, with bedding, three small boxes, a quantity of crockery, wooden and tin ware, two flat irons, two lamps, one gridiron, a pair of brass andirons, shovel and tongs, and a carpet. Plea, the general issue, and trial by jury, May Term, 1849,—KELLOGG, J., presiding. The bill of exceptions stated the proceedings upon the trial in the county court as follows. "The evidence of the plaintiff tended to show, that the plaintiff owned the goods described in the declaration. It farther appeared by the plaintiff's testimony, that the plaintiff, being about to remove to Massachusetts, boxed up the goods and delivered them to one John S. Willard, to keep for the *430 plaintiff, *informing Willard at the same time, that he might retain the goods, until the plaintiff indemnified him for a certain liability he had assumed for the plaintiff. It farther appeared by the plaintiff's testimony, that after Willard received the goods, and while the boxes were lying in Willard's door yard, in April, 1847, the defendant attached the goods on a writ in favor of Moore & Belknap, and removed them from the place, where he attached them, into the house of Willard, and left them in his charge to keep for the defendant. The evidence of a witness for the plaintiff farther tended to show, that he understood, that said liability, incurred by Willard for the plaintiff, had been discharged; and there was no evidence tending to show, that Willard ever made any claim to the property. There was no evidence introduced on the part of the defendant. The court instructed the jury, that if they believed the testimony in the case, the plaintiff was entitled to recover." Verdict for plaintiff. Exceptions by defendant.

Tracy, Converse & Barrett for defendant.

O. P. Chandler for plaintiff.

The opinion of the court was delivered by

BENNETT, J. It is quite probable, that this bill of exceptions presents questions not raised on the trial; but we must take the case, as made by the bill.

It seems the defendant attached the goods on a writ in favor of Moore & Belknap, while in boxes lying in Willard's yard, and removed them from the yard into Willard's house, and left them in his charge, to keep for the defendant. The court charged the jury, "that if they believed the testimony in the case, the plaintiff was entitled to recover." The only question in the case is, whether such facts were testified to on the trial, as detailed in the bill, as would warrant the charge.

It cannot be assumed, that the plaintiff was the owner of the goods described in the declaration. All we have upon this point is, that the evidence tended to prove it, and the jury have not found it. It is one thing to find, that evidence is given tending to prove a fact, and quite another thing to find such fact proved.

*Neither can we assume, that the *431 articles of property sued for were exempt from attachment and execution, on the ground that they were articles of household furniture belonging to the plaintiff, or used by him as such. They are doubtless appropriate articles for such use; but *non constat*, that they had ever been used for such purpose, or were intended by the plaintiff for such use. All we have is, that the plaintiff, being about to remove, boxed up the goods. If the plaintiff claimed, that these goods were exempt from the operation of the general law, subjecting property to attachment and execution, it was for him to show it. The court cannot intend it, as matter of law, or fact, from any thing, which appears in this bill of exceptions.

But it may be assumed, that there was a possession of the goods in the plaintiff prior to the attachment by the defendant. The bill states, that it appeared, "that the plaintiff boxed up the goods and delivered them to John S. Willard, to keep for him." This would be sufficient, to maintain trespass, or trover, against a wrong doer; but we cannot assume, that Willard had not a special property in the goods, as against the plaintiff. The fact, that the plaintiff informed Willard, when he delivered him the goods to keep, that he might hold them, until he indemnified him for a certain liability, which he had assumed for the plaintiff, does not necessarily show, that Willard acceded to it and received them as a security, but was proper evidence to go to the jury for them to pass upon. The evidence, no doubt, tended to prove a special property in Willard; and if the case were made to turn upon this point, it should have been put to the jury, to find how the fact was. If a right vested in Willard, to hold the goods as a security, we think, that, upon this bill of exceptions, no fact can be assumed, which will warrant the court in holding, that Willard is concluded, as matter of law, from setting up this special property, as against the plaintiff. All that the bill finds is, that the evidence of one witness on the part of the plaintiff tended to prove, that he understood, that the liability incurred by Willard for the plaintiff had been discharged. It was not put to the jury, to find how the fact was.

It is true the bill finds, that no evidence was given tending to show, that Willard ever made any claim to the property. If he made no claim, at the time the property was attached, it might, as *mat- *432 ter of law, conclude, or estop, Willard from setting up a special property against the officer, on the attaching creditors; but it could have no such decisive effect in favor of the plaintiff. It could only be evidence, at most, tending to prove, that Willard's lien did not in fact exist, and should have been, together with the other evidence, submitted to the jury, for them to have found, whether Willard had a special interest in the property, or not.

It does not appear from this bill of exceptions, that the property sued for was attached as the property of the present plaintiff. All that we have is, that it was attached by the defendant on a writ in favor of Moore & Belknap, and the writ is not made a part of the case. In this aspect of the case we could sustain the verdict, if we could assume, from the case itself, that Willard had not a special property in the goods. Upon such a construction, it would not be material, whether the property were exempt from attachment and execution, or not. If the property were not attached, as belonging to the plaintiff, the plaintiff might rely upon a prior possession, as against a stranger: but then we are met with another difficulty,—it not being put to the jury to find whether Willard had a special property, or not.

As we cannot assume, from this bill of exceptions, that the plaintiff had the possession of the goods, or the right of possession, when this suit was commenced, this action cannot be sustained. It is well settled, that the general owner cannot sustain trespass, or trover, when there is an outstanding possession in another, accompanied with a special property.

The result is, that, upon this bill of exceptions, the judgment of the county court must be reversed and the cause remanded.

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*433 *COUNTY OF ORANGE.

MARCH TERM, 1850.

PRESENT:

HON. ISAAC F. REDFIELD,
HON. DANIEL KELLOGG,
HON. HILAND HALL,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

AZEL NORTHROP v. THOMAS G. SANBORN.

(*Orange*, March Term, 1850.)

An order drawn for 87,89, without any mark ($) expressing dollars, is not void, as being unintelligible. The court will intend, that the figures were used, as whole numbers and decimals, to express the currency of the United States.

The plaintiff drew an order upon the defendant, directing him to pay to one C. a certain sum, to be accounted for on settlement between them. The defendant, upon the order being presented to him, wrote upon it an agreement to pay to C. such sum, as should be due from him to the *434 plaintiff after settlement. The *plaintiff and defendant subsequently attempted to make a settlement, and failing to do so, the plaintiff commenced this action of book account against the defendant, before a justice of the peace, and recovered judgment, and the defendant appealed. After the appeal was taken, the defendant paid to C. the full amount of the order, which exceeded the sum which was due from him to the plaintiff. *Held*, that the defendant might recover judgment, in this action, against the plaintiff for the amount of the excess so paid.

Book account. The action was commenced before a justice of the peace and came to the county court by appeal, taken by the defendant. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows. The plaintiff's account, which accrued in July, 1848, was allowed at $80,00. On the ninth day of August, 1848, the plaintiff drew upon the defendant an order, in these words,—"Please to pay the bearer, Joseph B. Clough, $37,89, and I will account to you for the same on settlement." The order was presented to the defendant, August 11, 1848, and he wrote upon it these words,—"The undersigned agrees to pay to J. B. Clough what may be due to A. Northrop after settlement;" (signed) "Thomas G. Sanborn." On the sixth day of November, 1848, the plaintiff and defendant and Clough were together, for the purpose of making a settlement, but did not settle, and the next day the plaintiff commenced this action. In December, 1848, the plaintiff paid to Clough $12,00, which was indorsed upon the order; and on the twelfth of December, 1848, the defendant paid to Clough, upon the order, $9,00; and after a judgment in this action had been rendered against the defendant, and he had appealed, he paid to Clough the balance then remaining due upon the order, amounting to $16,89. The auditor allowed to the defendant the sums so paid by him upon the order, and reported, that there was due from the plaintiff to the defendant $12,40, as the balance of accounts between them,—but that, if those payments were improperly allowed, there was due from the defendant to the plaintiff $13,49. The county court, June Term, 1849,—REDFIELD, J., presiding,—rendered judgment for the defendant upon the report. Exceptions by plaintiff.

*——— ——— for plaintiff. *435

The order given by the plaintiff to Clough is void, for want of a sum being stated in it. The figures "37,89" do not express dollars and cents, any more than they do mills and fractions of a mill. Brown v. Bebee, 1 D. Ch. 227. Wainwright v. Straw et al., 15 Vt. 215. Clark v. Stoughton et al., 18 Vt. 50. After the parties had met and no settlement could be effected, and a suit had been commenced, the defendant had no right to pay anything to Clough and charge it to the plaintiff. At all events, the acceptance of the defendant only bound him to pay what he should owe the plaintiff on settlement, and he cannot be justified in paying any thing more, than was really his due. The payment having been made after the judgment; the plaintiff's assent to it cannot be inferred.

A. Howard, Jr., for defendant.

The acceptor of a bill is the principal debtor, and the drawer is the surety, and nothing will discharge the acceptor, but payment, or a release from the payee, or holder. 3 Kent 86. 1 Sw. Dig. 423. Bayl. on Bills 155. Chit. on Bills 181, 186. In this case the order was accepted, and became absolute between the defendant and Clough, long before the commencement of this action. The plaintiff must pay the order, or procure for the defendant a release of his acceptance, before he can draw the funds from the defendant's hands. Tracy v. Pearl, 20 Vt. 162. Rev. St. 220, § 9. Pratt v. Gallup, 7 Vt. 344. Wing v. Hurlburt, 15 Vt. 607. Ambler v. Bradley, 6 Vt. 119.

The opinion of the court was delivered by

REDFIELD, J. We think it not necessary to say, that the order, expressed for 37.89, is so far unintelligible, that it is void. The law of the United States Congress, establishing our national currency, having declared, that it shall consist of the dollar, as a unit, and the decimal parts of the dollar, as dimes and cents, it would seem the necessary legal intendment, that a contract expressed in figures should be in the currency of the country. If prefixed by the usual sign ($) no one could entertain doubt; and that is nothing but a mark to signify, that the national currency is intended. Without that, we think the legal intendment is the same.

*It may be thought, by some, that *436 this decision conflicts with that of Clark v. Stoughton, 18 Vt. 50. But perhaps not necessarily so. In that case it was held, that such a mode of expressing value is not sufficient, in a declaration, or plea, because it is not a compliance with the statute, requiring the pleadings and proceedings in the courts of justice to be in the English language. The purpose of that statute probably was, to prevent the profession from excluding the parties from being their own counsel, if willing to brave the consequence of having fools for clients, as the old maxim has it. And in that view, the mode of expressing value, condemned in Clark v. Stoughton, was the kind of vernacular, which the statute was intended to vindicate and encourage.

But we are aware, that such marks, as "$," "£," and the like, have not been considered admissible in pleadings, in the English courts. So, also, "A. D." was lately condemned there, as vitiating a declaration, and the party was compelled to pay the whole costs of the suit, to procure an amendment,—Ch. J. TINDALL saying, that A. D. was neither English, or Latin. Warren's Duties of Attorneys and Solicitors, 137. So, also, we find in the English courts a writ is held fatally defective, if addressed to the "sheriff," instead of the "sheriffs" of London,—the singular for the plural number. Moore v. Magan, 16 M. & W. 95. So, too, in the English courts the initial letters of the name are not sufficient; and declarations in that form have in late years been held fatally defective.

But in this state no such strictness, even in pleadings, has of late been attempted. Since the case of State v. Hodgeden, 3 Vt. 481, where "A. D." was considered sufficient, even in an indictment, and of State v. Gilbert, 13 Vt. 647, where "*Anno Domini*" was held to be sufficiently English to be admitted in pleadings, even in an indictment, I should myself have supposed, were it not for the case of Clark v. Stoughton, that this mode of expressing value was sufficient, even in a plea. We have no doubt it is sufficient in a contract, where any language, which is intelligible, is competent.

And after the order was drawn and accepted, the defendant was bound to pay the balance of the amount to Clough; and we do not see, why he was not justified, as between himself and the plaintiff, in paying the full amount of the order.

Judgment affirmed.

*ELIPHALET ABBOTT v. VALENTINE WILMOT. *437

(*Orange*, March Term, 1850.)

If a party release, by parol, a valid claim, which he has against another party, in consideration of the surrender of a claim which such other party makes against him, but which he is under no legal or moral obligation to pay, and no claim is afterwards made by either party for some years, nor until after controversy has arisen between them in respect to other matters, this will be held a valid accord, and the party cannot recover for the debt so released.

Interest is only recoverable as damages for the detention of money, which the party ought to pay, unless there is an express contract to pay interest.

When a party agrees to pay money after his return from a particular place, he is entitled to a reasonable time after his return, within which to make the payment.

When there is no express contract to pay interest, and the creditor receives the principal without making any claim for interest, his neglect to make such claim for some years, and until after controversy has arisen between the parties in respect to other matters, is sufficient evidence of a waiver of any claim, which he might have had for interest.

Book account. Judgment to account was rendered, and an auditor was appointed, who reported the facts as follows. The first charge in the plaintiff's account was for four oxen, sold to the defendant in December, 1847, which the auditor allowed at $165,00. The second charge was for interest upon a part of the price of the oxen, in reference to which it appeared, that the defendant purchased the oxen to drive to market, and paid $100 when he received them, and agreed to pay the residue of the price after his return from Brighton, and to leave the money with one Barnes. Soon after the defendant returned from Brighton, he called upon Barnes, in order to leave the money, but not finding him in a suitable condition to receive it, he did not leave it; but afterwards, in consequence of a message left at his house by the plaintiff, he left the money with one Howe for the plaintiff, and the plaintiff received it. This payment was made twenty eight days after the defendant's return from Brighton; the plaintiff made no claim upon the defendant for interest, and made no charge of it, until the time of the hearing before the auditor, which was Feb. 21, 1849. The auditor disallowed the charge. The third charge was *for "going to West *438 Fairlee after sheep," fifty cents. The plaintiff rendered the service at the request of the defendant, and the price charged was reasonable; but in October, 1846, the defendant purchased of the plaintiff a heifer, to drive to market, and sold her for fifty cents less than the price he paid the plaintiff; the plaintiff did not send the heifer, to be sold on his account, nor did he agree to pay any loss, which the defendant, might sustain in selling her; but the defendant, after his return from market, informed the plaintiff of the loss, and the plaintiff replied, "I will give you in going after the sheep to Fairlee, which is worth fifty cents." The auditor disallowed this charge also. The plaintiff's fourth charge was for interest on $500, forty days. In 1844 the defend-

ant purchased of the plaintiff cattle to drive to market, to the amount of about $130,00, and at one time was owing the plaintiff $5,00, which he promised to pay after his return from Boston. The defendant, twenty one days after his return, left the money at the plaintiff's house, and the plaintiff received it. The plaintiff did not claim interest upon this sum, until the hearing before the auditor. The defendant resided about nine miles from the plaintiff's house. This charge, also, the auditor disallowed. The defendant had paid to the plaintiff $165,00 for the oxen above mentioned, and that sum was charged in his account. At the commencement of the hearing before the auditor, the controversy between the parties was wholly in reference to the price, which the defendant was to pay for the oxen,—the plaintiff insisting, that the price was to be $175,00, and the defendant claiming, that it was to be $165,00. After the testimony upon this point was closed, or nearly closed, the plaintiff entered upon his account the other charges above mentioned, and the defendant charged upon his account the loss upon the heifer above named, and some other charges, all of which were disallowed by the auditor. The auditor reported, that there was nothing due to either party, and that the defendant should receive his costs. The county court, June Term, 1849,—REDFIELD, J., presiding,—accepted the report and rendered judgment thereon for the defendant. Exceptions by plaintiff.

A. Howard, Jr., for plaintiff.

Parker for defendant.

*439 *The opinion of the court was delivered by

POLAND, J. 1. From the facts reported by the auditor it would seem sufficiently certain, that the plaintiff, in 1846, had a valid and legal claim against the defendant for the third item in his account, "for going to West Fairlee after sheep," amounting to the sum of fifty cents; and it does not appear, that this charge was ever paid, or adjusted, except as reported by the auditor, as follows;—In the autumn of 1846 the defendant purchased a heifer of the plaintiff and drove to market and there sold her for fifty cents less than the price he paid the plaintiff. On his return he made some complaint to the plaintiff on the subject, and the plaintiff then told him, that he would "give him in" the going after the sheep. It does not appear, from any thing reported by the auditor, that the plaintiff was under any legal obligation to the defendant to make up any loss he sustained on the sale of the heifer, nor can we infer, that he was under any such moral obligation to do so, as would have furnished any consideration for an express promise to remunerate him for such loss. But whether he was under any obligation, or not, either legal, or moral, he certainly had the right to do it, if he chose to do so voluntarily; and if he considered himself under a moral obligation to make it up to him, and did so, the law would not permit him to afterwards retract and recover back such payment. The auditor does not find, in terms, that the defendant consented to accept the plaintiff's offer, to receive said fifty cents in satisfaction for his claim for loss on the heifer; but he reports, that no charge was made and no claim preferred afterwards, upon either side, until this controversy arose about the price of the oxen, and the charges were first made, upon both sides, at the trial before the auditor. From these facts we think, the auditor was well warranted in finding, that there had been an accord of this item between the parties, and properly disallowed the same.

2. As to the charges for interest;—It seems, in both instances, the defendant had purchased the plaintiff's cattle to drive to market, and paid a part of the price before going to market, and was to pay the balance after his return from Boston. In one instance he paid the money in twenty one days, and in the other in twenty eight days, after his return. The defendant, we think, was entitled to a reasonable time after his return, in which to pay the money; he *was not bound to go at all haz- *440 ards, the day of his return, to the plaintiff's residence, which was several miles distant, to make payment of the money; and from any thing that is reported we cannot say, that the money was not paid in a reasonable time after his return. In one instance, it seems very clear, the defendant was in no fault for not making payment at an earlier day.

Here was no contract whatever to pay interest; and except where there is an express contract for interest, it is only recoverable as damages for the detention of the money, which the party ought to pay. In a case where a party is entitled to no interest by any contract, and afterwards receives his money without making any claim for interest, it is very difficult to see upon what ground he can afterwards make a claim for it. But even if he might have insisted upon having interest, it is manifest, that, his receiving his money without claiming it, and his subsequent silence for years, without making any charge or claim for it, furnishes ample evidence of a waiver of any claim, he might ever have had for it.

These charges, it seems, were first made and presented, after the evidence was closed on the main controversy between the parties. Charges made and presented under such circumstances ought not to be encouraged; and we think the auditor did "eminent justice" in disallowing them; and the judgment of the county court in accepting his report and rendering judgment for the defendant is affirmed.

TOWN OF THETFORD v. JOSIAH HUBBARD.

(*Orange*, March Term, 1850.)

Under the Revised Statutes, chap. 13, sec. 68, a town may sell the office of first constable at auction, in open town meeting, to the highest bidder, and, after having elected the purchaser to the office, may collect from him the amount of a promissory note, given by him for the price.

The statute,—Rev. St., c. 25, sec. 37,—which requires that exceptions, taken upon the trial of any case in the county court, shall be filed with the clerk within thirty days after the rising of the court, at which the judgment was rendered, has reference only to the final judgment in the case.

*441 *When a declaration in offset on book account is filed in the county court, the party may have judgment for the amount due to him at the time of the hearing before the auditor, notwithstanding a portion of his account accrued subsequently to the commencement of the principal suit. The statute,—Rev. St. c. 34, § 4,—which provides, that any sum, not due and payable at the commencement of the suit, shall not be pleaded in offset, has reference to the subject matter of the plea, whether contract, or book account. If any part of the account were due, at the commencement of the suit, the plea is sustained, and the whole account must be adjusted in the ordinary way.

Expenses incurred by an individual in support of a pauper, without the request of the overseer of the poor, cannot be recovered of the town, in which the pauper has his legal settlement.

A tender of a gross sum upon several demands, without designating the amount tendered upon each, is sufficient.

A demand of money tendered, in order to have the effect, if not complied with, to avoid the tender, must be of the precise sum tendered.

To a replication in offset, alleging that the defendant was indebted to the plaintiff in $200, and declaring in two counts, one upon a note for $200, and the other for $200 money had and received, the defendant rejoined a tender of $316,50. *Held*, that the two counts must be regarded as substantially for the same cause of action, and that so the rejoinder was of a tender sufficient to cover the whole replication;—but that, if the counts were to be held to set forth distinct and independent claims, a general rejoinder to the replication would be treated as a rejoinder of a tender upon each count of the replication, and that so the rejoinder was sufficient.

Assumpsit upon a promissory note for $16,50, dated April 1, 1844, and payable in one year from date. The action was commenced before a justice of the peace, and the defendant filed in offset there a claim upon book account, to the amount of more than $30,00. After judgment and appeal, the defendant pleaded in the county court the general issue, and also filed a declaration in offset upon book account, under Rev. St., chap. 34, sec. 8–11. Upon the declaration in offset judgment to account was rendered, and an auditor was appointed, who reported, that there was due from the plaintiffs to the defendant Hubbard the sum of $33,39. Of this sum $18,25 accrued subsequent to the commencement of this suit. Among the items which were disallowed of the defendant's account,
*442 *was a charge of $4,50, for services in effecting a settlement with Mrs. Percival, and a charge of $8,00 for boarding Mrs. Percival ten weeks, in reference to which it appeared, that Mrs. Percival was poor, and had her legal settlement in Thetford; that she desired the defendant to assist her about certain settlements, which must be made before she could leave Thetford, and he told her he would do so; that the defendant informed the overseer of the poor of her request, and he replied, that he wished he would assist her, and directed him to consult, if necessary, with the attorney who was engaged in the business of the town; and that the defendant, after some time and trouble, effected a settlement which was satisfactory to Mrs. Percival and the town of Thetford, and which was afterwards approved and closed by the town; that the overseer had been previously informed, that Mrs. Percival was in destitute circumstances and lived altogether on charity, and that he must take care of her, and, in the course of making the settlement above mentioned, he asked the defendant, if he could not let her come to his house and stay a few days; that the defendant said he could, and soon after brought her to his house; that the defendant was then absent from the state about ten weeks, during which time Mrs. Percival remained at his house,—but, as it seemed, contrary to his expectations; and that the town had at the time convenient accommodations for their poor, of which the defendant had knowledge. The plaintiffs objected to so much of the sum found due by the auditor, as accrued after the commencement of the principal suit; but the county court, December Term, 1848,—REDFIELD, J., presiding,—rendered judgment for the defendant, for the whole sum reported due by the auditor. Exceptions by both parties; but the plaintiffs' exceptions were not filed in the clerk's office until April 2, 1849. The case was tried by jury, at the June Term, 1849,—REDFIELD, J., presiding,—upon the general issue.

On trial the plaintiffs gave in evidence the note described in their declaration. The defendant then gave evidence tending to prove, that at the annual March meeting of the town of Thetford, in 1844, the office of first constable and collector was put up at auction, pursuant to a vote of the town, and was sold to the highest bidder; that the defendant was the highest bidder, and the office was sold to him *at the sum *443 of $16,50; that he was afterwards elected to the office by the town; and that the consideration of the note in suit was the sum so bid by the defendant for the office. It appeared, that the office was so put up at auction for the purpose of disposing of it in the best manner for the town, pursuant to the statute, or that that was the intention of the selectmen, by whose direction it was so sold. The office was put up for sale in open town meeting, and there were several bidders, of whom the defendant bid highest; and after the defendant's election, the town, at his request, voted to allow him to serve writs throughout the county. Upon these facts, the court directed the jury to return a verdict for the plaintiffs; and a verdict was returned for $20,71 damages. Exceptions by defendant.

The defendant then pleaded in offset the judgment recovered by him upon book account above mentioned. The plaintiffs replied an offset, alleging that the defendant was indebted to them "in a large sum of money, to wit, the sum of $200," and declaring in two counts,—one upon a promissory note for $200, dated February 7, 1837, and the other for $200 money had and received. The defendant rejoined, that after the making of the promises described in the two counts in the replication, and before the same were pleaded in offset, to wit, on the twenty seventh of December, 1848, he tendered to the plaintiffs $316,50, which they refused to receive; and that he had

ever been ready to pay the same to the plaintiffs, and that he brought the money into court; wherefore he prayed judgment, if the plaintiffs ought to maintain their aforesaid action against him. The plaintiffs filed their surrejoinder, in which they alleged, that after the making of the tender mentioned in the rejoinder, and before the filing of their replication, they demanded of the defendant "the sum of money due and owing on said note in said plaintiffs' replication mentioned," but the defendant refused to pay the same, or any part thereof, to the plaintiffs; and as to the second count in the replication, they alleged, that the defendant did not tender the money in that count mentioned, as alleged in the rejoinder;—and issue was joined. As to the first count in the replication, the defendant filed his rebutter, in which he alleged, that after the making of the promise, and before the pleading of the same in offset, he tendered to the plaintiffs the sum of
*444 $316,50 on the note *mentioned in that count "and two other notes," and the plaintiffs refused to receive the same; and that afterwards, when the plaintiffs demanded the sum of money due and owing upon the note mentioned in the first count, he offered and tendered to them the said sum of $316,50 on that note "and two other notes," and the plaintiffs refused to receive the same; and that the defendant had always been ready to pay the said sum of $316,50. To this the plaintiffs demurred. At the December Term, 1849,—REDFIELD, J., presiding,—the county court adjudged the rebutter sufficient, and, by consent, found the issue formed upon the surrejoinder, in reference to the tender upon the second count in the replication, in favor of the defendant; and judgment was rendered, that the defendant recover the balance of his set off over the damages recovered by the plaintiffs, being $14,06; to which decision the plaintiffs excepted.

A. Howard, Jr., and *J. W. D. Parker* for defendant.

The statute provides,—Rev. St. c. 13, § 63,—that "the inhabitants of any town shall have liberty to agree with some suitable person to fill the office of first constable, in such method as they shall judge most advantageous, and such person shall afterwards be chosen by the town." From the very terms the contract is one of a personal nature, that is, the town may select a suitable person and agree with him, and then the town shall choose him. This necessarily implies, that the suitableness of the person is first to be determined. Is not this mode of election in contravention of Part II, sec. 34, of the Constitution? and also of Part I, art. 8? The sale of office at public auction is against public policy. St. 5 & 6 Edw. VI, c. 16. 2 Steph. N. P. 1253. Cruise's Dig. 128. New York, by special enactment, and Maine and New Hampshire by their courts, have determined sales of office to be void and criminal. Meredith v. Ladd, 2 N. H. 517. Groton v. Waldoborough, 2 Fairf. 306. The charges in the defendant's account for expenses and services for Mrs. Percival should have been allowed. The services were rendered at the special instance of the overseer, and he bound the town. Wolcott v. Wolcott, 19 Vt. 37. Aldrich v. Londonderry, 5 *Vt. 441. *445 Castleton v. Miner, 8 Vt. 209. Washington v. Rising, Bravt. 188. Hutchinson v. Hutchinson, 19 Vt. 437. The objections to that portion of the defendant's account in offset, which accrued after the commencement of this action, are not well taken. Rev. St. 213, § 8; 220, § 9. Pratt v. Gallup, 7 Vt. 344. Wing v. Hurlburt, 15 Vt. 607. Learned v. Bellows, 8 Vt. 79. Ambler v. Bradley, 6 Vt. 119. Martin v. Fairbanks, 7 Vt. 97. The plaintiffs' exceptions to the judgment upon the book account were not seasonably filed. Rev. St. 164, § 37. Higbee v. Sutton et al., 14 Vt. 555. Shattuck v. Oakes, 14 Vt. 556. The rejoinder, setting forth the tender, is sufficient. Story's Plead. 156. 2 Sw. Dig. 615. 1 Ib. 295. Wade's Case, 5 Co. 114. The surrejoinder is insufficient. After the tender is admitted by the pleadings, a plea, setting forth a subsequent demand and refusal, must allege a demand of the exact sum specified as having been tendered. Spybey v. Hide, 1 Camp. 181. 3 Steph. N. P. 2607, 2609. 2 Greenl. Ev. 500, § 608. 5 Dane's Abr. 485.

Hebard & Martin for plaintiffs.

There is no equity in the defence to the note. The defendant has had all he expected, and there was no deception in the transaction. There is nothing against public policy in the transaction; it has none of the characteristics of a wagering contract. The statute authorizes precisely such a proceeding as this; and a statute is not to be held unconstitutional on the ground of policy. So much of the defendant's account, as accrued after the service of the writ in this action, should have been disallowed as an offset. The subject of offsets is statutory regulation, and not a common law right. The statute,—Rev. St. 212, § 1,—provides generally for offsets; section 4 makes the exception of matters which cannot be pleaded in offset,—one of which is, "Any sum not due and payable before the service of the original writ in the action." Without a farther provision, no part of this account could be set off. By sec. 8 and 9 so much of the account, as is not excluded by sec. 4, may be audited and applied in offset; but the proceedings under sec. 8 and 9 are subject to and controlled by sec. 1 and 4. Sec. 9 of chap. 36.—Rev. St. 220.—applies only to cases, in which the original action is upon book account. *The rejoinder is insufficient. *446 It does not allege the purpose, for which the money was tendered,—whether upon the note, or upon the money due as alleged in the second count. It does not allege, that it was the full amount due from the defendant to the plaintiffs. In the replication the plaintiffs demand $400, and the defendant should either have tendered sufficient to cover the claim upon the face, or have averred in his plea, that the sum tendered was the full sum due. The conclusion is bad; it concludes in bar of the action, whereas it should conclude in bar of the recovery of farther damages. 3 Steph. N. P. 2607. 1 Chit. Pl. 539. 3 Ib. 922. The surrejoinder is sufficient. The plain-

tiffs were not bound, in this form and state of the pleadings, to aver that they demanded the precise sum tendered. The note described in the replication was a separate and independent cause of action. The plaintiffs had a right to demand payment of that, without the others, since they had not put the others in suit; and when demanded, it was the defendant's duty to pay. 1 Chit. Pl. 581. The plea does not allege, that the tender was upon this note, and the sum tendered does not correspond with the note. The plaintiffs had no right to demand the whole sum tendered, as there was not so much due upon the note. The rebutter is insufficient; it sets forth two tenders, on two different occasions; the facts, if true, should have been given in evidence under a traverse of the demand and refusal; it does not answer what it purports to answer; it does not describe the "two other notes," nor aver, that they were notes held by the plaintiffs, nor due and owing to them.

The opinion of the court was delivered by

REDFIELD, J. The first question made in the present case is in regard to the validity of the defendant's note, given to the town for the price of the office of constable, which was set up at auction in open town meeting and sold to the highest bidder, the defendant, for $16,50, for which he gave the note in suit.

It is claimed, that this note is void, the consideration being illegal, or for the price of a thing, the sale of which the law will not countenance. In the absence of all statute law upon the subject, I should incline to the same view. I think, that the open and unblushing sale of offices, at public auction, is more detrimental *447 to *public morals and public taste, and more subversive of the rights and liberty of the citizen, than when the same thing is accomplished in a more indirect and circuitous mode;—which will always be more or less the case, no doubt, in free governments. But we trust, that the open sale of offices, for a specified sum of money, told down, as the price of the bribe, will not soon become general. But if the legislature should pass a law, making all offices venal, from the lowest to the highest, it is not easy to say, that securities for the price would not be perfectly valid. So, too, if the legislature legalizes prostitution, gambling, or any other immorality, it is difficult to say, how the courts could pronounce the laws invalid upon any supposed ground of public policy, which would not equally subject all laws to the same ordeal, and virtually make the judiciary a co-ordinate branch of the legislature.

The validity of this note, then, depends upon the fair construction of the statute upon this subject,—Rev. St. 93, § 63,—which provides, that "The inhabitants of any town shall have liberty to agree with some suitable person to fill the office of first constable, in such method as they shall judge most advantageous, and such person shall afterwards be chosen by the town." Here it is expressly provided, that the inhabitants of any town may make such bargain in regard to this office, as they shall deem most advantageous; the office may be sold, or bought. The mode of sale, then, whether at public auction, or not, is mere matter of convenience, or taste,—the essence of the thing is, whether the office may be sold, or farmed out. Upon this subject the statute is too explicit, and the practical construction has been too long and uniformly in favor of such a construction, to be now brought in question. And we think, the practice of putting the office up at public auction has not been without frequent and early precedents, in some sections of the state. And we see no objection to the mode. Every voter is to be esteemed competent to discharge the duties of any office, to which he can obtain an election; the only other requisite qualification for this office, under our statute, is that he will give the highest price for the office. This will best be determined by bidding, and he must then be regularly instituted into the office, by an election,—which two things, paying the highest price, and getting the greatest *number of votes, estops every *448 one from denying, that he is the most suitable person for the office.

We next have questions upon both sides, in regard to the correctness of the judgment rendered upon the report.

1. It is claimed, that the plaintiffs' exceptions are waived, because they were not filed within thirty days after the rising of the court, at which the judgment was rendered. But we think, the provision of the statute in regard to that matter has reference only to the final judgment in the case. It is obvious, that all the provisions of the statute can only apply to such a judgment, —for instance, that in regard to the clerk striking off the entry of exceptions, and issuing execution. The evil to be remedied under the former law, the releasing of bail and attachments by delay of entering exceptions, had no application to any interlocutory judgment. The statute was enacted chiefly, we think, to enable the party prevailing to have some certain rule, by which he might know, when he was entitled to execution. This has been so decided before by this court.

2. It is claimed, that all that portion of the account, which accrued subsequent to the bringing of the suit, cannot come into the plea of set off, because the statute provides, that no sum, not due and owing at the commencement of the suit, shall be pleaded in offset. But we think, this provision has reference to the subject matter of the plea, whether contract, or book account. If so due, that an action could be maintained upon it contemporaneously with the principal action, then it may be pleaded in offset. If none of the account were due, the plea must fail. But if any part were due, the plea is sustained, and the whole account must be adjusted, in the ordinary way, as is expressly provided. An account is an entire thing, and cannot be subdivided into parcels. The obligation is only to pay the balance; and if pleadable at all, it must be for the balance.

3. The items of account for keeping Mrs. Percival were correctly rejected. The auditor does not find any contract between the defendant and the overseer for pay for

keeping this person. She was not an acknowledged pauper; and the facts reported show, that the overseer did not intend to so regard her. Perhaps he should have so regarded her; but we cannot go beyond the facts.

*449 *In regard to the plaintiffs' replication in offset, two general questions are raised;—1. In regard to the merits of that claim, upon the general facts, as they are disclosed upon the record;—2. As to the forms of the pleading.

The first is doubtless the more important inquiry. For as the facts seem to be admitted to be substantially set forth upon the record, whichever party fails in the substantial merits, upon this point, must ultimately fail in the suit, and be cast in the general costs of the litigation. As mere defects in the forms of pleading may always be amended upon terms, even in this court, unless in dilatory pleas, that question becomes of less ultimate importance.

1. Upon the question, whether the tender was sufficient, we think the case is with the defendant. I at first entertained doubts, whether it was competent to plead a gross sum to several demands, but no question of the kind is made in the argument; and in looking into the books upon pleading, and the precedents, I am satisfied the plea is good in this respect. In 3 Steph. N. P. 2001, it is said, a tender of a gross sum to several creditors, if they refuse it generally, is good. Black v. Smith, Peake 121. This may not be sound law; but the precedents all show, that a defendant may plead, generally, tender to several counts for different demands; and if so, he may surely make the tender in that mode.

2. There seems to be no question whatever, from the authorities, that a demand, to avoid the tender, must be of the precise sum tendered; and if of a different sum, the debtor is not bound to regard it.

As to the form of the plea of tender, we have entertained more doubt; but have not been able to find any defect, clearly fatal upon general demurrer. 1. The replication in offset is in two counts, substantially for the same cause, and would no doubt be so regarded, upon a question of jurisdiction before a justice, whether upon the point of the final or ultimate jurisdiction. 2. It seems to have been so regarded by the parties to this suit; as they have made no account whatever of the second count. 3. But if the counts were obviously for distinct and independent claims, a general plea of tender to the whole declaration is to be treated as a tender upon each count, and the debtor may, in proof, apply it to either count. PATTESON, J., in Robinson v. Ward et al., 8 Ad. & E., N. S., *450 [55 *E. C. L.,] 920, "If there were a general plea of tender to three special counts, the contract in each count would be admitted." Bulwer v. Horne, 4 B. & Ad. 132. Douglas et al. v. Patrick, 3 T. R. 683.

This disposes of the only serious question we have had,—whether the amount tendered was sufficient to cover the whole declaration. The other defects in the plea are, we think, merely formal, and not fatal upon general demurrer.

Judgment affirmed.

ASA S. MATTOON v. ANSEL MATTOON.

(*Orange*, March Term, 1850.)

A defendant, in a suit before a justice of the peace, who does not attend the trial, can only tax for travel within this state. No party, in any court in this state, is allowed to tax for travel beyond the limits of the state.

Assumpsit. The action was commenced before a justice of the peace, and a trial was had and judgment rendered for the plaintiff, and the defendant appealed; and at the same time the justice taxed the defendant's costs, and allowed him for travel from his residence in Ohio, eight hundred miles, $40,00. The defendant did not attend at the trial, and had made no actual travel in consequence of the suit. In the county court the plaintiff became nonsuit, and the defendant then claimed to be allowed his costs, as taxed by the justice. The plaintiff claimed, that the defendant was only entitled to one dollar for his travel. It was agreed by the defendant's counsel, that the case, for taxing said cost, was regularly before the court. The county court, December Term, 1848,—REDFIELD, J., presiding,—allowed the defendant cost, as taxed by the justice. Exceptions by plaintiff.

Hebard & Martin for plaintiff.

L. B. Vilas for defendant.

*BY THE COURT. The judgment is *451 reversed, and the defendant is allowed to tax travel only within this state, in analogy to the rule of taxing costs for the parties in other courts of the state.—no account being taken of travel out of the state. And although the statute, in regard to the costs of parties in justice courts, does not in terms restrict the costs of the defendant, or of the plaintiff, when he actually attends in court, still it is to be understood, that no party, in any court in this state, is to tax for travel beyond the limits of the state. It may admit of doubt, whether the defendant in a justice court can be allowed to tax more costs, when he does not attend in person, than what is allowed him in the county and supreme courts; but it does not seem easy to come at such a result under the existing statutes.

EDWARD DOUGLASS v. HALL & PALMER.

(*Orange*, March Term, 1850.)

The firm of Carter, Coolidge & Co., a partnership consisting of Carter, Coolidge and Childs, was dissolved by the death of Coolidge. Subsequently the defendants executed a promissory note, which was made payable "to the late firm of Carter, Coolidge & Co." Childs sold his interest in the note to Carter, and then Carter indorsed the note, without recourse, in the name of Carter, Coolidge & Co., to the plaintiff. *Held*, that the plaintiff thereby acquired the legal interest in the note, and might sustain an action thereon in his own name, as indorsee.

Assumpsit upon a promissory note for $650,11, executed by the defendants, dated January 18, 1843, and made payable "to the late firm of Carter, Coolidge & Co., or order." At the date of this note there was no such firm in existence as Carter, Coolidge & Co. There had been such a firm, in Boston, consisting of Carter, Coolidge and one Childs, but it had been dissolved by the death of Coolidge. Immediately after

the execution of the note Childs sold his interest in the note to Carter, and Carter afterwards transferred the note to the plaintiff, by indorsement, without recourse, in the name of Carter, Coolidge & Co. Upon these facts the county court, June Term, 1849,—REDFIELD, J., presiding,—rendered judgment for the plaintiff. Exceptions by defendants.

*452 *Peck & Colby* for defendants.

If the note had been delivered to Carter, Coolidge & Co. before the dissolution of the firm, the indorsement by Carter after the dissolution would have been void; and the delivery afterwards only lessens his right to indorse for the firm. Sanford v. Mickles, 4 Johns. 224. Abel v. Sutton, 3 Esp. R. 108. Parker v. Macomber, 18 Pick. 507. Chit. on Bills 50-52. Torrey v. Baxter, 13 Vt. 457. If any party is payee, it is Carter, Coolidge & Co.; U. S. Bank v. Lyman et al., 20 Vt. 668; and Carter having no authority to use that name, the indorsement is invalid. If this be held virtually a note payable to the two surviving partners, it is merely evidence of indebtedness to them in that capacity, as trustees of the firm. But if negotiable, both must indorse, and the sale without indorsement by one to the other confers no right to indorse the name of both. Goddard v. Lyman, 14 Pick. 270. Russell v. Swan, 16 Mass. 316. Carvick v. Vickery, 2 Doug. 653. Smith v. Whiting, 9 Mass. 334.

Hebard & Martin for plaintiff.

The doctrine, that one partner, after dissolution, cannot indorse a note, applies between partners, and not between the maker and indorsee. The controversy in this case is not between the different partners, in relation to the authority of one to indorse the note so as to bind the others. The note was indorsed without recourse, so that that question cannot arise. McPherson v. Rathbone, 11 Wend. 96. Yale v. Eames, 1 Metc. 486. It was indorsed in fact by the person who had the sole interest in the note, and one of the persons named as partners and payees in the note. If any authority is wanting from the other partners, the law will infer it, in a case where the indorser is the sole owner of the note. Chit. on Bills 53. Eaton v. Taylor, 10 Mass. 54. Graves v. Merry, 6 Cow. 701. This is but a transfer of interest, which one partner may make by his own indorsement. Snelling v. Boyd, 5 T. B. Monroe 172. Torrey v. Baxter, 13 Vt. 452. Woodworth v. Downer, 13 Vt. 522. Lewis v. Reilly et al., 41 E. C. L. 572. Yale v. Eames, 1 Metc. 486. 1 Dane's Abr. 387.

*453 *The opinion of the court was delivered by

POLAND, J. 1. The note upon which the suit is founded, being made payable to the late firm of Carter, Coolidge & Co., after the death of Coolidge, is to be considered as legally payable to the surviving partners of the firm, Carter and Childs, by the name of Carter, Coolidge & Co.

2. The note, being made payable in terms to Carter, Coolidge & Co., or order, might be legally indorsed, by the same name, by any person who had the legal right and authority to make a transfer of the note.

3. Had Carter authority to make the indorsement? The firm of Carter, Coolidge & Co. had been dissolved by the death of Coolidge, and Carter and Childs not being partners, Carter had no authority, as a partner, to make the indorsement. He and Childs are to be considered as joint payees of the note. The case finds, that Childs had sold all his interest in the note to Carter, and that Carter had the sole and exclusive ownership of the note. He, therefore, being the owner, had the exclusive right to make a sale of the note; and the question arises, could he transfer the legal interest by indorsement? This, it is to be remembered, is to be considered as a question of his authority to transfer merely, and not as to his right to make an indorsement to create any obligation to bind Childs,—for that he clearly could not do.

Mr. Chitty says,—"With respect to the person, who may transfer a bill, or note, whoever has the absolute property may assign it, if payable to order." Chitty on Bills 197. In the case of Carvick v. Vickery, 2 Doug. 653, note 134, it was held, that when a bill was drawn by father and son, who were not partners, payable to their own order, and indorsed by the son alone, it was a valid indorsement; and it was said, that, by making the bill payable to their own order, the father and son had made themselves partners as to that transaction. This case carries the doctrine much farther, than is necessary to sustain the indorsement in this case, and farther, we apprehend, than any other case has done; at least we find none, that goes to the same extent. The case of Lewis v. Reilly & Watson, 1 A. & E., N. S., 347, [41 E. C. L. 572,] was an action against the defendants, as drawers of a bill of exchange, payable to their own order, by the plaintiff, as indorsee. The defendants were part- *454 *ners when the bill was drawn; but it was indorsed to the plaintiff by Watson alone, in the partnership name, after a dissolution of the partnership. The case went to a jury upon an issue, whether the plaintiff, at the time of taking the bill, had notice of the dissolution; and the jury gave a verdict for the defendant Reilly,—the other defendant, Watson, having suffered judgment by default. On a motion for judgment *non obstante veredicto*, the court made the rule absolute; and Lord DENMAN said, "It is, perhaps, doing no violence to language to say, that the partnership could not be dissolved, as to this bill, so as to prevent it from being indorsed by either defendant, in the name of the firm;" and PATTESON, J., said, in the same case, "If the bill was duly drawn by the defendants, when partners, which is here admitted, it continued to be their joint property, after the partnership was dissolved, and might therefore properly be indorsed in their joint names."

The case of Yale v. Eames et al., 1 Met. 486, was an action by an indorsee against the maker of a promissory note. The note was made payable to the firm of Gay & Bird, or order, during their partnership, and continued their property until after their dissolution. The plaintiff applied to one of them to purchase the note, and made

him an offer for it, in the absence of the other. The one applied to afterwards consulted with the other partner, and he consented to the sale of the note on the terms offered; but nothing was said about indorsing it. The one first applied to then sold the note to the plaintiff, and indorsed it in the name of the late firm, "without recourse." The court there held, that this was a valid indorsement of the note to the plaintiff, and that, as one had thus an authority to sell the note, the right to make a legal transfer was to be inferred, as an incident.

In this case Childs, previous to the indorsement of the note, had sold all his interest in the note to Carter; so that Carter had the exclusive right of control over the note, and, by the well established doctrine, he had the right to make use of the name of Childs for the purpose of enforcing the collection of the note, even against his will and without any consent. By selling his interest in the note to Carter, Childs certainly gave as much consent, that he might dispose of the note, as if he had merely given his consent to a sale of it; and if the right to use his name, for the purpose of *455 transferring *the legal interest merely, may be inferred as an incident in the one case, we see no reason, why it may not, with equal propriety, be inferred in the other;—and as Carter had, by the sale from Childs, acquired the exclusive right to receive payment of this note, or to dispose of it, we see no impropriety in allowing him to use the name of Childs for that purpose. Childs certainly could not be injured by it, as Carter could impose no liability upon him by his indorsement; and the defendants have no cause of complaint, as their liability is not thereby in any way affected. This view of the case seems to be well supported by the case of Yale v. Eames et al., and we think that decision is founded in good sense and reason.

The judgment of the county court is therefore affirmed.

RICHARD DOWNING v. PERLEY ROBERTS.

(*Orange*, March Term, 1850.)

Where a case was appealed from a justice of the peace to the county court by the plaintiff, and was carried by the plaintiff, upon exceptions, to the supreme court, and judgment was reversed, and final judgment was rendered in the county court for the plaintiff, for a sum less than all his costs, it was held, that he was entitled to an amount of costs equal to his damages, and to his costs in the supreme court, in addition thereto. It makes no difference, in this respect, whether a case passes to the supreme court upon exceptions, or by a writ of error.

This case came to the county court by appeal from the judgment of a justice of the peace, taken by the plaintiff, and was carried by the plaintiff, upon exceptions, to the supreme court, and the judgment of the county court was there reversed, and final judgment was rendered for the plaintiff in the county court, but for a sum less than all his costs; and the county court, June Term, 1849,—REDFIELD, J., presiding,—decided, that the plaintiff was entitled to an amount of costs equal to his damages, and his costs in the supreme court in addition thereto. Exceptions by defendant.

Hebard & Martin for defendant.

The plaintiff can recover no more costs than damages. Rev. St. *c. 106, §§ 17, 20. The case of Baker v. Blodget, 1 *456 Vt. 141, upon which the plaintiff relies, went to the supreme court by writ of error; the case at bar went up on exceptions. The writ of error is in the nature of a new suit; it gives a new jurisdiction, fully competent to the taxation of costs, as well as the affirming or reversing the judgment of the county court. A bill of exceptions gives no new jurisdiction; it is in the nature of an appeal from the county court upon a question of law apparent upon the record. Barlow v. Burr, 1 Vt. 488. The case of Pollard v. Wheelock, 20 Vt. 370, does not apply to the case at bar. That was a case commenced in the county court, and the costs in no way depended upon the amount of damages.

J. L. Buck for plaintiff.

The question of costs in the supreme court is not affected by any law, restricting costs in any inferior court. The proceedings upon exceptions are regarded as a distinct matter, beginning and ending in itself, and in no way dependent on the amount of costs below, or the final determination of the suit. Pollard v. Wheelock, 20 Vt. 370. Wheelock, Adm'r, v. Wheelock, 5 Vt. 433. Ellenwood v. Parker, 3 Vt. 65. Preston v. Whitcomb, 17 Vt. 183.

The opinion of the court was delivered by

KELLOGG, J. The only question raised in this case is in relation to the decision of the county court allowing to the plaintiff his taxable costs in the supreme court. The defendant insists, that the decision was erroneous,—that, under the circumstances of the case, the plaintiff's costs should have been limited to the amount of his damages.

The statute provides, "that in actions commenced before a justice, the plaintiff shall recover no more cost than debt, or damages, except costs that may accrue from continuances at the request of the defendant, or in case the defendant shall appeal to the county court. Notwithstanding the restrictions contained in the statute of 1828, it was held by this court, in Baker v. Blodget, 1 Vt. 141, that the plaintiff, who succeeded upon a writ of error and finally recovered in the suit, was entitled to his costs upon the writ of error, without reference to the amount of his damages. That case was similar in principle to the present. The statute of 1828, *restricting *457 costs in suits appealed from justices of the peace, and which was then in force, was substantially the same as the present law. The only difference between the case of Baker v. Blodget and the present is, that in the former the proceeding in the supreme court was by writ of error, and in the latter by exceptions taken upon the trial, pursuant to the existing statute. This difference has been supposed, and so urged at the argument, to be sufficient to warrant a different rule in the taxation of the costs. But this position, we think, cannot be sustained upon principle. The present mode of removing cases by exceptions into the su-

preme court was adopted, to save the necessity of resorting to a writ of error, and thereby saving to suitors unnecessary expense. The object in both cases is the same,—to correct the errors of the court below. And we are unable to perceive, why the recovering party should not recover his cost in the supreme court, without regard to his damages, in one case, as well as the other. It is true, that the learned judge, who delivered the opinion of the court in Barlow v. Burr, 1 Vt. 488, remarked, that there was a difference between a case carried up by exceptions and one by writ of error,—that in one case cost might be allowed, while in the other it must be denied. The case called for no such distinction, and we are not satisfied, that such distinction exists. It was an appeal from a justice of the peace, and the county court dismissed the suit, on the ground that the justice had no jurisdiction, and that decision was affirmed by the supreme court, and they held, that, as the court had no jurisdiction of the suit, they could not allow costs, but the party must be left, in such case, to his common law remedy by suit, to recover his cost. The case of Baker v. Blodget is in point, and we think decisive of the present case.

Judgment of the county court affirmed.

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*458 *ABEL WILLARD v. TOWN OF NEWBURY.

(*Orange*, March Term, 1850.)

The location of a rail road across a public highway, in pursuance of the power conferred by the charter of the rail road company, does not, while the rail road is in process of construction at that point, operate a discontinuance of the highway, but only a temporary suspension of the use.

The town, in such case, during the temporary obstruction of the highway by the construction of the railroad, must provide a suitable by-way for the public, and use all proper and reasonable precautions, to prevent travellers from passing upon the highway, while it remains unsafe.

The obligations imposed upon the Connecticut and Passumpsic Rivers Rail Road Company, by their charter, in the construction of their rail road across public highways, do not absolve the town, in which there is a highway, across which the railroad is located, from its duties and liabilities to the public;†—those continue obligatory upon the town, so long as the public highway remains such.

The question, whether a town has been guilty of want of ordinary care and diligence, in reference to the sufficiency of a public highway, is one of fact, to be determined by the jury.

In this case a rail road corporation located their road, in pursuance of their charter, across a public highway in the town of Newbury, and, in the process of constructing their road, made an excavation across the highway; both the corporation and the town took some measures to prevent travellers from passing over the highway, while it was thus unsafe; but, the jury having found a want of ordinary care and diligence on the part of the town, in this respect, a traveller, who, without fault on his part, suffered injury in consequence of the obstruction of the highway by the corporation, was held entitled to recover damages of the town therefor.

*Trespass on the case for an injury *459 sustained by reason of the insufficiency of a public highway. Plea, the general issue, and trial by jury, June Term, 1849.—REDFIELD, J., presiding. On trial the plaintiff gave evidence tending to prove, that there was an ancient highway in the town of Newbury, passing upon a ridge of land, with a descent on each side of thirty feet, or more; that the road was about twenty five feet in width; that the Connecticut and Passumpsic Rivers Rail Road Company located their rail road across said highway, and, in its construction, had made an excavation across the highway, thereby preventing all travel thereon; that north of the excavation, for six or eight rods, the company had placed in the highway a quantity of large blocks of granite, for the purpose of constructing an arch, by means of which travellers on the highway might pass over the railroad; that the company, previous to making the excavation, had made a convenient by-way for the public travel, to the acceptance of the selectmen of the town, by repairing an old road, not previously much used; that this by-way diverged from the highway about half a mile from the excavation, the curve of the two roads, at the point of divergence, being about equal; that before the company commenced their excavation, they erected timbers across the highway, some rods north of the excavation, so as to intercept all travel, which they kept there most of the time, until the injury occurred to the plaintiff, and until the highway was filled with blocks of stone, as before stated; that the plaintiff, coming from the north, with a horse and wagon, in a dark night, and having been a few years previously familiar with the road, and not knowing of any alteration, passed south, over the highway, and, as he approached the blocks of granite, his horse inclined to the east side of the road, to avoid the granite, and finally stopped; and that the plaintiff urged his horse forward, when the horse sprung to the west, to avoid going off the bank on the east side, by which movement the hind wheels of the wagon ran off the bank on the east side, and, with the body, separated from the forward wheels and went down the declivity, injuring the plaintiff. The defendants gave evidence tending to prove, that, before the travel upon the highway was interrupted, they placed a guide board at the point where the by-way diverged, directing travellers to that road, and also placed a pole

†The charter provides, that "If the said road shall, in the course thereof, cross any canal, turnpike, or other highway, the said road shall be so constructed, as not to impede, or obstruct, the convenient use of such canal, turnpike, or other highway; and the said corporation shall have the power to raise or lower such turnpike, highway, or private way, so that the said rail road, if necessary, may conveniently pass under or over the same; and if said corporation shall raise or lower any such turnpike, highway, or private way, pursuant thereto, and shall not so raise or lower the same, as to be satisfactory to the proprietors of such turnpike, or to the selectmen of the town in which said highway or private way may be situate, as the case may be, said proprietors, or selectmen, may require, in writing, of said corporation, such alteration, or amendment, as they may think necessary;" and then follows a provision for redress, in case the corporation shall not comply with such requirement. Acts of 1835, page 95.

across the highway, at the same
*460 point, *elevated some feet above the surface of the road, which was kept up at all times, both night and day, so far as it was in the power of the officers of the town to do so; but it appeared, that this pole would be occasionally removed, and probably by persons who travelled the highway. The defendants also gave evidence tending to prove, that several families lived on the highway, between the point, where the by-way diverged, and the excavation,—one family living about fifteen rods north of the excavation, and that there was no way, in which they could travel from their dwellings to other parts of the town, except to pass north, over the highway; and that for this reason no permanent obstruction was placed across the highway, where the guide board was erected; and the evidence tended to prove, that if the rail road company had kept the timbers across the highway, where they first erected them, or if they had erected a barrier north of the place where they obstructed the road by the blocks of granite, the injury would not have happened to the plaintiff. It appeared, that there was no dwelling house between the place where the rail road company placed their obstruction and the excavation, and that it was necessary for the men to remove this barrier, which consisted of hewn timber, in order to draw the granite to the place where it was to be deposited, and that from this cause the barrier was frequently left down through the night, and that it was so left down, at the time the plaintiff was injured; and that the granite blocks, near to the excavation, were so placed, as nearly to cover the surface of the highway, but that near the barrier the road was but little obstructed by them. The defendants requested the court to charge the jury, that the rail road company had the right, under their charter, to make the excavation above mentioned, and to obstruct the highway, so far as was necessary, to enable them to construct their road; but that it was the duty of the company to protect the public, as well as the town, against the consequences of their acts; and that, if the plaintiff was injured by reason of want of due care on their part, his remedy was against the company; and that, under the circumstances of this case, the plaintiff could not recover against the town, but should have brought his action against the company. The court instructed the jury, that, the general laws of the state having imposed upon towns the duty of keeping the roads
*461 in repair, *those who had occasion to travel had a right to expect of them the performance of that duty, so far as it could be performed, by common care and diligence; that the fact, that the rail road company had a right, by their charter, to make an excavation across the highway, would not relieve the town from the obligation to exercise reasonable care and watchfulness, to see that the public had a proper by-way to pass around the excavation, and that proper obstructions were placed and kept up, to divert the travel from the highway, where it was rendered dangerous by the rail road company, so far as this could be done by common care and diligence; and that, if the town intrusted this to the rail road company, and they omitted to do it faithfully, whereby injury occurred to the plaintiff, and he was himself guilty of no want of common care, the town were liable to the plaintiff, and he was not obliged to look to the company, even if they had also been negligent, and might so have become liable to any one suffering injury on that account. Verdict for plaintiff. Exceptions by defendants.

Peck & Colby for defendants.

The case shows, that the town were in no fault. All the means were used, to divert travel from the highway, which could reasonably be required. Permanent obstructions would be impossible, which would preclude several families from communication with the rest of the town. Was not the road so far discontinued temporarily by the act of the town in placing the guide board and adopting the new road, built by the company as a substitute, as to shield the town from liability? Tinker v. Russell, 14 Pick. 279. The rail road company may have been negligent, and yet the town not at all so. The case contains no evidence, that the town relied upon the rail road company to maintain a barrier, or furnish a by-way. The by-way was adopted by the selectmen, the guide board was placed by them, and the pole across the highway. It is true, the company had placed timber across the road, before they began the excavation, and it appears, that it was kept in place almost constantly. The town merely relied upon the timber being allowed to remain in its position; and they had a right to rely upon this; as the timber was placed by the company for the protection *of the public, the town had a *462
right to rely upon it, that neither the company, nor any other person using the road, would leave the barrier down. It would have been precisely the same, if the town had placed the barrier; the company might still have left it down and this accident have happened. The company had a right to pass and repass there, in prosecuting their work, and so to remove the barrier, whether placed by the town, or the company; and there is no reason, why it was not equally prudent to rely on this barrier, as to erect another, when it was known, that the company could place and replace it at their option. The suit should have been commenced against the company. Their charter provides, that they shall so construct their road, as not to obstruct the safe and convenient use of the highway. Neglect of this duty would give a right of action to the party injured, against the company. Why should the town be held liable? The charter shifts the obligation to repair to the company; and it is not merely useless circuity of action, to sustain this recovery, and to require the town to seek redress of the company; there is great reason to doubt the right of the town, after a verdict against them, to recover of the company. The town is not liable for the fault of the company, as a master for his servant; and the law does not recognize a several liability in two principals, who are unconnected. Quarman v. Burnett et al.,

6 M. & W. 497. Rapson v. Cubitt, 9 Ib. 710. Sotne v. Cartwright, 6 T. R. 411. Laugher v. Pointer, 5 B. & C. 547. Nicholson v. Mounsey, 15 East 384. Brown v. Lent, 20 Vt. 529. Lane v. Cotton, 12 Mod. 472. But a recovery here will shield the company,—the party really in fault. The town cannot recover of them. After a judgment against the town, the parties are *in pari delicto*. Holman v. Johnson, Cowp. 343. Morck v. Abel, 3 B. & P. 38. Griswold v. Waddington, 16 Johns. 487. Harlow v. Humiston, 6 Cow. 189. Peck v. Ellis, 2 Johns. Ch. R. 137. Drew v. New River Co., 6 C. & P. 754. Smith v. Smith, 2 Pick. 621. Butterfield v. Forrester, 11 East 60.

Tracy, Converse & Barrett for plaintiff.

The rail road company had the right to make the excavation; but did that excuse the town from all care in relation to the highway? The town are liable for all damages happening upon roads, which *463 *they are "bound to keep in repair." Rev. St. 139, § 26. They are bound to keep in repair all public highways within the town. The right of the company to make their road across the road in question did not take away its character as a highway. It only gave a right to use it for a particular purpose, for a short time, thereby temporarily interrupting the ordinary use of it. The company are amenable to the town. The selectmen have the subject under their control; individuals have no such control. To hold that towns are under no obligation to the traveller, in cases like the present, would be to remove the principal if not the only guaranty of safety to his person and property. The case of Currier v. Lowell, 16 Pick. 170, is directly in point. Rev. St. of Mass. 246, § 22. 6 Pick. 59. 13 Ib. 94. Sec. 11 of the charter of the Boston & Lowell Rail Road Company is identical with sec. 14 of the charter of the Conn. & Pass. Rivers Rail Road Co. The decision in Currier v. Lowell was recognized as sound law in Lowell v. Boston & Lowell R. R. Co., 23 Pick. 24, where the town of Lowell was allowed to recover from the rail road company the single damages recovered in Currier v. Lowell.

The opinion of the court was delivered by

KELLOGG, J. Upon the trial in the court below, the court refused to instruct the jury in the manner requested by the defendant, and by reason of such refusal the case is brought here for the consideration of this court. These requests lead to an inquiry as to the duty and liability of the town to take and continue the necessary measures to guard and protect the public against injury upon the road in question, while the rail road was being constructed at that place, and until the highway was restored to its former condition. That the road was a public highway is not controverted; and consequently the town was bound by law to maintain it. It has, indeed, been said, that the grant to the rail road company, authorizing them to lay their track across the highway and to make all necessary excavations, was a virtual discontinuance of the highway at this place, and consequently that the town was relieved, as to that part of the road, of all responsibility. No authorities are produced, and it is believed that none are to be found, to sustain this position. It is quite evident, that a discontinuance of the road was not necessary *to the enjoyment of the rights *464 secured to the rail road company, and that such discontinuance was never contemplated by the company, or the town. For the rail road company only found it necessary to cross the highway at this point; and although this might interrupt public travel, while the rail road track was being constructed, yet it would not amount to a discontinuance of the road. Such interruption, however, was but a temporary suspension of the use of the highway, and not a discontinuance of the road. It might as well be urged, that every highway, which is temporarily obstructed, so as to be impassable, or unsafe, is thereby discontinued. Inasmuch, then, as the road remained a public highway, the duty and obligation of the town continued,—not, however, to keep the road at this place passable at all times, for this might be impracticable, while the rail road was being constructed; but we think the town was bound, during the interruption of the travel by the construction of the rail road, to see, that a suitable by-way was provided by the public, and to take all proper and reasonable precautions to guard them against passing upon the highway, while it remained unsafe by reason of the operations of the rail road company in the construction of their road.

Equally untenable is the ground assumed by the defendants, that the obligations imposed upon the rail road company, by the charter, in the construction of their road across public highways, absolve the town from its duties and liabilities to the public. That duty still remains obligatory upon the town, so long as the road continues a public highway. This view is fully sustained by the case of Currier v. Lowell, 16 Pick. 170, which is almost identical with the case at bar; and with the law of that case we are entirely satisfied.

It has been urged, that if the town is held liable to the plaintiff, it will do great injustice, inasmuch as it may deprive the defendants of all remedy against the rail road company. If this were true, it would be no sufficient reason for denying to the plaintiff a right, clearly secured to him by law. If the law give the plaintiff a remedy for the injury he has sustained, against either the rail road company, or the town, at his election, the court have no power to deny him that right. If, however, the plaintiff's remedy against the town were doubtful, and the remedy against the rail road company *unquestionable, the court *465 might, perhaps, be justified in remitting the party to the latter remedy. But we entertain no such doubt.

And we are inclined to think, the supposition, that, if the plaintiff recover of the town, the town will thereby be deprived of a remedy against the rail road company, is not well founded in law. In Lowell v. Boston & Lowell R. R. Co., which was a suit founded upon the provisions of a charter similar to the charter of the Pass. & Conn. Rivers Rail Road Co., and in a case very similar to the present, the

town were held entitled to recover the amount, which they had been compelled to pay for an injury occasioned by the rail road company, by obstructing the highway in the construction of their rail road. 23 Pick. 24. This decision seems to us to be founded in reason, and is directly in point.

But it has been urged in argument, that, upon the facts reported, the plaintiff is not entitled to recover. This depends upon whether the evidence discloses a want of ordinary care and diligence on the part of the town, to guard and protect the public against injury, resulting from the state and condition of the road. This was a question of fact, for the consideration of the jury, and which the jury have found in favor of the plaintiff. And this question, we think, was properly submitted to the jury, and under suitable instructions from the court below. Consequently their finding upon this question must be conclusive upon the parties. For it is obvious, the evidence tended to show, that the town were not using that reasonable care, which was necessary to warn the traveller of the unsafe condition of the road, and which, had they done, the injury now complained of would not have occurred. If the jury believed this evidence, (and doubtless they did,) it justifies their verdict.

We discover no error in the judgment of the county court, and the same is therefore affirmed.

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*466 *CYRUS J. S. SCOTT v. ROBERT MORSE AND TIMOTHY MORSE.

(*Orange*, March Term, 1850.)

The plaintiff, March 9, 1846, bargained to purchase of the defendant a quantity of pine timber, then lying upon the bank of a river, and which the parties expected would be floated off by the overflow of the water that spring, at a specified price for each thousand feet,—the quantity to be ascertained by measurement to be made by certain persons agreed upon, and the plaintiff to furnish two steerage plank for each box which the timber should make, when rafted; and the plaintiff promised, that, so soon as the timber should be surveyed, he would deliver to the defendant "a promissory note of hand" signed by the plaintiff and one H., for the price of the timber and steerage plank, payable one half by the fifteenth of July, 1846, and the other half by the fifteenth of October, 1846, with interest after July 15, 1846, and to be made payable at some bank in Boston, if the defendant so desired; and it was also agreed, that, if the timber did not float, and the defendant could not put it fairly afloat, he should delay payment and interest, until he should put the timber afloat; and it was also agreed, that if any part of the timber could not, by reasonable expense, be put afloat that spring, the plaintiff should have the same time to pay for that portion, after it should be put afloat, as he was to have for that part rafted that spring, and that, if any part of the timber could not be floated in season to take to market so soon as the next autumn, on so much of said timber payment and interest should be delayed until July 15, 1847. The timber was not floated, so that it could not be taken to market in 1846. And it was held, that the plaintiff was bound, by the agreement, when the price of the timber was ascertained by measurement, to execute and deliver to the defendant an absolute, negotiable note for the price of the timber, payable one half July 15, 1846, and the residue October 15, 1846, with interest after July 15, 1846, without stating therein any of the conditions, in reference to the payment, which were embraced within the original agreement.

Trover for a quantity of round pine timber. Plea, the general issue, and trial by jury, June Term, 1849,—REDFIELD, J., presiding. The timber sued for was originally the property of the defendant Robert Morse, and was bargained to the plaintiff by the defendant Timothy Morse, as the agent of Robert Morse, by a written agreement, which was in these words.

"This contract, made this ninth day of March, 1846, by and between Robert Morse of Rumsey in the county of Grafton and state of New Hampshire, by the said Robert Morse's agent, Timothy Morse, of the first part, and C. J. S. Scott, of the state of Vermont, of the second part, witnesseth;—That the said Robert *Morse *467 has this day sold to the said Scott all of his the said Robert Morse's pine lumber, now lying on his the said Robert Morse's brook meadow in said Newbury, and also two steerage plank for each and every box said timber shall make, after rafted; and also hereby agrees to furnish said Scott a suitable quantity of pine timber and steerage beams, of a good quality, delivered on said landing, with which to raft said timber; said pine timber and steerage beams to be free of expense to said Scott. And the said Morse farther agrees, that in case all of said timber is not floated by the rise of the river, to put such timber, as does not float, fairly afloat; or in case said Morse cannot put said timber afloat, he is to delay payment and interest, until he does put said timber afloat. And the said Cyrus J. S. Scott hereby promises, so soon as said timber is surveyed, to furnish said Morse a promissory note of hand, signed by him, the said Scott, and Samuel Hutchins of said Newbury, for the amount said timber and steerage plank shall come to, at eight dollars per thousand feet, payable one half by the fifteenth day of July next, and the other half by the fifteenth day of October next, with interest after the fifteenth day of July next,—said notes to be payable at some bank in Boston, if the said Morse desires. It is farther agreed by the parties to this instrument, that Hosea S. Baker of Haverhill, N. H., and Horace Duncan of Lyman, shall survey said timber, unless the parties shall hereafter agree upon some other person, or persons, to do so. It is understood, that on such timber as is defective a suitable deduction is to be made, so as to make said timber equal to merchantable timber; and it is farther understood and agreed by the parties, that if there is any part of said timber, that cannot by reasonable expense be put afloat the present spring, the said Scott is to have the same time to pay for said timber, after it is put afloat, as he does for that part, which is rafted this spring, and no longer; provided farther, that if any part of said timber cannot be floated in season to take to market as soon as next fall, on so much of said timber payment and interest is to be delayed, until the fifteenth of July, 1847. And the said Morse farther agrees to furnish the said Scott, free of expense, a good experienced man two weeks, to trim, peel

and prepare said timber for rafting. Signed, sealed and delivered the day and year first above written.

(Signed) "C. J. S. SCOTT. [Seal.]
"TIMO. MORSE, [Seal.]
"For ROB'T MORSE."

The timber was surveyed and the price ascertained about the fourth of April, 1846; but the timber did not float, so that it could all be taken to market in 1846. The plaintiff was applied to by Timothy Morse for the notes pursuant to the contract, in the spring of 1846, after the price had been ascertained, and he offered, in due season, so far as it appeared, to give to
*468 Morse notes for the price, *signed as required by the contract, which should specify the conditions of payment, as stated in the contract; but Morse refused to receive such notes, and claimed, that he was entitled to absolute, negotiable notes, payable in Boston. The plaintiff offered to give such a note, as Morse required, for that portion of the timber which was afloat in the spring of 1846; but Morse declined to receive any note, unless he could have the whole price. In the spring of 1847, when the residue of the timber floated, the defendants took it to market and sold it;—for which this action was brought. The court decided, that, by the terms of the contract, the plaintiff was not bound to give an absolute or negotiable promissory note for the price of the timber, but only a note expressed to be payable in the manner and upon the conditions named in the contract; and that, if he offered a negotiable promissory note for so much of the timber, as was floated in 1846, and a note of the same tenor for the residue, but payable the next year, in the manner and at the time specified in the contract, with such surety as the contract required, and in the time therein specified, it was, in this respect, a compliance with the contract on his part. A verdict was taken for the plaintiff, for the difference between the contract price of the timber and the value of the timber in 1847, which was the time of conversion. Exceptions by defendants.

Parker, Peck & Colby and *Tracy, Converse & Barrett* for defendants.

In the sale of personal property, when any thing remains to be done, before the sale can be considered as complete,—whether to be done by the vendee or the vendor,—as between the parties the right of property does not pass. Chit. on Cont. 376. Ward v. Shaw, 7 Wend. 404. The defendants had the right to retain the logs until payment of the price, according to the contract; and the non-performance of the plaintiff, in that respect, entitled the vendor to dissolve the contract. Chit. on Cont. 427. The plaintiff failed to perform the conditions of the contract; he agreed to deliver to the defendant a "promissory note of hand," as soon as the timber was surveyed. The writing offered was a mere simple contract. A "promissory note," or "note of hand," is a written promise for the payment of money absolutely and at all events,
*469 at a time therein *limited, or on demand, to a person therein named, or his order, or to bearer. Bayl. on Bills 1. 3 Kent 73. Chit. on Bills 331. The statute of 7 Anne c. 7 recognizes only such notes, as are payable "to some person, or order, or bearer." Chit. on Bills 333. The county court held the plaintiff bound only to give a conditional note, not negotiable. But the contract excludes such a construction by distinctly describing the note to be given,—1. A promissory note of hand;—2. Signed by Scott and Samuel Hutchins;—3. Payable one half July 15th and one half October 15th;—4. At some bank in Boston, if desired by the defendants;—5. With interest after July 15th. The parties could not have intended, that the note should have reference to the floating of the logs; for the note was to be deliverd as soon as the timber was surveyed, and, of necessity, before any was floated. The stipulations in relation to delay of payment were covenants by Morse, and pre-supposed a note to have been given, on which payment was to be delayed. By the very terms of the writing the whole note might have become collectible in July and October, 1846, and yet, by the charge of the court, the various conditions would still have been engrafted on the note, as that was to be delivered, before the result was known. This would be a mere renewal of the contract, with a surety.

A. Underwood and *Hebard & Martin* for plaintiff.

It is evident from the whole contract, that two prominent points were contemplated by the parties,—first, that the lumber would probably be afloat by the rise of the river in the spring of 1846,—which would entitle Morse to notes payable by the times specified in the contract, with interest from the following July,—second, that the time of payment and for interest to commence would be governed by the event of the lumber floating and consequent time of its arrival in market. The court will so construe the contract, as to carry out the meaning of the parties, as gathered from the whole contract. How could the matter of the commencement of interest and payment of the notes, which were to depend on the floating of the lumber, be made sure, otherwise than by making the floating of the lumber a condition in the notes, on which they were to depend. If the notes were unconditional, and the day of payment fixed, the plaintiff could not control the payment, whether the lumber floated, *or not. By the con- *470
tract Morse could put the timber afloat in the spring of 1846, and in that event he might call, perhaps, for absolute notes. But he protects himself from the necessity of putting it afloat, as it might occasion great expense; and while he does not absolutely bind himself to put the lumber afloat, it would be a manifestly erroneous view of the case, to say that Scott must give absolute notes, which he would be bound to pay at maturity, whether the lumber were floated, or put afloat, in one, two, or three years, or never. Again, Morse was to furnish the steerage plank for each box the timber should make, after rafted, and the note, or notes, were to cover the steerage plank as well as other lumber. Hence, as the rafting of the boxes could not be done, until the lumber was afloat, the amount of

steerage plank, which the notes were to cover, could not all be ascertained, until the lumber was afloat. From this it would seem, that it could not have been contemplated to give at least absolute notes, until the lumber was all afloat, or rafted, or only on such portion, as should be rafted, or afloat, ready for market; or, if absolute notes were to be given, it was upon the ground that all the lumber was expected to be afloat in the spring, or that Morse should put it afloat. But as Scott was to furnish a note, as soon as the lumber was surveyed, it may be well supposed, a note was to be given for the whole lumber, and, as payment and interest were to depend on its floating, which would be subsequent to the survey, this payment and interest could be controlled in no other way, than by making the floating of the lumber a condition in the note, on which they are to depend. Hinsdale v. Partridge, 14 Vt. 547. Morey v. Homan, 10 Vt. 565. Adm'r of Wheelock v. Clark et al., 11 Vt. 583. Isaacs v. Elkins, 11 Vt. 679. Hatch v. Hyde, 14 Vt. 25.

The opinion of the court was delivered by

POLAND, J. The plaintiff admits, that he was bound to deliver, or offer to deliver, to the defendant, Robert Morse, or Timothy Morse, his agent, a note for the amount of the price of the timber according to the terms of their written contract of the ninth of March, 1846, before the defendants were bound to deliver the timber to him, and that he cannot maintain this suit, without such performance, or offer of performance, by himself;—and the only ques-
*471 *tion presented by this case is, whether this was done. This depends entirely upon what is to be deemed the true effect and construction of the aforesaid written contract.

The contract on the part of the plaintiff is in the following words;—"And the said Cyrus J. S. Scott, hereby promises, so soon as said timber is surveyed, to furnish said Morse a promissory note of hand, signed by him the said Scott and Samuel Hutchins of said Newbury, for the amount said timber and steerage plank shall come to at eight dollars per thousand feet, payable one half by the 15th day of July next and the other half by the 15th day of October next, with interest after the 15th day of July next,—said notes to be payable at some bank in Boston, if the said Morse desires it." This stipulation of the plaintiff is in clear and distinct language, and leaves no room for dispute as to its import, or requirements; but it is insisted, that other portions of the contract should have the effect to govern and control this, so as to vary and alter its terms,—and doubtless the whole contract should be considered together, and all its provisions be made to harmonize, if possible.

The plaintiff relies upon the following clause of the contract, which precedes the one copied above, viz., "And the said Morse farther agrees, that in case said timber is not floated by the rise of the river, to put such timber, as does not float, fairly afloat, or, in case said Morse cannot put said timber afloat, he is to delay payment and interest, until he does put said timber afloat:" and also upon the following stipulation in the contract, after his covenant above recited, to wit, "And it is farther understood and agreed by the parties, that if there is any part of said timber, that cannot by reasonable expense be put afloat the present spring, the said Scott is to have the same time to pay for said timber, after it is put afloat, as he does for that part which is rafted this spring, and no longer; provided farther, that if any part of said timber cannot be floated in season to take to market as soon as next fall, on so much of said timber payment and interest is to be delayed until the fifteenth of July, 1847."

In cases where contradictory provisions are found in the same contract, they are all to be viewed together, and to be interpreted by that fundamental rule of construction, the apparent intention of
*the parties; but before any one *472
clearly expressed provision of a contract is to be entirely thrown aside, as repugnant to others in the same contract, courts seek with great diligence and care for a construction, which will give effect to all. In this case the defendants claim, that the plaintiff was bound to give, or offer to give, a note, according to the stipulation on his part. The plaintiff insists, he was not bound to execute, or offer to execute, such a note, but only a note, or notes, in which all the above conditions and stipulations should be expressed; and he made his offer accordingly. We have carefully examined all the provisions contained in the written contract of the parties, and are clearly and unanimously of opinion, that the plaintiff's construction of the contract, in relation to the notes to be given for the price of the lumber, cannot be supported, and I will briefly state some of the reasons, which have induced this conclusion.

The stipulation of the plaintiff, as to the note he was to give, is clear and explicit, involving no doubt or uncertainty whatever in its terms; and we cannot easily be induced to suppose, that the parties used such unequivocal language, without understanding and intending that force and effect should be given to it. Neither are we able to perceive, that the stipulations on the part of Morse at all conflict with those of the plaintiff, so that full effect cannot be given to all the terms of the contract, and all stand together; indeed, it appears to us, that the language of Morse's part of the contract is more consistent with our view of the other part of the contract, than that which the plaintiff claims. The plaintiff was "to furnish a promissory note of hand, so soon as the timber was surveyed." It is to be inferred from the contract, (and it is so treated by the plaintiff's counsel in argument,) that this was to be done, before any portion of the timber would be floated, and before it could be known by the parties, whether any part, or, if any, how much, of said timber would be floated that spring, or even during that season; and of course, by the plaintiff's construction, it was entirely uncertain, when or how he was to pay for the timber, and his note must be equally indefinite and general.

A promissory note is said by Mr. Chitty

"to be a promise, or engagement, in writing, to pay a specified sum at a time therein limited, or on demand, or at sight, *473 to a person therein named, or *his order, or to the bearer." Chitty on Bills 516. And this definition, we apprehend, well expresses the popular and general idea of a promissory note. But it is very apparent, that, by the plaintiff's construction of this contract, his note, which he was to give, and which he offered, was of an entirely different character, and in no sense answered to the legal or popular definition of a promissory note.

The plaintiff also agreed, to make his note "payable at some bank in Boston, if Morse desired it." The evident intention of the parties by this provision was, to enable Morse to negotiate the note and anticipate the money for his timber, and, of course, it tends strongly to the belief, that the parties contemplated not only a note legally negotiable, but an absolute note, such as would be discounted by a city bank. But it is not to be supposed, that these parties, who were business men and acquainted with the course of mercantile transactions, could have believed, that such a note as the plaintiff offered would have been of any avail to Morse for that purpose.

As before stated, we think this view not at all in conflict with the other provisions of the contract, on the part of Morse. The parties evidently supposed, that the timber probably would all be floated and sent to market that spring, and provided for the giving of a note accordingly; still, there was a contingency about it, which the plaintiff wished to guard himself against, and therefore required a stipulation from Morse, that, in case the lumber was not floated that spring, he would "delay payment and interest" on so much as did not float. These terms, as it seems to us, would not have been used, if Morse had not the power to call for and enforce payment; and if the note were to be such as the plaintiff claims, there was no necessity for any such provision. On the other hand, if Morse held the plaintiff's note, which he might enforce against him and compel payment of the money, the plaintiff then needed such a provision for his own protection, and it was exceedingly natural, that he should require such an agreement from Morse.

It is urged, however, by the plaintiff's counsel, that if Morse negotiated the note, as contemplated, the plaintiff might be compelled to pay it, and his only remedy would be by a suit against Morse, upon the agreement to delay, and that the plaintiff would not have what Morse contracted he should have, delay, but only dam- *464[1] ages for *breach of the agreement, which might not compensate him. We can see no greater force in this objection, than arises in every other case of contract between parties, if either refuses to perform what he agreed to do; the only remedy is in damages for non-performance, which frequently fail to make full compensation to the party injured. What Morse contracted to do, in case the timber was not all floated, was certainly a thing within his power to perform, even if he negotiated the plaintiff's note; and it is not to be assumed, that he would not have performed it, as he agreed; and whether the contract was such as the plaintiff ought to have relied upon for his security is not for us to determine; it is sufficient to say, that it seems to have been all that he required, when he made his contract.

That these stipulations were to be independent of each other is apparent from the manner, in which the contract is drawn; for if the parties had intended the note to be conditional, and to include the contract on the part of Morse for delay in the payment, the plain and natural course would have been, to provide for such a note to be given, and then the other portions of the contract would have been wholly unnecessary.

In our view the county court erred in the construction of the contract, and their judgment is reversed and a new trial granted.

JACOB BAILEY, 2D, v. LEANDER QUINT.

(*Orange*, March Term, 1850.)

The lien, which the owner of a saw mill has upon lumber which is sawed by him at his mill, for the payment of the price of sawing, is waived, if he voluntarily permit the owner of the lumber to remove it from his possession; and the owner of the lumber may sustain trespass for a subsequent taking of the property by a stranger.

If the purchaser of personal property remove it from the possession of the vendee to premises occupied by a third person, by permission of the owner of the premises, it is a sufficient change of the possession of the property, as against the creditors of the vendor, although the owner of the premises, to which the property was removed, were not informed of the sale.

*Trover for a quantity of boards. *475 Plea, the general issue, with notice, that the defendant attached and sold the property, in due form of law, as sheriff, as the property of one Harrison Bailey, upon process against Harrison Bailey and others in favor of one Buchanan. Trial by jury, June Term, 1849, REDFIELD, J., presiding. The evidence tended to prove, that the logs, from which the boards in question were sawed, were the property of Harrison Bailey, and that he procured them to be sawed at a mill owned by William Bolton and occupied by John Bolton; that after the boards were sawed, the mill yard being filled, they were, at the request of John Bolton, drawn away from the mill premises and piled by the side of the road; that subsequently Harrison Bailey, being indebted to the plaintiff, sold to him the boards in question, and either the plaintiff, or Harrison, (but which did not appear, although they were both near,) applied to John Bolton for permission to put the boards in the mill shed, and he referred them to William Bolton; that one of them, and the testimony tended to show that it was the plaintiff, then applied to William Bolton, and by his permission the boards were placed by Harrison and the plaintiff in the mill shed, and there remained until they were attached by the defendant. It did not appear,

[1] By error in printing the original, page 464 was substituted for 474.

that either John Bolton or William Bolton was informed, that Harrison had sold the boards to the plaintiff, at the time they were placed in the mill shed. The mill owners claimed no lien upon the boards, until the defendant sold them, or was about to sell them, when a claim by way of lien for the sawing was asserted, and something was paid by the defendant on that account. The defendant requested the court to charge the jury, that, if the property were in the possession of John Bolton at the time of the sale from Harrison Bailey to the plaintiff, it must appear, in order to show a change of possession, that the plaintiff notified Bolton of the sale to him, and that Bolton must have consented to keep the property for the plaintiff;—that if the jury found, that the plaintiff and Harrison Bailey applied to John Bolton for leave to place the boards in the shed, and John Bolton referred them to William Bolton, yet that if the plaintiff did ask and obtain leave of William, it would not amount to a change of possession, unless he was notified of the sale to the plaintiff;—and that, if Bolton had a lien upon the boards for sawing them, at the commencement of this suit, and *476 at the time of *the sale of the boards upon the execution, and had the possession of the property, the plaintiff cannot sustain this action. But the court charged the jury, that if the boards were the property of Harrison Bailey, and he sold them to the plaintiff in payment for a debt justly due, and the plaintiff applied to the owner and the occupant of the mill, and obtained permission to put the boards in the mill shed, and, in pursuance thereof, did place them there,—although neither the owner or occupier of the mill were informed by him of his purchase of the boards,—it was, nevertheless, a sufficient change of possession to enable the plaintiff to hold the property; and that the fact, that the occupant or owner of the mill had a lien for sawing the boards, would not prevent the plaintiff from holding the boards against the defendant's attachment,—that being a question between the plaintiff and the persons in whose favor the lien existed. Verdict for plaintiff. Exceptions by defendant.

A. Underwood, for defendant, cited Pierce v. Chipman, 8 Vt. 334; Stiles v. Shumway, 16 Vt. 435; Hall v. Parsons, 17 Vt. 271; 1 Chit. Pl. 137.

C. B. Leslie, for plaintiff, cited 2 Aik. 79, 115; 3 Steph. N. P. 2692, 2695; 1 Sw. Dig. 539; 3 Hill 485, cited in 6 Law Rep. 232; Foster ex parte, 5 Law Rep. 55; 2 T. R. 485; 9 Dane's Abr. 157; Wetherby v. Foster, 5 Vt. 136; Brackett et ux. v. Walt et al., 6 Vt. 411.

The opinion of the court was delivered by

REDFIELD, J. It may be true, that the existence and exercise of a lien will defeat the right of the general owner of personal property to maintain trespass; but it must, most clearly, be a lien in exercise before the trespass is committed. If the person, in whose favor the lien would exist, had never asserted it, the mere existence of some such dormant right could not be permitted, I think, to defeat the action of the general owner for a trespass, or conversion, committed by a mere stranger. But we think the facts in this case show, that the sawyer had virtually parted with the possession of the boards, before Harrison Bailey sold them to the plaintiff;—and es*pe- *477 cially, when the plaintiff made known to John Bolton, the sawyer, his intention to put the boards in a mill shed, which John Bolton did not claim to control, but of which he virtually disclaimed any control, by referring the plaintiff to William Bolton, the owner of the shed,—all the time making no claim to any lien for sawing,—we think his lien must be considered as waived, he having fully relinquished the possession, or control. Upon the same ground, too, we think it must be considered, that the plaintiff did remove the boards from the possession either of Harrison Bailey, or of John Bolton,—and more properly, we think, the former,—into the possession of William Bolton. We entertain no doubt, that this was a sufficient change of the possession to perfect his title, even against the creditors of Harrison Bailey.

Judgment affirmed.

ELISHA MAY v. EDMUND P. BLISS AND AMOS EVERETT.

(*Orange*, March Term, 1850.)

The defendant was the owner of boards, which were piled in the mill yard of a saw mill, near to a pile of boards belonging to the plaintiff, and sent a man in his employment to draw away his boards, and directed him to call upon the sawyer to inform him which were the defendant's boards. The person sent having obtained information of the sawyer, and supposing he was obtaining the defendant's boards, drew away the boards of the plaintiff with those of the defendant. And it was held, that the defendant, having sent his hired man to follow such instructions, as he might obtain from the sawyer, and he having received such instructions, as induced him to take away the plaintiff's boards, it was the same, as if the defendant had given the instructions himself, and that the defendant was liable in trespass for taking the boards, whether the fault were in the sawyer, in not giving sufficiently specific instructions, or in the hired man, in not properly apprehending or not following them, the same as if he had done the whole business himself and taken the plaintiff's boards by mistake.

The plaintiff declared against A. and B. for a joint trespass. A. suffered judgment to be rendered against him by default, and judgment was rendered against B. upon trial, and damages were assessed against A. at the same amount with the judgment against B., and the case was passed to the supreme court upon exceptions taken by B. And it was held, that herein there was no error.

*Trespass for taking a quantity of *478 boards. The defendant Everett being an infant, under the age of twenty one years, a guardian *ad litem* was appointed, at whose request judgment was rendered against him, as by default. The defendant Bliss pleaded the general issue. Trial by the court, December Term, 1849,—REDFIELD, J., presiding. It appeared, that one Homer, who occupied a saw mill, sawed boards for Bliss, which were afterwards piled in the mill yard. The plaintiff also owned boards, which were piled near the boards of Bliss. Bliss sent Everett, who was his hired man, with a team, to draw away his boards, and directed him to call upon Homer, and he

would inform him which boards belonged to Bliss. Everett called upon Homer, who gave such directions to him, that he took away all the boards of Bliss and also the boards of the plaintiff, supposing he was following the directions of Homer, and that he was taking the boards of Bliss and none other. Subsequently, upon inquiry being made by the plaintiff, Bliss became satisfied, that he had the plaintiff's boards, and he sent word to the plaintiff, that he had found an excess among his boards of 980 feet, which he would draw back to the plaintiff, or pay him for them the price of poor hemlock. The number of feet of the plaintiff's boards, which were taken, was nearly 2000, of a poor quality of pine, but much more valuable than hemlock. Bliss also, at some time, told the plaintiff, that if he would examine the boards drawn by Everett, and find those belonging to him among them, he would draw them back, or account for them; but the plaintiff declined making the examination, upon the ground, as the court inferred, that he did not suppose, that either he or Bliss could determine which boards had belonged to the plaintiff. There was testimony tending to prove, that Bliss had kept on hand about 1200 feet of the boards drawn by Everett, and which he supposed were those which had belonged to the plaintiff, and that they were still ready to be delivered to the plaintiff. The testimony was not entirely satisfactory, as to whether there were not more of the plaintiff's boards taken by Everett. The court decided, that Bliss, having sent his hired man to follow such instructions, as he might receive from Homer, and he having received such instructions, as induced him to take away the plaintiff's boards, it was the same, as if Bliss had given the in-
*479 structions *himself, and that Bliss was responsible, whether the fault were in Homer, in not giving sufficiently specific instructions, or in Everett, in not properly apprehending or not following them, the same as if Bliss had done the whole himself and taken the plaintiff's boards by mistake. Judgment was accordingly rendered for the plaintiff, for the value of the boards taken. Exceptions by Bliss. Damages were assessed against Everett equal to the amount of the damages for which judgment was rendered against Bliss.

Ormsby, for defendant, insisted, that the mistake, whether of Homer, or of Everett, was not a necessary result of the directions given by Bliss, and that therefore trespass was not the proper form of action against him; and that, the declaration being for a joint trespass, the county court erred in assessing the damages severally and rendering several judgments,—citing Cro. Eliz. 870, Heydon's Case, 11 Co. 6 *b*, Cro. Jac. 118, 5 Burr, 2790.

Parker, for plaintiff, insisted, that the county court had found the fact of a joint liability of the defendants, and that this was final,—citing Noble v. Jewett, 2 D. Ch. 36, Strong v. Barnes, 11 Vt. 221, Kirby v. Mayo, 13 Vt. 103, Cilley v. Cushman, 12 Vt. 494, Card v. Sargeant, 15 Vt. 393, Steph. N. P. 2635, Minot's Dig. 680, pl. 1, Archb. N. P. 300, 304;—that Everett was acting as the agent and servant of Bliss, and consequently they were co-trespassers,—citing Steph. N. P. 2537, 2635, Brown v. Lent, 20 Vt. 529, 2 Greenl. Ev. §§ 614, 621, Archb. N. P. 297, 365, 307;—and that really there had been but one assessment of damages, and that jointly against Everett and Bliss; but that, if the judgments were several, the plaintiff had the right of election of the best,—citing 2 Greenl. Ev. 277. Heydon's Case, 11 Co. 5, Halsey v. Woodruff, 9 Pick. 555, 1 Sw. Dig. 660, Archb. N. P. 399.

BY THE COURT. We think the decision of the court below, upon the main question of the liability of Bliss, and the reasons assigned in the bill of exceptions are correct. Indeed, the question as to the participation of Bliss in the act of Everett is chiefly matter of fact; and the case having been tried by the court, and they having found his participation, it is difficult to revise that decision, in the matter of law, without reversing also the finding of the facts. But *to the extent of the reasons *480 stated by the county court, this court see no reason to doubt their perfect soundness.

In regard to the judgment being several against the defendants, it does not appear, that it was so, in the county court. But this court having decided, in two cases in the county of Washington, that one joint tort-feasor may review the case, or carry it to this court by exceptions, after it is ended as to others, of course it must follow, that this may be done, without opening the case as to the other; otherwise he might, through the instrumentality of other joint defendants, obtain a judgment in his favor after a final judgment against him;—the effect of all which is, doubtless, that the judgment was joint in the county court. But one party only taking exceptions, the case became final as to the other, and it is here only as to Bliss. Upon this point see Sheple et al. v. Page et al., Washington Co., March Term, 1848, not yet reported, but reported at a subsequent term upon another point 12 Vt. 519; also Paine et al. v. Tilden et al., 20 Vt. 554. Judgment affirmed.

TIMOTHY C. KNIGHT v. SOLOMON G. HEATON.

(*Orange*, March Term, 1850.)

If land within the surveyed limits of a public highway be inclosed by an individual and occupied by him constantly for more than twenty years, under a claim of right, he will acquire a prescriptive right to the land so occupied, as against the public, and can maintain trespass against the selectmen of the town, who remove his fence to the original line of the highway.

Trespass *quare clausum fregit*. The case was referred under a rule from the county court, and the referee reported the facts as follows. The selectmen of Thetford, in 1819, laid out and surveyed a public highway in Thetford, three rods in width, which was opened for public travel in 1820, and has ever since continued to be an open public highway; but the road was so fenced, as to leave less than three rods in width between the fences, and so continued most of the

time until 1845, when the selectmen of Thetford directed the plaintiff, in writing, to remove his fence to the easterly line of
*481 the *highway, as originally surveyed, and the plaintiff promised to do so, but did not. In 1846 the selectmen gave verbal notice to the plaintiff to remove his fence and he again agreed, that he would do so, but did not. In the spring of 1847 the plaintiff was again notified by the selectmen to remove the fence, and he refused to do so. And the defendant, who was one of the selectmen, then removed the fence to the easterly line of the highway,—which was the trespass complained of in the declaration. The fence, for more than twenty years previous to its removal by the defendant, had remained in the place from which it was removed, which was within the limits of the highway, and the defendant had continued in possession of the land to the fence during all that time. The original survey of the highway was duly recorded, and the record preserved; and the original limits of the highway could be and were accurately ascertained. Upon these facts the referee submitted to the court the question, whether, in law, the plaintiff was entitled to recover, and assessed the plaintiff's damages at forty dollars. The county court, June Term, 1849,—REDFIELD, J., presiding, rendered judgment for the plaintiff upon the report. Exceptions by defendant.

A. Howard, Jr., and *Hebard & Martin* for defendant.

There was no laying out, making, or altering this highway, by the defendant, as contemplated by Rev. St. c. 20, § 6; nor was there any laying out and opening of the highway wider than it was originally laid out in 1819, as provided by Rev. St. c. 20, § 7. Sec. 8 provides, that "where the survey of any highway previously laid out shall not have been properly recorded, or the record preserved, or where for any reason the terminations and boundaries of such highway cannot be accurately ascertained, the selectmen may resurvey such highway," &c. How, then, could the selectmen remove the plaintiff's fence out of the highway. They could not do it under sec. 7, because the highway had been laid out as wide, as the present law or public convenience requires. It could not be done under sec. 8, because the survey was duly recorded and preserved, and the termination and boundaries could be accurately ascertained from survey. The Rev. St. c. 21, § 35,
*482 amended by the *statute of November 15, 1847, [Acts of 1847, p. 21,] provides, "that if any person shall enclose any part of the highway, or erect any fence" &c., "in such highway, or shall continue any such enclosure, fence" &c., "the selectmen may, by their order, require such person to remove such fence" &c., "within such convenient time as they shall think reasonable." The case finds, that the selectmen did make the proper order; and they were fully authorized, by this statute, to remove the fence. The plaintiff cannot hold the land by possession, it having been dedicated to the public use. Sl. St. 289, sec. 6. Rev. St. c. 58, §§ 1-4. State v. Trask, 6 Vt. 355. University of Vt. v. Reynolds, 3 Vt. 543. The plaintiff's possession was not adverse to the public; he admitted, that his fence was in the highway, and promised to remove it.

S. Austin for plaintiff.

The plaintiff contends, that the defendant had no authority, under the Rev. St. chap. 21, sec. 35, to remove the fence, although it stood within the surveyed limits of the highway, for the reason, that the fence had remained there for more than twenty years. In order to give the town a right to the land enclosed, they must have caused the damages to be appraised and paid to the plaintiff, as for a new laying out of a highway. Rev. St. c. 20, § 8.

The opinion of the court was delivered by

REDFIELD, J. Upon two grounds it seems to us, the plaintiff is entitled to be quieted in his possession of more than twenty years, against a re-survey of the adjoining highway, even against the rights of the public, notwithstanding *nullum tempus occurrit regi*.

1. Such a long possession is the most conclusive evidence of what was, at the date of the survey, considered its true location, as a long possession under a deed is the most satisfactory evidence of the true location of the thing granted. 2. If it could now be shown, beyond all controversy, that the survey extended as far upon the plaintiff. as is now claimed, the non user on the part of the public and the constant use by the plaintiff, under a claim of right, is sufficient to establish a prescriptive right, in that class of cases, like the present,
*where no statute of limitations ap- *483
plies. Moore v. Rawson, 3 B. & C., 332. 5 Dowl. & R. 234. Gale & Whately on Easements 256. 2 Greenl. Cruise 214.

But it is said, I know, in the English books upon this subject, that one cannot prescribe against the crown. But the same result is attained, in that class of cases, by presuming a grant. 3 Stark. Ev. 915. In Johnson v. Ireland, 11 East 280, Lord ELLENBOROUGH, in giving judgment, says, a new trial should be awarded, because the judge at the trial told the jury, they could not presume a grant against the crown. That was a somewhat longer period, than is shown in the present case. But changes are now so much more frequent than formerly, in regard to the occupancy or the title to lands, that ninety years then did not afford more satisfactory evidence of title, than thirty years uninterrupted possession does now. In many of the newer states five years is the ordinary term of limitations of real actions. And one ought not to be surprised, perhaps, that even that term should some day be very essentially abridged. And Lord ELLENBOROUGH then said, "I would presume any thing, capable of being presumed, in order to support an enjoyment for so long a period; as Lord KENYON once said, on a similar occasion, that he would not only presume one but one hundred grants, if necessary to support so long an enjoyment." Crimes v. Smith and Bedle & Beard's Case, 12 Co. 4, are cases of grants presumed against the crown, as the acknowledged head of the establishment of the Church in England. Many American cases might be cited, where the same prin-

ciple is recognized. Mather v. Trinity Church, 3 Serg. & R. 509.

It is every day's practice, to presume a dedication of land to the public use from an acquiescence of the owner in such use. And in practice it was never doubted, but that the right of the public to a highway might be lost by fifteen years disuse, and, under circumstances, by a much less period. And we see no reason, why the limits of a highway should not be fixed by the same lapse of time. The sense of the legislature upon this subject is sufficiently indicated by a recent statute, by which it is expressly provided, that, in such cases as the present, the proprietor or occupier of land for twenty years, which was originally a portion
*484 of the highway, when *the same is again reclaimed by the public, shall be entitled to compensation, the same as in other cases.

The statutes of limitation now in express terms providing that the state shall not be exempt from its operation, we see no good reason, why one may not set up prescriptive and presumptive rights against the public, the same as against individuals. And there is, perhaps, no good reason, why such prescriptions should not apply as well against the public, as in their favor.

Judgment affirmed.

DANIEL BUCK AND OTHERS v. REUBEN SQUIERS.

(*Orange*, March Term, 1850.)

Under the Revised Statutes of this state, if no administrator be appointed upon the estate of a deceased person, his heirs may maintain ejectment, to recover land to which he had title, without an order of distribution being made by the probate court.

The question, whether, in a conveyance of land abutting upon a highway, the highway does or does not pass to the grantee, is in all cases a matter of construction and intention merely, to be determined from a consideration of the language used by the parties and such surrounding circumstances, as are proper to be considered in ascertaining their intent; but the presumption, in such cases, is, that the parties did intend to include the highway, and the burden of proof is upon the party, who assumes to show, that they intended the contrary.[1]

Land was conveyed by deed, by this description, —"Beginning at the intersection of the road from Chelsea to Allen's saw mill and the branch on which the saw mill stands on the northerly side of said branch and nearly opposite my now dwelling house; thence on the easterly side of said road until the said road strikes the bank of said branch; thence down said branch, in the middle of the channel, to the first mentioned bounds." And it was held, that the point of commencement was at the intersection of the northerly bank of the stream with the eastern side, or edge, of the road, and that no land lying south of that point, and no part of the highway, was intended to be conveyed by the deed. REDFIELD, J., dissenting.

Ejectment for land in Chelsea. The suit was brought in the name of the heirs of D. Azro A. Buck, as plaintiffs, for the benefit of Sereno Allen, to whom the plaintiffs conveyed the demanded *premises by deeds dated September 7, 1847, *485 and November 11, 1847, the defendant being in possession of the premises at the time, claiming adversely to the plaintiffs. Plea, the general issue, and trial by jury, December Term, 1848,—REDFIELD, J., presiding.

The plaintiffs proved, that the land in dispute had formerly, for more than fifteen years, been in the possession of the plaintiffs' ancestor, he claiming to hold the land in his own right, and that the plaintiffs were his heirs, and that the defendant was in possession of the premises at the date of the service of the plaintiffs' writ. The plaintiffs, in proving their title as heirs of D. Azro A. Buck, proved, that he died, in the year 1840, in the city of Washington, and that the plaintiffs were his sole surviving heirs, and that there had never been any administration upon his estate in this state. It was admitted, that there had been no division or distribution of the estate among the heirs, by the probate court. The defendant insisted, that the plaintiffs could not maintain this action, without showing such division and distribution; but the court overruled the objection. The defendant gave in evidence a deed from D. Azro A. Buck to Daniel Wyman, dated September 10, 1813, describing a piece of land in Chelsea by the name of the "hop yard," and also by metes and bounds, as follows, —"Beginning at the intersection of the road from Chelsea to Allen's saw mill and the branch on which the saw mill stands on the northerly side of said branch and nearly opposite my now dwelling house; thence on the easterly side of said road until the said road strikes the bank of said branch; thence down said branch, in the middle of the channel, to the first mentioned bounds." The defendant also gave in evidence deeds of the same land, through many intermediate persons, to himself, and proved, that, as the road and the branch now run, all the land in dispute was conveyed by the deeds to the defendant. The defendant also gave evidence tending to prove, that the premises called the "hop yard," from a time soon after the conveyance to Wyman until the commencement of this suit, had been inclosed and occupied by the several persons to whom they had been conveyed; but that the point of land in dispute, lying in the angle of intersection between the road and the branch, at the southerly point of the same, had been for many years low and marshy and mostly unfit for use, but had been used, when sufficiently dry for that purpose, by the proprietors
*of the adjoining portion of the "hop *486 yard" for the purpose of piling wood, and for other convenient uses, from time to time, until it became more dry, when the defendant erected a shop thereon; that formerly the road was travelled nearer the land in dispute, but that lately, in consequence of the bridge being placed lower down the stream, the travel had inclined more to the westerly side of the road,—but that the fence upon the west side of the road had remained where it now is for more than thirty years, and probably for

[1] See note at end of case.

more than forty years; and that during all the time after the conveyance by D. Azro A. Buck to Wyman, until the commencement of this suit, the defendant and those under whom he claims had claimed the land in dispute, as a portion of the land included in the deed to Wyman, and that, to the time of the deed from the plaintiffs to Allen, neither the plaintiffs nor D. Azro A. Buck, had ever made any claim to the land in dispute. The plaintiffs, for the purpose of rebutting the evidence of the defendant, offered to prove, that the land in dispute, at the time of the deed from D. Azro A. Buck to Wyman, was between the middle of the road and the middle of the stream, and that, in consequence of the stream cutting a deeper channel and the road being laid farther west in 1836, this land became suitable and convenient for use, without interfering with the road or the stream. It was admitted, that on the tenth of September, 1813, D. Azro A. Buck owned the land on both sides of the road, and that before his death he conveyed that on the west side of the road, opposite the land in dispute. The plaintiffs also conceded, that they did not claim, that either they or D. Azro A. Buck had ever been in possession of the land sued for, since the conveyance to Wyman; but they claimed, that the possession, since that time, had been vacant. The court being of opinion, that the deed from D. Azro A. Buck to Wyman would convey all the land to the middle of the stream and to the middle of the road, and the plaintiffs not contending, that any of this land could, on such construction, be exempted from the operation of the deed, a verdict was taken for the defendant, and the plaintiffs excepted to the decision of the court.

*487 **Hebard & Martin* for plaintiffs.

The plaintiffs contend, that by the terms of the description in the deed from Buck to Wyman the road is necessarily excluded; and if so, it is equivalent to a declaration, that no part of the road is intended to be conveyed. Tyler v. Hammond, 11 Pick. 193. If the description be of land lying on the east side of a road, it must be construed to lie entirely on the east side of such road. Bodley et al. v. Taylor, 2 U. S. Cond. R. 227. 11 Pick. 193. Jackson v. Hathaway, 15 Johns. 447. Starr v. Child, 20 Wend. 164. S. C., 4 Hill 369. Sibley v. Holden, 10 Pick. 249. We contend, that the point of beginning is not, where the centre of the road and the centre, or thread, of the stream intersect,—but that it is, where the eastern side of the road and the northerly side of the stream intersect. Where land was described as running "on the southerly bank of said river," it was held, that the bank and not the thread of the river was the bound intended. Albee v. Little, 5 N. H. 277. This is shown by the language used in describing the terminus of the first line,—"thence on the eastern side of said road, until the [eastern side of] said road strikes the bank of said branch." There can be no question, at common law, but what the plaintiffs are entitled to their action to recover possession of the real estate, to which their ancestor was entitled, in his lifetime. The decision in Boardman v. Bartlett, 6 Vt. 631, was made under the provisions of sec. 3 of the probate act of 1821; [Sl. St. 346;] but the statute now in force is very different in its provisions.

L. B. Vilas and *C. W. Clark* for defendant.

The plaintiffs cannot maintain this action, as heirs, without showing a decree of distribution of the estate of their ancestor, by the probate court. Boardman v. Bartlett, 6 Vt. 631. The deed from Buck to Wyman conveys to the centre of the highway, and consequently includes the premises in dispute. A grant of land, bounded upon a highway, carries with it the fee to the centre of the road, as parcel of the grant. Stevens v. Whistler, 11 East 51. Grose v. West et al., 7 Taunt. 39, [2 E. C. L. 250.] 1 Sw. Dig. 106. 3 Kent [3d Ed.] 433. Chatham v. Brainerd, 11 Conn. 60. Champlin v. Pendleton, 13 Conn. 23. Jackson v. Hathaway, 15 Johns. 447. In Johnson v. Anderson, 6 Shep. 76, it is *said, that "a grant *488 of land, bounded upon a highway, carries the fee in the highway to the centre of it, if the grantor at the time owned to the centre, and there be no word showing a contrary intent." There may be little doubt, but proprietors of land adjoining a highway may convey in such a manner, as to exclude the fee in such highway; but such an intention must appear by express terms in the deed, and will never be presumed; for it is admitted by all the cases, that the general rule of the common law carries the fee to the centre, and as the exclusion of the highway becomes the exception, that exception ought to be expressly stated. In Tyler v. Hammond, 11 Pick. 193, and Sibley v. Holden, 10 Pick. 249, the descriptions in the deeds, which were by metes and bounds, were held to furnish evidence of an intention on the part of the grantors to exclude the road. It is well settled, that a boundary upon a fresh water stream, not navigable, carries the fee *ad filum aquæ;* and there is a perfect analogy between that case and a boundary upon a highway. 3 Kent [3d Ed] 427, 432. O'Linda v. Lothrop, 21 Pick. 292. Starr v. Child, 20 Wend. 149. King v. King, 7 Mass. 496. Luce v. Carley, 24 Wend. 451. Lunt v. Holland, 14 Mass. 149. People v. Canal Appraisers, 13 Wend. 355. Canal Com'rs v. People, 5 Wend. 423. Ang. on Water Courses 4.

The opinion of the court was delivered by

POLAND, J. The first question made in this case arises upon the defendant's objection, that this action cannot be sustained by the present plaintiffs, because there has been no decree made by the Probate Court, directing a division of the estate among the several heirs entitled to it; and the case of Boardman v. Bartlett, 6 Vt. 631, is relied upon, to sustain the objection. That case arose and was decided under the statute of 1821, which expressly prohibited heirs and devisees from maintaining actions of trespass, or ejectment, for lands of the testator, or intestate, until such estate shall be set off to them by order of the Probate Court. The Revised Statutes of this state do not contain any such prohibition, and indeed no prohibition whatever, except in cases

where there has been an administrator or executor appointed, who has assumed the trust of administering upon the estate. See Rev. St., p. 269, sec. 11. By the common law, upon the death of the ancestor the title *immediately descended to and vested in the heir, and *489 he was the proper party to bring an action for any injury to the realty; and as this case is clearly not within any of the prohibitions contained in the Revised Statutes, this objection of the defendant cannot be sustained, and was properly overruled by the county court.

Another and much more important question is raised in the case upon the construction of the deed from D. Azro A. Buck to Daniel Wyman, dated September 10, 1813, as to the extent of the boundary line of the premises conveyed, and especially, whether any part of the road, or highway, mentioned in said deed, is to be considered as included within the description of the land conveyed.

There has been much discussion in this country, both by the courts and elementary writers, in relation to the rules, which should govern in the construction of deeds and grants of lands lying upon or bounded by highways, or streams not navigable; and the most perfect harmony has not prevailed among the various decisions of courts and opinions of law writers upon this subject. The following general principles, however, seem now to be pretty well established. That where one owns land adjoining to or abutting a highway, the legal presumption is, in the absence of evidence showing the fact to be otherwise, that such land owner owns to the middle of the highway;—so, also, where one conveys land adjoining to or bounded upon a highway, (of which the grantor owns the fee,) the law presumes the party intended to convey to the middle of the highway, and will give the deed such an effect, unless the language used by the grantor is such, as to show a clear and explicit intent to limit the operation of the deed, or grant, to the side, or outer edge, of the highway. And in all cases, where general terms are used in a deed, such as "to a highway," or "upon a highway," or "along a highway," the law presumes the parties intended the conveyance to be to the middle or centre line.

The doctrine has sometimes been advanced, that where land was conveyed, which abutted upon a highway, though by a description which did not include any part of the highway itself, yet the grantee would take to the middle of the highway, upon the principle, that the highway would pass as appurtenant to the adjacent land. This doctrine seems now, however, to be very justly and generally exploded. The owner of the fee of the land, upon which a public high*way is located, *490 has not a mere easement in the land, which might pass as a mere appurtenant; but he is considered as still the real owner of the soil and freehold in the land, and entitled to the use and possession of it, so far as it can be used, or occupied, without detriment to the rights of the public to use it for a highway; and he may maintain trespass, or ejectment, even, against any other person, who commits an injury upon the soil, or makes an erection upon it.

The true reason, why this doctrine cannot be sustained, is well stated by PLATT, J., in giving judgment in the case of Jackson v. Hathaway, 15 Johns. 447. He says, "A mere easement may, without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries." And the law is laid down in nearly the same language by WILDE, J., in delivering the opinion of the court in the case of Tyler v. Hammond, 11 Pick. 193, and by MORTON, J., in the case of O'Linda v. Lothrop, 21 Pick. 292; and we are not aware, that this doctrine is now held, in terms, by any court in England, or in this country.

The question, then, whether, in a conveyance of land abutting upon a highway, the highway is included and passes to the grantee, or whether it is excluded and does not pass, becomes in all cases a matter of construction and intention merely, from the language used by the parties, and such surrounding circumstances, as are proper to be taken into the account in ascertaining the intentions of the parties,—keeping always in view the legal presumption, that the parties intended to include the highway, and that the burden is upon the party, who assumes to show, that the parties intended the contrary.

From the plan, referred to in the bill of exceptions in this case, it appears, that the piece of land conveyed by D. A. A. Buck to Wyman was a narrow strip of land, lying between the road and the branch, terminating at the south end in a sharp point, at the intersection of the road and the branch, the road there crossing the branch diagonally; and the main question seems to be in this case, as to the starting point mentioned in the deed. The plaintiffs claim, that it is at the intersection of the northern, or western, bank *of the branch and the eastern edge, or side, *491 of the highway. The defendant claims, that by a proper construction of the deed the point of intersection is where the centre line of the branch and the centre line of the road intersect,—which is several rods farther south than the point claimed by the plaintiffs. The land in dispute is between these two points.

If the position of the plaintiff, as to the point of beginning, in the description of the premises in the deed, were admitted to be correct, it would not be important to inquire, whether any part of the highway was included in the premises conveyed, or not, as we think, if the centre of the road were the boundary intended, it would have to be reached by a direct line from the starting point, and thus the land in dispute not be covered by the deed. But as the whole description is to be taken together, in order to ascertain the intent of the parties, and the proper determination of the place of beginning may be materially affected by the construction given to the deed in this par-

ticular, we have examined the case in reference to the question, whether the land conveyed goes to the centre of the highway, or only to the eastern side, or edge, thereof.

It may be proper here to notice some of the leading decisions in similar cases; though in cases, where we are merely seeking the intent of the parties from the language they have used, not very much aid can be obtained from authorities, except where the very same language is used. In the case of Jackson v. Hathaway, 15 Johns. 447, it was held, that, where land was conveyed, and bounded upon the side of a road, no part of the highway passed by the deed. In the case of Sibley v. Holden, 10 Pick. 249, tenants in common owned land lying upon both sides of a highway, and executed mutual deeds to make partition of their land; and in the deeds the land was described as beginning at a stake and stones on the side of the road, thence, by various courses, to said road again, thence by said road to the place of beginning; and it was decided, that no part of the road was included in the conveyance, but that it still belonged to both, as tenants in common. In Tyler v. Hammond, 11 Pick. 192, a piece of land was conveyed by certain metes and bounds, and was also described as bounded upon one side of a road; and it was held, that no part of the road passed by the deed, it not being included within the metes and bounds given by the deed.

*492 *The following cases were conveyances of land bounded upon streams not navigable; and all authorities seem to agree, that the law is the same in relation to such waters, as in the case of highways. 3 Kent 432, and notes. In the case of Albee v. Little, 5 N. H. 277, it was held, where a deed of land described it as beginning at a river, and then the line was particularly described, until it came to the river again, and was then described as running "on the southerly and easterly bank of said river to the bound first mentioned," that the conveyance did not extend to the centre of the stream, but only to the side, or bank. In Hatch v. Dwight et al., 17 Mass. 289, the description of the land was, "Beginning at the west end of the dam on Mill river, at the upper mills, so called, thence running up the river two rods, thence westwardly, &c., thence to the bank of the river,"—and it was held, that the words used clearly excluded any part of the stream.

The defendant relies mainly upon the following cases;—Chatham v. Brainerd, 11 Conn. 60, where the land was described by courses and distances, and was also described as bounded easterly on the highway, and it was held, that the deed extended to the centre line of the road; though considerable stress seems to be laid upon the fact, that it did not appear clearly, that, by the courses and distances as given, the road was excluded. In the case of Champlin v. Pendleton, 13 Conn. 23, land adjoining a highway was conveyed by metes and bounds, without mentioning the highway; but it being made to appear, that the south line of the land and the north line of the highway were the same, it was held, that the conveyance extended to the middle of the highway. In the case of Starr v. Child et al., 20 Wend. 149, the deed described certain premises by a line running to the river, thence along the shore of said river to a certain street; and it was held by a majority of the supreme court of New York, that the grantee took to the middle of the river. This case was afterwards carried up and decided by the court of errors in that state, and the judgment of the supreme court was reversed, and it was held, that the grantee only took to low water mark, and that no part of the bed of the river was included in the deed. 4 Hill 369.

To return, then, to the language of the deed in this case;—"Beginning at the intersection of the road from Chelsea village to Allen's *saw mill and the *493 branch on which the saw mill stands on the northerly side of said branch and nearly opposite my now dwelling house, thence on the easterly side of said road, until the said road strikes the bank of said branch, thence down said branch in the middle of the channel to the first mentioned bound." The land is described as bounded on the west by a line running on the easterly side of the highway;—now upon what ground can it be fairly said, the parties intended, by the "easterly side," the centre line of the highway? The language, as commonly used and understood, certainly does not import that; and it seems to us, that when the case is viewed in the light of the authorities upon the subject, the great majority of them are against giving this deed such a construction, as the defendant claims for it. The case in 13 Conn. is an authority sufficiently strong to sustain the defendant's view; but that case is directly at variance with the case in 11 Pick., and, as it seems to us, cannot be sustained upon the principle established, even in Connecticut, that the highway must come within the description and cannot pass as appurtenant merely.

Where, then, is the starting point in the deed? In the first place it is to be on the northerly side of said branch, and, as we understand the terms used, they must refer to the bank, and not to the centre or thread, of the stream. The line leading from this point is to follow the easterly side of the highway, which, as already stated, in our opinion, is to be construed to mean the eastern edge, or line of the road, and not the centre line of the road. We come to the conclusion, therefore, from the language used in this deed, that the true starting point is at the intersection of the northerly bank of the stream and the eastern side, or edge, of the road, and that no land lying south of that point was intended to be conveyed by the deed; and also that no part of the highway was intended to be included in the deed.

The judgment of the county court is therefore reversed and a new trial granted.

REDFIELD, J., dissenting. The importance of this case to the immediate parties would hardly justify me in making a formal dissent from the opinion of the court; and could I feel any assurance, that

the decision made in this case will
*494 not hereafter be regarded, *as having virtually set aside the well settled rule of law, that land bounded, by deed, or other conveyance, upon a fresh water stream, not navigable, or by the side of a highway, is to be regarded as extending to the centre of such boundary, I would surely not occupy the time of the court, or space in the reports, by making any dissent from the judgment of the court in this case.

But if I comprehend that rule, and also its application to the facts of this case, it must be regarded, hereafter, as virtually abrogated, in this state, for all useful purposes. The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one, which the American courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is, to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title, for generations, shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless, litigation shall spring up, to vex and harrass those, who in good faith had supposed themselves secure from such embarrassment.

It is, as I understand the law, to prevent the occurrence of just such contingencies as these, that, in the leading, best reasoned and best considered cases upon this subject, it is laid down and fully established, that courts will always extend the boundaries of land, deeded as extending to and along the sides of highways and fresh water streams, not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance. And to have this rule of the least practical importance to cure the evil, which it is adapted to remedy, it must be applied to every case, where there is not expressed an evident and manifest intention to the contrary,—one from which no rational construction can escape. The rule, to be of any practical utility, must be pushed somewhat to the extreme of ordinary rules of construction, so as to apply to all cases, when there is not a clearly expressed intention in the deed to limit the conveyance short of the middle of the stream, or way. If it is only to be applied, like the ordinary rules of construction as to boundary, so as
*495 to *reach, as far as may be, the clearly formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility, as a rule of expediency, or policy. For in ninety nine cases in every hundred the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance, either way; hence they use words naturally descriptive of the prominent idea in their minds at the time, and, in doing so, define the land, which it is expected the party will occupy and improve. This is the view taken by Wallace, in the American notes to Dovaston v. Payne, 2 Smith's Leading Cases, 90, where the cases upon this subject are collated and compared.

The general rule as to monuments undoubtedly is, that the centre of such monuments, stake, stone, tree, rock, &c., is intended, when lands are so defined. So, also, in regard to highways and streams, when referred to in deeds as the limits of the grant, or conveyance, the middle is to be presumed to be the limit, unless the contrary be clearly expressed. The real boundary, then, is the belt of land extending along the highway, or stream, between the margin and centre. And this will ordinarily be referred to, as extending to the road, or the stream, as to a wall, or stone, or tree, &c.,—the intention being to convey one half of the monument.

But if land be bounded, as extending to other land of the grantor, or along another strip of land, ever so narrow, owned by the grantor, it will be supposed the margin of the land is intended. Seventeenth Street, 1 Wend. 262. Lewis Street, 2 Ib. 472. Livingston v. Mayor of New York, 8 Ib. 85. But in this case there is no ground to suppose, that the party, while describing one piece of land, intended to convey half of another piece, as appurtenant to it. Land cannot be conveyed, as appurtenant to other land; if conveyed at all, it must be as parcel of the land conveyed. And it is this rule, which the Massachusetts courts have attempted to apply to the case of lands bounded along the side of a highway. Tyler v. Hammond, 11 Pick. 94. Webber v. Eastern Rail Road Co., 2 Met. 147 The Massachusetts courts, too, have repudiated Chancellor Kent's view,—3 Kent 433,—*in toto*. But if any thing whatever is attempted to be made out of the rule, beyond mere show, the reasoning of the Chancellor is the only ground, upon which it can stand, that is, to treat it as a rule of policy merely, (and not one of intent chiefly,) to
be *applied to all cases, where there *496
is not a clearly defined intention to the contrary.

This rule we find fully adopted in two elaborate and well considered cases in Connecticut,—Chatham v. Brainerd, 11 Conn. 60, and Champlin v. Pendleton, 13 Conn. 23. The same rule is now fully established in New York, both as to highways and streams, putting them both upon the same ground; Starr v. Child. 20 Wend. 149; Canal Com'rs v. People, 5 Wend. 423; S. C., 13 Wend. 355; and this notwithstanding the decision in Starr v. Child was reversed by the court of errors, [4 Hill 369,] by a vote of eleven to ten,—the vote constituting the majority being perhaps that of some senator, who had acquired his knowledge of law in a counting room, or upon a canal boat. The New York courts have repeatedly refused to regard the decision of their court of errors as evidence of the law, in that state even, except as to the particular case; and it has never been regarded elsewhere as much evidence of the law of any case. This same rule has been adopted in many of the other American states. It only remains to inquire, how far it applies to the present case.

It seems to me, that there is no difficulty

in applying the terms used in this conveyance in the manner for which I contend. The place of beginning is "the intersection of the stream and the highway on the northerly side and nearly opposite my now dwelling house." The mention of the dwelling house of the grantor is evidently referred to, to show in what vicinity the "intersection" is,—not to fix any particular point, as the point of beginning. The term is not the "point" of intersection, but the intersection of the whole stream and the whole highway. The northerly side of the stream is named, not to fix any starting point, but to show upon which side is the land, as the grantor owned land upon both sides, and the intersection was upon both sides. And it is evidently not a point upon the bank, which was intended to be fixed as a starting point, as the returning line of the circuit is expressly defined to be in the middle of the stream and to return to the "first mentioned bound,"—which would be impossible and absurd, if the bound were upon the bank of the stream. And every contract should be so construed, as to give every portion its just operation, when that can be done. "Thence on
*497 the easterly side of said road" is *wholly consistent with the rule, for which I contend, and with the decided cases upon this subject. "Until said road strikes the bank of said stream" comes next; and it does not seem to me, that there is any difficulty with this, upon the view I take of the case. If the side of the road means one half of it, and so of the bank of the stream, then when they come in contact it answers the call. And it is evident, the term "bank" is here used in the precise sense, for which I contend, as the description proceeds, "Thence" (that is, from the bank) "down said branch, in the middle of the channel, to the first mentioned bound."

Now I submit, that the language of this description in general, as to the terms used, more strongly indicates an intention only to go to the margin of the stream, than it does to the margin only of the road, aside from the express provision in regard to the easterly side going to the middle of the channel. The ends of this line are defined to be on the "northerly side of the stream" and "the bank of said branch," and yet the line between these two monuments is expressly defined to be "in the middle of the channel;" thus showing, that the other terms are used to imply an extension to the "middle of the channel." Why, then, it may be asked, shall we not hold, that "the easterly side of said road" means the easterly half of said road, as well as of the stream. It does seem to me extremely difficult to escape from this conclusion by any satisfactory reasoning, which does not, at the same time, subvert all the leading cases upon this subject, and, in effect, overthrow the rule itself.

The consideration, too, that the ancestor of the plaintiffs had never made any claim to this land for more than twenty or thirty years, and had no suspicion of any such title remaining in him, goes very far, in my mind, to corroborate the view, which I have taken of the case. For these reasons I cannot concur with the decision of the court.

NOTE.

DEED—DESCRIPTION—LAND ABUTTING ON HIGHWAY. Where the language is such that, by a fair construction, the intent is doubtful, it is the duty of the court to resolve that doubt so as to give to the deed the effect of conveying the land to the center of the highway. Mash v. Burt, 34 Vt. 289. If the conveyance is in terms extended to a highway, or bounded on or by a highway, with nothing to render the intention of the grantor more definite and certain, the grantee will take to the center of the highway. Cole v. Haynes, 22 Vt. 588. The grantee of a lot bounded by a public street in a recorded town plat, whether the lot is designated in the conveyance thereof by its proper number in the plat or by some other appropriate description, as by metes and bounds, takes to the center of the street, unless the street is expressly excluded by something appearing upon the plat or by the terms of the conveyance. Kneeland v Van Valkenburgh, (Wis.) 1 N. W. Rep. 63. The presumption that it was intended to convey to the center of the street is not overcome from the mere fact that the boundary lines specified in the grant are outside the limits of the street. Id. It has been held that the presumption that a grantor intended to convey to the center of an adjacent highway is not overcome by the fact that the measurement is given in the deed of side lines which reach only to the outer line of the way. Gould v. Railroad Co., (Mass.) 7 N. E. Rep. 543.

But where the boundary of a lot conveyed was described as running in line with a certain street, and it appeared that such boundary was several hundred feet long, and that, at the time of the conveyance, such street covered only about 30 feet of the line, and no extension of the street was legal, and none was contemplated, it was held that the general rule did not apply. Hamlin v. Manufacturing Co., (Mass.) 6 N. E. Rep. 531. In such case the reason for the general rule does not exist, viz., "that it is not to be presumed that the grantor intends to reserve a narrow strip of land, not capable of any substantial use by him, after having parted with the land by the side of it, and of no considerable value if the highway should be discontinued." Id. So, where the boundary was described as the "easterly and northerly side" of a road, the deed was held not to convey to the center of the highway, no such intention appearing in the deed. Holmes v. Turner's Falls Co., (Mass.) 8 N. E. Rep. 646. The rule is limited to those cases where the grantor owns the fee of the highway. Church v. Stiles, (Vt.) 10 Atl. Rep. 674.

Where a street is laid wholly on one's land, and is located on the margin of the tract owned by him, so that he owns nothing beyond the road, a conveyance of such tract will carry the fee in the street to the opposite boundary line thereof. In re Robbins, (Minn.) 24 N. W. Rep. 356.

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*TIMOTHY SHED v. GEORGE R. LESLIE. *498

(*Orange*, March Term, 1850.)

The grantor in a deed, which was expressed to be executed for the purpose of having the business of a clothier carried on where the grantor lived and in consideration of five shillings, conveyed to the grantee, and his heirs and assigns, the privilege of drawing from the mill pond, on which the grantor had a grist mill, "water sufficient for carrying one fulling mill and shears for one clothier's shop,—reserving always, in a scarcity of water, sufficient to carry" the grantor's grist mill; *habendum* to the grantee, and his heirs and assigns, so long as he or they should carry on the clothier's business at or near said place, and should be at one sixth part of the expense of erecting and keeping in repair the dam and flume necessary for supplying the pond with water. *Held*, that the grant restricted the use of the water for the purposes of a fulling mill and clothier's works only, and could not be con-

strued as giving to the grantee the right to use the same quantity of water in carrying a carding machine.

Held, also, that the grantor and grantee did not thereby become tenants in common in the right to use the water, and that the deed did not restrict the right of the grantor to use the water, not conveyed to the grantee, for other purposes than a grist mill.

In order to render a deposition admissible as evidence, both the certificate of the oath administered to the deponent and the caption must be severally signed by the magistrate, before whom the deposition is taken.

Assumpsit, to recover for the use of water to carry a carding machine owned by the defendant in the village of Wells River, in Newbury, from 1832 to 1847. Plea, the general issue, and trial by jury, June Term, 1849,—REDFIELD, J., presiding. On trial the plaintiff gave in evidence a deed from Ezra Chamberlin to Josiah Marsh, dated December 6, 1805, conveying one half of the "Governor's farm," so called, excepting what he had before that time deeded to John Quimby and others; also a deed from Josiah Marsh to Josiah & Samuel W. Marsh, dated March 20, 1811, conveying the "old grist mill," so called, and privilege, and the land on the north side of Wells River conveyed by Chamberlin to Josiah Marsh; also deeds from Josiah and Samuel W. Marsh, through several intermediate grantees, to the plaintiff, conveying all the land and water privilege belonging to the grist mill privilege, so called; also a deed from Stedman & Gordon to the plaintiff, dated January 7, 1822, conveying six acres of *499 land, together with the saw *mill, and so much of the dam as pertained thereto, and the privilege thereunto belonging, on the north side of Wells River. The plaintiff also gave evidence tending to prove, that the saw mill, above named, was situated upon the north side of the river, and was occupied by the plaintiff until 1828, when it was destroyed by the water; but that the dam, upon which it was situated, had always been kept in repair by the plaintiff, the defendant, and one Holt, who owned a trip hammer shop; that on the south side of the river the water is taken from the pond caused by that dam, by the plaintiff, the defendant and Holt, and conveyed a few rods into another pond, mostly on the defendant's land, which has been made by constructing a dam across a hollow, on which last dam is a trip hammer shop, near where the grist mill formerly stood, near the east end of the pond, and the water is taken from the north side of the last mentioned pond and carried to the defendant's shop; that previous to the spring of 1832 the defendant carried on the business of fulling and dressing cloth, and in the spring of 1832 he put a carding machine into the same building and took the water to carry the same from the flume, from which water was taken to carry the fulling mill, and has used his carding machine every year since, during the season of carding, which usually commenced about the first of June and ended about the first of September, and has also continued the business of cloth dressing during the usual seasons for that business, but has not used the water to any considerable extent for both purposes at the same time. It also appeared in evidence, that since the carding machine has been put in, the defendant has not used the water for both purposes more than about half the year, and that previous to that time he used it from half to three fourths of the year, and that the quantity required, or used, to carry the carding machine is less by thirty eight inches, than that required to carry the fulling mill, besides seventy inches used to carry the shears. The plaintiff never had a grist mill on the dam, from which the defendant takes his water for his carding machine, but has used the waste water, which runs over the dam, at his tannery about twenty rods below.

The defendant gave in evidence a deed from Ezra Chamberlin to John Quimby, dated April 24, 1797. In the commencement of this deed the grant was declared to be made "for the purpose of having *the business of a clothier carried on *500 where I now live, and in consideration of five shillings." The description of the right conveyed was in these words,—"the privilege of taking and drawing, from the mill pond on which my grist mill now stands, at any one place adjoining a certain piece of land, which I have this day sold said John, southerly of said mill pond, water sufficient for carrying one fulling mill and shears for one clothier's shop,—reserving always, in a scarcity of water, sufficient to carry my own grist mill." The *habendum* was to the grantee, and his heirs and assigns, "so long as he or they shall carry on the clothier's business at or near said place, and shall be at one sixth part of the expense of making and keeping in repair the necessary dam, or dams, and flume, or flumes, for supporting and supplying said pond with water." The defendant also gave in evidence deeds from John Quimby, through several intermediate grantees, to himself, of the same privilege. The defendant also gave in evidence conveyances from Ezra Chamberlin to one Williams of the privilege of water for a trip hammer shop on the same dam. The defendant also gave evidence tending to show, that he put a carding machine into the shop in the early part of May, 1832; and the evidence tended to prove, that he commenced using the same about the tenth of June, 1832. The defendant's evidence also tended to prove, that in the early part of May, 1847, the plaintiff requested the defendant to sign some writing respecting the water privilege,—which the defendant declined to do, saying, at the same time, that he was not aware, that he was using any of the plaintiff's water, or in any way interfering with his right; and that the plaintiff did not then claim, that any bargain had ever been made with the defendant respecting the water, but assigned as a reason for requesting a writing, that the defendant would soon acquire title to the privilege by possession. On trial the plaintiff offered the deposition of Daniel Patterson, which was objected to, for the reason that the magistrate, by whom it was taken, had not made and signed any certificate, that the oath was administered to the witness. The certificate, that the oath was administered, was

written upon the deposition in the usual form, with a space between that and the certificate of the caption, in which the words "Justice of Peace" were written, but it was not signed by the magistrate; but the certificate of the caption, which
*501 *immediately followed the certificate of the oath, was in due form, and was signed by the magistrate, and showed, that the deposition was taken upon notice, and that the adverse party attended at the taking. The objection was overruled.

The defendant requested the court to charge the jury,—1. That the plaintiff's deeds do not show any title in him to the privilege in question. 2. That if he had any title, it was as tenant in common with the defendant and the grantees of Wiliams, and so he cannot maintain this action. 3. That the grant from Chamberlin to Quimby, and from him to the defendant, is of a sufficient quantity of water to carry a fulling mill and shears, and that the defendant had a right to use the same quantity of water for any other purpose;—that the limitation was of quantity, and not of the purpose, for which the water should be used. 4. That the defendant had acquired the right by fifteen years occupancy. 5. That unless the plaintiff had shown some contract between the parties, or some request by the defendant for permission to use the water, he could not recover in this action. The evidence did not distinctly show how the defendant claimed to use the water,—whether as matter of right or by permission of the plaintiff; but some parts of the testimony tended to show, that it was by permission of the plaintiff, and that question was submitted to the jury. The court charged the jury, that if the plaintiff, and those under whom he claimed, had exercised control of the water in the dam, to which the deeds referred, the plaintiff's title was sufficiently proved;—that the plaintiff's title was paramount to the title of the defendant and those under whom he claimed, and they did not hold as tenants in common;—that the defendant's deed would only give him the right to use the requisite quantity of water for a fulling mill and its apparatus, as specified in the deed, and during the season of fulling and cloth dressing, and not at any other season; and that if the business so diminished, as to require less water, than at the time the deed was originally executed, that would not justify the defendant in putting the water, which would have been necessary, if the business had not diminished, to other uses; but that, to the extent of the quantity requisite each year for the purposes named in the deed, and for the same time, the court considered the defendant might, if
*502 *he chose, put the water to any use, which he desired, thereby causing no detriment to the plaintiff; but that the defendant could not, under his deed, make use of water at a different time in the year from that when fulling and cloth dressing is carried on, and for another purpose, although he used in the whole year no more water, than was required for cloth dressing at the time the deed was executed, and although he used no more at any one time, than he might draw from the gate, by which his cloth dressing was operated;—that it was conceded, that the defendant used water for carding, which was taken from the plaintiff's pond at a time, when he would not be required to use any for the cloth dressing business, and that for some portion of the time he used it for both operations at the same time; and the plaintiff must recover, unless the action failed upon one of two grounds;—1. If the defendant had so used the water, under a claim of right, for fifteen years, he would thereby acquire right so to use it;—2. If the defendant used it under a claim of right, without the permission of the plaintiff, this action could not be maintained; for to maintain this action for use and occupation, it was requisite, that the use should be by the plaintiff's permission, acknowledging his right to the thing used, without any adverse claim of right in the defendant. Verdict for plaintiff. Exceptions by defendant.

C. B. Leslie for defendant.

The deposition of Patterson should have been rejected,—as it does not appear, that the deponent made oath to the truth of the deposition. Rev. St., c. 31, § 7 Bell v. Morrison, 1 Pet. 355. Pingry v. Washburn, 1 Aik. 264. Whitney v. Sears, 16 Vt. 587. Burroughs v. Booth, 1 D. Ch. 106. The defendant insists, that the plaintiff, the defendant and the grantees of Williams are tenants in common of the water privileges; that each grantee is to sustain a certain proportion of the expense of making and keeping in repair the necessary dams and flumes, and all draw water from one common pond. They hold by distinct titles, without unity of interest, but a unity of possession. If a man enfeoff another of a moiety, not limiting it in severalty, they are tenants in common. Co. Lit. 190, sec. 299. 3 Bac. Abr. 195. The general rule is, that a deed shall be construed most strongly *against the *503 grantor. Co. Lit. 196. Ib. 48. 1 Bl. Com. 380. Chit. on Cont. 78. 1 Sw. Dig. 234. 1 Pow. on Cont. 395. Therefore the proper construction of the deed from Chamberlin to Quimby is, that the defendant, in the use of water, is restricted only as to quantity. After a right has been acquired to use water for one purpose, the owner has the right to use the same extent of water for a different purpose, provided he do no prejudice to any other owner. 3 Steph. N. P. 2749. 6 N. H. 22. 2 Ib. 255. The water has not been wanted for the grist mill, and the plaintiff has not the right he claims; his right was only to the use of sufficient water to carry the grist mill.

A. Underwood for plaintiff.

The plaintiff insists, that the construction of the deed from Chamberlin to Quimby, contended for by the defendant, is contrary to the manifest intention of the parties to it. In construing an instrument the whole is to be considered. The conveyance is limited in duration to such period, as Quimby and his assigns carry on a clothier's shop, and was made for the express purpose of having the business of a clothier carried on,—plainly indicating, that the water would revert to Chamberlin and his assigns, whenever the clothing business should cease to be carried on. If the defendant's construction be correct, the conveyance would become perpetual, to whatever use the water might be

converted. The fact, that the plaintiff's grist mill and saw mill had been discontinued can make no difference as to his right; he, being the general owner of Chamberlin's water power, subject only to the rights conveyed to Quimby, might use it, or retain it without use. Mason v. Hill, 5 B. & Ad. 1, [27 E. C. L. 11.] Palmer v. Keblethwaite, 1 Show. 64, and Glynne v. Nichols, 2 Show. 507,—reported also in Comb. 43,—referred to in Mason v. Hill. The plaintiff and defendant were not tenants in common. Chamberlin and those claiming under him were the general owners, and Quimby's right was special, limited, and subject to be defeated by non-user for the purposes designated in the grant.

The opinion of the court was delivered by

HALL, J. The most important questions in the case relate to the construction of the deed, or lease, from Chamberlin to Quimby in 1797.

*504 *It is insisted in behalf of the defendant, that the deed of Chamberlin conveyed to Quimby the right to use, in such manner as he might choose, such quantity of water, as would be sufficient for carrying a fulling mill and shears for a clothier's shop; while it is claimed on the part of the plaintiff, that the deed restricted the use of the water to the purpose of driving a fulling mill and shears.

To sustain the position of the defendant, that the grantee of Chamberlin and those claiming under him, having acquired the use of the water for one purpose, are entitled to use it to the same extent for other purposes, the case of Saunders v. Newman, 1 B. & Ald. 258, [3 Steph. N. P 2749,] is much relied upon. The question in that case, however, did not arise upon the construction of a grant. In England the owner of land upon a stream, by twenty years use of the water, acquires a right to such use, as against the owners of land, on the same stream, above and below him. In Saunders v. Newman the plaintiff had occupied a mill for forty years, but had recently changed the construction of his water wheel, though not in such manner as required the use of more water, than was before used. The defendant, who had forced the water back upon the plaintiff's new wheel, claimed the right to do so, because the form of its construction had been changed, by which, it was insisted, the plaintiff had lost his ancient right to the use of the water. But the court held differently, and said, in reference to a right thus gained by ancient user, that, where a party has thus acquired a right to use water for one purpose, he may use the same extent of water for a different purpose, provided it does no prejudice to any other owner in his use of the water. But this case had no reference to the construction of a contract in regard to the use of water, or of a grant of the use of it,—which grant must doubtless be construed by the same rules, that govern in other cases,—the intention of the parties being the matter to be looked after in the construction.

On a careful examination of the deed from Chamberlin to Quimby, we feel constrained to hold, that the right to use water for a fulling mill and clothier's works, only, was intended to be conveyed, and that the parties had not in their minds the fulling mill and clothier's shears as a mere measure of the quantity of water, that might be used. In the beginning of the deed the grant is declared to be "for the purpose of having the business of a clothier *carried on, *505 and in consideration of five shillings." And though the description of the right conveyed, if it stood alone, might perhaps be construed to embrace a quantity of water for general purposes,—the words being, "water sufficient for carrying one fulling mill and shears for one clothier's shop,"—yet the *habendum* of the deed clearly shows, that the right conveyed was not designed to continue any longer, than the grantee, his heirs and assigns, should carry on the clothier's business. When that business should cease, the right to use the water was to terminate. It could not, therefore, have been the intention of the parties, that the water should be used for other purposes, than for clothier's works.

This being our view of the grant from Chamberlin to Quimby, it follows, that we find no error in the charge of the court in regard to the quantity of water, which the defendant might use for his carding machine, of which the defendant is entitled to complain.

This construction of the conveyance from Chamberlin to Quimby also disposes of the question, made in regard to a tenancy in common, as well as that in relation to the right to the water retained by Chamberlin, and to which the plaintiff has succeeded. We must decide both these points against the defendant.

It is objected, that there was not sufficient evidence of a contract for the use of the water, between the plaintiff and defendant, to entitle the plaintiff to recover in this action. But there appears from the bill of exceptions to have been some evidence, tending to prove that the defendant used the water by permission of the plaintiff; and though it would seem not improbable, that the jury came to a wrong conclusion upon the evidence, and charged the defendant, when their verdict might very well have been the other way, yet that is not a matter that can be reviewed on a bill of exceptions. The verdict of the jury upon the evidence is conclusive.

The only remaining question in the case is in reference to the admission of the deposition of Patterson.

The deposition appears to have been taken and certified in due form, except that the certificate of the oath of the deponent is not signed by the justice. It is insisted in behalf of the plaintiff, that the signature of the justice, which appears to the caption below, is to be considered as attached to both certificates, and that the deposition was therefore properly admitted. But this is not a compli*ance with the statute. *506 The form provides for two signatures of the magistrate, and on consideration we think it will not do to dispense with either. In this case there is a blank left for the signature of the justice to the certificate of the oath. The omission of the signature leaves the paper imperfect. It does not appear to have been the intention of the justice to em-

brace this certificate in his signature of the other, and the omission may have been for the very reason, that the oath had not been administered. If the deponent were indicted for perjury, it would, we think, be difficult to maintain, that the deposition was proper evidence, that the oath had been administered. We therefore think the deposition was wrongly admitted.

The judgment of the county court is reversed, and a new trial granted.

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*507 *COUNTY OF WASHINGTON.

APRIL TERM, 1850.

PRESENT:

HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. DANIEL KELLOGG,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

JACKSON T. HARWOOD v. ESTATE OF EDMUND HARWOOD.

(*Washington*, April Term, 1850.)

Parol evidence is admissible, to show that the sum, expressed in a deed to be the consideration for the conveyance, and which was received by the grantor, was in fact received by him as the consideration for the conveyance and also as payment of a debt then due to him from the grantee.

Book account. Judgment to account was rendered, and auditors were appointed, who reported the facts as follows. The plaintiff's account was for labor from April, 1840, to February, 1844. In the winter or spring of 1840 the plaintiff *508 talked of *going west, and his father Edmund Harwood, the deceased, wished him to remain at home and assist him in carrying on the farm, and offered the plaintiff such inducements, that he relinquished his purpose of going west and entered into the service of his father. It did not appear, that there was any stipulated sum agreed upon for his labor, but it appeared, that he remained with his father, laboring, until February, 1844, except an absence of about two months, when his father exceuted a deed of his farm to the plaintiff and his two sisters. The transfer of the property did not change the mode of operations upon the farm, but all remained in possession, as before the conveyance. The plaintiff continued there until the autumn of 1847, when he released to his father his interest in the property, and received $500,00,—the consideration mentioned in the deed. The defendant offered to prove, that the said sum of $500,00 was to be a full satisfaction of all claims, which the plaintiff had against his father; to which the plaintiff objected, but the objection was overruled and the testimony received. The county court,—REDFIELD, J., presiding,—rendered judgment for the defendant upon the report. Exceptions by plaintiff.

J. A. Wing for plaintiff.

The contract between the parties was reduced to writing. The plaintiff released his interest in the farm and received $500,00, and it would be adding to the written contract to hold, that the same $500, for which he gave his deed, was also received in satisfaction of all other claims, not mentioned in the deed. Ripley v. Paige, 12 Vt. 353. Isaacs v. Elkins, 11 Vt. 679.

Heaton & Reed for defendant.

1. From the report of the auditors it is evident, that they found the fact, that the settlement and discharge of the plaintiff's claim against the deceased and the plaintiff's conveyance of the real estate was the contract and the consideration on the one side, and the payment of the $500,00 the contract and consideration on the other; and of these mutual contracts there has been a performance. A plea of accord and satisfaction to this claim of the plaintiff would have been fully supported by this proof. 2 Greenl. Ev. 22. 2. The recital in a deed of the consideration, and the acknowl*edgment of its receipt, is *509 no estoppel, when the deed itself is not sought to be affected. For every other purpose this recital is merely formal, at best but *prima facie* evidence, and may be varied, or contradicted, by parol. It is regarded in the same degree inconclusive with any other receipt, and evidence, only, that can be overcome, or explained, by other evidence. McCrea v. Purmort, 16 Wend. 460. Wolfe v. Hauver, 1 Gill 84. Elden v. Seymour, 8 Conn. 304. Jack v. Dougherty, 3 Watts 151. Wilkinson v. Scott, 17 Mass. 249. Webb v. Peele, 7 Pick. 247. Bullard v. Briggs, Ib. 533. Morse v. Shattuck, 4 N. H. 229. Pritchard v. Brown, Ib. 397. 2 Cow. & H. Notes to Phil. Ev., n. 194. 3 Ib., n. 964. The same doctrines have been adopted in our own state. Beach v. Packard, 10 Vt. 96. Lazell v. Lazell, 12 Vt. 443.

The opinion of the court was delivered by

KELLOGG, J. This was a report of auditors, upon which the county court rendered judgment for the defendant. At the hearing before the auditors certain testimony was admitted, which the plaintiff claims should have been excluded, and for this cause he insists, the report should have been set aside. This objection is founded on the supposition, that the tendency of the testimony was to vary or contradict, the terms of a deed executed by the plaintiff to E. Harwood, the deceased, in his life time. The plaintiff had labored for the deceased, who was his father, for several years, when his father executed to him a deed of certain real estate. Subsequently an arrangement was made between the plaintiff and his father, by which the plaintiff re-conveyed to his father the same real estate, upon the payment of five hundred dollars. And the testimony objected to proved that the five hundred dollars, by the agreement of the parties, was to be in full of all claims, which the plaintiff had against his father.

The plaintiff relies upon the case of Ripley v. Paige, 12 Vt. 353, as an authority to show the inadmissibility of the testimony

objected to. The question in that case arose upon the construction of a written agreement for the conveyance of a farm. The contract particularly described the estate, that was to be conveyed, and the price that was to be paid for it. The farm was conveyed, pursuant to the contract.

But the defendant insisted, that the *510 plaintiff was *to convey other property besides the farm, and which was not specified in the contract, and offered parol testimony to prove it,—which was properly excluded by the court, as it tended to enlarge and vary the written contract. The case is not analogous to the one before the court. The testimony received by the auditors had no tendency to vary, or impair, the legal effect of the terms of the deed.

That the parties are not concluded by the consideration expressed in the deed has long been settled. If no consideration be expressed, the grantee may prove a consideration *aliunde* and by parol, so as to uphold the deed. So, if a consideration be expressed in the deed and acknowledged to have been received to the satisfaction of the grantor, yet the grantor is not estopped from showing, that no consideration was in fact paid. Shephard v. Little, 14 Johns. 210. So, in an action upon the covenant of seisin in a deed, the grantee may show, by extrinsic evidence, the payment of a greater consideration than that expressed in the deed. 8 Conn. 304. 4 N. H. 229. So, it has been held, that a consideration may be averred and shown, which is consistent with the consideration expressed in the deed. And Mr. Phillips, in his treatise upon evidence, says, "that the cases appear to have established, that it is not considered to be contrary to or inconsistent with a deed, to prove another consideration in addition to the consideration expressed."

Indeed, it seems to be well settled, "that the only effect of a consideration clause in a deed is to estop the grantor from alleging, that the deed was executed without consideration; and that for every other purpose it is open to explanation, and may be varied by parol proof." 16 Wend. 460. The same doctrine is held in Beach v. Packard, 10 Vt. 96, and Lazell v. Lazell, 12 Vt. 443.

The testimony was properly received by the auditors, and the judgment of the county court is therefore affirmed.

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*511 *MAHLON COTTRILL v. ABRAHAM VANDUZEN, OLIVER P. VANDUZEN AND H. G. VANDUZEN.

(*Washington*, April Term, 1850.)

When persons hold themselves out to the world as partners and conduct as such, those dealing with them may hold them responsible as partners, though there be no partnership in fact.

If any evidence be given before an auditor, which has a legal tendency to prove a fact in controversy before him, his decision upon the weight and sufficiency of the evidence is conclusive.

Where the auditor, in an action upon book account, has reported, that one of the defendants so conducted in reference to the business of his co-defendants, who were proprietors of a stage coach and team, as to entitle the plaintiff to hold him responsible as a partner with them, and it appeared before the auditor, that such defendant had sometimes driven the stage, and had purchased and otherwise furnished some portion of the grain for the horses, and had written letters to the plaintiff, respecting the account in suit, such as he would have been expected to write, had he been in fact a partner, it was held, that the decision of the auditor upon this point was conclusive.

The declarations of one of the defendants, in such case, that the defendants were jointly interested in the business, are only admissible to establish his own liability, and cannot be received to charge his co-defendants.

Book account. Judgment to account was rendered, and an auditor was appointed, who reported the facts as follows. The account of the plaintiff was for keeping and boarding the horses and driver of a stage coach, which run between Montpelier and Warren. In the years 1838 and 1839 the defendant Abraham Vanduzen, who resided in Warren, was the proprietor of the stage in question, and the plaintiff kept the stage horses at his tavern, and the bills therefor were paid by said Abraham. The stage was driven, most of the time, by the defendant Oliver P. Vanduzen, a son of the said Abraham, who became twenty one years of age in 1839. In January, 1840, Oliver, who was still driving, informed the plaintiff, that he and his father and his brother H. G. Vanduzen had become jointly interested in the staging business; and the plaintiff, after that, charged his account to "Vanduzen,"—having before made his charges against "Abraham Vanduzen." This declaration was proved by the testimony of the plaintiff alone. Oliver P. Van*duzen died after the commence- *512 ment of this suit. Oliver P. and H. G. Vanduzen lived with their father during the time of the accruing of the plaintiff's account, except that in May, 1841, H. G. Vanduzen removed to a farm a short distance from his father's. The stage was kept at said Abraham's, the same as before 1840; oats were raised on his farm for the horses, and oats were purchased for them on the father's credit. The father's farm horses were run a few times in the stage; and the property was put in the list as the father's. No notice was ever given to the plaintiff, that said Abraham was not concerned in the business. H. G. Vanduzen was employed more or less in the business, such as occasionally driving the stage, when Oliver could not, and sometimes purchasing oats; but Oliver was the active man in the business. In July, 1841, in reply to calls by the plaintiff for payment, H. G. Vanduzen wrote two letters to the plaintiff,—the first of which was dated July 14, 1841, and was in these words;—"Mr. Cottrill,—Sir: I take this opportunity to inform you, that we shall be up to Montpelier in the course of next week, and shall be able to pay you a part of the money we are owing you, if not the whole. I hope you won't be uneasy, or worried. We have just received our drafts for the last quarter, ending June, on the offices on the road, and the quarterly dues from the government, on the quarter ending March, we have not yet received. But as soon as we receive the quarterlies we will settle and pay to your satisfaction, if we don't make out to settle, when we are up next week."

(Signed) "H. G. Vanduzen." The second letter was dated July 28, 1841, and was in these words;—"Mr. Cottrill,—Sir: Enclosed I send you forty five dollars, you will accept, and oblige us by waiting for the rest till we have returns from government, when we will come up and settle and pay you up. It is not convenient for us to come up, as I told of last week." (Signed) "H. G Vanduzen." Abraham and H. G. Vanduzen testified, that in January, 1840, Abraham sold the staging business to Oliver, and that after that time Oliver had the sole interest in the business and they had none; and evidence was presented upon both sides, upon the question whether there was a partnership between the defendants. In relation to the circumstances, under which the letters above mentioned were written, the principal testimony was that of H. G. Vanduzen, who testified,
*513 that *Oliver was at that time engaged in driving a stage from Hancock and requested him to collect the drafts and settle matters; and that he knew of there being a balance due from his father, and perhaps his father requested him to write;—and the auditor reported, that this testimony was credited by him. He also testified, that he did not know, how he came to use the terms "we," &c., in the letters, but that he wrote as a mere agent. The stage contract ended in July, 1841; after that Oliver was interested in a stage from Hancock to Middlebury, and he owned the stage from Warren to Hancock after January, 1840. The plaintiff furnished a bill of his account, to July, 1840, to Abraham Vanduzen, made out as against him alone. The auditor reported, that he did not find sufficient proof of a specific and definite partnership, or joint interest, in the staging business between the defendants; but that he was of opinion, that the plaintiff had a right to hold all of the defendants responsible, inasmuch as the business was conducted in the manner above stated, and Abraham and H. G. Vanduzen so held themselves out to the plaintiff, that the plaintiff had a right to give the credit to all the defendants, as he did. And the auditor found a balance due to the plaintiff, subject to the opinion of the court upon the facts reported. The county court, November Term, 1849,—REDFIELD, J., presiding,—rendered judgment for the plaintiff upon the report. Exceptions by defendants.

Heaton & Reed for defendants.

The auditor does not find the fact of any actual partnership; but among the facts considered by him, and reported as the ground of his decision, is the declaration of Oliver P Vanduzen to the plaintiff, that Abraham and H. G. Vanduzen were partners with him. This was incompetent testimony to establish for the plaintiff the sole issue made in the case. McPherson v. Rathbone, 7 Wend. 216. Whitney v. Ferris, 10 Johns. 66. Tuttle v. Cooper, 5 Pick. 414. 2 Greenl. Ev. 398. Without this, there is not sufficient to show any joint liability to the plaintiff.

*514 **Peck & Colby* for plaintiff.

The auditor finds, that the plaintiff gave credit to all the defendants, and that they held themselves out to him as jointly liable, and that the plaintiff had a right, from the acts, conduct and sayings of the defendants, so to regard them. All this is matter of fact; and an inference of fact, drawn by the auditor, cannot be re-examined in this court.

The opinion of the court was delivered by

POLAND, J. The auditor reports, that, from all the evidence in the case, he was unable to find, that the defendants were really partners between themselves, but does find, that they so conducted and held themselves out to the plaintiff, that he was justified in dealing with and giving credit to them as such.

No doctrine is more familiar, or better settled, than that, when persons hold themselves out to the world as partners, and conduct as such, persons dealing with them have a right to give credit to them and hold them responsible as partners, though there may be no partnership in fact. Stearns v. Haven et al., 14 Vt. 540. In the present case the defendants do not deny, but that the evidence before the auditor was sufficient to show a liability against Abraham and O. P. Vanduzen, but they insist, that the auditor erred in finding H. G. Vanduzen liable. The only question for us to determine upon this report is, whether there appears to have been any evidence given before the auditor, which legally tended to show a liability against H. G Vanduzen; for if there were, the sufficiency, or insufficiency, of the evidence to prove the fact was a matter resting wholly in the discretion and judgment of the auditor, and his decision of any question of fact upon the evidence is as final and conclusive, as the finding of facts by a court, or jury. Does the auditor's report show any evidence, having a legal tendency to show, that H. G. Vanduzen held himself out to the world as a partner, or jointly interested, in the stage business, out of which the plaintiff's account accrued? We think such evidence appears on the report.

In the first place the defendant H. G. Vanduzen was to some extent at least actually engaged in the stage business himself, and, during the time the plaintiff's account was accruing, actually drove the stage a portion of the time to and from the plaintiff's house in *Montpelier to Warren. *515
In the second place, it appears from the report, that he bought and otherwise furnished, himself, some portion of the keeping for the horses, that were used in the stage business. These acts of H. G. Vanduzen were clearly evidence tending to show, that he was a partner, or joint owner, and the performance of them must necessarily tend to induce a belief of the existence of such an interest in him;—how conclusive they would be would depend much upon the situation of the parties and other surrounding circumstances, to be judged of by the auditor. In the third place, the letters of H. G. Vanduzen to the plaintiff not only have a tendency to show a joint interest and liability upon the writer of them, but they must be regarded, as we think, as testimony of a very conclusive character. The language is entirely incon-

sistent with the notion, that the writer had no interest in the payment of the money to the plaintiff, but wrote merely by the request and procurement of some other person, who had the sole interest. The testimony of the defendant H. G. Vanduzen, that the letters were really written by him as the agent of his brother O. P. Vanduzen, would not at all alter the impression the letters would give the plaintiff, nor his right to act upon the language contained in them. It seems, then, clear, that there was evidence before the auditor tending to show such facts, as the auditor has found, and if so, we cannot disturb his decision upon the facts.

In relation to the defendants' objection to the admissions of O. P. Vanduzen, it is only necessary to say, that they were admissible for the purpose of establishing his liability, (though not to charge the other defendants,) and it does not appear, from the report, that the auditor gave any weight to such admissions, except against the party making them.

The judgment of the county court is affirmed.

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*516 *GEORGE P. HASSAM v. LEWIS HASSAM, JR.

(*Washington*, April Term, 1850.)

When the cattle of the plaintiff were depastured in the field of the defendant without right, or license, and as a mere tort, it was held, that the defendant could not, without some agreement between the parties, change it into a contract, and recover therefor in an action on book account.

In an action upon book account, it is the duty of an auditor to merely adjust the accounts between the parties; a mere independent offset, not a matter of account, must be pleaded in the county court. A judgment, which the defendant has recovered against the plaintiff, cannot be given in evidence before the auditor as a defence to the plaintiff's book account.

But if the judgment be pleaded in offset in the county court, a replication of a tender of the amount due upon it, made after the commencement of the action upon book account, will be sufficient,—the judgment being an independent claim, which cannot be considered as in litigation betwen the parties, until pleaded in offset.

Book account. The action was commenced before a justice of the peace, the writ being served July 7, 1848, and came to the county court by appeal. Judgment to account was rendered, and an auditor was appointed, who reported as follows. The defendant presented an account against the plaintiff, in which was a charge of $1,68 for pasturing the plaintiff's cattle. The cattle were not pastured at the plaintiff's request, nor under any express contract. The plaintiff had knowledge, that his cattle were running in the defendant's pasture, there being no sufficient fence to enclose it; and the defendant claimed, that it was the duty of the plaintiff to build the fence, or a portion of it,—which the plaintiff declined doing. The defendant notified the plaintiff, that he should let his pasture lie common, and afterwards, after the cattle had been running there some time, said to the plaintiff, that if he did not repair the fence, he should charge him for the pasturing. The pasturing was worth the sum charged; but the auditor disallowed the item. The defendant also offered, as an offset to the plaintiff's account, a judgment recovered by him against the plaintiff. This was rejected by the auditor, as not admissible in this action. The auditor found due to the plaintiff a balance of $7,92. In the county court the defendant pleaded in offset the same judg*ment, offered as an offset before *517 the auditor, rendered by a justice of the peace, July 6, 1848, for $5,24 damages and $5,24 costs. The plaintiff replied, that after the rendition of said judgment, and before the same was pleaded in offset, to wit, August 1, 1848, he tendered to the defendant $10,75 in satisfaction of the same, which the defendant refused to receive, and that he had ever since been ready to pay the same sum to the defendant, and that he now brought the same into court, ready to pay to the defendant, if he would receive the same. To this replication the defendant demurred specially. From the record of the justice of the peace, before whom this suit was commenced, it appeared, that the defendant there pleaded in offset the same judgment, and the plaintiff replied a tender, made after the commencement of this suit, but before the time of trial. The county court, November Term, 1849,—REDFIELD, J., presiding,—adjudged the replication sufficient, and rendered judgment for the plaintiff, upon the report, for the sum found due by the auditor. Exceptions by defendant.

H. Carpenter for defendant.

There was error in disallowing the charge for pasturing. The plaintiff should not complain, if the defendant waives the tort and counts upon an implied promise to pay. The auditor erred in rejecting the judgment offered as an offset to the plaintiff's account. In Pratt v. Gallup, 7 Vt. 344, and May v. Brownell, 3 Vt. 463, the court held, that "a party may avail himself of any defence before the auditor, which he could plead in the county court." If this were a case, where the plaintiff could make a legal tender, it should have been done before the commencement of this action. This is not alleged in the replication. Bro., Tender, pl. 9. Bac. Abr., Tender D. Chit. on Cont. 305. 3 Chit. Pl. 955. The money should have been brought into court, when the case was entered in the county court. The replication does not allege, that this was done. 1 Tidd's Pr. 669. 5 Shep. 43. Currie v. Thomas, 8 Port. 293. 2 Dall. 190. 1 Bibb 272. 14 Wend. 221. This is not a case, where the plaintiff could make a tender, so as to deprive the defendant of his right to offset the judgment against *the book *518 account of the plaintiff. The defendant was not obliged, while the suit was pending, to receive the pay on a single charge of his account, or on any offset he might have, at the hazard of having this payment turn the suit against him. Wing v. Hurlburt, 15 Vt. 607. Pratt v. Gallup, 7 Vt. 344.

J. L. Buck for plaintiff.

The item for pasturing was properly disallowed. The law will not imply a promise, when there is neither a request, nor an acknowledgment of the right of the party making the charge. The judgment was properly rejected by the auditor. It is not

book account. The tender, in this case, was not made to the declaration, but to the subject matter of the plea in offset; and if made before the judgment was pleaded in offset, it was sufficient; for a tender to an offset, made before the offset is pleaded, is the same, in effect, as a tender on the original cause of the suit before service of the plaintiff's writ. Rev. St. 212. There was no necessity of bringing the money into court, until the tender could be pleaded there, and no allegation, that it was before brought in, was necessary. The plea is sufficient, for aught that appears by the demurrer, for the reason, that the tender might well have been pleaded in the county court, if it had never been pleaded before the justice.

The opinion of the court was delivered by

POLAND, J. 1. The item of $1,68 in the defendant's account, for pasturing the plaintiff's cattle, was properly disallowed by the auditor. If the plaintiff were liable at all to pay the defendant for his cattle going upon his land, it could only be enforced by some action in form *ex delicto*. There was no request on the part of the plaintiff to have his cattle go there, and no license, or permission, given by the defendant. If the plaintiff were liable at all to the defendant, (which it is not necessary now to decide,) it was a mere tort; and the defendant could not, without some agreement between the parties, change it into a contract. The very question has been fully considered by the court at this term in the case of Stearns v. Dillingham, post 624, and the views of the court are fully given in that case.

*519 *2. The auditor was correct, also, in refusing to allow the amount of the judgment in favor of the defendant against the plaintiff. The judgment was not a proper item of account between the parties; and, indeed, it was not claimed to be allowed by him as such, but as an offset merely. The duty of an auditor is merely to adjust the accounts between the parties to the time of making his report; any defence to any item of the account may be set up before the auditor,—such as payment, tender, or the statute of limitations; but a mere independent offset, not a matter of account, must be pleaded in the county court. Such has been the uniform practice and course of decisions in this state, and such we deem the more correct and convenient practice.

3. As to the defendant's plea in offset and the plaintiff's replication of tender. The defendant claims, that the tender of the amount of his judgment, being subsequent to the commencement of the plaintiff's suit on book account, was too late in point of time and cannot avail the plaintiff to defeat the offset.

It is undoubtedly true, that, if the defendant's judgment had been a proper item of account between the parties, the tender could not have been made subsequent to the commencement of the plaintiff's suit. The accounts between the parties are considered as entire, and neither party can single out a particular item and make a valid tender upon it, and thereby change the balance between the parties. Such were the cases of Pratt v. Gallup and Wing v. Hurlburt. But in this case the judgment was a distinct, independent claim, and could not be considered as in litigation between the parties, until it was pleaded in offset; —the pleading it in offset is to be considered as the commencement of proceedings upon the judgment. The defendant was not bound to plead it in offset. He might enforce it by execution, or by a separate suit upon it. Until the judgment was pleaded in offset, we think the plaintiff clearly had the right to make a tender of it to the defendant. This point was decided, on the present circuit, in Orange county, in the case of Town of Thetford v. Hubbard, ante 440.

It is objected, that this tender was not brought into the justice court, when the case was first tried. As this question is raised upon a demurrer, it must be decided upon what appears upon the pleadings. Nothing appears upon the face of the pleadings, but *what the offset was *520 first pleaded in the county court, and that this was the first opportunity the plaintiff had to set up his tender; and if so, he certainly could not be called upon to bring the tender into court, until it became necessary to plead it.

We are not prepared to say, however, even if it appeared, that the offset was pleaded before the justice and the plaintiff omitted to reply the tender then, that he could not afterwards do it, when the offset was pleaded in the county court;—but we do not decide that point, as it does not become necessary in the determination of the case here.

We see no objection whatever to the form of the plea in offset, or the replication of tender.

The judgment of the county court is therefore affirmed.

BENJAMIN F. GOSS v. BARKER & HAIGHT.

(*Washington*, April Term, 1850.)

Form of a sufficient declaration upon an order, accepted by the defendants, which is contingent as to their ultimate liability, and as to the amount which may be due upon it.

Assumpsit. The plaintiff declared against the defendants in these words:—"For that whereas, heretofore, to wit, on the eleventh day of March, A. D. 1846, to wit, at Middlesex, in the county of Washington, one John Diamand entered into a certain contract with the said Barker & Haight, whereby the said John became obligated to the said Barker & Haight to execute, construct and finish, on or before the first day of July, A. D. 1847, in every respect in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the engineer of the Vermont Central Rail Road Company, the grading and masonry work on section seven, so called, on Brown's division, so called, of the Vermont Central Rail Road, commencing at the western termination of the section of said road which, on the day and year last aforesaid, was under construction by said Barker & Haight, and running one mile, or section, westwardly, or down Onion River, on the line located, or to be located, for the construction of said

railroad, at a certain price to be paid therefor by the said Barker & Haight: and
*521 *whereas the said Barker & Haight, on the day and year last aforesaid, at Middlesex aforesaid, became obligated and then and there agreed, on condition of the fulfilment by the said Diamand of his said contract, that the said engineer would, between the first and tenth days of each month after the commencement of the said work by the said Diamand, estimate the quantity of work which had been done, prior to the time of the making of said estimate, by the said Diamand, and that the amount, which should then and there be due to the said Diamand for said work, excepting ten per cent. thereon, which might be retained, should thereupon be then and there paid to the said Diamand, and that when the whole of said work should have been done and completed and accepted agreeable to the said contract, that the balance, which should be due for said work, should be paid to the said Diamand, his heirs, executors, or assigns, with a proviso in said contract, that no estimate should be made within one month after commencement of the said work by the said Diamand; and whereas afterwards, to wit, on the 20th day of March, A. D. 1846, the said Diamand commenced the said work of constructing the said section of said rail road and continued the said work for a long time, to wit, until the first day of July, A. D. 1846, to wit, at Waterbury, in the county of Washington; and the plaintiff avers, that on the 24th day of June, A. D. 1846, at Waterbury aforesaid. the said John Diamand became and was indebted to the plaintiff in a large sum of money, to wit, the sum of one thousand dollars, for divers goods, wares and merchandize by the plaintiff before that time sold and delivered to the said Diamand, at his special instance and request, and being so indebted he, the said Diamand, in consideration thereof, on the day and year last aforesaid, at Waterbury aforesaid, drew his order in writing under his hand, of that date directed to the defendants by the name of their said firm of Barker & Haight, therein and thereby requesting and directing the said defendants, by the name of their said firm of Barker & Haight, to pay the plaintiff, by the name of B. F. Goss, or his order, the amount of the said Diamand's monthly estimate, as the same should become due, as aforesaid, and the plaintiff thereafterwards, to wit, on the same day and year last aforesaid, presented the said order to the said Barker & Haight, for their acceptance, who then and there accepted the same, whereby they, the said Barker & Haight, became liable, and in consideration thereof then and there promised the plaintiff, to pay him the amount of the said monthly estimates, according to the tenor of the said order; and the plaintiff farther avers, that afterwards, to wit, on the 27th day of June, A. D. 1846, at Waterbury aforesaid, the said engineer made an estimate of the quantity of work, which had been done, prior to the time of the making of said estimate, by the said Diamand, on the said section
*522 seven of said rail road, and *that the money, which then and there became and was due to the plaintiff, amounted to a large sum, to wit, the sum of sixteen hundred and seventy dollars, whereby they, the said Barker & Haight, became liable and in consideration thereof then and there promised the plaintiff to pay him the said sum of sixteen hundred and seventy dollars, when they should be thereto afterwards requested. Yet, though often requested, the said Barker & Haight have never paid the same, but wholly neglect and refuse so to do." After verdict for the plaintiff the defendants filed a motion in arrest of judgment for the insufficiency of the declaration; which motion was overruled by the court and judgment rendered upon the verdict. Exceptions by defendants.

C. W. Prentiss for defendants.

The objection to the declaration is, that it is a declaration on a bill of exchange, when in fact the instrument declared on is but an agreement, and not a bill, inasmuch as it is not for any sum of money, and is payable on a contingency Chit. on Bills, 132–139. Byles on Bills, 6–10. Story on Prom. Notes, 19–32. 2 B. & P. 413. 1 Cow. 691. 6 Cow. 108, 151. 9 E. C. L. 145. 26 E. C. L. 308. 3 Kent, 73–76. The instrument declared on is not a bill of exchange, because it is payable out of a particular fund, and dependent on the sufficiency of that fund; it is not payable for any sum of money, nor for money; and it is payable on the contingency, that the estimates should become due. No consideration for the acceptance is set forth in the declaration. Being a mere agreement, a consideration should have been set forth specially 1 Chit. Pl. 295. No value received is alleged.

O. H. Smith and *P. Dillingham* for plaintiff.

The rule of law in relation to a motion in arrest is, that if the declaration, or plea, is so defective, that the merits cannot be considered as having been determined, the motion must prevail. But if the issue determines the right, and substantial justice has been done, the court will not, after verdict, arrest the judgment, although the declaration, or plea, might have been bad on demurrer. By taking issue on the declaration, or plea, and consenting to go to trial, the party must be considered as having waived all objections to the proof of the facts, and the facts constituting a cause of action, or defence, in equity, and the issue determining the right, there *is *523 no reason, why judgment should not be rendered on the verdict. Barney v. Bliss, 2 Aik. 60. 1 Chit. Pl. 401. It is now well settled, that a court of law will protect a right in equity, and that a right in equity is a good consideration to support a promise. Harrington v. Rich, 6 Vt. 666. Stiles v. Farrar, 18 Vt. 444. It seems to be equally well settled, that a draft by the creditor on his debtor, in the form of a bill of exchange, to the amount of the debt, or the whole fund in his hands, is a good and valid assignment of the debt, or fund. Crocker et ux. v. Whitney, 10 Mass. 316. Cutts v. Perkins, 12 Mass. 206. Robbins v. Bacon, 3 Greenl. 346. Gibson v. Cooke, 20 Pick. 15. Crowfoot v. Gurney, 9 Bing. 372. Perry v. Harrington, 2 Met. 368. Taft v. Aylwin, 14 Pick 336. Blin v. Pierce, 20 Vt. 25.

The opinion of the court was delivered by

REDFIELD, J. The only question much urged, in the argument of this case, is, whether the contract declared upon is a bill of exchange, and may be declared upon as such. We feel very certain, that upon this point the case is clearly with the defendant. A contract, although payable in money, if its obligation depend upon any contingency, even as to the amount ultimately due, cannot be regarded either as a promissory note, or bill, so as to be strictly negotiable. This principle is too familiar, and too elementary, to require to be substantiated by authority. If any were needed, those cited at the bar are ample, and all the books upon this subject abound in them.

But we do not regard the present declaration as coming within the rule. This declaration sets forth the entire transaction, the original indebtedness of all parties, very much in detail, the drawing of the order, the conditional acceptance, the happening of the contingency, by which the acceptance became absolute, and then the formal *assumpsit* is raised. This is no more like a declaration upon a bill of exchange, than is every declaration in *assumpsit*. And it seems to us, that if the transaction will give an action in favor of the present plaintiff, this declaration is quite sufficient, either upon motion in arrest, or general demurrer. We do not well perceive, how it can be said, that any substantial fact is omitted.

The consideration for the promise is *524 certainly as full as it is in any *case of the promise to pay any debt to a third person, not originally due to him. And that such a consideration is sufficient is fully settled in Moar v. Wright, 1 Vt. 57; Hodges v. Eastman, 12 Vt. 358.

But if the original indebtedness be a promissory note, this collateral promise does not attach to it, as such, but must be specially declared upon, as in the present case. Here the same thing is effected through what is commonly called, by the people of this state, "an order," which is a species of contract about as far removed from the inland bill of exchange of the common law, as are our cattle and grain contracts from promissory notes. The latter class of contracts, it has been held in this state, may be declared upon as promissory notes. Brooks v. Page, 1 D. Ch. 340. Dewey v. Washburn, 12 Vt. 580. The cases cited from the Massachusetts Reports seem to us fully to justify this action, in its present form. Perry v. Harrington, 2 Met. 368. Gibson v. Cooke, 20 Pick. 15. And the late English cases cited, or to which we have referred, raise no doubt whatever in regard to the perfect propriety of the declaration, both in form and substance. Crowfoot v. Gurney, 23 E. C. L. 621. Jones v. Simpson, 2 B. & C. 318. Dixon v. Hatfield, 2 Bing. 439, [9 E. C. L. 650.]

Judgment affirmed.

LUCIUS LAWTON v. WILLIAM CARDELL.

(*Washington*, April Term, 1850.)

When the defence, in an action of trespass *quare clausum fregit*, is stated by way of notice, under the general issue, under the statute, no replication is required; but the proof is the same, as when formal pleadings are made.

Where the evidence, in an action of trespass *qu. cl. fr.*, tended to prove, that the defendant entered the dwelling house of the plaintiff by virtue of a search warrant, to find stolen goods, and, after the search had been concluded, and the goods had been found and taken, together with the plaintiff, before the magistrate who issued the warrant, again aided others in entering the house for the purpose of finding evidence merely against the plaintiff, to be used in convicting him of the theft, and the court instructed the jury, that, if the defendant went to the house the second time merely for the purpose of finding more evidence against the plaintiff, and assumed, as a mere pretext, to go for some other purpose, the plaintiff was entitled to recover, it was held, that there was no error in the charge.

*So, where the evidence, in such case, tended *525 to prove, that the house, in which the trespass was alleged to have been committed, belonged to one C., and had been occupied by one P. until a short time before the alleged trespass, and that then P. had removed to another town, taking most of his household goods, but leaving a few, which were of less frequent use, and at the time P. left the plaintiff moved his goods into the house, and made the garden, but did not in fact commence residing in the house until some months after, and the jury were instructed, that they must be satisfied, that the plaintiff, at the time of the alleged trespass, had the exclusive possession of the house, and the jury returned a verdict for the plaintiff, it was held, that the verdict could not be disturbed.

And where it appeared, in such case, that immediately previous to the issuing of the search warrant, the defendant said, that "he had got a place fixed for Lawton," meaning the plaintiff, and the jury were instructed, that if this was said by the defendant in reference to the prosecution, it could have no tendency to increase the damages, but that, if they believed the defendant went in to the plaintiff's house merely to abuse and insult him, without any serious belief that he was guilty, it might be considered by them in estimating the damages, and the jury returned a verdict for the plaintiff, it was held, that herein there was no error.

Trespass *quare clausum fregit*, for breaking and entering the plaintiff's dwelling house. Plea, the general issue, with notice, that the defendant would justify under a search warrant, which issued upon the oath of the defendant, that a pair of blacksmith's tongs, a shovel, two chains and a broad axe had been stolen from him, and was directed to Ira Richardson, a deputy sheriff, to serve and return; and it was alleged in the notice, that the sheriff, upon search, did find the said tongs and broad axe in the plaintiff's dwelling house, and that the same, together with the plaintiff, were taken before the magistrate who issued the warrant, and such proceedings were had, that the plaintiff was adjudged guilty of stealing the same. Trial by jury, May Term, 1849,—REDFIELD, J., presiding. On trial the plaintiff gave evidence tending to prove, that he occupied a dwelling house in the town of Warren, which the defendant, with Ira Richardson, Sophia C. Page and Charles Jones broke and entered on the twenty second of December, 1845. The defendant gave in evidence the complaint and warrant and record of the proceedings thereon, described in his special notice, and also a complaint and warrant in another prosecution against the plaintiff for larceny, and the record of the proceedings thereon. It *appeared, that *526 after the officer had made thorough

search in the plaintiff's house, and had arrested the plaintiff upon the warrant and brought him before the magistrate for trial, and the witnesses, Charles Jones and Sophia C. Page, were in attendance, some question arose in regard to the property of a certain wash bowl, which was found upon the broad axe in the plaintiff's house, at the time the officer made the search, and which was claimed to have been one of the articles stolen. The defendant and his attorney made application to the officer to go in and make farther search, and thus give these witnesses an opportunity of seeing the wash bowl; but he declined going, saying that he had made all the search he desired and did not think he would be justified in going in for any secondary purpose, such as procuring evidence against the plaintiff. The witnesses above named were children of the wife of one Paine, who resided in the house immediately previous to the plaintiff, and who had, by permission of the plaintiff, suffered some of his things to remain in the house until that time; and they now suggested, that they wished to go in for the purpose of seeing these things, as Paine had requested them to look after them. This was deemed a good occasion for entering the house, and the defendant and Richardson went with the witnesses and unlocked the door and admitted them, and Richardson showed them the bowl. The defendant did not enter the house himself, but aided the witnesses to enter and advised them that they might justly enter. It did not appear, that any of the persons entering the house looked after any thing but the wash bowl, or that there was any *bona fide* purpose of looking after any thing else, except from the testimony of said witnesses. It was claimed by the defendant, that the plaintiff was not in possession of the house at the time of the alleged trespass. But it appeared, that the house belonged to one Curtis, and had been occupied by Paine until a short time previous to the alleged trespass, and then Paine had removed to another town, taking most of his household goods, leaving some few, which were of less frequent use, as above stated, and that, at the time Paine left, the plaintiff moved his goods into the house, and made the garden, but had not begun house keeping there at that time, being at board in Montpelier, where some temporary business detained him. When he did return to Warren, which was some few months
*527 after, he went into this *house. In the complaint made by the defendant it was described as the plaintiff's dwelling house.

The plaintiff, for the purpose of enhancing the damages in the case, gave evidence to prove, that immediately previous to the issuing of the warrant the defendant said, that "he had got a place fixed for Lawton," meaning the plaintiff. This testimony was objected to by the defendant, but admitted by the court for the purpose for which it was offered, the jury being told in relation to it, that if the defendant's remark had reference to either of the prosecutions, it could have no tendency to increase the damages; but that, if they believed the defendant had formed the purpose of harassing and insulting the plaintiff, and that, with this view, he went into the plaintiff's house merely to abuse and insult the plaintiff, without any serious belief that he was guilty, or that any honest, truthful evidence could be procured against him, it might be worthy of consideration by the jury in estimating damages. In regard to the right of recovery in the case the court instructed the jury, that they must be satisfied, that the plaintiff, at the time of the alleged trespass, had the exclusive possession of the house, and that the defendant and those who entered it by his aid and counsel did not go in for the purpose of looking after the goods of Paine, but to search for evidence against the plaintiff,—the search having been fully made previously for the goods described in the search warrant; but that if Paine had the possession of the house, or a joint possession with the plaintiff, then he and his servants might enter when they would, without regard to the motive, and the defendant might justly aid them in such entry, whatever might be his motives;—so, too, if the plaintiff had the exclusive possession of the house, but permitted the goods of Paine to remain there, and these witnesses went by Paine's request, for the real purpose of looking after the goods, they would be justified in so doing, and the defendant also, in aiding them to make the entry, although a leading motive with him might have been to find evidence against the plaintiff; but that, if the real purpose of all, who entered at that time, was to find more evidence against the plaintiff, and they made use of the circumstance of looking after Paine's goods as a mere pretext, it would not avail them. Verdict for plaintiff. Exceptions by defendant.

J. A. Vall, for defendant, cited *528 Humphrey v. Douglass, 11 Vt. 24, Benson v. Bolles, 8 Wend. 175, Cong'l Soc. in Bakersfield v. Baker, 15 Vt. 119, and Ripley v. Yale et al., 16 Vt. 257.

O. H. Smith, for plaintiff, cited Merest v. Harvey, 5 Taunt. 442, Sears v Lyons, 2 Stark. R. 317, 3 Stark. Ev. 1451, Major v. Pulliam, 3 Dana 584, Treat v. Barber, 7 Conn. 274, Churchill v. Watson, 5 Day 140, Anthony v. Gilbert, 4 Blackf. 348, Simpson et al. v. McCaffrey, 13 Ohio 508, Bohun v. Taylor, 6 Cow. 313, Machin v. Geortner, 14 Wend. 239, Bradley v. Davis, 2 Shep. 44, and Cro. Eliz. 246.

The opinion of the court was delivered by

REDFIELD, J. The first question in the case seems to be more one of fact, than any thing else, that is, whether the officer really made the last entry upon the plaintiff's premises, to complete his search for the lost goods, or whether the entry was a wholly distinct matter, and for another purpose. Ordinarily, in special pleading, such subsequent and distinct entry must be newly assigned by the plaintiff; but when the defence comes in by notice, under the statute, no replication is required; but the proof is the same, as where formal pleadings are made. And it was never denied, or doubted, that if the officer have legal process to execute and voluntarily abuse and pervert

it to other purposes, he is not only a trespasser in that act, but becomes one *ab initio*, and is thus liable for all that he has done under the process. This has been familiar law since the time of the Six Carpenters' Case, 8 Co. R. 146.

And the same is true of the right of entry claimed, to look after Paine's goods. It was matter of fact, whether any such entry, for any such purpose, were really made. Both of these points, it seems to us, were properly left to the jury, and under proper instructions, so far as there was testimony in the case. In regard to the entry under the search warrant the officer did not claim to so enter.

The question of possession, too, was mainly one of fact; but the facts, as detailed in the bill of exceptions, seem fully to justify the verdict. The charge upon this point seems unobjectionable.

The statement of the defendant, before the entry, that he had got a place fixed for Lawton, so far as it had reference to *529 the entry, for *which the plaintiff recovered damages, and tended to show, whether it was *bona fide*, was proper enough to be considered in estimating damages; and beyond that the jury were told not to consider it. The trial seems correct; possibly the damages might with propriety have been less; that is not a matter of which we are permitted to judge, or of which, in this court, we have the means of forming any correct estimate.

Judgment affirmed.

THOMAS J. PADDLEFORD v. CARLOS BANCROFT AND GEORGE P. RIKER.

(*Washington*, April Term, 1850.)

When *audita querela* is brought, alleging the fraudulent misconduct of the party in obtaining a judgment, the judgment itself cannot be regarded as an estoppel upon the inquiry, but the whole subject is necessarily open to examination, as a mere matter *in pais*. Therefore, in such case, the party seeking to impeach the judgment may give in evidence the original files in the former case, and may call as a witness the justice of the peace, who rendered the judgment, to prove the manner in which the minutes upon the files were made, and by whom they were made.

If a case be continued without the appearance of the defendant, and without his consent, and with no statutory or other legal ground for such continuance, it operates a discontinuance, and no legal judgment can thereafter be taken in the case without the consent of the defendant, and if a judgment be taken, after the suit is so discontinued, it will be vacated by *audita querela*.

The continuance of a suit from term to term, without the consent of the defendant, or other just cause, does always discontinue the suit. REDFIELD, J.

Where a creditor commenced a suit against his debtor during the pendency, in the district court, of the application of the debtor for his discharge under the bankrupt act of 1841, and the debtor had personal notice of the suit, but neglected to appear at the return day of the writ, and thereupon the creditor, for the purpose of evading the effect of the certificate of discharge, when obtained, without legal cause, and without the consent or knowledge of the debtor, caused the suit to be continued from time to time, until after the debtor had obtained his certificate, and then procured a judgment to be entered by default, it was held, that the judgment thus obtained would be vacated upon *audita querela*.

Audita querela, to vacate the judg- *530 ment of a justice of the peace. It was alleged in the first count in the declaration, that the complainant, on the sixth day of September, 1842, preferred his petition to the district court of the United States for the district of Vermont, praying for the benefit of the bankrupt act of 1841, and was, on the sixth day of October, 1842, duly declared a bankrupt, and on the twenty second of June, 1843, received his certificate of discharge; that Bancroft & Riker, on the eighteenth of March, 1843, sued out a writ in their favor against the complainant, in an action upon book account, returnable, March 29, 1843, before Azel Spalding, Esq., a justice of the peace; that service of said writ was made upon the complainant personally, but that he did not appear at the return day, and supposed that therefore judgment would then be rendered against him by default; but that Bancroft & Riker, with intent to deprive the complainant of his just rights and to defeat the effect of the bankrupt act, corruptly procured the said justice to continue the suit from time to time until the twenty third of June, 1843, and then to enter judgment against the complainant by default;—all which was without the knowledge, or consent, of the plaintiff; and it was alleged, that an action of debt had been commenced against the complainant upon said judgment. In the second count it was alleged, that judgment in the original suit was rendered against the complainant, by default, at the return day of the writ, and that afterwards Bancroft & Riker, to deprive the complainant of his just rights under the bankrupt act, procured the justice to enter the suit continued from time to time until the twenty third of June, 1843, and then to render a pretended judgment against the complainant by default. In other respects the second count was similar to the first count. Plea, the general issue, and trial by jury, September Adjourned Term, 1849, —REDFIELD, J., presiding. On trial one count was read by the plaintiff to the jury, and the substance of the other was stated, before any testimony was given. The plaintiff then gave in evidence a copy of the record of the justice's judgment, rendered June 23, 1843, described in his declaration; also the petition of the plaintiff for the benefit of the bankrupt act, dated September 6, 1842, the decree of bankruptcy thereon, dated October 6, 1842, and the certificate of his discharge in bankruptcy, dated June 15, 1843. The plaintiff then offered in evidence *the original writ *531 in the suit in favor of the defendants against him, containing the entries of the continuances and default and of the amount of the judgment thereon; to which the defendants objected; but the objection was overruled by the court. The plaintiff then offered as a witness Azel Spalding, the justice who rendered the judgment sought to be vacated, to prove how said suit came

to be continued and who made the entries of the continuances and default on the original writ, and to prove his usual manner of doing business as a justice. To the admission of the witness for this purpose the defendants objected; but the objection was overruled by the court. This witness testified, that the entries of the continuances on said original writ were in the hand writing of the defendant Riker, and that the word "default" and his own name to said continuances were in the hand writing of the witness; that he usually directed the party, for whom he did business as a justice, or his attorney, to make such entries for his own convenience, and he, as justice, signed the same; that he presumed, that the suit was continued regularly, as it appeared upon the writ, and that the entries thereon were made by his direction and signed by him at the time, and that the suit was defaulted by him on the twenty third of June, 1843; that he had no recollection respecting said suit, either as to the reason for the continuances, or whether Bancroft & Riker requested him to continue it, but that he always allowed the plaintiff to enter a cause continued, when the defendant did not appear, if he chose, as they knew more of their own business than he, the witness, did. J. A. Vail was then called as a witness by the plaintiff, who testified, that he was counsel for the plaintiff in his proceedings in bankruptcy, that he recollected, that while those were pending the plaintiff was sued by some of his creditors, but that he did not recollect, what the plaintiff said about the suits; and that the plaintiff at that time resided in Middlesex, and was about there. This was all the testimony on the part of the plaintiff.

The defendants then proved, that the hearing upon the petition of the plaintiff for his discharge in bankruptcy was appointed for the eleventh of January, 1843; that E. P. Jewett proved his debt against the plaintiff, in the district court, on the tenth of January, 1843, and filed his objections to the discharge of the plaintiff on the ground of a fraudulent conceal-
*532 ment by him of his property; that an *order was granted by said court for the personal examination of the bankrupt, on motion of said Jewett, upon his objections; that on the ninth of June, 1843, Jewett not having proceeded with his objections, the plaintiff filed a motion in the district court for his discharge; and that his discharge was granted on the fifteenth of June, 1843. This was all the testimony on the part of the defendants. The defendants claimed, that, on this state of facts, the justice had a right to continue the original suit, as stated in his record, and that the judgment was valid, and that the court should so instruct the jury. But the court charged the jury, that they were to inquire, whether the defendants brought their original suit, returnable March 29, 1843, and then, of their own mere motion, without any agency, or order, of the justice, entered it continued from time to time, until after the plaintiff had received his discharge in bankruptcy, and then entered a default and obtained the signature of the justice, in order to defeat the operation of the plaintiff's discharge,—the plaintiff supposing, at the time, that he been defaulted at the return day of the writ; that the legal presumption is in favor of the regularity of the proceedings, as they appear on their face, and that the continuances were for good cause,—but that this might be rebutted by proof; and that, if they were satisfied, that the plaintiff was at home and had notice of the suit, and that the defendants knew this and had the continuances entered for the mere purpose of defeating the operation of the plaintiff's discharge, or if, as alleged in the second count, the case was in fact defaulted at the return day of the writ, and after the discharge the defendants entered the continuances upon the files, so as to have it appear, that the default was at a later day, and procured the justice to adopt the entries as his record, in either case the plaintiff was entitled to recover, and otherwise not. Verdict for plaintiff. Exceptions by defendants. After verdict the defendants moved in arrest of judgment, for the insufficiency of the declaration; but the court overruled the motion, and rendered judgment for the plaintiff; to which decision the defendants also excepted.

J. A. Vail for defendants. *533

1. The original files of the justice were improperly admitted in evidence. Strong et al. v. Bradley, 13 Vt. 9. Nye et al. v. Kellam, 18 Ib. 594. 2. Spalding, the justice, was improperly admitted as a witness to explain the reason of his judicial action and to contradict, or impeach, his own record. The record of a justice judgment cannot be falsified, explained, or impeached, by parol. Martin v. Blodget et al., 1 Aik. 375. Spaulding v. Chamberlin, 12 Vt. 538. Barnard v. Flanders, 12 Ib. 657. Pike v. Hill, 15 Ib. 183. Wheeler v. Lothrop, 4 Shep. 18. 3. The defendants were entitled to the charge requested. The plaintiff having notice of the justice suit, the whole case really depended upon a question of law, as to the right of the magistrate to continue the case. The statute authorized him to continue it at any stage of the proceedings, and to any time not exceeding three months. Rev. St. 171, sec. 18. Griffin v. Spaulding, 6 Vt. 60. The reasons for continuing a cause, where the defendant does not appear, are numerous. It is a practice sanctioned by a standing rule in the county court; and this court will not inquire of another court the reason of its action, where it has the power. The allegations of fraud and corruption are of no force and were not supported by any proof. Where the act is legal, the motive is immaterial. Humphrey v. Douglass, 11 Vt. 24. There being no material fact for the jury to pass upon, it was error to permit the case to go to them. Barnard v. Flanders, 12 Vt. 657. There was no evidence to sustain the second count. The parol and record evidence was all against it. 4. The instructions to the jury should not be sustained. 1. Because it was left to the jury to find whether the defendants entered the justice suit continued of their own mere motion,

without any agency or order of the justice,—when there was no evidence tending to show that fact. Manwell v. Briggs, 17 Vt. 176. 2. Because the county court instructed the jury, that, where a cause has been continued, parol proof might be received to show that there was no good cause for the continuance. 3. Because the jury were told, that if the defendants procured the continuance of the suit to defeat the effect of the plaintiff's discharge, the plain-
*534 tiff had made *out a case,—when the evidence had no tendency to show that fact, and the defendants had a right to ask for a continuance, and the continuance was the act of the court, for which *audita querela* will not lie. 4. The charge, so far as it refers to the second count, was erroneous. All the evidence in the case tended to negative the facts put to the jury to find. 5. The court should have told the jury, that all the allegations and proof, relating to the alleged misconduct of the justice, were of no importance and could have no force to enable the plaintiff to sustain this action. Little v. Cook, 1 Aik. 363. Eddy v. Cochran, Ib. 359. Dodge v. Hubbell, 1 Vt. 491. Titlemore v. Wainwright, 16 Vt. 173. Betty v. Brown, Ib. 669. Spear v. Flint, 17 Vt. 497. As to the motion in arrest:—The first count sets out nothing, for which this complaint can be sustained. The general charges of fraud have no bearing on this question. Dodge v. Hubbell, 1 Vt. 491. The continuances complained of were the act of the court. The plaintiff had notice and could have appeared, if he desired. His neglect to appear, or his expectation of being defaulted, did not make the acts of the justice void. The second count is bad, also. This alleges fraudulent and corrupt conduct in the magistrate, in his judicial capacity. No court should permit such a declaration to be read or a judgment to be rendered upon it. Middletown v. Ames, 7 Vt. 166.

Peck & Colby and *F. F. Merrill* for plaintiff.

1. Where a good matter of defence has accrued since the judgment, or before the judgment, and the party is deprived of the opportunity to plead or prove it, by the fraud or collusion of the other party, the party so injured will be relieved by *audita querela*. 3 Bl. Com. 405. Staniford v. Barry, 1 Aik. 321. Barrett v. Vaughan, 6 Vt. 244. Lovejoy v. Webber, 10 Mass. 103. The jury have found, that the defendants entered the continuance on the writ deceptively, so as to have the default appear of a date after the discharge, and thus deprive the plaintiff of the benefit of the bankrupt act. This was an imposition on the court, for which this is the remedy; Little v. Cook, 1 Aik. 363; and a fraud on the plaintiff, for which this is the only remedy. Supra. 2.
By law, judgment by default should
*535 have been entered against *this plaintiff on the return day; and the plaintiff had a right to rely upon that, without appearing and moving the court for the privilege; and the continuance is itself such a fraud on the plaintiff, as entitles him to relief in this form. Carrington v. Holabird, 17 Conn. 531. No other reason for the continuance can be intended, and none was proved;—it could not have been continued for notice,—as for that purpose it could only be continued one month; Rev. St. 172, sec. 25; besides it was shown, that the plaintiff was at home in Middlesex, and not out of the state, and that known to the defendants.

The opinion of the court was delivered by

REDFIELD, J. The first question made in the present case, that the files in the former case between the parties were admitted in evidence in this case, together with the minutes made thereon and signed by the justice, and also the second objection, that the justice was improperly admitted to justify in relation to the manner of such minutes being made and by whom made, seem based upon the same general ground, viz,. that the judgment is conclusive and not to be examined. But it seems to us, that when *audita querela* is brought, alleging the fraudulent misconduct of the party in obtaining a judgment, the judgment itself cannot be regarded as an estoppel upon the inquiry. If so, the remedy would in most cases be wholly unavailing. The conclusiveness of a judgment only extends to collateral attacks. When process is brought directly upon the judgment, whether by way of bill in equity, claiming a new trial, or a perpetual injunction, on the ground of the misconduct of the party in obtaining the judgment, or on petition for new trial, or on petition for rehearing, under our statute, or in cases like the present, the whole subject is necessarily open to inquiry, as a mere matter *in pais*.

In many cases of *audita querela*, which have been determined by this court against the sufficiency of the judgments of inferior courts, when those judgments have been reversed and vacated and the parties placed in *statu quo ante bellum*, an objection of the character above alluded to, if sustained, must have precluded all inquiry. Eddy v. Cochran, 1 Aik. 359, in effect decides this; and the following cases are full authority upon this point, Brown v. Stacy, 9 Vt. 118; Phelps v. Birge, 11 Vt. 161; Crawford
v. Cheney, 12 Vt. *567. In Pike v. Hill, *536
15 Vt. 183, something is said, which is calculated to give the impression, that the court hold a judgment, which is attempted to be vacated by *audita querela*, equally conclusive, as against that remedy, as when attacked collaterally. But that point was not then before the court. The record of the court below, in that case, showed the defect complained of, and the other party offered to show, that the record was false in that particular, for the purpose of sustaining the judgment, and the court held, that the party must be bound by the record as it stood. This is no doubt true in all cases. It involves an absurdity, a solecism indeed, to sustain a judgment, or record, by showing its falsity. The sufficiency of all records is to be determined upon inspection; and, if not sufficient upon their face, they cannot be eked out by parol evidence. But that question is wholly distinct from that of the conclusiveness of a judgment, when process is brought

directly upon it; and this distinction is not sufficiently adverted to, by me, in the case last named.

If this case were really continued, without the appearance of the defendant, and without his consent, and with no statutory or other legal ground for such continuance, then, it was, in strictness, discontinued, and no legal judgment could thereafter be taken in the case, without the consent of the defendant; and if one be taken, after the suit is so discontinued, it will be vacated by *audita querela*, as has been repeatedly decided by this court. This point was expressly ruled in Pike v. Hill, supra, and indeed in most of the cases above cited. So that the continuance of a suit from term to term, without the consent of the defendant or other just cause, does always discontinue the suit. And this is always, in contemplation of law, the act of the plaintiff. If the plaintiff choose to keep his suit upon the docket from term to term by continuances, it is a matter into which the court never looks. That is matter of course and always of mere routine, if indeed it be not provided for, by the general rules, to be entered by the clerk, without coming, in form even, to the knowledge of the court.

But especially when it is shown, that no good reason did exist for these continuances, and that a corrupt, or interested and unlawful one was apparent, and which was fully adequate to produce the result, it would be unphilosophical, we know,
*537 not to attribute the re*sult to the adequate cause. And in the present case, in addition to the legal discontinuance of the cause, by carrying it forward in court, by continuances without cause, the effect of having the judgment bear so late a date is to deprive the defendant of a sufficient legal and equitable defence, which would have been conclusive in his favor, unless impeached for fraud, had the judgment borne its proper date. We think, then, that the defendant has thus, in effect, been as truly deprived of his day in court, his reasonable opportunity to make defence, as if he had never known of the day of court, in the first instance, as in Stone v. Seaver, 5 Vt. 549, or as if he had in any other mode been deprived of his proper day in court, by the fraud and circumvention of the other party, which has always, in this state, been held sufficient ground to vacate the judgment, so obtained, upon *audita querela*,—which in similar cases, in other states and in England, is more commonly done in the court of chancery perhaps. The case cited from 17 Conn. 531, seems to run with the present *quatuor pedibus*.

The charge to the jury seems to us entirely correct and in accordance with the principles above stated. And for the same reasons, the motion in arrest was properly overruled.

Judgment affirmed.

*COUNTY OF LAMOILLE. *538

AUGUST TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. LUKE P. POLAND, ASSISTANT JUDGES.

WILLIAM P. SAWYER v. JOHN D. HOWARD, and JOSHUA SAWYER, Trustee.

(*Lamoille*, Aug. Term, 1850.)

So far as the trustee is concerned, there is no substantial difference between the form of the trustee process under the Revised Statutes and under the former statute; and process, issued since the enactment of the Revised Statutes, in the form required by the former statute, will not, as to the trustee, be dismissed on motion for that cause.

That the trustee, by that form of process, is required to answer the plaintiff upon his declaration is mere surplusage, under the existing law, and does not vitiate the process.

*And process, issued in that form and duly *539 served upon the principal debtor, is not, under the Revised Statutes, defective as to him.

The case of Park et al. v. Trustees of Williams, 14 Vt. 211, considered and explained.

Trustee process. The process was in these words:—"*State of Vermont, Lamoille County, ss.* To any sheriff or constable of Vermont, Greeting. By the authority of the State of Vermont, You are hereby commanded to attach the goods, chattels and estate of John D. Howard, late of Hydepark in the county of Lamoille, but now in parts unknown, to the value of one thousand dollars, and him notify to appear before the county court next to be holden within and for said county on the second Tuesday of June next, and also to summon Joshua Sawyer, of Hydepark in the county of Lamoille, trustee of said John D. Howard, if to be found in your precinct, to appear before the county court next to be holden at Hydepark within and for the county of Lamoille, on the second Tuesday of June, A. D. 1843, then and there in our said court to answer unto William P. Sawyer, of said Hydepark, upon his, the said William P. Sawyer's, declaration against the said John D. Howard, in a plea," &c.; [declaration for money had and received, and for money paid;] "To the damage of the said William P. Sawyer, as he saith, the sum of one thousand dollars. And the said William P. Sawyer farther saith, that said Joshua Sawyer has in his possession money, goods, chattels, rights, or credits, of the said John D. Howard, to the amount of one hundred dollars. And you are farther commanded

to leave a true and attested copy of this writ, with your return of your doings thereon, with the said John D. Howard, the principal debtor, or at his last and usual place of abode within this state. Fail not" &c. The defendant moved to dismiss the suit, for the reason, that the writ was dated, served and entered in court subsequent to the enactment of the Revised Statutes, but was not in the form prescribed by the Revised Statutes, but the trustee was summoned to answer to the plaintiff's declaration, contrary to law. The county court dismissed the suit. Exceptions by defendant.

H. P. Smith for defendant.

The process, in this case, is in the form required by the old statute. Sl. St. 154, 155. Acts of 1835, p. 12. The Rev. St. reversed the procedure under the former statute, changed the form, and prescribes a different process, the observance of which is *540 imper*ative. Rev. St. 484, 504. The case of Park et al. v. Trustees of Williams, 14 Vt. 211, is directly in point. If a writ materially vary from the outlines of the form prescribed by statute, it will abate. Cooke v. Gibbs, 3 Mass. 193. Wood v. Ross, 11 Ib. 276. Defective process can be objected to by motion, or plea. 1 U. S. Dig. 11.

J. Sawyer for plaintiff.

The opinion of the court was delivered by

REDFIELD, J. This is a motion to dismiss the writ and the action on the ground of material defects in the form of the writ. The case of Park et al. v. Trustees of Williams, 14 Vt. 211, is relied upon as an authority in point. But the cases are essentially different. In that case there was in reality no process against the principal debtor and no service. The old statute did not contemplate, that the case would proceed, unless the goods, &c., should be found in the hands of the trustee; so that the process was, in fact and in form, against the trustee, and only contained a parenthetical direction to the officer to leave a copy for the principal debtor, for the mere purpose of notice, as he was interested in the proceeding, but not esteemed a necessary party in court.

Under the Revised Statutes the principal debtor is a necessary party, and the primary party, and the proceeding against the trustee is merely incidental;—so that trustees may now from time to time be added, as they shall be discovered, before service on the principal debtor. In the case of Park et al. v. Trustees of Williams, the suit was dismissed, on motion of the principal debtor, because it was wholly defective, in regard to process and service, as against him, who was the chief party defendant. That process does not seem to have been regarded as defective, as against the trustee. It contained, as this does, all that is requisite, as far as the trustee is concerned. In one case it is alleged, that he has goods, &c., of the principal debtor to a certain amount, and in the other he is required to disclose all he has in his possession.

Under the old statute, and in this case, the trustee is farther required to answer the plaintiff upon his declaration against the principal debtor. But that is what, by law, he is not bound to do, and such a command in the writ, based upon no law, is mere *brutum fulmen*, mere surplusage, and of no avail for good, or evil.

*We do not therefore think there is, *541 so far as the trustee is concerned, any substantial difference between the form of the writ under the former statute and the present Revised Statutes. And we are not prepared to say, that the suit shall be dismissed, or even abated, for a mere formal defect, which is immaterial, even if it be a statute requisite. Verbal departures from statute forms are found in almost all our judicial and other proceedings, and still they have always been upheld, where the departure was not in matter of substance. And that an obsolete form, found in some former statute, is adopted, does not make the case worse, if the two forms are, in substance, alike. This has been expressly decided, in regard to the form of taking depositions under the Revised Statutes,—that the form of the former statute is still sufficient. And I have no doubt, a similar rule will be adopted as to other cases, where the difference in the forms is not of substance. So that we are not prepared to say, that the process is so defective, as to the trustee, that on that account alone it should be dismissed. We think the present writ, with reference to the existing law, contains, as to the trustee, all that the form of the Revised Statutes requires, that is, to appear and disclose the goods, &c. of the principal debtor in his hands, and something more, which is merely nugatory. The case of Park et al. v. Trustees of Williams does not touch this point.

We come, then, to inquire upon the very point of the decision in Park et al. v. Trustees of Williams, viz., the process against the principal debtor. In that case the form was that of the statute of 1797 and 1807, which contained no process whatever against the principal debtor, and in that case there was no service upon him. For this reason alone this court held the process fatally defective. If that be true of the present writ, it must share the same fate.

The Revised Statutes require, that there should be an entire writ, either of summons, or attachment, in the first instance, against the principal debtor. And in looking into the present case, and comparing the writ, word by word, with the common writ of attachment, we find a full and exact correspondence, until we come to the expression, "Then and there in said court to answer to the plaintiff in a plea." Instead of this, the trustee is summoned to answer to the plaintiff on his declaration against the principal debtor. This is informal, and irregular; but it is not a defect in the process, *but rather in the declaration. It *542 might, in strictness, be said to be a declaration, to which the trustee is required to answer, as, under the old statute, he was allowed to do. But as it could have no such legal effect under the existing law, and as the declaration is entitled against the principal debtor, and the process is entire to bring the party into court, and duly served, we think it ought to be intended that he is brought into court to answer to this declaration.

It does not appear to us, that there really is any such uncertainty in regard to the true import of this process, as could be made the ground of a plea in abatement, or special demurrer. Clearly we think it is not a case, where the whole proceedings are to be dismissed, as fatally defective.

Judgment reversed and motion to dismiss overruled.

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*543 *COUNTY OF ORLEANS

AUGUST TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. LUKE P. POLAND, ASSISTANT JUDGES.

SARAH GRAHAM v. GEORGE MONSERGH.

(*Orleans*, Aug. Term, 1850.)

A proceeding, for the purpose of affiliating a bastard child and compelling aid from the father in its support, is, in its nature, confined to causes of action arising within this state. Such a proceeding is altogether a matter of internal police, and in its very nature as exclusively local, as is the administration of criminal justice.

Where, in such case, it appeared, that the child was begotten and born out of the state, and that the parties never resided within this state, the mother being only temporarily here at the time the proceedings were instituted, and that the child, at the time of the trial, was in the care of a family residing in this state, the suit was dismissed, upon motion.

*544 *This was a complaint for bastardy, in which it was alleged, that on the eighth of July, 1847, a child was begotten by the defendant upon the body of the complainant at Stanstead in Canada East, and that said child was born a bastard at Walpole in the state of New Hampshire on the tenth of April, 1848, and was still living. The defendant moved, that the suit be dismissed, alleging, that neither the defendant, nor the complainant, nor the bastard child, was, at the time of making the complaint, or at any time before or since that time, a citizen, inhabitant, or resident of the county of Orleans, or within the state of Vermont, and that the said child was begotten without this state. The motion was demurred to, except so far as the facts therein stated may be varied by an agreement between the parties as to the facts, in which it was stated, that, at the time the complaint was made and the warrant issued, the complainant and her bastard child were temporarily in the town of Derby, in the county of Orleans, that the complainant, being a foreigner, had no settled residence, and that, at the time of filing the motion to dismiss in this case and for some months previous, the bastard child of the complainant was a resident of the town of Derby. The county court, June Term, 1849,—POLAND, J., presiding,—overruled the motion to dismiss; to which decision the defendant excepted. The case was then tried upon the plea of not guilty, and a verdict returned for the complainant, and an order of affiliation made.

J. Cooper for defendant.

The right of action, in this case, is created by statute, and hence must be local in its effects. The object of the statute originally was, to provide for the maintenance of illegitimate children. 1 Tol. St. 379, sec. 1. Rev. St. 348. This statute cannot extend to children begotten and born in a foreign country. Originally the right of action was first given to the overseer of the poor, and that only when the child was likely to become chargeable; and the right of action ceases on death, or miscarriage of the woman. 1 Tol. St. 379. The expression "any justice in the same county" means something in regard to locality. It refers to the domicil of one of the parties,—either mother, putative father, or child. The case of *Allen v. Ford, 11 Vt. 367, seems to *545 have given the true construction to this expression. This prosecution is penal, and strictly penal, in its consequences; if so, it falls within the principle of Slack, q. t., v. Gibbs, 14 Vt. 357.

C. W. Prentiss for plaintiff.

The child and the mother were in Derby, in Orleans county, for a few days, after the birth of the child, and then the suit was instituted,—and we insist properly; for it is a civil suit,—Coomes v. Knapp, 11 Vt. 543,—and in its nature transitory, not local. Dennett v. Kneeland, 6 Greenl. 460. Williams v. Campbell, 3 Met. 209. It is in its nature transitory, when considered as a suit to give relief, indemnity, or damages, to the mother, for the injury she has received,—or rather, for the burden imposed upon her. It is so, when considered under the pauper law system, that is, if the burden is cast, or is likely to be cast, upon a town in this state, the object of the law is to relieve such town. Sisco v. Harman, 9 Vt. 129. Derby was the town, to which the child was likely to become chargeable, and there was the place, where the process should be instituted.

The opinion of the court was delivered by

REDFIELD, J. This is a complaint and proceeding, under the statute in regard to bastards and bastardy. The important facts, admitted on the record, are, that the child, which is confessedly not legitimate, was begotten and born out of the state, and the parties never resided in the state, the mother only being temporarily here, at the time the proceedings were instituted. The child resided, or was in the keeping of a family, which resided, in Derby in this state, at the time of the trial.

The court are well agreed, that a proceeding, for the purpose of affiliating a bastard child and compelling aid from the father in its support, is, in its nature, confined to causes of action accruing within the state. The remedy is a peculiar one, and given and regulated exclusively by statute, and has no fair or reasonable application to causes of action accruing out of the state. And if we allow a case, which accrued in a neighboring state, or province, to be brought into our courts, we could not exclude such a case, coming from *Japan, or *546 farther India, or Kamschatka. Or, if

we admit such cases to come into our courts from countries, where similar laws exist, we must, equally, from countries, where no such laws exist, and, for aught we can perceive, from those countries where polygamy is allowed to the fullest extent. We should thus be liable to become engaged in a species of knight errantry, in a ludicrous attempt to redress the wrongs and regulate the police of other countries, in matters which very little concern us. The truth is, the proceeding is altogether a matter of internal police, and in its very nature as exclusively local, as is the administration of criminal justice.

It is not necessary here to consider, how far the case of a woman, *bona fide* coming into this state to reside, before the birth of the child, might merit a different consideration. It is supposable, too, that, should the birth of such a child occur during the temporary absence of the mother from the state, with the continuance of the *animus revertendi*, she might, on her return to the state, be entitled to proceed against the father, under these statutes.

Judgment reversed and suit dismissed.

JOHN STANFORD, JR., v. WILLIAM P. BATES.

(*Orleans*, Aug. Term, 1850.)

The party, in an action of book account, may testify to distinct admissions of facts, made to him by the adverse party, although made after the commencement of the suit, and during a negotiation for a settlement, or compromise.[1]

Book account. Judgment to account was rendered, and an auditor was appointed, who reported, that he found due to the plaintiff $11,28, and also reported, that, upon the trial before him, the plaintiff offered to prove, by his own testimony, as admissions of the defendant, a conversation between himself and the defendant, after the writ was served, and when the defendant was endeavoring to effect a compromise, or settlement, with the plaintiff, to avoid a law suit, and that this testimony was objected to by the defendant, but admitted by the auditor. The county court, December Term, 1849,—POLAND, J., pre- *547
sid*ing,—accepted the report and rendered judgment thereon for the plaintiff. Exceptions by defendant.

C. W. Prentiss, for defendant, insisted, that the admissions of the statements of the defendant was erroneous, and cited Stranahan v. East Haddam, 11 Conn. 507, Mitchell v. Preston, 5 Day 100, Marsh v. Gold et al., 2 Pick. 285, Gerrish v. Sweetser, 4 Ib. 374, 1 Phil. Ev. 82, 83, and Cow. & H. Notes to Phil. Ev. 109, n. 196.

J. L. Edwards and *W. M. Dickerman*, for plaintiff, insisted, that the party, in an action upon book account, may testify to admissions made by the adverse party,—citing Reed v. Talford, 10 Vt. 568,—and that evidence of the admission of any independent fact is receivable, though made during a treaty of compromise,—citing 1 Greenl. Ev., sec. 192, Mount v. Bogert, Anthon 259, 1 Greenl. Ev. 245, n., and Thomson v. Austen, 2 D. & R. 358.

The opinion of the court was delivered by

POLAND, J. The case of Reed et al. v. Talford, 10 Vt. 568, establishes the doctrine, that, in an action on book account, a party may testify to the admission of the other party.

It is objected, however, in the present case, that the defendant's admission (to which the plaintiff was permitted to testify) was made after the commencement of the suit, and when the defendant was endeavoring to make a compromise, or settlement, with the plaintiff, in order to avoid a law suit. It is now well settled, that a mere offer, or proposition, made by a party to his adversary for the purpose of effecting a settlement of a suit, is not receivable in evidence, as an admission of any liability upon the party making such offer. It is equally well settled, also, that a distinct admission of a fact may be given in evidence against the party making it, though such admission were made during a negotiation for a settlement, or compromise. Sanborn v. Neilson, 4 N. H. 501. Hamblett v. Hamblett, 6 Ib. 333. Marsh v. Gold, 2 Pick. 284. Hyde v. Stone, 7 Wend. 354. Thomson v. Austen, 16 E. C. L. 94. In the case of Wallace v. Small, 1 M. & M. 446, [22 E. C. L. 562,] it was held by Lord TENTERDEN, that an offer of a specific sum, by way of compromise, was admissible in evidence, unless accompanied with a caution, that *548
*the offer was confidential. But this decision has frequently been doubted, and has not, in this country at least, been followed. It does not appear from the report of the auditor, what the defendant's

[1] A distinction is made between facts admitted pending an attempt to compromise, and a mere proposition of settlement; the former being admissible as evidence while the latter is not. Railroad Co. v. Ragsdale, (Tex.) 2 S. W. Rep. 515. The general rule is that all admissions, not expressly made to make peace, and all independent facts admitted during negotiations for settlement, are admissible in evidence. Bank v. Seymour, (Mich.) 31 N. W. Rep. 140. The admission of a fact, made because it is a fact, may be shown though made upon the occasion of an attempted compromise. Quinn v. Halbert, 57 Vt. 178. But otherwise, where the admission is made to open the way to a compromise. Railroad Co. v. Wright, (Ind.) 16 N. E. Rep. 145. If the admission is of such a nature as that the court can see it would not have been made except for the purpose of producing the objects of the negotiation, and under an agreement that could be fairly implied from the circumstances that it was not to be used afterwards to the prejudice of the party making it, such admission is properly excluded. White v. Steam-Ship Co., (N. Y.) 6 N. E. Rep. 289. Letters written in response to a proposition for a compromise of a disputed claim are not admissible to show an implied admission of liability. Kierstead v. Brown, (Neb.) 37 N. W. Rep. 471. But an offer made by a vendee of goods to the seller to pay 50 cents on the dollar, and which he terms an effort to compromise, does not constitute such a proposition made with a view to compromise as is excluded by the rule where there is no dispute as to the liability of the purchaser. Cooper v. Jones, (Ga.) 4 S. E. Rep. 916. And where the defendant sought a conversation with plaintiff with regard to injuries which the latter had received from defendant's dog, and offered to pay a certain sum, which was declined as not sufficient in amount, such offer was held to be admissible, there being no reservation that the conversation was to be confidential, nor that the offer was made for the sake of peace. Brice v. Bauer, (N. Y.) 15 N. E. Rep. 695.

admissions were, to which the plantiff was permitted to testify; and the objection is based upon the broad ground, that all admissions, made during the pendency of a negotiation for a settlement, are inadmissible. This, as we have seen, is not maintainable; and as it does not appear, that the admission proved was of that class, which is excluded, the county court were correct in giving the plaintiff judgment on the auditor's report, and the same is affirmed.

SAMUEL BLAKE v. DANIEL BUCHANAN.

(*Orleans*, Aug. Term, 1850.)

Where a promissory note was assigned to a firm, as collateral security for a debt due to the firm from the payee, and, upon the trial of a suit instituted by the firm, in the name of the payee, upon the note, one member of the firm executed to his co-partners an assignment of all his interest in the note, or suit, and in the debt due to the firm from the payee of the note, and his co-partners thereupon released him from all liability for costs, &c., in the suit, it was held, that he was thereby rendered a competent witness on the part of the plaintiff.

After a promissory note, not negotiable, has been assigned by the payee to his creditor, as collateral security for a debt, and the maker of the note has had notice of the assignment and acknowledged the note to be due and promised to pay it to the assignee, he cannot pay the note to the payee, or receive any release from him, which will operate to defeat the equitable interest of the assignee.

When a suit, in which the general issue has been pleaded, is referred under a rule of court, the defendant cannot, upon the trial before the referee, avail himself of that, which is mere matter of offset.

But the equitable interest of the assignee of a promissory note, not negotiable, which was assigned as collateral security merely, extends only to the amount of the debt, for the security of which it was assigned, and not to costs, which have accrued in a suit subsequently commenced thereon; and in a suit by the assignee, in the name of the payee, against the maker, the defendant, as to the amount beyond the equitable interest of the assignee, may avail himself of a release, obtained by him from the payee subsequent to the assignment.

*549 *Assumpsit* upon a promissory note for $121,46, not negotiable. Plea, the general issue. The suit was referred under a rule from the county court, and the referee reported the facts substantially as follows. The plaintiff gave in evidence the note declared upon, the execution of which was conceded; and the defendant then produced a release of the note, executed by the plaintiff. The counsel for the plaintiff then claimed, that the note was the property of Cobb, Rollins & Co., that it was assigned to them by Blake, the payee, in September, 1842, which was previous to the execution of the release produced by the defendant, and that the defendant was then notified of the assignment and promised to pay to them the amount due upon the note, and offered to prove these facts by Cobb,—one of the firm of Cobb, Rollins & Co., to whose admission as a witness the defendant objected. Cobb then executed to his copartners an assignment of all his interest in the note and suit, and in the debt due to the firm from Blake, for the security of which the note was assigned to the firm, and the other members of the firm executed to Cobb a release from all liability for the costs &c. of this suit. The defendant still objected to the witness, but the objection was overruled, and the referee found, from the testimony of Cobb, that in September, 1842, Blake, being indebted to the firm in the sum of $112, assigned and delivered to them this note as security for his indebtedness, and that as early as November, 1842, the defendant was notified by the firm of this assignment, and then acknowledged, that the note was due, and promised to pay it to the firm; —but the referee reported, that if Cobb was not properly admitted as a witness,—which question was submitted to the court,—then he did not find this acknowledgment and promise proved. The referee farther reported, that he found, from other testimony, that the note was in fact assigned to the firm, in September, 1842, for the purpose above stated, and that the defendant, on the fifth day of December, 1842, was notified by the firm of the assignment, and then informed the assignees, that nothing had been paid upon the note, that he had some contingent claim to apply against the note, and that he made the note not negotiable, intending it as security for that contingency,—which contingency depended upon the fulfilment of some contract between Blake and the defendant in refer-
*ence to land,—but that he was will- *550
ing to pay the whole of the note to the firm, if Blake should fulfil that contract. It also appeared, that the defendant then informed the firm, that about fifty dollars depended upon that contingency, but did not then say to them, that he should decline paying to them the residue of the note. It appeared, that Blake had executed to the defendant a deed of certain land, and at the same time executed to the defendant a contract to procure for him the title to about twelve acres of land adjoining the land conveyed by the deed, to the possession of which the father of Blake was entitled during his life, and that the note in suit and other notes, amounting in all to about five hundred dollars, were at that time executed by the defendant to Blake for the deed and contract. The defendant took possession of the premises, under the deed and contract, by consent of the plaintiff's father, and occupied them about two years, and made some improvements upon the land, when a difficulty arose between the plaintiff's father and the defendant in reference to the possession, and the defendant was forbid to work upon the twelve acres; and about the time of this difficulty Blake and the defendant concluded to rescind, and did rescind, the whole trade, and Blake surrendered to the defendant his notes, and executed to him the release above mentioned, intending thereby to discharge the note now in suit, and paid the defendant for the improvements, which he had made upon the premises, and the defendant surrendered the land and the possession of it. The contract above named was in writing, and was surrendered by the defendant to Blake to be cancelled, when the trade in reference to

the land was rescinded. A question was made in reference to the competency, or sufficiency, of evidence of the admissions of Blake, to prove the loss and contents of the written contract,—the referee reporting, that, if such evidence were improperly received by him, he was unable to find, that the paper was lost, or its contents. This suit was instituted by Cobb, Rollins & Co., and was prosecuted by the other members of that firm, after the release of Cobb, for their own benefit. It farther appeared, that Cobb, Rollins & Co. commenced a suit against Blake in Canada, in January, 1845, upon the debt for $112,00, above mentioned, and obtained a judgment thereon, which, with the costs, amounted to $200,00, and it did not appear, that Blake had paid any part of it, or that Cobb, Rollins &
*551 *Co. had any security for their demand, except the note now in suit. The referee reported, that the amount due upon the note was $182,25; that the amount, deducting $50,00 mentioned by the defendant December 5. 1842, was $108,22; and that the amount due upon the claim in favor of Cobb, Rollins & Co. against Blake, exclusive of the costs of the suit in Canada, was $157,36. The county court, June Term, 1849,—POLAND, J., presiding,—accepted the report and rendered judgment thereon for the plaintiff, for $157,36. Exceptions by defendant.

——— for defendant.

C. W. Prentiss, for plaintiff, cited Cummings et al. v Fullam, 13 Vt. 434, Strong v. Strong, 2 Aik. 373, Weeks v. Hunt, 6 Vt. 15, Campbell v. Day, 16 Vt. 558, Stiles v. Farrar, 18 Vt. 444, Warner v. McGary, 4 Vt. 507, Bullard v. Billings, 2 Vt. 309, Hines et al. v. Soule, 14 Vt. 99, Washburn et al. v. Ramsdell, 17 Vt. 299, and Sargeant v. Sargeant, 18 Vt. 371.

The opinion of the court was delivered by

POLAND, J. The first question in this case is as to the admissibility of Cobb as a witness. He was a member of the firm of Cobb, Rollins & Co., to whom the note, upon which the suit was founded, had been assigned by the plaintiff, and for whose benefit the suit was brought and prosecuted. We do not discover any reason, why the releases, from Cobb to the other members of the firm, of all his interest in the note, or suit, and of the debt of the firm against the plaintiff, which the note was assigned to secure, and their release to him, did not discharge him from all legal interest in the suit and render him a competent witness. This very question seems to have been directly decided by this court in the case of Moore v. Adm'r of Rich, 12 Vt. 563.

Cobb being admissible as a witness, the referee reports, that he finds, that the plaintiff, in September, 1842, assigned the note to the firm of Cobb, Rollins & Co., to secure a debt due to them from himself for the sum of $112, and that notice was soon after given of such assignment by Cobb, Rollins & Co. to the defendant, who acknowledged the note to be due and promised to
*552 pay the note to *them. After this notice of the assignment of the note to Cobb, Rollins & Co., and of their equitable interest in the note, the defendant could not pay the note to Blake, or take any discharge, or release, from him, which would operate to defeat the interest, which Cobb, Rollins & Co. had acquired in the note. This principle has been so long and so well settled, that authorities need not be quoted to sustain it.

The notes given by the defendant to the plaintiff were supported by a sufficient consideration, viz., the conveyance of the land and the contract to convey, and there was no such partial failure of consideration, as would have enabled the defendant to set it up as a defence, either in whole or in part, to an action upon the notes under the plea of the general issue. It does not distinctly appear, that the written contract in relation to the land had ever been broken at all by the plaintiff; but if it had been, the only mode of making it available as a defence was by pleading it in offset, as a distinct claim against the plaintiff. Whether this could have been done by the defendant, after notice that the note had been assigned and a promise on his part to pay it to the assignee, may well admit of doubt; but it is not necessary now to decide that question. In this case the general issue alone was pleaded by the defendant, which would exclude this defense, even if the suit had been for the benefit of Blake, the party of record.

The discharge from Blake to the defendant of this note, long after notice of its assignment to Cobb, Rollins & Co. and the defendant's promise to pay it to them, was a clear fraud upon their equitable right in the note, and, upon the plainest principles of law and common honesty and justice, could not be set up and made available to bar a recovery for their benefit, to the extent of their interest under the assignment.

The note being assigned by the plaintiff to Cobb, Rollins & Co., to secure a debt of $112 only, the balance of the note remained the property of Blake, and to that extent we think he might settle or discharge it. The subsequent increase of the debt of Cobb, Rollins & Co. against the plaintiff, by the costs of a suit against him to enforce the collection of it, did not give them any greater interest in the note against the defendant, than they took by virtue of the original assignment; and therefore the discharge from the plaintiff to *the *553 defendant would be operative as a defence to the balance of the note, above the amount of the debt, which it was assigned to Cobb, Rollins & Co. to secure.

These views render it unnecessary for us to examine the remaining questions submitted by the referee in his report. The judgment below, having been in accordance with the views above expressed, is affirmed.

TOWN OF NEWPORT v. TOWN OF DERBY.

(*Orleans*, Aug. Term, 1850.)

Under the Revised Statutes of this state an illegitimate child does not follow the settlement of the mother derived by marriage after the birth of the child There is no difference, in this respect, between the Revised Statutes and the statute of 1817.

Appeal from an order of removal of a pauper, from Newport to Derby, made by two justices of the peace, pursuant to the statute. The facts were agreed to be as follows. The pauper, John Knox, at the time the order was made, was fourteen years of age, and an illegitimate child. He came to Newport with his mother, some years previously, from the state of Maine, and neither he nor his mother had any settlement in this state previous to that time. The mother married one Luther Agen, who had a settlement at the time in Derby and has ever since retained it. The pauper resided in Newport from the time he came into the state with his mother, until the order of removal was made. His mother has resided with Agen, in Derby, since their marriage. Upon these facts the county court, June Term, 1849,—POLAND, J., presiding,—adjudged, that the pauper was unduly removed. Exceptions by plaintiffs.

H. F. Prentiss for plaintiffs.

The pauper's mother, by her marriage with Agen, gained a settlement in Derby. Rev. St. 99, sec. 1. And it would seem, from the same authority, that the pauper, being an illegitimate child, follows and has the same settlement,—the statute being, *554 that "illegiti*mate children shall follow and have the settlement of their mother." There is a marked difference between this case and that of Burlington v. Essex, 19 Vt. 91. In that case the pauper had a settlement by birth, under the common law, and it was held, that the statute of 1817, being in its terms wholly prospective, could not have a retrospective effect and change a settlement acquired previous to the enactment of that statute.

J. L. Edwards for defendant.

The construction of the statute,—Rev. St., c. 15, § 1,—is determined by the case of Burlington v. Essex. The settlement must be acquired by the mother in her own right, in order to transmit it to the children. Manchester v. Springfield, 15 Vt. 385. Legitimate children do not follow their mother's derivative settlement; Wells v. Westhaven, 5 Vt. 322; and there can be no distinction in this respect, between legitimate and illegitimate children.

The opinion of the court was delivered by

REDFIELD, J. The only question in the present case is, whether an illegitimate child, under the Revised Statutes, takes the settlement of the mother, derived from her husband, after the birth of such child. This point was expressly decided by this court in Burlington v. Essex, 19 Vt. 91, so far as the statute of 1817 is concerned. That statute was precisely like the present, so far as this point is concerned, with the change of a single word, which, we think, is not important. In the statute of 1817 the expression is, "shall have the settlement of the mother," and in the Revised Statutes the expression is, "shall follow and have." We do not think any difference in construction could be based upon any such difference in the terms used. It is said, a different construction of a similar statute obtains in some of the states. See Plymouth v. Freetown, 1 Pick. 197; Canajoharie v. Johnstown, 17 Johns. 41; Petersham v. Dana, 12 Mass. 429. But this point was decided in this court as early as 1836, in the county of Addison, in a case not reported, and in accordance with what we understand to be the rule, as to legitimate children, having a settlement in the right of the mother, in England, if the mother obtain a new settlement by marriage. Judgment affirmed.

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*CHAUNCEY HOLMAN v. SAMUEL S. *555 KIMBALL.

(*Orleans*, Aug. Term, 1850.)

Communications made by a party to one who is acting as his counsel in the commencement and management of a suit, but who has not been admitted as an attorney, and who is not a clerk in the office of an attorney, are not privileged, although he may be pursuing the study of the law under the direction and instruction of one who is an attorney.

Trover for a quantity of hay, &c. Plea, the general issue, and trial by the jury, December Term, 1849,—POLAND, J., presiding. On trial the defendant offered in evidence the deposition of Thomas Abbott, to prove admissions and communications relating to this suit, made by the plaintiff to Abbott, while he was acting as counsel and attorney for the plaintiff in this suit. It appeared, that Abbott had an office and did business as a lawyer in Barton, where the plaintiff resided, and that he was employed by the plaintiff to bring this suit. Abbott's name was indorsed upon the writ, as attorney for the plaintiff, and after the suit was entered in this court, upon appeal, his name was entered upon the docket, as attorney for the plaintiff. Abbott had previously been a student in the office of Mr. Cooper, an attorney at Irasburgh, and was still pursuing his studies under Mr. Cooper's direction, but had an office and did business upon his own account; and he had not been admitted to the bar, as an attorney, at the time above referred to, but subsequently was admitted. The court excluded the depositions. Other questions were made upon the trial, and were argued in the supreme court; but as they were not decided by the court, they need not be stated. Verdict for plaintiff. Exceptions by defendant.

T. P. Redfield, for defendant, insisted, that Abbott's deposition should have been received, and cited 2 Stark. Ev. 229, and 1 Phil. Ev. 183.

——— for plaintiff.

*The opinion of the court was deliv *556 ered by

REDFIELD, J. Some questions are raised in regard to the merits of this case, which are claimed to have been decided, when the case was last before this court: but not having participated in that decision I could say nothing in regard to it. As the question in regard to the admissibility of Abbott was decided by this court in Windsor county, on the winter circuit, and the case must go back for a new trial, that his testimony may be received, I have spent no time in regard to any other question. The privilege of refusing to disclose confidential

communications in court, by the English law, extends only to the relation of client and counsel, or attorney; and to extend it beyond that limit would be embarrassing to courts and liable to the grossest abuses. The attorney's clerk is considered the same as the attorney himself; but this is not the privilege of the clerk, or of the client growing out of his relation to the clerk, but solely out of his relation to the attorney; and when that relation does not exist, the claim for privilege has no just basis to rest upon.

Judgment reversed and case remanded.

BURNHAM HUNT v. ORSEMUS TAYLOR AND DAVID A. TALLMAN.

(*Orleans*, Aug. Term, 1850.)

Possession of part of a lot of land, with definite boundaries, under a written contract of purchase, not recorded, from one who has no title to the lot, is sufficient to extend, by construction, to the whole lot, so as to enable the occupier to sustain trespass against a stranger to all title, who cuts timber thereon.

And a provision in the contract, that the purchaser shall not cut certain timber upon the lot, until he has complied with the conditions of purchase, will not preclude him from sustaining trespass against a stranger, who cuts such timber without license

In such case it is competent for the plaintiff to prove declarations, made by the defendant immediately previous to the trespass being committed, that he intended to cut the timber, for the purpose of showing, in connection with other evidence, that he did in fact cut it.

*557 *Trespass *quare clausum fregit*, for entering upon lot No. 5 in the twelfth range of lots in Craftsbury and cutting and carrying away two pine trees. The writ was served January 23, 1846. The defendants severally pleaded the general issue. Trial by jury, June Term, 1847,—DAVIS, J., presiding. On trial the plaintiff proved, that he was in the occupancy of a small clearing on the west part of the lot mentioned in his declaration, and that the remainder of the lot was unimproved and uninclosed. The plaintiff then gave in evidence a written contract between himself and James A. Paddock, dated September 22, 1842, by which the plaintiff agreed to purchase of Paddock the said lot, and pay him therefor $480,—fifty dollars to be paid by the first day of May, 1843, and the remainder in four equal annual payments,—and it was agreed, that when the first payment should be made, Paddock should procure a sufficient deed of warranty of said lot to the plaintiff and the residue of the payments should be secured by a mortgage of the land, and it was farther agreed, that the plaintiff should not cut any of the pine timber upon the lot, until the execution of the deed. This contract was not recorded; and no evidence was offered, that Paddock had any title to the lot, or that he claimed to be the owner of it. The plaintiff also gave in evidence a warrantee deed of the same lot to himself, from one Clark, dated December 11, 1846; but no evidence was given, that Clark had any title, or color or claim of title, to the lot. The plaintiff then gave evidence tending to prove, that the defendants cut and carried away two pine trees from the east side of the lot, about sixty rods from any land actually improved or occupied by the plaintiff. The plaintiff also offered to prove by one Thompson, that the defendant Tallman came to the witness five or six weeks before these trees were cut, and proposed that he should go with him and cut some pine timber on that lot,—which was declined by Thompson. This testimony was objected to by the defendants, but admitted by the court. The defendants requested the court to charge the jury, that unless the plaintiff was actually in possession of the land, where these trees were cut, or was in the actual occupation of some portion of the lot under color of title to the whole lot, he had not proved such a title, as would enable him to recover in this action; and that the reservation in the contract between Paddock and the plaintiff, in re- *558 *lation to cutting timber by the plaintiff, precluded the plaintiff from recovering against any person who should cut pine timber on the lot. But the court charged the jury, that if they found, that the plaintiff had cleared a part only of said lot and actually improved and cultivated only a part, but did so under a claim to the whole lot by virtue of his contract with Paddock, he must be deemed to have a constructive possession of the whole and could recover against the defendants, who were strangers, making no claim to any portion of the lot, for cutting timber upon any part of the lot; and that the provision in the contract, relative to the right of the plaintiff to cut the pine timber, could have no effect to preclude him from maintaining this action. Verdict for plaintiff. Exceptions by defendants.

Poland for defendants.

There cannot be a constructive possession of land, without title, or color of title. Adams on Eject. 488-498. Jackson v. Halstead, 5 Cow. 219. Jackson v. Vermilyea, 6 Cow. 677. Miller v. Shaw, 7 S. & R. 143 Pearsal v. Thorp, 1 D. Ch. 92. Doolittle v. Linsley, 2 Aik. 155. Sawyer v. Newland, 9 Vt. 383. The plaintiff had neither title, nor color of title, to the land in question, and there was nothing to indicate to the world, that he was other than a trespasser. If the plaintiff is deemed in possession, so as to be enabled to sustain this suit, it must be under his contract with Paddock. By the conditions of that contract he had no right to cut the standing pine trees, and if he did so, Paddock could sustain trespass against him, or against any other person, who should commit the same act. Hence the defendants were only liable to Paddock, if to any one. The declarations of Tallman, proved by Thompson, had no tendency to prove that the defendants committed the trespass, of which the plaintiff complains.

T. P. Redfield for plaintiff.

The only important question is, whether the plaintiff, being in actual possession of a part of the lot, under a written contract for the purchase of the whole lot, has such possession, as will enable *him *559 to sustain this action against a mere

stranger. See Ripley v. Yale, 13 Vt. 257. Goodrich v. Hathaway, 1 Vt. 485; Hapgood v. Burt, 4 Vt. 155; Beach v. Sutton, 5 Vt. 209; Pearsal v. Thorp, 1 D. Ch. 92; Doolittle v. Linsley, 2 Alk. 155; McGrady v. Miller, 14 Vt. 128; Spear v. Ralph, Ib. 400. The testimony of Thompson was admissible. It tended to prove, that the defendant had declared his intention to take the timber. Paddock reserved no right, or property, in the timber. The provision in the contract was merely, that the plaintiff should not cut the timber until after a specified time.

The opinion of the court was delivered by

REDFIELD, J. We think the plaintiff's possession, under a written contract of purchase, was sufficient to extend, by construction, to the whole lot. The case of Beach v. Sutton, 5 Vt. 209, decides, that a mere pitch, which is no deed, is sufficient, with actual possession of a part, to give constructive possession of the whole lot. So, also, the same case decides, that a deed, defectively executed, is sufficient for that purpose. And this latter point has been often recognized by this court. The case of Spear v. Ralph, 14 Vt. 400, is almost identical with the present, so far as regards the written claim of title.

These decisions go upon the ground, that possession in part is sufficient, ordinarily, to put an adverse claimant upon inquiry, as was held in Rublee v. Mead, 2 Vt. 544, and often since. And being put upon inquiry, he is bound to demand of such occupant his claim of title, and, so far as the claim is in writing, is affected with notice of all which he might have learned upon such inquiry. So, too, in many cases, no doubt, actual possession may be constructively extended by such unequivocal acts, on the part of the occupier, as indicate to all who observe them, that the person proposes to extend his occupancy beyond its present limits.

The exception in the plaintiff's contract of purchase, or his contract, more properly, not to cut the pine timber, was a stipulation for the security of the vendor, and was not intended to reserve the title to the vendor, except in the contingency of that being necessary for his security, doubtless. That does not appear in the present case; and we think the contrary is reason-
*560 ably to be inferred, per*haps, from his suffering the purchaser to proceed with the suit, for the value of such timber. It is a matter, at all events, in which the defendant has no concern farther than to see, that the judgment in favor of the plaintiff shall be a sufficient bar of any after claim,—of which we have no doubt in the present case.

The declaration of the defendant, that he intended to cut the timber, was in the nature of a threat, and, in connection with the fact, occurring at, or near, the time, and in the manner threatened, is always admissible, to show the guilty agent, even in criminal cases of the greatest magnitude.

Judgment affirmed.

*COUNTY OF CALEDONIA. *561

AUGUST TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD,
HON. MILO L. BENNETT,
HON. LUKE P. POLAND, ASSISTANT JUDGES.

MOSES BUCHANAN & CO. v. MCLEAN MARSHALL.

(*Caledonia*, Aug. Term, 1850.)

The indorsement of a promissory note, waiving notice, does not excuse the indorsee from demanding payment of the maker in due time; and if such demand be not made, the indorser will be discharged.

Assumpsit, declaring against the defendant as indorser of a promissory note, executed by one Heath and made payable to the defendant, and by him indorsed to the plaintiffs, waiving notice. Plea, the general issue, and trial by the jury, June Term, 1849,—POLAND, J., presiding. *562 *On trial the plaintiffs proved the execution of the note by Heath, and the indorsement and delivery of the note, for a valuable consideration, April 23, 1842, by the defendant to the plaintiffs, "waiving notice." The plaintiffs also proved, that the defendant, immediately after the indorsement, left this state and went to the state of Maine, where he remained until the autumn of 1842; that Heath, July 23, 1842, paid to the plaintiffs a part of the amount due upon the note, which was indorsed thereon; and that about a month previous to that time the plaintiffs, who resided in Groton, Vermont, wrote to Heath, who resided in Barton, in Vermont, notifying him that they owned the note and requesting payment,—which letter was received by Heath in due course of mail. It farther appeared, that, at the time Heath made the payment, the plaintiffs agreed with him, that they would wait for payment of the residue until the next autumn,—but that there was no consideration for the agreement,—and that the plaintiffs accordingly waited, but before autumn Heath became insolvent and has ever since continued so. The court decided, that the plaintiffs, upon this evidence, were not entitled to recover, and directed the jury to return a verdict for the defendant. Exceptions by plaintiffs.

A. Underwood for plaintiffs.

The making of the indorsement, waiving notice, took the case out of the law merchant, so far as to supersede the necessity of a demand. A demand could be of no service to the indorser, having waived the notice back. The waiver of notice on the part of the indorser was in effect an agreement on his part, that he would see that the note was paid.

S. Austin for defendant.

Demand upon the maker is necessary, though notice back be waived by the terms of the indorsement. 1 McCord 339. Berkshire Bank v. Jones, 6 Mass. 524. Chit. on Bills 507. The agreement to wait upon the maker for payment discharged the indorser. Chit. on Bills 500–508.

*563 *The opinion of the court was delivered by

REDFIELD, J. The defendant's agreement, at the time of indorsing the note, to waive notice presupposes, that he did not intend to waive demand upon the maker; and there is nothing in the case to excuse the demand upon the maker. The defendant was thereby discharged. There is no necessity to determine the other point in the case; but there is a case in Pickering's Reports, which decides, that, under such a state of facts, the indorser is exonerated by the naked agreement to wait, if in the mean time the maker or surety become insolvent.

Judgment affirmed.

WILLIAM WARDEN v. ESTATE OF ANDREW WARDEN.

(*Caledonia*, Aug. Term, 1850.)

When a paper has been read to the jury without objection, but the jury are afterwards instructed by the court, that it can be of no avail in the case, it is not error for the court to suffer it to be taken by the jury with the other papers in the case.

Appeal from commissioners. The plaintiff declared in *assumpsit* for money paid. Plea, the general issue, and trial by jury, June Term, 1850,—POLAND, J., presiding. On trial, the plaintiff having given evidence tending to prove his case, the defendant, among other things, read in evidence, without objection, a submission of all matters in difference between the plaintiff and Andrew Warden, dated April 29, 1843, and also offered in evidence a copy of an award made in pursuance of said submission, which was objected to by the plaintiff and excluded by the court. The defendant also offered parol evidence to prove an award, —which was objected to by the plaintiff and excluded by the court. The court, in charging the jury, directed them to consider the case upon the several matters of defence relied upon, aside from the submission and award, and told the jury, that the submission, not being followed by proof of any award made, constituted no defence; and the charge was not excepted to by either party. After the charge, and when the counsel were selecting the papers

*564 to be *delivered to the jury, the counsel for the plaintiff objected to the submission being permitted to go to the jury; but the court permitted it to be taken by the jury, with the other papers in the case; and to this the plaintiff excepted. The jury returned a verdict for the defendant.

——— for plaintiff.

J. Potts for defendant.

The opinion of the court was delivered by

REDFIELD, J. There seems to be no question whatever in this case. Any paper, which should go to the jury without objections, although it should appear, that it might have misled the jury, could hardly form the basis of a writ of error, the court having made no decision in regard to it. But if the paper had gone into the case by direction of the court, and at a subsequent stage of the trial the court became convinced that the paper ought not to be considered in determining the case, and should so instruct the jury, it would effectually cure the error. Courts, at the present day, consider jurors rational beings, and capable of following plain instructions, and willing to do so, and do not suppose, that one word, more or less, even of incompetent testimony, is incapable of being so expunged from the case, as not to influence the event. In the case of Smith v. Richardson, Willes 20, 23, there is a *dictum*, which would seem to justify the conclusion, that the jury were not to be trusted in such a case,—although it shows that eminent judges had ventured sometimes to admit doubtful evidence *de bene esse*. The following are the words of the reporter; "It was said, that a very great judge had frequently admitted evidence, if doubtful whether it were evidence, or not, and said he would afterwards tell the jury, how far they ought to have regard to it; but this, though the practice of a very great man, was thought to be of very dangerous consequence." I, for one, should be content to follow the practice of the judge, so severely questioned; and it is certain no practice is more universal, in the English courts, in jury trials, than to take the testimony down in course, and strike out such as is incompetent, when that shall fully appear. If that could not be done, it would

*leave the court often in a very ludi- *565 crous dilemma; they could neither go forward, nor retrace their steps. They would virtually have committed an unpardonable transgression, which neither repentance, or restitution, could atone for. We do not apprehend, there is any necessity of making even the law of jury trials so inflexible. But this question, even, is not fairly raised in the present case,—the paper having, in the first instance, gone to the jury, without objection.

Judgment affirmed.

JOHN SHAW v. JAMES GILFILLAN.

(*Caledonia*, Aug. Term, 1850.)

A justice of the peace has not jurisdiction, under Rev. St., ch. 26, sec. 7, of an action on the case, brought by a land owner, under the provisions of chap. 89 of the Revised Statutes, against the owner of adjoining land, to recover the expense of building that part of the division fence between them, which the fence viewers have assigned to the defendant as his proportion thereof.

Fence viewers have no authority to settle the rights of different claimants of land, or to establish disputed boundaries; and neither party is precluded, by their decision, from contesting the question of ownership in himself, or in the adverse party, or the location of their boundaries.

This was an action on the case, to recover the expense of building a division fence,—commenced before a justice of the peace and brought to the county court by appeal. The plaintiff alleged in his declaration, that, dispute having arisen between himself and the defendant concerning a certain division fence between their adjoining lands, he made application to the fence viewers of the town, and that they decided, upon due examination and notice to the parties, that the defendant should build one half of the fence, describing it, and that the defendant having neglected, for more than three years after such division, and after proper request, to build his half of the fence, the plaintiff had built it, and that the defendant neglected and refused to pay him therefor. The defendant pleaded, in the county court, the general issue, with notice that he should prove, in defence, that he was not the owner of the land adjoin-
*566 ing the plain*tiff's land, upon which the said fence had been built, but that the title to said land was in the heirs of one Robert Gilfillan, deceased; and that the fence was not built upon the true line between the plaintiff's land and the land adjoining. The defendant then moved to dismiss the suit, for want of jurisdiction in the justice, before whom the suit was commenced, to try the same,—alleging, that he pleaded before the justice certain pleas, by which the title to land came in question, and then moved the justice to dismiss the suit for want of jurisdiction; and that the justice overruled the motion, and the defendant had now pleaded the same pleas in this court and formed the same issue, as before the justice. The defendant also alleged in his motion, that the justice was interested in the suit, by reason of his holding a mortgage of the plaintiff's land, described in the declaration. The county court, June Term, 1850,—POLAND, J., presiding,—dismissed the suit; to which decision the plaintiff excepted.

M. Hale and *J. Potts* for plaintiff.

The statute confines the jurisdiction of justices to twenty dollars, when the title of land is concerned. Rev. St. 170, § 7. In this case the title to land is not called in question by the declaration, nor does that question necessarily arise in the defence. The fence viewers have decided, where the fence should be built, and their decision is conclusive upon the parties. Rev. St. 417, §§ 2, 3.

Bartlett and *Bingham* for defendant.

If from the nature of the suit, as shown by the declaration, the title of land comes necessarily in question, a justice of the peace has not jurisdiction, under Rev. St. chap. 26, section 7. The action is founded upon the provisions of chap. 89 of the Revised Statutes, and the allegation in the declaration, that the plaintiff and defendant are adjoining owners of land is not only an essential allegation for the plaintiff to make, but is the first important point for him to prove upon the trial. And the plaintiff must also prove, that the fence is built upon the line dividing the plaintiff's land from that of the defendant, or, if it varies from that line, that it is by the agreement of the parties, or by the order of the fence viewers. So, also, when, by the course of the pleadings, the title of land comes in *question, or is con- *567
tested, in a suit, the prohibition must take effect. 19 Vt. 223. And in this case both the title to the land and the correctness of the line, on which the fence is built, are put in issue by the plea.

The opinion of the court was delivered by

POLAND, J. We are all of opinion, that the present case comes within the list of actions excepted from the jurisdiction of a justice of the peace, by the Revised Statutes, chap. 26, sec. 7, upon the ground, that the title of land is concerned.

The plaintiff alleges in his declaration, that he was the owner of a piece of land in Barnet, and that the defendant was the owner of another piece of land adjoining thereto. This allegation we think a material one, and one that the plaintiff, upon a trial of the action upon the plea of the general issue, putting him to the proof of his whole case, would be required to establish by evidence;—indeed, it seems to be an allegation lying at the very foundation of the whole proceeding, by which the suit is attempted to be sustained.

It is urged, however, by the counsel for the plaintiff, that if there ever existed any question between the parties, as to their being adjoining owners, or in relation to the true dividing line between them, if they were such owners, that question cannot now be raised in this suit,—upon the ground, that the decision of the fence viewers, in the premises, is in the nature of a judgment, and concludes the parties in relation to the questions of adjoining ownership and the location of their boundary line. But this doctrine would invest fence viewers with a much higher and more responsible duty, than they have generally been supposed to possess, and much beyond the terms of the statute defining and prescribing their official duty. In cases like the present the fence viewers are only authorized, by statute, to determine the proportion, or part, of the fence, which each adjoining owner shall make, or maintain. If disputes arise between the occupants of adjoining lands, as to their ownership, or their boundary lines, these are to be settled by some other tribunal than the fence viewers;—they are authorized to divide fences, and the statute declares their judgment in that respect conclusive; but they have no authority to settle the rights of different claimants to landed property or to establish disputed boundaries. Neither party, *therefore, is con- *568
cluded, by the decision of the fence viewers, from contesting the question of ownership in himself, or his adversary, or the location of their boundaries.

The cases of Whitney v. Bowen, 11 Vt. 250, and Haven v. Needham et al., 20 Vt. 183, seem fully to establish the principle, upon which the present case is decided.

This view of the case renders it unnecessary to examine the questions raised as to the effect of the defendant's course of pleading to the action, or as to the question of interest in the justice, before whom the suit was brought. Judgment affirmed.

RAWSON STODDARD v. PETER GILMAN.

(*Caledonia*, Aug. Term, 1850.)

Under the Revised Statutes no security for costs need be given by way of recognizance, upon the issuing of a writ of replevin.

It is no objection to the legality of a town meeting, that the notices for the meeting were not posted by the selectmen in the places where such notices had usually been posted in the town,—it not appearing, but that they were posted in public places, as required by the statute.

Where in an action of replevin, the defendant avows the taking under a vote of the town to raise a sum of money to be expended upon a certain highway, a replication, that the highway in question was never legally laid out, is insufficient.

Where a town have voted to raise a tax, but nothing has been done under the vote, the town have the power, at a meeting legally warned for that purpose, to rescind, or reconsider, the vote; and having done so, the collector cannot legally proceed to collect the tax.

Replevin for a cow. The defendant moved to dismiss the suit, for the reason that no security for costs was given by way of recognizance, at the time the writ was issued. It appeared, that a replevin bond had been given, in the form required by the statute. The county court, December Term, 1848,—POLAND, J., presiding,—overruled the motion; to which decision the defendant excepted.

*569 *The defendant then pleaded the general issue, and also avowed the taking of the property, as constable and collector of taxes of the town of Westmore, under a rate bill and warrant for the collection of a tax to the amount of $500,00, voted by said town, at a meeting held March 2, 1847, for the purpose of making roads in said town and defraying other liabilities of said town. It was alleged, that the warrant was dated March 25, 1847, and that the rate bill and warrant were delivered by the selectmen to the defendant, March 26, 1847; and the proceedings of the defendant, in distraining and selling the property of the plaintiff for the payment of the tax, were set forth specifically. The plaintiff pleaded to the avowry,—1. Traversing severally the allegations in the avowry;—2. That the town of Westmore voted, March 2, 1847, "to raise five hundred dollars in money, to be expended on the Lake road the ensuing season,"—which was alleged to be the only vote, at any town meeting in Westmore in March, 1847, for the raising of a tax of $500,00: that subsequently, at a legal town meeting, duly warned, and held on the twenty fifth of March, 1847, the said town voted "to reconsider the vote taken March 2, 1847, to raise $500,00 to be expended on the Lake road;" and that the property replevied was taken by the defendant for the sole purpose of satisfying, in part, said tax of five hundred dollars;—3. "That there was no legally laid out 'Lake Road,' so called, as specified in the record of the vote taken at the annual meeting on the second day of March, 1847, in town meeting of the legal voters of said town of Westmore, either by the authority of said town of Westmore, or by any other authority, whereby the polls and rateable estate of the inhabitants of said Westmore, or property therein of non-residents, could lawfully be taxed, for the purpose of making, building, or repairing the same." Upon the first plea to the avowry issue was joined; to the second plea the defendant demurred generally; and to the third plea he demurred specially, for the alleged cause, that it attempted to put in issue, to be tried by the jury, mere inference and matter of law. The county court, December Term, 1848,—POLAND, J., presiding,—adjudged the second and third pleas insufficient; to which decision the plaintiff excepted.

*The issues of fact were tried by the *570 court, December Term, 1849,—POLAND, J., presiding. The defendant admitted the taking of the property. The defendant then offered in evidence the record of the warning and proceedings of the meeting of the town of Westmore, held March 2, 1847, —which was objected to by the plaintiff, but admitted by the court. The defendant then offered in evidence the rate bill and warrant mentioned in his avowry, and also the collector's receipt for the same, indorsed thereon; which were objected to by the plaintiff, but admitted by the court. It was conceded by the plaintiff, that at the time the tax, mentioned in the avowry, was voted and assessed, the plaintiff was the owner of rateable estate in Westmore, and had a legal list there, as alleged in the avowry The plaintiff then offered to prove, that the notices for the meeting of March 2, 1847, mentioned above, were not posted at the places, where notices for town meetings had usually been posted for several years previous to that time, and that by reason thereof many of the voters in said town had no notice of said meeting and did not attend; to which evidence the defendant objected, and it was excluded by the court. The court rendered judgment for the defendant. Exceptions by plaintiff.

E. A. Cahoon for plaintiff.

The decision, overruling the motion to dismiss the suit for want of a recognizance, was correct. The replevin bond is an ample substitute for the ordinary recognizance, and was so intended. The statute does not require a recognizance in such a writ. A writ of replevin is not strictly one of summons, or attachment, in which security by way of recognizance is required to be given. Rev. St. 179, § 5; Ib. 198, § 3. The form of the writ given by statute, does not contemplate a recognizance. Rev. St. 502. The third plea to the avowry is sufficient. The allegation, that the road was not "legally" laid out, no more calls upon the jury to decide a question of law, than the allegation, that an act is felonious, requires them to decide what is felony. The second plea involves the power of a town, in regular meet*ing *571 assembled, to reconsider previous votes, or acts. Independent of precedent, the general principles of corporate, legislative, congressional and conventional action, unrestricted by positive enactment, most surely warrant the exercise of such power. There is no statute provision, forbidding a town, in its corporate capacity, to reconsider, or rescind, a vote raising taxes,—especially when nothing has been done under the vote, (as in the case at bar.) and the parties can be placed in their former

position. And the existence of this right is distinctly recognized in Pond v. Negus, 8 Mass. 230.

Bartlett and *Bingham* for defendant.

Upon the issue formed upon the first plea, the facts stated in the avowry are found to be true. As to the second plea, the defendant insists, that the vote to raise the money, the assessment of the tax and the rate bill and warrant are a good justification for him; and that a subsequent reconsideration of the vote would not, in law, vacate the assessment, nor the rate bill and warrant in the hands of the collector. The third plea attempts to put in issue the question, whether the "Lake road" was legally laid out,—which is a question of law. The averment is "that there was no legally laid out 'Lake road,' so called." This may be true, and yet the town be under obligation to keep the road in repair. The road may have had its origin by adoption and dedication, and so long since, that the town cannot now disown it.

The opinion of the court was delivered by

POLAND, J. 1. The first question in this case arises upon the defendant's motion to dismiss the plaintiff's suit for want of a recognizance for costs.

We think this motion was correctly overruled. In all the classes of replevin suits, provided for by our statute, the plaintiff is required, before his writ is served, to give a bond to the defendant with sufficient surety, in double the value of the property to be replevied, one of the conditions of which bond is, to pay all such costs, as the defendant may recover in the suit against him. This was doubtless intended to be the only security for costs, which the plaintiff is required to give, and to stand in the place of the recognizance, required in ordinary cases. The action of replevin
*572 *was indeed known at common law; but the whole form of proceeding, in the commencement and subsequent proceedings, in this state, is regulated by statute; and as no other security, except the bond, is required by the statute itself, or the prescribed form given by the statute, none other need be furnished. Such has been the uniform practice in this form of action, so far as we have any knowledge. Under our old statute, which was similar to the present in this respect, it was held, that no recognizance for costs was necessary. Dunshee v. Stearns, 1 Aik. 149.

2. The records of the town meeting held on the first Tuesday of March, 1847, at which meeting the tax, under which the defendant justifies the taking of the plaintiff's property, was voted, have not been furnished to us, and we cannot of course determine any of the questions raised as to the validity of the proceedings of that meeting, or of the tax voted at that time. The only question, which is raised by the exceptions, as to the validity of this meeting, is upon the plaintiff's offer to show, that the notices for the meeting were not posted at the place, where such notices had usually been posted. The statute does not require, that the notices shall be posted at the same places every year, but only requires, that the selectmen "shall post up notices at three public places in their respective towns" &c. The plaintiff's offer, if true, would not show, that the notices were not given in conformity to the statute;—hence the evidence offered was correctly excluded.

3. Another objection is raised to the validity of the tax, under which the defendant justifies the taking, by the plaintiff's third plea to the defendant's avowry.

In this plea the plaintiff avers, that there was no legally laid out Lake road in the town of Westmore, as specified in the vote raising the tax. The evident intention of the plaintiff's counsel, in this plea, was, to show that the tax was raised for the purpose of being expended in a manner and for a purpose not coming properly within the sphere and scope of their corporate powers and duties, and so not legally collectable. But what is alleged in this replication may, as we think, all be true, and yet this Lake road be one, for which the town of Westmore might well raise money to lay out, or one which they might be compelled to keep in repair. The amount of the plaintiff's allegation is, that this road was never "legally laid out." This *573 may be true, and yet the town, by adoption, or prescription, may have become liable to keep the road in repair, in the same manner and to the same extent as if the road had been legally laid out in the first instance. This plea was therefore correctly adjudged insufficient by the county court.

4. The remaining question in the case is upon the sufficiency of the plaintiff's second plea, to the defendant's avowry, wherein the plaintiff sets up a subsequent meeting of the voters of the town of Westmore, and a reconsideration of the vote to raise the sum of five hundred dollars, under which the defendant justifies. This latter vote to reconsider is alleged in the plea to have been passed on the twenty fifth day of March, 1847. In the defendant's plea it is alleged, that the tax bill, upon the tax raised on the first Tuesday in March, was made out on the twenty fifth day of March, by the selectmen, and delivered to the defendant for collection on the twenty sixth day of March. These facts all standing admitted by the pleadings, the question is raised as to the effect of this vote to reconsider. The statute, in terms, authorizes towns to raise money by voting taxes, but is silent as to any power to reconsider, or rescind, such votes. But on consideration of this case we are all satisfied, that, to a certain extent, this power must exist.

A vote to raise money for town purposes is a mere declaration, or resolution, on the part of the town alone, and not in the nature of a grant, or contract between the town and an individual. As said by Judge PARSONS in Pond v. Negus, "it is merely a resolution to provide themselves with money." So long as this rests in mere resolution, and has not been acted upon, we think the town must have the power to rescind or reconsider it. Until something has been done under the vote, the town are alone interested in it, and may alter their resolve at their own pleasure. If the town have not this power, great inconveniences

might arise. At the time of voting a tax there might be the strongest apparent necessity for the town to raise a sum of money; but before any thing is done towards its collection, such necessity may wholly have passed by and the money be entirely needless to the town. Is it true, that they must proceed to collect the tax, whether needed, or not?

What would be the effect of such a vote, after proceedings had been had under it and the tax partially collected, it is not *574 necessary *now to decide. Clearly the collector could not be made a trespasser, for any thing already done by him; and perhaps such a vote would be wholly inoperative. In the present case it seems nothing had been done; the tax bill had not even been delivered to the collector, and perhaps not made out by the selectmen. Under these circumstances we are of opinion, that the town had the right to retrace their steps and rescind, or reconsider, the vote raising the tax; and having done so, the collector could not legally proceed to collect it. For this reason, therefore, the judgment of the county court is reversed, and judgment will be entered, that the plaintiff's second plea is sufficient.

The defendant applied for leave to withdraw his demurrer to the plaintiff's second plea,—which was allowed, on terms.

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*575 *COUNTY OF ESSEX.

AUGUST TERM, 1850.

PRESENT:

HON. STEPHEN ROYCE,
CHIEF JUDGE.
HON. MILO L. BENNETT,
HON. LUKE P. POLAND,
ASSISTANT JUDGES.

ISAAC R. HOUSTON v. MOSES C. KIMBALL, HARLON KEYES, CYRUS SMITH AND JOHN S. PIKE.

(*Essex*, Aug. Term, 1850.)

A child, six years of age, was chargeable to a town as a pauper, and the plaintiff, at a legal town meeting, agreed with the town, that he would board the child one year, at a specified price per week. *Held*, that the plaintiff thereby acquired the right to the custody and control of the child for the year, and that the overseer of the poor of the town had no authority to interfere with the plaintiff's exercise of this right.

Held, also, that the father of the child, who was himself a vagrant, without any settled residence or means of support, could not, by his consent, authorize the overseer of the poor to remove the child from the custody of the plaintiff during the year.

*576 *Trespass *qu. cl. freg.*, for breaking and entering the plaintiff's dwelling house in the town of Victory. Plea, the general issue, with notice of special matter of defence, and trial by jury, May Term, 1849,—POLAND, J., presiding. On trial the plaintiff gave evidence tending to prove, that in the latter part of March, 1847, the defendants, together with one Reuben Dunton, came to his house, during his absence, and demanded admittance,—which was refused by the plaintiff's wife, who was within; that Dunton then demanded his boy, who was also in the plaintiff's house,—to which the plaintiff's wife replied, that she had no authority to let the boy go; and that, after considerable talk between the defendants and the plaintiff's wife, the defendants opened the door from the outside, the latch string being pulled in, and went in and took the boy and carried him away. The plaintiff proved, that the boy was about six years of age, and was a pauper, chargeable to the town of Victory, and that he had been supported by the town and by the charity of his relatives since his early infancy; that Reuben Dunton, the father of the boy, possessed no property, and had no settled home, but led a wandering, vagrant kind of life, and had never contributed to the support of the child; and that the child's mother died, when he was but one or two days old, and since that time the child had generally resided in the family of the plaintiff, who was his uncle. The plaintiff claimed the custody of the child by virtue of a contract, made with the town of Victory at their annual town meeting in March, 1847; and it appeared, that at that meeting the plaintiff, in pursuance of a vote of the town, offered to support the child the ensuing year, at twenty five cents per week, and that this offer was accepted by the town. The defendants gave evidence tending to prove, that the defendant Kimball was overseer of the poor of the town of Victory, duly elected at the annual meeting of the town in March, 1847, and that, as such overseer, he went with the said Reuben Dunton to the plaintiff's house, a day or two previous to the breaking and entering complained of by the plaintiff, and, with the consent of Dunton, took the boy and carried him to his, Kimball's, house, for the purpose of binding out the boy, so as to save the town any farther expense towards his support; that on the same day the plaintiff went to Kimball's house and took the boy and carried him back to his *own *577 house, contrary to the wishes of Kimball and Dunton; that when the defendants went to the plaintiff's house and took the boy, as complained of by the plaintiff, they went for the boy, for the same purpose for which he was first taken; that Kimball was acting as overseer of the poor and the other defendants were acting as his assistants; and that Reuben Dunton consented and agreed to such arrangement. The defendants also offered in evidence articles of apprenticeship of the boy to one Asa Kimball, of Lancaster, New Hampshire, which were subsequently executed by the defendant Kimball, as overseer of poor, and by Reuben Dunton, the father; but this evidence was objected to by the plaintiff, and excluded by the court. The court instructed the jury, that, upon these facts, the defendants could not justify a forcible entry into the plaintiff's house, for the purpose of taking away the boy, and that the plaintiff was entitled to recover his damages for breaking and entering his house; —but that, if the defendants acted in good

faith, under a supposed right in law to do as they did, the plaintiff should not recover more than his actual damages. The jury returned a verdict for the plaintiff. Exceptions by defendants.

Bartlett and *Bingham* for defendants.

The plaintiff agreed with the town to board the boy, for twenty five cents per week, for a year; and the question is, how far this agreement will control the powers of the overseer of the poor, or deprive the parent of his natural right to the custody of his own child. That a person, who, by his bid, agrees to board a pauper for the then ensuing year, acquires a right to the custody of the person of the pauper, against the overseer and the relatives and friends of the pauper, is a doctrine that is both new and extraordinary. If this be true, it is difficult to perceive, why the doctrine is not equally applicable to every case of hiring board for a definite term. The boy, in this case, was chargeable to the town; but it by no means follows, that he was doomed to be a perpetual pauper, or even for the time that the plaintiff agreed to board him. The parent was the natural guardian of the boy, and had the right to resume the custody and control of him, and bind him an apprentice, if he saw fit.

A person chargeable is a pauper no *578 longer than the force of *circumstances compels him. By sec. 23 of chap. 16 of Rev. St. overseers of the poor are empowered to bind out as apprentices all such children, as are chargeable to the town. This power the overseer derives from the statute, and not from the town; and no arrangement, which the town could make with the plaintiff concerning the boy, could divest the overseer of this right. And for the purpose of exercising this right, the overseer, after demanding admission, had authority to enter the plaintiff's house, doing no unnecessary damage, and take the boy.

Fletcher & Heywood for plaintiff.

It is provided by the Revised Statutes, chap. 16, sec. 24, that towns, at their annual March meetings, may dispose of their paupers in such manner, and make such provision for their support, as a majority of the inhabitants present shall agree upon. In this case the inhabitants of Victory exercised the authority given them by this law; and while the contract thus made was in existence, it of course superseded the authority of the overseer of the poor, and he had no right to enter the plaintiff's house to take the boy, and he and his assistants were guilty of a trespass in so doing. The presence of the father of the boy and his demand to have the boy delivered were of no validity. The parents of pauper children have no authority to dispose of them, or bind them out to service. Rev. St. c. 16, §§ 23, 24. Warner v. Swett et al., 7 Vt. 446.

The opinion of the court was delivered by

POLAND, J. Admitting that the defendants are well grounded in their claim, that the defendant Kimball, as overseer of Victory, had the right, as against the plaintiff, to take the boy for the purpose of binding him out as an apprentice, it may well be doubted, whether that gave him a legal right to forcibly enter the plaintiff's house for the purpose of getting the boy into his possession. But this question has not been argued, and need not necessarily be determined, in order to decide the case. By the exceptions it appears, that the case, in the court below, was tried entirely upon the question, as to who had the legal right to the custody of the boy; and the case here has been placed upon the same ground. On examination of the facts proved at the trial, we are all agreed, that the plaintiff was *legally entitled to the cus- *579 tody of the boy, and that the county court took the correct view of the case.

The vote of the town of Victory, at their March meeting in 1847, and the plaintiff's bid under it and the acceptance thereof by the town we consider as amounting to a contract between the plaintiff and the town of Victory, that the plaintiff should keep the boy a year, that he was entitled to the custody and control of him, and was entitled to his earnings, if he was able to perform service of any value to him. From the very nature and object of all such contracts these conditions are implied; and in the present case, from the very small compensation the plaintiff was to receive, it is evident, that he contemplated some other object than mere pecuniary advantage by the board of the boy.

The facts disclosed show the boy to be a fixed and permanent charge upon the town; and by the statute the town had the right to make such a bargain for his yearly support, as they did make with the plaintiff, which they and the plaintiff would be bound to perform.

It is however urged, that the statute invests overseers of the poor with a superior and controlling authority over paupers, (especially as to binding out minors as apprentices,) paramount to the right of the town itself, or of any person, who has made a contract with the town for keeping or supporting such a pauper. This doctrine, upon its face, wears a somewhat singular appearance. The overseer is a mere agent, or servant, of the inhabitants of the town, appointed by them to perform for them, and on their behalf, duties imposed upon them by statute; and to hold that his powers are superior to those of his creators would be at least novel. But the statute itself furnishes a full answer to this objection. The second section of chapter sixteen of the Revised Statutes, prescribing the duties of overseers of the poor, provides, that the overseers shall see that poor and indigent persons shall be suitably relieved, &c., either in the poor house provided by the town, or in such other manner, as the town shall direct, or otherwise, at the discretion of said overseers, &c. From this section it is clear, that the overseers' discretion is only to be exercised in the absence of any action, or direction, in the premises by the town itself.

It is claimed, however, that the defendants had the assent and permission of the father of the boy, to take him away from the *plaintiff for the purpose of *580 binding him out, and that this gave them a legal right so to do. It appears, that

the father had never furnished any support for the boy whatever, but had always left him to the charity of his other relatives, and of the town, for a support, and that at the very time in question he was wholly destitute of a home, or means of support, for himself, and much less of any ability to provide for the boy. It is not now necessary to enter into any discussion in relation to the rights of a parent, in the cases put by the defendants' counsel, where a man from a state of poverty and inability to furnish support for himself and family, and where the aid of the town is received, by some stroke of good fortune is suddenly raised to a state of affluence,—nor as to what effect such an unexpected change of circumstances would have upon contracts already entered into by towns for the support of such persons as paupers. We apprehend, however, that but little difficulty will be practically experienced in cases of this character, by a rigid and unyielding exaction of the fulfilment of such contracts.

In the present case no such change had taken place. The town of Victory for years had been obliged to assume what would have been the father's legal duty towards this boy, if he had possessed the ability, or disposition, to support him. In such a state of things the town had made a permanent contract for the boy's keeping, and the same state of facts still existed. It seems very clear to us, that the father could not come forward and claim to exercise the rights of a parent and natural guardian, and control and direct as to the custody and disposition of the boy, until he was also prepared to assume the obligations and liabilities of the same relation, and furnish the means of support. If the doctrine be true, that a pauper parent may at pleasure assume to interfere with and break up any contract, which the town may have made for the support of his pauper children, by virtue of his paternal right and authority, the burden and difficulty of supporting the poor will soon become much greater, than it ever has been. But we find no warrant in our statute, or in any general principle of law, for such a claim; and it appears to us wholly unsupported by any sound sense, or reason. These views of the rights and duties of the parent seem to be fully supported by the case of Warner v. Swett et al., 7 Vt. 446.

Judgment affirmed.

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*581 *CHITTENDEN COUNTY.

DECEMBER TERM, 1849.

[Continued from ante, p. 141.]

NICHOLS & BLISS v. HIRAM BELLOWS.

(*Chittenden*, Dec. Term, 1849.)

The right of a bankrupt to sue for and recover back money paid by him as usury is not such a right of property as vests in the assignee in bankruptcy. Although the statute has given a form of action in *assumpsit*, by which money so paid may be recovered, yet this remedy, in legal contemplation, is no less a mode of redressing an injury caused by personal wrong and oppression, than if the action sounded wholly in tort.

In such action, brought to recover back money paid by the plaintiff, as usury, to the defendant, upon a note signed by the plaintiff, and by several other persons as sureties for the plaintiff, one of the sureties is a competent witness for the plaintiff, notwithstanding he may have agreed to indemnify another surety against the note.

Although the payment of usury upon a note will, in law, be deemed a part payment of the note, if the note include both the money loaned and the usury, yet if separate securities are given for the usury, whether at the time of negotiating the loan, or afterwards, and the usury, when paid, is applied upon such securities, the debtor is at liberty to treat such a payment as having no connection with the legal demand and bring his action to recover it back.

Indebitatus assumpsit. Plea, the general issue, and trial by jury, September Term, 1848,—BENNETT, J., presiding. The action was brought to recover of the defendant $48,00, alleged to have been paid to him by the plaintiffs in January, 1841, as usury, and also the sum of $48,00, paid for like purposes in January, 1842. On trial the plaintiffs called as a witness one Griffin, whose testimony tended to prove, that on the twenty third of January, 1840, the plaintiffs were partners, and that the plaintiffs, as principals, and Nathaniel Packard, Danforth Wales and the witness, as sureties, executed a note on that day to the defendant, for $800,00, which was written, in common form, as payable with interest, and which was given for money loaned by the defendant to the plaintiffs; that *the *582 plaintiffs, in consideration of the loan, agreed to pay to the defendants six per cent. extra interest for the use of the money; that the extra interest for the first year was included in a separate note, for $48,00, which was signed by the plaintiffs; that in January, 1841, the plaintiff Nichols paid to the defendant the amount of the last mentioned note, and then executed another note to the defendant for $48,00, which was given for the extra interest upon the $800,00 note for the second year,—which second $48,00 note was also signed by the defendant Griffin; and that in January, 1842, the second $48,00 note was also paid by the plaintiffs. This witness also gave evidence tending to prove, that the note for $800,00 had been fully paid, previous to the commencement of this suit; but it was conceded on the trial, that it had not been paid, unless in the manner hereinafter set forth. There was no testimony given upon the trial, tending to prove the usurious payments, except what was given by the witness Griffin. The defendants offered in evidence a record of the district court of the United States for the district of Vermont,—from which it appeared, that the plaintiff Bliss filed his petition in bankruptcy in said court September 8, 1842, and obtained his certificate of discharge January 15, 1843; and the defendant claimed, that this action could not be sustained in the name of the present plaintiffs, but that it should have been brought in the name of Nichols and of N. B. Haswell, assignee in bankruptcy of Bliss. To this evidence the plaintiffs objected, and it was excluded by the court. The defendant then called as a witness Nathaniel Packard, one

of the signers of the $800,00 note,—from whose testimony it appeared, that this witness had never paid any part of that note, but that in the spring of 1843 the plaintiff Nichols and the witness Griffin had executed to him a bond of indemnity against said note, which bond this witness still held against Griffin. The defendant then requested the court to instruct the jury, that they should disregard the testimony of Griffin, for the reason, that, although the witness had been allowed to testify, yet if, in the progress of the trial, it appeared that he was interested, it was the duty of the court to instruct the jury to disregard the testimony of such witness. But the court charged the jury, that the testimony of Griffin was proper testimony in the case, even although it should appear, after *583 he had given his *testimony in court, that he was interested, and yet that his interest was discovered too late to be taken advantage of by the defendant.

It appeared, that on the twenty third of July, 1840, the plaintiffs paid to the defendant the interest upon the $800,00 note to that date, and the amount was indorsed upon the note, and that on the twenty third of July, 1843, Danforth Wales, one of the sureties upon the note, paid to the defendant $299,31, which was also indorsed upon the note, and that on the eighth day of August, 1843, Wales entered into an agreement with the defendant, for securing said note, which was evidenced by an instrument in these words:—"Received of Danforth Wales two notes in his favor against John A. Hill, both dated February 26, 1840,—one for $318,20, payable with interest annually on or before one year from date, on which there is indorsed, November 9, 1842, $87,71,—the other note for $318,19, payable on or before two years from date, with interest annually,—both of said notes secured by mortgage. And it was agreed, that one third part of said notes was to be paid in the month of May last, one third in the month of May, 1844, and one third in the month of May, 1845. Now the said Wales turns out the said notes to me, with a mortgage securing the payment of said notes, for the purpose of securing the note dated Jan. 23, 1840, for $800,00, payable to said Bellows, or his order, and signed by Nichols & Bliss, Almon Griffin, Nathaniel Packard, Danforth Wales. Westford, Aug. 8, 1843." (Signed) "HIRAM BELLOWS." It was also conceded, that the amount due upon the notes against Hill, mentioned in said agreement, had been paid to the defendant previous to the commencement of this suit, and that that amount exceeded the balance then due upon the $800,00 note. It was also conceded, that, at the time that amount was paid to the defendant, Wales was indebted to the defendant upon other obligations, which were then due, to the amount of $200,00, and which still remain unpaid, and which, with the balance due upon the $800,00 note, exceeded by $150,00 the amount received by the defendant from Hill; and that there had never been any accounting, between Wales and the defendant, in respect to the money received upon the notes against Hill, nor had Wales directed the application of that money upon the $800,00 note, nor had any part of it been so applied by the defendant,—but that the defendant still held the $800,00 note unsatisfied, except so far as it was satisfied by the indorsement upon it, and by the payment to the defendant of the notes *against Hill, in pursuance of *584 the agreement between Wales and the defendant above set forth. The defendant requested the court to charge the jury, upon these facts, that the plaintiffs could not recover in this suit; that the payment to the defendant of the amount due upon the notes against Hill, under such circumstances, did not amount to a payment and extinguishment of the $800,00 note, and could not so operate, until there had been an application of said money upon the $800,00 note; that while the $800,00 note remained unsatisfied, the payment of the said two sums of $48,00 each would be considered as a payment of so much money generally on that note; and that, even if such application had been made, the suit for the recovery of the said two sums of $48,00 each could not be sustained by the plaintiffs, but should have been brought in the name of Danforth Wales. But the court charged the jury, that the payment to the defendant of the amount of the notes against Hill, which were held by the defendant as collateral security for the $800,00 note, was in law an actual extinguishment and payment of the $800,00 note, and that, if they found, that the said two sums of $48,00 each were paid by the plaintiffs and received by the defendant as extra interest, the plaintiffs were entitled to a verdict for the amount so paid, with interest from the time of payment. Verdict for plaintiffs. Exceptions by defendant.

Platt & Peck for defendant.

1. The payment of the usury was, in its legal effect, a payment generally upon the principal note. If the money, which the defendant subsequently received upon the Hill notes, was, by law, applied upon the balance remaining after the application of the usury, and the payment of interest July 23, 1840, and the payment by Wales July 23, 1843, and if the total amount thus applied exceeded the note, the excess is recoverable by Wales. When each of the usurious notes was paid, the $800,00 note was mature, and its payment could have been enforced against the plaintiffs at any time. The payment of the usury was a part of the note transaction; it was made for the use of the consideration, for which the note was given;—hence it was made upon the note. It is the same, as if a payment had been made to discharge the interest *legally *585 due upon the note, but by mistake the payment had exceeded the interest. Ward v. Sharp, 15 Vt. 115. Smith v. Bromley, 2 Doug. 696. Dey v. Dunham, 2 Johns. Ch. R. 182. The statute, which gives this action, does not apply, when the usury can be applied in payment of the debt, but only when the plaintiff must otherwise suffer loss. The law would not so operate, as to restore to the principal debtors what had already been paid by them, and thus call out so much more from the sureties. If the facts disclosed by Packard, relative to Griffin's liability to him upon the bond, had been known when the latter was sworn in chief,

they would have sufficed to exclude him, if he had then been objected to. The effect of the bond increased the risk and liability of Griffin and Wales. The record of the discharge of Bliss in bankruptcy should have been admitted. The assignment in bankruptcy was made after the payment by the plaintiffs of the usurious interest. It transferred the legal and equitable right of Bliss in the payment to the assignee, and a recovery can be had for that payment in the names of Nichols and the assignee alone. Blin v. Pierce, 20 Vt. 25. Owen on Bank. 68, 85, 124. Smith et al. v. Stokes, 1 East 363. Thomason v. Frere, 10 East 418. Hague v. Rolleston, 4 Burr. 2174. Eckhardt v. Wilson, 8 T. R. 140. Moult v. Massey, 1 B. & Ad. 637. Page v. Bauer, 4 B. & Ald. 345. 1 Chit. Pl. 27. Arch. Pl. 58. Murray v. Murray, 5 Johns. Ch. R. 60. Van Valkenburgh v. Elmendorf, 13 Johns. 314.

Smalley & Phelps for plaintiffs.

The record in bankruptcy was properly rejected. The right to recover back usury is not a debt, and does not pass to the assignee in bankruptcy. It is a personal privilege in the nature of a penalty, and cannot be reached by creditors in any form. Barker v. Esty, Tr., 19 Vt. 131. The court were right in refusing to instruct the jury to disregard the testimony of Griffin. He had signed a bond to indemnify one of the sureties upon the principal note, on which the usury had been computed; but that note had been paid, as the case shows, before the commencement of this suit, and the bond was of course discharged; and even if not paid, a recovery either way in this suit *586 *could have no possible bearing upon the payment of it, or upon the liability or indemnity of the surety. The court were right in instructing the jury, that the facts proved constituted all the payment of the principal note, that the law required. 1. No payment was necessary. The usury, having been included in separate securities, and paid *eo nomine* at different times, may be recovered back without any payment of the principal note. Grow v. Albee, 19 Vt. 541. 2. The note had been fully paid in point of fact. The defendant had received assets from the plaintiff, to an amount sufficient to pay it, under a written agreement that the proceeds should apply in payment of this note.

The opinion of the court was delivered by

ROYCE, Ch. J. Several objections are taken to the right of the plaintiffs to recover.

It is insisted, that the cause of action in favor of the plaintiff Bliss passed to his assignee in bankruptcy, who should have joined with the other plaintiff in bringing this action. To sustain the objection, the defendant relies on the words of the United States' bankrupt act of 1841, which professed to transfer to the assignee all the bankrupt's "property and rights of property, of every name and nature." This sweeping enactment undoubtedly extended to every thing, which would properly go to make up a full inventory of the bankrupt's estate,—all his means consisting of tangible property, and rights of property, which could be expected to be made available for the payment of debts. But the right to sue for torts is not a right of property in any such sense. It is simply a right of redress, which is personal to the party injured, and which he may decline to enforce at his election. And though the statute has given a form of action in *assumpsit*, by which a party, who has paid usury, may recover it back, yet this remedy, in legal contemplation, is no less a mode of redressing an injury caused by personal wrong and oppression, than if the action sounded wholly in tort. Barker v. Esty, 19 Vt. 131. We consider, that no right to sue for the usury claimed ever vested in the assignee of Bliss, and that the record of the proceedings in bankruptcy was correctly excluded.

It is also claimed, that the witness, Griffin, was incompetent to testify for the plaintiffs, on the ground of interest. I shall not *inquire, whether the objection to *587 this witness was seasonably taken at the trial. If the note of eight hundred dollars, given for the loan, and which the witness signed as surety, had been fully paid, (as the evidence tended strongly to prove,) he could have had no interest at the time of testifying. And if it had not been paid, he was rather interested to have the usury remain in the defendant's hands, that it might be applied, by equitable offset, or otherwise, in part satisfaction of that note. It is not perceived, how the fact of the witness having agreed to indemnify another surety upon the note could operate to create an interest in this suit in favor of the plaintiffs, whether the note had or had not been paid.

The remaining objection is, that the usury, when received by the defendant, went, by operation of law, in part payment of the note for eight hundred dollars, though such an application was not contemplated by the parties. And that such will be the effect, where the security on which the payment is made includes both the loan and the stipulated usury, is doubtless well settled. That was the case of the first sum of thirty two dollars, mentioned in Ward v. Sharp, 15 Vt. 115. So a general payment, upon what the borrower owes the lender, will be applied by the law to a debt legally due, and not in satisfaction of any usurious stipulation. But when separate securities are given for the usury, whether at the time of negotiating the loan, or afterwards, and the usury, when paid, is applied upon such securities, the debtor is at liberty to treat such a payment as having no connection with the legal demand, and bring his action to recover it back. This is settled by the cases of Grow v. Albee, 19 Vt. 540, and Nelson v. Cooley, 20 Vt. 201, both of which were actions of *assumpsit*, like the present. At the same time he may, at his election, at least in a court of equity, compel the application of such usurious payments upon the lawful debt of the creditor. Ward v. Sharp, above cited, and Day v. Cummings, 19 Vt. 496. The plaintiffs are clearly entitled to retain their judgment, and the same is affirmed.

*588 *MORTON COLE v. JOSHUA HAYNES AND NORMAN HAYNES.

(*Chittenden*, Dec. Term, 1849.)

Land does not pass as a mere appurtenance to other land; and consequently no portion of a highway, adjoining upon land conveyed, will be conveyed, unless the instrument of conveyance can, by reasonable construction, be made to include it.

Where land adjoining upon a highway was levied upon, and the second line in the description defined the eastern boundary as extending from a certain point north nineteen degrees west, three chains and seventy five links, "to the road," and the northern limit was then described as running south thirty three degrees west, "in the line of the road," three chains and fifteen links, and thence the closing line run south six degrees west, eighty two links, to the place of beginning, it was held, that the levy did not include any portion of what was then recognized as the highway.

Ejectment for land in Williston. Plea, the general issue, and trial by jury, March Term, 1849,—BENNETT, J., presiding. On trial the plaintiff, among other testimony to prove his title to the demanded premises, gave in evidence the record of a judgment in favor of Moses Catlin against Daniel Hurlburt, and the levy of an execution, which issued thereon, upon several parcels of land, as the property of Hurlburt, and conveyances to himself, from Catlin, of the land so levied upon. The third parcel of land levied upon was described in the officer's return in these words;—"Beginning at the north west corner of a piece of land owned by Joshua Haynes, at a notch in the fence on the east side of the road leading to Hubbell's falls; thence south eighty six degrees east, on said Haynes' line three chains; thence north nineteen degrees west, on said Haynes' line, three chains seventy five links, to the road; thence south thirty three degrees west, on the line of the road, three chains and fifteen links; thence south six degrees west, eighty two links, to the place of beginning." It became material to determine, whether the third parcel of land, so levied upon, extended to the centre of the highway mentioned in the description; and the court charged the jury, that the land conveyed by the levy was limited by the side of the highway, as fenced and used by the public, and that Catlin did not, by his levy, acquire title to any portion of the road fenced and used as such, but the title to the same remained in Hurlburt. Verdict for defendants. Exceptions by plaintiff.

*589 *A. Peck* for plaintiff.

It is a well settled rule of construction, that a line, described as running to a stream, not navigable, or to a highway, extends to the centre of such object; and when, by any language, the line in fact goes to such object, it is, by legal construction, carried to the centre, unless limited to the margin by the most clear and explicit language. The description of the third course,—"thence south thirty three degrees west, in the line of the road, three chains and fifty links," is consistent with this construction of the second course. The words "to the road" fix the termination of the second line, and therefore the commencement of the third line, at the centre of the road; and the words "line of the road" in the description of the third line, are used to give the direction, but not to change the location, of that line. This is the only construction, that reconciles all parts of the description. 3 Kent 432. Peck v. Smith, 1 Conn. 103. Chatham v. Brainerd, 11 Conn. 60. Lunt v. Holland, 14 Mass. 149. 12 Johns. 255. King v. King, 7 Mass. 496. Stiles v. Curtis, 4 Day 329. Grose v. West, 7 Taunt. 39, [2 E.C. L. 250.] The same rules of construction apply to a levy, as to a deed. Waterhouse v. Gibson, 4 Greenl. 230.

J. Maeck and *Smalley & Phelps* for defendants.

The opinion of the court was delivered by

ROYCE, Ch. J. The plaintiff seeks in this action to recover land formerly included in a highway. He derives his alleged title under the levy of an execution, made in 1831, and while the road, or highway, was in use as a public thoroughfare. The question in dispute is, whether the levy operated to pass a title in any portion of the highway; and it arises upon the description of the third tract of land taken by the levy. The second line in that description extends the eastern boundary from a certain point north, nineteen degrees west, three chains and seventy five links, to the road; the northern limit is then described as running south thirty three degrees west, in the line of the road, three chains and fifteen links, —and thence the closing line runs south, six degrees west, eighty two links, to the place of beginning. It is contended by the plaintiff, that the line here given, as running to the road, must be taken to have ex*tended to the centre of the *590 road; and that the next boundary given, being the line of the road, must be understood to mean the centre line of the road. The defendants insist, that the expression to the road means to the southern line or margin of the road, and that the same line or margin is intended by the line of the road; so that the highway, as then fenced out and used by the public, was wholly excluded.

It is unquestionably the ordinary presumption and inference of law, that the soil of highways, and the beds of fresh water streams not navigable, belong to the adjoining proprietors. And hence if one convey land as being bounded by a highway, or by such a stream, it will usually be intended, that he parts with his interest to the centre of the highway, or stream. The presumption is not, however, an invariable and conclusive one. For it is certain, that a party, in such a case, may so describe and limit the subject of his grant, as to constitute the highway, or stream, a boundary, without passing any portion of either by the conveyance. And whether this has been done in a given case will depend on the manner, in which the granted premises are described. Land does not pass as a mere appurtenance to other land; and, consequently, no portion of the highway, or stream, will be conveyed, unless the instrument of conveyance can, by reasonable construction, be made to include it. Where

the owner of land conveys it by his deed, all general and ambiguous expressions are to be construed so as rather to enlarge than to restrict the conveyance. If, therefore, the conveyance is in terms extended to a highway, or bounded on or by a highway, with nothing to render the intention of the grantor more definite and certain, the grantee will take his interest to the centre of the highway, and this for obvious and satisfactory reasons;—first, because such terms of description may be applied as well to the center as to the edge or margin of the highway, and no intention distinctly appears to exclude the grantee from that interest in the highway, which an adjoining proprietor is generally understood to have; and secondly, because courts are bound to give this operation to deeds in such cases, whenever their terms will permit, on account of the manifest inconvenience of having the sites of discontinued highways left as gores, and owned by others than the proprietors on either side.

It is urged, that the same construc-
*591 tion should be given to the de*scriptive words in the levy of an execution, as to those in a deed of the party. In the former case, however, the words of description used are not those of the judgment debtor, but of third persons, over whom he has no control. And it would therefore seem, that a construction operating to his prejudice, if to result from ambiguity of description, ought not to be admitted.

But, without attributing to this distinction any decisive influence in the present case, we are convinced, that the levy in question should not be understood to have included any portion of what was recognized as the highway. Those concerned in making the levy were careful to limit the land taken by very exact admeasurements; and if the second line actually extended to the centre of the road, it was the officer's duty to certify the fact in express terms. Uniform practice, under like circumstances, would require this. And if the third line was really the centre of the road, there was equal necessity for so describing it. The line of a road, in reference to adjoining land, is universally taken to denote a side line, unless something appear, which clearly shows it to be otherwise. In reference to the course of the road, it may well be taken to mean the centre line. We think the only just or probable conclusion is, that the levy in this instance did not extend into the known highway.

Judgment of county court affirmed.

BENJAMIN BISHOP AND ZENO D. BISHOP v. CHARLES F. WARNER.

(*Chittenden*, Dec. Term, 1849.)

The *ad damnum*, in a writ returnable before a justice of the peace, is taken as a test of apparent jurisdiction only in cases, where the declaration does not otherwise limit the extent of the plaintiffs' claim. In an action of debt upon judgment, the plaintiffs' demand is limited to the amount of the judgment described in the declaration and the interest upon it; and if that amount be within the limit of the justice's jurisdiction, the excess of the *ad damnum*, beyond that amount, will be treated as unmeaning, for any purpose of affecting jurisdiction.[1]

Audita querela. The plaintiffs alleged in their complaint, that the defendant, Warner, prayed out a writ of attachment in his favor against the plaintiff Benjamin Bishop, as principal debtor, and *592 *therein summoned Zeno D. Bishop as trustee, in an action of debt upon a judgment,—which writ was made returnable before Lyman Cummings, a justice of the peace, on the twenty third day of October, 1846, demanding damages fifty dollars; that said writ was duly served and returned; and that afterwards, at some time unknown to the plaintiffs, Warner fraudulently, and without law, or right, procured said justice,—not having any jurisdiction of said cause,—to render a judgment therein against Benjamin Bishop, as principal debtor, and Zeno D. Bishop, as trustee, for $32,30 damages, and $2,34 costs, and had taken execution thereon, which he had caused to be levied upon the property of Zeno D. Bishop. Plea, the general issue, and trial by jury, September Term, 1848. On trial the plaintiffs gave in evidence the trustee process in favor of Warner against them, mentioned in their complaint,—from which it appeared, that the cause of action described in the declaration in that suit, was a judgment, rendered by a justice of the peace September 25, 1846, in favor of Warner against Benjamin Bishop, for $30,-57 damages, and $1,53 costs. The *ad damnum* was fifty dollars. And it appeared by the record in said suit, that judgment was rendered therein against the principal debtor and trustee, by default, October 23, 1846, for $32,30 damages, and $2,34 costs. The plaintiffs also gave in evidence the execution, issued upon the last mentioned judgment described in their complaint. The court, upon this evidence, rendered judgment for the defendant. Exceptions by plaintiffs.

A. Peck and *L. Underwood* for plaintiffs.

The defendant having pleaded the general issue only, and the plaintiffs having proved the allegations in their complaint, they are entitled to judgment. By the pleadings nothing is put in issue but the truth of the complaint. The sum demanded in the writ before the justice was fifty dollars,—which, as the law then was, was not within the jurisdiction of a justice of the peace. The matter in demand in all cases, in which the statute does not define it, is the sum set in the *ad damnum*. Even in an action on book account, if the *ad damnum* show the case without the jurisdiction, the court cannot examine the evidence, to determine whether the debit side *of *593 the plaintiffs' book is less than forty dollars, in order to hold the trustee; and if judgment be taken against the trustee by default, it will be set aside on *audita querela*.

S. Wires and *W. W. Peck* for defendant.

The matter in demand, in a suit before a

[1] As to the test for determining whether the amount involved in an action is such as to give a justice of the peace jurisdiction, see Richardson v. Denison, 1 Aik. 210.

justice of the peace, under Rev. St. 190, § 2,† is that for which the plaintiff must recover, if he recover at all. In an action for a debt, specifically set forth, the matter in demand is the debt, as set forth. In an action upon a judgment, the matter in demand is the amount of the judgment, as described;—the *ad damnum* is intended to cover only the interest, which may be allowed upon the judgment as damages, and hence, however large the *ad damnum* may be, it is no criterion of the demand. Southwick v. Merrill, 3 Vt. 320. Brush v. Torry, Brayt. 141. Perkins v. Rich, 12 Vt. 597. Hill v. Wait, 5 Vt. 124.

The opinion of the court was delivered by

ROYCE, Ch. J. The ground of complaint in this case was the alleged want of jurisdiction in the magistrate to render the judgment, and issue the execution, which the plaintiffs sought to have vacated. The original proceedings were had, while the statute limited the jurisdiction of a justice, in the trustee process, to cases where the matter in demand between the plaintiff and principal defendant did not exceed the sum of forty dollars. The complainants alleged, that the action before the justice was debt on judgment, demanding in damages the sum of fifty dollars; and they added an averment, that he had not jurisdiction of the suit, but gave no description of the judgment, on which the action was founded.

To establish the truth of the complaint, in answer to the plea of not guilty, the plaintiffs produced in evidence the record in the action before the justice; by which it appeared, that the amount of the judgment then declared on was considerably less than forty dollars, but that the declaration concluded with an *ad damnum* of fifty dollars. It is now claimed, that the substance of the complaint was proved by that record; and that, in conformity *594 with intimations of *this court, to be found in Harding v. Cragie, 8 Vt. 501, and some other cases, the issue should have been found for the plaintiffs, without regard to the legal sufficiency of the matters alleged.

But it is only in cases, where the declaration does not otherwise limit the extent of the plaintiff's claim, that the *ad damnum* is taken as the proper evidence of it, or as a test of apparent jurisdiction. And in the action before the justice, the demand was defined with certainty upon the face of the declaration,—being limited by law to the amount of the judgment there described, and the interest upon it. So that any claim in damages for a greater amount was a claim for what the law could not give; and the excess should therefore be treated as unmeaning, for any purpose of affecting jurisdiction. It follows, that the evidence adduced, instead of sustaining, conclusively disproved, the averment, that the justice had not jurisdiction. And hence the finding and judgment in favor of the defendant were justified and required by the proof.

Judgment affirmed.

†By which it is enacted, that no trustee process shall be commenced before a justice of the peace, "when the matter in demand shall exceed the sum of forty dollars."

*FRANKLIN COUNTY. *595

JANUARY TERM, 1850.

[Continued from ante, page 159.]

ALANSON M. CLARK, Administrator of THOMAS CLARK, v. JAMES M. TABOR.

(*Franklin*, Jan. Term, 1850.)

In an action of ejectment, commenced by an administrator May 9, 1849, the defendant pleaded in abatement, that the administrator had not, at the time of bringing his suit, given any administration bond; the plaintiff replied, that such bond had been given; and issue was joined. It appeared by the record of the probate court of May 8, 1849, that a decree was made on that day, that the plaintiff be appointed administrator, and that he give bond, before entering upon the duties of his appointment, and it was then recited, that it appeared to the court, that he had executed such bond, and it was then stated, that the court thereupon decreed, that he "be and hereby is appointed administrator." *Held*, that it sufficiently appeared by the record, that the administration bond was executed May 8, 1849, and that an interlineation, made in the record upon a subsequent day, that said bond was received and filed in said court May 26, 1849, was no part of the record of what was done May 8, 1849, and could have little tendency to show, that the bond was not in fact executed on that day.

But it appearing by parol evidence, that the probate court, on the eighth of May, 1849, determined the amount of the bond and who should sign it, and then informed the administrator, that if the bond were executed and delivered to one S., it should have the same effect as if returned to the judge of probate, and that the bond was in fact executed and delivered to S. on the eighth of May, but not delivered to the judge of probate until the 26th of May, it was held, that the bond, for all legal purposes, should be considered as executed on the eighth of May.

Ejectment, brought by the plaintiff, May 9, 1849, as administrator of Thomas Clark. The defendant pleaded in abatement, that the administrator had not, at the time of bringing his suit, given any administration bond. The plaintiff replied, that such bond was given; and issue was joined. Trial by the court, September Term, 1849,— POLAND, J., presiding. *On trial the *596 plaintiff gave in evidence a copy of the record of the probate court of May 8, 1849, in which it was stated, that, upon hearing, it was decreed by the court, that the plaintiff be appointed to administer upon the estate, and that he give bond, with sufficient surety, in the penal sum of five hundred dollars, conditioned for the faithful discharge of his trust; and it was then recited, that it appeared to the court, that such bond had been executed, agreeably to the order of the court; and it was then stated, that thereupon the court decreed, "that the said Alanson M. be and he is hereby appointed administrator" &c.; but after the recital of the execution of the bond there was an interlineation, made in the record at a subsequent day, in these words, —"which bond was received and filed in said court on the twenty sixth day of May, 1849." The plaintiff also gave in evidence the original bond, executed to the probate court, signed by himself and Asa O. Aldis, in the penal sum of $500,00, dated May 8, 1849, with the certificate of the judge of

probate indorsed upon it, that it was received and filed in the probate court May 26, 1849. The plaintiff then proved by parol evidence, that a hearing was had upon the plaintiff's application for administration on the eighth of May, 1849, and that on the evening of the same day the judge of probate decided to grant administration to the plaintiff, and a bond was written by the judge of probate and delivered to B. H. Smalley; that Smalley informed the judge, that the plaintiff wished to commence some suits immediately, as administrator; that Smalley was then told by the judge, that if the bond was executed by the plaintiff, and by Mr. Aldis, as surety, and was returned to him, Smalley, it should be the same, as if returned to the judge of probate; and that the bond was executed by the plaintiff, and by Aldis, as surety, on the same evening, and returned the same night,—May 8, 1849,—to Smalley, who carried it that evening to the office of the probate court, but was unable to leave it there, as the office was locked. To this evidence the defendant objected, but the objection was overruled by the court. The bond was not in fact returned to the probate court until May 26, 1849. Upon these facts the court rendered judgment, that the writ abate. Exceptions by plaintiff.

*597 *A. O. Aldis* for plaintiff.

J. & J. G. Smith and *Stevens & Edson* for defendant.

The opinion of the court was delivered by

BENNETT, J. The plea in abatement alleges, that the administrator had not, at the time this suit was commenced, given any administration bond; and this is traversed. The question for consideration is, do the facts in evidence, and which were proved in the county court, constitute legal proof, that a bond had been executed prior to the institution of this suit?

No question is raised in regard to the due appointment of the plaintiff, as administrator, before this suit was commenced; and the probate record shows the appointment to have been made on the eighth of May, 1849; and this suit was commenced the ninth of May. Whatever view we take of the subject, we think the evidence is clearly competent, and the issue established in favor of the plaintiff. The decree, or order, of the probate court, under date of the eighth of May, was, that the plaintiff be appointed administrator, &c., and that he give bonds, &c., and the record then proceeds to recite, that it appeared to the court, that Alanson M. Clark had executed a bond, agreeably to the order of the court, &c. This all purports to have been done on the eighth of May, and in contemplation of law the record is made as of that date.

The interpolation in the record, that the bond was received and filed in the probate office on the twenty sixth of May, is and can be no part of the record of what was done on the eighth of May; and if we regard this as proper evidence, it can have but little tendency to show that to have been the true time, when the bond was executed.

If we regard the recitals in the record of the eighth of May as evidence of the bond having been then executed, which I am inclined to think should be the case, it was then shown by the record itself, that the administration bond was executed before this suit was commenced. But suppose the time of the execution of the bond to rest in parol, it is quite clear, that the facts found by the county court prove the bond to have been, for all legal purposes, executed on the eighth of May. The court of probate determined *what *598 should be the amount of the bond, and who should sign it; and in taking the delivery of the bond Mr. Smalley acted ministerially, and under the sanction of the court of probate, and in their behalf. It is the same, in legal effect, as if Mr. Smalley had been the register and had received the bond. Certainly it could not have been necessary, that it should have been filed in the probate office, to give it vitality. In either view, then, the affirmative of the issue was proved and should be found for the plaintiff.

But for myself I do not think, that the facts alleged in the plea constitute any legitimate matter of abatement, if true. The failure of the administrator to give the bond, in pursuance of the order of the probate court, may be good reason, why the probate court should vacate the appointment and refuse to issue the letters of administration, but cannot, I think, have the effect to render null and void the appointment *per se*. The power is conferred upon the administrator by the decree, or order, making the appointment. The letters of administration are only the evidence, that the power has been conferred. The appointment precedes the bond, though the statute directs, that, before he receives his letters and enters upon the duties of his office, he shall give the requisite bond.

It is clear, we think, that the county court should have given judgment on the issue for the plaintiff.

The result is, the judgment of the county court is reversed; and in this case we understand the counsel to agree, though issue is taken on the plea, yet that judgment be rendered, that the defendant answer over, —which the clerk will enter accordingly.

BENJAMIN H. SMALLEY AND HENRY ADAMS v. JOSEPH CLARK, JACOB MAECK, ORLANDO STEVENS AND PHELPS SMITH. (In Chancery.)

(*Franklin*, Jan. Term, 1850.)

A solicitor in chancery, who is employed to commence and prosecute a suit for the purpose of obtaining for his client an unembarrassed title to land to which he has a claim, and who successfully prosecutes the suit to a final decree, whereby the client obtains the land, has no specific lien upon the land, thus obtained, for the payment of his account for services and expenditures in the prosecution of the suit.[1]

*Appeal from the court of chancery. *599 It appeared, that John Nason, August 20, 1833, being the owner of certain land in

[1] As to attorneys' liens, see Walker v. Sargeant, 14 Vt. 247.

St. Albans, subject to the payment of an annual rent to one Jotham Bush, conveyed the same, by deed, to Jonathan M. Blaisdell and received from Blaisdell a bond of defeasance, conditioned for a reconveyance of the land upon payment of the sum of $375,00, with interest, on or before April 1, 1834; and Nason having neglected to make the payment at the day specified, Blaisdell then took possession of the land, and claimed to own it in his own right, free from all equity of redemption; and on the sixth day of April, 1836, Nason assigned the bond of defeasance, and at the same time conveyed all his interest in the land, to Phelps Smith. On the twenty first of July, 1820, Nason, by quitclaim deed, had conveyed all his interest in the same land to his sisters Peggy Nason, Sally Morrill, Betsey Ainsworth and Polly Ryan, and at the September Term, 1827, of Franklin county court, he had consented to a judgment against him, in favor of Jotham Bush, in an action of ejectment brought to recover the possession of the same land. In November, 1836, Phelps Smith applied to the orators, who were partners in business as attorneys at law and solicitors in chancery, and employed them to examine the title to said land, and retained them to commence such suits in law and equity, to recover the possession of the land, as might be deemed necessary, and for that purpose delivered to them the bond of defeasance above mentioned, and the deeds constituting the evidence of his title to the land. The orators having ascertained, that the title to the land, at law, was in Peggy Nason and her sisters, under the conveyance made by John Nason in 1820, Smith, upon the advice of the orators, purchased the title of Peggy Nason and Betsey Ainsworth to the land and received from them a deed thereof, dated November 21, 1836, and delivered this deed, also, to the orators, for the purposes above named, and the orators, at the request of Smith, and for his benefit, then commenced an action of ejectment, in the name of Peggy Nason, against Blaisdell, to recover the land,—which suit was entered in Franklin county court, April Term, 1837, and was prosecuted by the orators, as attorneys, until September Term, 1845, of said court, when they suffered a discontinuance, without costs, to be entered, for the alleged reason, that Smith had conveyed his interest in the land to the defendants Clark
*600 and Maeck, *and they refused to furnish money for the necessary expenses of farther prosecuting the suit. On the fourteenth of February, 1838, Smith purchased of Sally Morrill her title to the land, and received a deed thereof, which he also delivered to the orators. Subsequently the orators, at the request of Smith and for his benefit, commenced a suit in chancery in favor of Smith against Blaisdell, stating the title of Smith to the premises and praying relief, and this suit was entered in court, January Term, 1840, and was prosecuted by the orators, as solicitors, until April Term, 1845, when a decree was made therein by the court of chancery, that Smith, on or before the first day of May, 1845, pay to the clerk of the court $390,60, being the amount specified in the bond from Blaisdell to Nason, with interest to May 1, 1834, and that Blaisdell, within ten days thereafter, release and convey to Smith all his title to the premises, with a covenant of warranty against all claims and demands of any person, claiming said premises, or any part thereof, under Blaisdell, and that Blaisdell pay to Smith the costs of the suit in chancery, taxed at $44,51. While the action of ejectment and the suit in chancery, above named, were pending, Blaisdell filed a bill in chancery against Smith and Peggy Nason, touching the matters in litigation in those suits, and the orators, upon the employment of Smith, defended said suit, and procured a final decree, that the same be dismissed. The orators have retained the possession of the bond of defeasance and the deeds and documentary evidence of the title of Smith to the land from the time the same were delivered to them by Smith, for the purposes above named. On the fourth day of October, 1841, Smith mortgaged this land, with other premises, to one Austin,—who had knowledge of the pendency of the suits above named,—and this mortgage, on the first day of July, 1844, was purchased of Austin by the defendants Clark and Maeck, for valuable consideration,—they then having knowledge of the pendency of the suits above named:—and Clark and Maeck, on the twenty eighth day of April, 1845, paid to the clerk of the court of chancery $390.60, in pursuance of the decree above mentioned, and Blaisdell, on the same day executed a deed of said premises to Smith, and Smith, on the same day conveyed all his right and title to said premises, by an absolute deed of conveyance, to Clark and Maeck; and Clark and Maeck took possession of the premises, and
*subsequently bargained a portion *601
thereof to the defendant Stevens, who entered into possession, but had received no deed and made no payment on account of his purchase. Smith had become insolvent, and there remained due to the orators, for their services and disbursements in the several suits above named, about the sum of $626,00. And the orators insisted, that they had a specific lien upon said land, for the payment of the amount so due to them, and prayed, that the defendants might be decreed to pay to the orators the amount so due to them, or be decreed to release the land to the orators, upon being repaid the amount paid by them to the clerk of the court of chancery, in pursuance of the decree above mentioned,—which sum the orators offered by their bill to pay to the defendants. The court of chancery dismissed the bill; from which decree the orators appealed.

B. H. Smalley and *C. Beckwith* for orators.

It is well established, that attorneys and solicitors have a general lien upon all the papers and documents of their clients in their possession, not only for their costs and charges in the particular suit, for the prosecution of which the papers were delivered to them, but for their costs and charges for other professional business; and it is submitted, that a solicitor has a lien, for his costs and charges, on the judgment, or estate, recovered by his diligence, as well as

upon the mere documentary evidence of title. Heartt v. Chipman, 2 Aik. 162. Walker v. Sargeant, 14 Vt. 247. Hutchinson et al. v. Howard, 15 Vt. 544. Barnesley v. Powell, 1 Ambl. 102. Turwin v. Gibson, 3 Atk. 720. 1 Smith's Ch. Pr. 692, 695. 1 Newl. Ch. Pr. 427. 2 Madd. Ch. 571. If the orators have a lien, a court of equity will enforce it. 2 Story's Eq. 571, sec. 1215 et seq. This lien cannot be defeated by the bankruptcy, or assignment, of the client. Heartt v. Chipman and Hutchinson et al. v. Howard, above cited. Martin v. Hawks, 15 Johns. 405. Smith never had any legal title to the land in question; consequently he conveyed none to his grantee Austin by his deed in October. 1841. The defendants have no legal title, upon which they can rest their defence. By their purchase of Austin's interest and by Smith's conveyance to them they have become the mere *602 assignees of the latter's equitable *interest in the estate, with full knowledge of all the infirmities of his title, and subject to all the equities subsisting between him and the orators.

J. Maeck for defendants.

We insist, that the orators are not entitled to any part of the relief prayed. The circumstance, that no authority can be brought to sustain it, is conclusive evidence against it. The authorities cited by the orators do not sustain the legal propositions advanced by the bill. Courts of equity have been frequently called upon to protect the solicitor's lien; but it will be found, that the lien has been limited to papers of the client, or to the costs recovered, or funds in court, or to be paid into court. Pow. on Mort. 1063. It will also be found, that the lien of the solicitor is more circumscribed, than that of attorneys in the courts of common law. The solicitor can have no greater aid from the court to secure his lien, than that of the conveyancer, and he can only retain the deeds. Hollis v. Claridge, 4 Taunt. 807. Pow. on Mort. 1063. The rule in England is, that an attorney cannot take from his client, *ab ante*, a legal mortgage; and if he cannot, it is difficult to perceive, how he can have a lien on the land itself, which, if carried out, is in substance the same. Pow. on Mort. 1064. Pitcher v. Rigby, 9 Price 79. Jones v. Tripp, Jac. 322. To allow the lien would conflict with the registry system and with the statute of frauds, would render the title to real estate insecure and uncertain and impede its sale and transfer. The two classes of cases in the English law, which bear the strongest analogy to the doctrine contended for by the plaintiffs, are, first, the vendor's lien for the purchase money, secondly, an equitable mortgage arising from the deposit of title deeds; but it will be found, that the analogy is extremely faint. In the first case payment of the purchase money is an essential part of the contract, and the right of the vendee is not complete, in equity, although a conveyance has been made, until the purchase money is paid. Per Ld. ELDON, 2 Rose 328. The case of Russel v. Russel, 1 Bro. C. C. 269, is the first reported case, establishing an equitable mortgage, since the statute of frauds of 29 Car. 2. It was based on a case decided just previous to the statute. The best English judges have considered the doctrine in opposition to the statute and lamented the decision, but considered *603 themselves bound by the authorities. Per Ld. ELDON, in Ex parte Coming, 9 Ves. 115. Ex parte Wetherell, 11 Ves. 398. Ex parte Whitbread, 19 Ves. 209. Ex parte Haigh, 11 Ves. 403. Norris v. Wilkinson, 12 Ves. 192. Pow. on Mort. 1052.

The opinion of the court was delivered by

BENNETT, J. It seems, that Phelps Smith, one of the defendants in this bill, claimed title to certain real estate, situate in St. Albans, and that his title to it became embarrassed. The plaintiffs were employed by Smith to institute proceedings to remove the cloud, that was resting upon his title, and at the January Term of the supreme court. 1845, a decree in chancery was obtained in behalf of Smith against one Blaisdell, who was in possession, claiming title, that, upon Smith's paying to Blaisdell a given sum of money, on or before a given day, he (Blaisdell) should give up the possession to Smith, and release to him all right and title, which Blaisdell claimed to the premises. The money was paid within the time specified by the court, and the release executed by Blaisdell to Smith, and thereupon Smith conveyed to the defendants, Maeck and Clark. The object of this bill is, to obtain a decree for the payment of the plaintiffs' account against Smith for services as solicitors and moneys paid out in the chancery suit, and also in two other suits particularly set forth in the orators' bill, and, in default thereof, that the defendants be decreed to release and convey to the orators all their title to the premises. The bill is predicated upon the idea, that the orators had what is called an attorney's lien upon the land for the payment of their account, and that the land, from the facts in this case, is chargeable with the lien in the hands of Smith's grantees.

The first and only question, which we shall have occasion to examine, is, have the orators any specific lien upon this land, as against Smith, which a court of equity can protect and enforce; and if not, this court need go no farther.

It is well understood, that attorneys have a lien upon judgments recovered by their clients or their costs. If the money come to their hands, they may retain it for the amount of their lien, and may have an order to restrain their clients from receiving it, until their bills shall have been paid, and may, by giving notice to the judg- *ment debtor, that they rely upon *604 their lien, protect themselves, in their lien on the judgment against the debtor, from a payment to the creditor; and in the case of Heartt v. Chipman, 2 Aik. 162, it was held, that the attorney might maintain an action for money had and received, to the extent of his lien, against the assignee of the judgment creditor, to whom the money had been paid.

In the present case, there is no pretence, that the orators had any lien upon the land, while the possession and ostensible title was in Blaisdell, and he is specifically decreed to convey his whole title to Smith. This is done in obedience to the decree of the court.

Neither Smith is in the wrong, in taking the title, nor Blaisdell, in conferring it upon him. It may, then, well be inquired, whether, in this situation, an attorney's lien can attach to these lands, so as to give the orators, in equity, a paramount control over them?

This is the first instance, that I am aware of, in which it has been attempted to extend the attorney's lien, as in this case. In England it is a familiar doctrine, that, in equity, the vendor of real estate has a lien upon the land for the unpaid purchase money; but this is upon the ground of a constructive trust,—the vendee holding the legal estate as the trustee of the vendor to the extent of the lien; and in the case of Manly et al. v. Slason et al., 21 Vt. 271, this English chancery doctrine was applied in this state, though after considerable hesitation.

In the case of Russel v. Russel, 1 Brown's Ch. C. 269, Lord THURLOW introduced the doctrine of equitable mortgages by means of the deposit of title deeds; and though the decision in that case has been since followed in England, yet it has been universally regretted, as being at variance with the statute of frauds, and as leading to discussions upon the truth and probability of evidence, which it was the object of that statute to exclude. The doctrine, no doubt, is founded upon the idea, that a mere deposit of the title deeds furnished evidence of an agreement to make a mortgage. I am not aware, that our courts have ever been called upon to introduce the English chancery doctrine of equitable mortages; and it may well be questioned, whether they will do it, if called upon.

But this doctrine, being founded, if it has any foundation, upon a supposed agreement to make a mortgage, would have but little application to the question now before us. The only case, *605 that I *am aware of, which materially countenances the ground assumed in this bill, is the case of Barnesley v. Powell, 1 Ambl. 102. That case came up in 1750, by the way of a petition by the solicitor of Barnesley, (a lunatic,) setting forth, that he had expended large sums of money in prosecuting suits in chancery and at law in behalf of the lunatic; and the object of the petition was, that the solicitor might be allowed to enter up judgment against the lunatic, in order that he might have a lien upon the real estate of the lunatic. This is refused by the chancellor, upon the ground, that no action will lie against the lunatic, but that it must be against the committee of the lunatic, who employed the solicitor. The chancellor says, the committee has a lien upon the lunatic's estate, and being willing, as he says, to assist the solicitor what he can, he will declare the solicitor stands in the place of the committee, and has a lien upon the lunatic's estate. This case is reported with a *quære*, whether the committee had such a lien; and the counsel for the solicitor doubted of it. This case, then, does not establish the point, that the solicitor had a lien, except by the way of substitution. The control of the person and estate of a lunatic falls into chancery, and the chancellor commits the custody of the person and estate of a lunatic to a committee, who is to render his account, and may be required to give bonds; and I think this is usual. The committee would doubtless be allowed, in his account, to retain in his hands assets of the lunatic sufficient to balance his account, and in this way have an indirect lien on the estate; and probably, as the lunatic is incapable of making any contract with the committee, or the committee with the lunatic, and his whole property is within the control of the court of chancery, it might with propriety be held, that the committee should have a lien upon the lunatic's estate. But if so, we think this will not sustain the general proposition of the orators.

It is true, that Lord HARDWICKE, in this case, observes, that if a solicitor prosecutes to a decree, he has a lien upon the estate recovered, in the hands of the persons recovering, for his bills. No such point was before the chancellor for adjudication; and in the case then at bar the chancellor having held, that the solicitor had no right of action against the lunatic, we do not well see, how he could have a lien against the lunatic's estate.

*If such a lien, as is contended for in *606 this case, existed in England, it is somewhat remarkable, that numerous adjudged cases are not to be found, in which it has been recognized and enforced. I am not aware of any such case; and none has been cited on the argument; and the absence of such cases, especially as there would have been frequent occasions for enforcing the lien, if it existed, furnishes a strong argument, that no such lien does exist. But suppose solicitors, as was said by Lord HARDWICKE in Ex parte Price, 2 Ves. sen. 407, have an equity allowed them, to be entitled to a satisfaction out of the fund, for their expenses in the case of a lunatic, whether in the way of a suit, or for his costs in taking out a commission of lunacy, the principles claimed by the orators would by no means follow therefrom.

We think, then, to hold that the attorney's lien attached to these premises, when conveyed by Blaisdell to Smith, would be introductory of a new principle, and an extension of the doctrine of the attorney's lien beyond any adjudged case, and would, in effect, be to create an equitable mortgage, which would be exposed to all the objections, that have been made to the doctrine of equitable mortgages in England, and even more, under our registry system, without having the same plausible ground to stand upon, that is, the presumed agreement to execute a legal mortgage. The result, then, is, the decree of the chancellor, dismissing the bill, should be affirmed, with additional costs in this court.

Let the cause be remitted to the court of chancery, with a mandate for an affirmance of their decree, with additional costs.

ROYCE, Ch. J., did not sit in this case, being related to one of the parties.

*607 *RUTLAND COUNTY.

JANUARY TERM, 1850.

[Continued from ante, p. 287.]

WARREN & BLISS v. GEORGE R. BISHOP.

(*Rutland*, Jan. Term, 1850.)

A balance, ascertained and struck upon a mutual settlement of book accounts, may be charged as an item in a new account, and recovered in an action upon book account; and the parties are competent witnesses before the auditor, to prove the stating of the former account and their agreement upon the balance.

But the stating of the account, in such case, and agreeing upon the balance due, is only conclusive upon the defendant of the truth of the account and the balance found, and not of the obligation to pay. If the defendant have obtained a discharge in bankruptcy, previous to the stating of the account, so that he was then under no obligation to pay it, the law will not imply such obligation from the mere fact of stating the account, but the right of the plaintiff to recover will depend on the nature and extent of the defendant's express promise in reference to it.[1]

And where it appeared, in such case, that the defendant, at the time of stating the account and ascertaining the balance, agreed that the portion belonging to him of certain demands then in the possession of the plaintiff should be appropriated to pay this balance, but nothing had been in fact received by the plaintiff thereon, it was held, that this could not be treated as an absolute undertaking to pay the balance, so as to avoid the effect of the discharge in bankruptcy.

Book account. Judgment to account was rendered, and an auditor was appointed, who reported the facts substantially as follows. All the items in the plaintiff's account, except the first, were admitted to be correct. The first item was a charge in these words;—"Balance due January 1, 1844, as agreed, $186,61." The defendant objected to the competency of the plaintiffs to establish this item by their own testimony; but the objection was overruled by the auditor; and from the testimony of the parties, and other evidence, the auditor found, that the plaintiff Bliss and the defendant, on the first day of January, 1844, or soon thereafter, examined the ac-
*608 counts *between the plaintiffs and defendant, which had accrued previous to that time, and agreed upon the sum above stated as the balance then due, and that the defendant had frequently, since that time, spoken of and admitted that sum, as the balance due at that time, and promised to pay it by applying the funds belonging to him, arising out of the clothing and carding business, carried on by him under a contract with the plaintiff Warren, and in which he was jointly interested with Warren. But the auditor found, from the testimony of the defendant and Warren, that the plaintiffs had never received any payment of this account from the funds of the defendant arising under said contract,—which consisted of notes and accounts left by the defendant with Warren to collect,—and that there had not at any time been any thing in Warren's hands to be applied. The defendant gave in evidence the certificate of his discharge in bankruptcy, and claimed that so much of the account, as accrued previous thereto, was barred by it. It appeared, that the account previous to January, 1844, out of which the balance constituting the first item of the plaintiff's account was made, accrued at different times in the years 1840, 1841, 1842 and 1843; but the auditor declined to take that account, or any item of it, into consideration, as he found, that there had been an examination of it by the parties, and that the balance had been agreed upon to January 1, 1844, and there was no offer on the part of the defendant to show any mistake in the account and balance then stated;—but the defendant did not admit in his testimony, that he had agreed to the balance, or that he would pay it any other manner, than by his share of the proceeds of the accounts and claims put into the hands of Warren, as above stated. The auditor decided, that the first item in the plaintiffs' account was a proper charge to be recovered in this action, and that it accrued January 1, 1844, and therefore was in no way affected by the defendant's certificate in bankruptcy. The county court, April Term, 1849,—HALL, J., presiding,—accepted the auditor's report, and rendered judgment thereon for the plaintiffs. Exceptions by defendant.

Thrall & Smith for defendant. *609

No question is made, but that the account, from which the item of $186,61 was made, was due to the plaintiffs, at the time the defendant was declared a bankrupt, and was proveable under the commission of bankruptcy. The debt was therefore discharged by the decree in bankruptcy. And not only the original debt was discharged, but this item of 186,61, when found, notwithstanding it might have been found by an examination of the accounts by the parties, unless there was such a promise, after it was found, as to restore it after the act of bankruptcy. The finding the balance by the parties no more merges the original cause of action, than a judgment; and this brings the case within the principle decided in Harrington v. McNaughton, 20 Vt. 295. The item of $186,61 was not a proper matter of charge on book. It is not within the principle of the cases of Gibson v. Sumner, 6 Vt. 163, and Spear v. Peck, 15 Vt. 566. Both of those cases proceeded upon the ground, that the parties assented to the correctness of the balance found, and that it might be charged in the new account. In this case this was denied by the defendant. In whatever form the plaintiffs seek to recover such a matter, they must prove an express promise, made upon adequate consideration; a mere acknowledgment is not sufficient. Walbridge v. Harroon, 18 Vt. 450. The testimony to prove such promise must be common law proof. The parties cannot be witnesses. McLaughlin v. Hill, 6 Vt. 26. Clark v. Marsh, 20 Vt. 341. 7 Conn. 132. 11 Ib. 211. But the decision of the auditor is not sustained by the testimony. From this no promise can be found to pay this balance, except so far as the defendant's share of certain old accounts would pay it. The defendant had a right thus to limit his promise. Cross v. Conner, 14 Vt. 394.

[1] See note at end of case.

Briggs & Williams for plaintiffs.

The first item in the plaintiffs' account, upon the facts found by the auditor, was a proper subject of book charge. Gibson v. Sumner, 6 Vt. 163. Spear v. Peck, 15 Vt. 566. The parties were proper witnesses in support of this charge. Stevens v. Richards, 2 Aik. 81. Fay et al. v. Green,
*610 Ib. 386. *May v. Corlew, 4 Vt. 12. Delaware v. Staunton, 8 Vt. 53. Whiting v. Corwin, 5 Vt. 451. McLaughlin v. Hill, 6 Vt. 20. Clark v. Marsh, 20 Vt. 338. Such an agreement, if established, was conclusive upon the parties, unless some mistake in it could be shown,—in which case the mistake only should be rectified. Hodges v. Hosford, 17 Vt. 615. This item, or charge, accrued on the first of January, 1844; and the defendant's discharge in bankruptcy, being anterior, could have no operation upon it. The charge, and the agreement of the parties, which was the foundation of it, had no existence before the first of January, 1844, and now has no relation, or reference, to any state of facts, which existed before that time;—every thing prior thereto was brought forward and merged in that agreement as effectually, as though a note had been given, or a judgment recovered, for that amount.

The opinion of the court was delivered by

ROYCE, Ch. J. That a balance ascertained and struck, upon a mutual settlement of book accounts, may properly be charged as an item in a new account, was settled by the cases cited, of Gibson v. Sumner, and Spear v. Peck. And the auditor has found the fact, (though the defendant did not admit it before him,) that the accounts between the plaintiffs and the defendant, existing before the first of January, 1844, were adjusted by the defendant and one of the plaintiffs, and the amount of the first item in the subsequent account mutually agreed upon as the balance. The legality of that charge, in point of form, is therefore fully sustained by the doctrine of those cases.

Under the construction which was given, in Stevens v. Richards, 2 Aik. 81, to our statute regulating the action of account on book accounts, and which has been uniformly acted on in subsequent cases, there can be no doubt, that the parties were competent witnesses before the auditor, to prove the stating of the former account, and their agreement upon the balance found against the defendant. They are general witnesses as to all facts, transactions and agreements, on which the account, or any of its items, was based;—every matter affecting the original validity and justice of the account, to which other witnesses could prop-
*611 erly testify. So, too, they are wit*nesses, to the same extent, in reference to actual payment and satisfaction of the account; but probably not to its simple release or discharge by a sealed instrument. It has long been the doctrine in Connecticut, that, in the action of book debt, one party may testify to admissions by the other, which tend to show that the charges in the account were rightfully made. Johnson v. Gunn, 2 Root 130. Bryan v. Jackson, 4 Conn. 288. Peck v. Abbe, 11 Conn. 207. The same has also been adjudged by this court in the action on book account; and even where the admission was made in a writing, which had been lost, and was not produced. Reed v. Talford, 10 Vt. 568. Warden v. Johnson, 11 Vt. 455. Clark v. Marsh, 20 Vt. 338.

But the principal question in the case concerns the liability, which the defendant incurred by stating the account and making the promise reported by the auditor. If it be granted, that merely stating an account, and agreeing upon the balance, will ever create a new liability and cause of action, without the aid of an express promise, (and as to this the authorities are somewhat conflicting,) that effect can be produced in those cases only, where the party found in arrear was under a subsisting liability, in some form, upon the account adjusted. And such was not the condition of the defendant; for his indebtedness to the plaintiffs had been legally discharged. It is urged, indeed, that the accounting was conclusive upon the defendant. But that must be understood of the truth of the account and the balance found, and not of the obligation to pay. Even a promise, unless induced by some new consideration, will not bind a party in a different right from that in which he was already liable, nor to a greater extent. Drue v. Thorne, Aleyn 72; Mitchinson v. Hewson, 7 T. R. 348, and Rann v. Hughes, there cited in note.

This being a case, then, where the law would not imply an obligation from the naked fact of stating the account, the right of the plaintiffs to recover upon this first item of their present account, must depend on the nature and extent of the defendant's promise in reference to it. As the debt had not been paid, but merely discharged by operation of law, we are not disposed to question the validity of any express undertaking for its payment, though resting *simply upon moral obligation. *612 At the same time, the plaintiffs were not in a condition to prescribe terms, and could only be content with such an undertaking, as the defendant chose to give. And the only promise appearing in the report was, to pay this balance by the defendant's share in the avails of certain demands, then in the hands of Warren, one of the plaintiffs. Had the defendant then legally owed the debt in question, the promise would probably be construed as implying a guaranty, that the demands could be made available to satisfy the debt. But, under the circumstances, we think it merely operated to appropriate his disposable interest in the demands to that special purpose. It is therefore considered, that the auditor erred, in treating the promise as an absolute undertaking for the payment of the entire balance claimed.

The judgment of the county court, accepting the report, is accordingly reversed, and the cause recommitted to the auditor.

NOTE.

BANKRUPTCY—DISCHARGE—NEW PROMISE. In order to revive a debt discharged by bankruptcy proceedings, the promise must be express, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt. Meech v. Lamon, (Ind.) 3 N. E. Rep. 159. The promise must be express, thus differing from the

promise required at common law to take a debt out of the statute of limitations. So partial payments are insufficient evidence of a new promise to pay the residue. Griel v. Solomon, (Ala.) 2 South. Rep. 322. The promise must be an express one, or, if acknowledgment is relied upon, it must be so far unqualified as to necessarily authorize the implication of the promise to pay, and no other. Craig v. Seitz, (Mich.) 30 N. W. Rep. 347. The promise must be specific and determinate; it must, in some way, carry with it the means of identification, and be referable only to the debt in suit. Hobaugh v. Murphy, (Pa.) 7 Atl. Rep. 139. Expressions, such as "I will settle with you," or "I will pay you every cent I owe you," are consistent with the belief that nothing is due, and are wholly uncertain as not showing the existence of any particular debt. Id. The expression, "I will send you the first spare 'V' or 'X' I have," contained in a letter written by a discharged bankrupt to a creditor, does not import an absolute promise to pay five or ten dollars. Bigelow v. Norris, (Mass.) 6 N. E. Rep. 88. Evidence that a judgment debtor said to his creditor that he was going to pay the judgment, and that he should not lose a cent of it, is not sufficient to establish a new promise. Brewer v. Boynton, (Mich.) 39 N. W. Rep. 49. Neither is the expression, "I do not intend you shall lose it; I will make it all right." Meech v. Lamon, (Ind.) 3 N. E. Rep. 159. But where there was but one debt owing by the bankrupt, evidenced by a note which was a renewal of a former one, it was held that it was not essential to the validity of the new promise that there should have been a mutual understanding as to whether the promise related to the old or the new note. Jones v. Sennott, 57 Vt. 355.

A promise to pay as soon as the bankrupt is able is not void for uncertainty. Griel v. Solomon, (Ala.) 2 South. Rep. 322. But in Murphy v. Crawford, (Pa.) 7 Atl. Rep. 142, it is held that the promise must be without qualification or condition. It is held that a promise to pay a specialty debt, discharged by certificate in bankruptcy, does not revive the original debt, and that to make the new promise available, the declaration must be upon such promise, and not upon the original obligation. Id. But in Craig v. Seitz, supra, it is said that the effect of the discharge is only to suspend the right of action, the debt remains.

A promise made by a bankrupt before his discharge, but after his adjudication, is effectual to revive the debt against him. Griel v. Solomon, (Ala.) 2 South. Rep. 322; Knapp v. Hoyt, (Iowa,) 10 N. W. Rep. 925.

Silas Bowen v. Calkr Hall.

(*Rutland*, Jan. Term, 1850.)

Those provisions of the statute, which authorize the taking of depositions by a justice of the peace, evidently contemplate, that the suit, for which a deposition is taken, shall be pending at the time of the taking, and that it will, in regular course, be before the court named in the caption, at the time, or term, designated for the trial.

Where a deposition was taken by a justice of the peace, to be used in a suit at a term of the county court named in the caption, and the suit, at the time the deposition was taken, was pending in the supreme court, upon exceptions, and could not, in regular course, be pending in the county court at the term named in the caption, it was held, that the justice had no power to take the deposition.

In this case the defendant, on trial, offered the deposition of Eunice Parker, to which the plaintiff objected. The deposition was taken by a justice of the peace, in August, 1847, to be used, as stated in the caption, at the ensuing September Term of Rutland county court. The cause had been *613 tried by a jury at a term of the *county court previous to the February Term, 1847, of the supreme court for the county of Rutland, and a verdict rendered for the plaintiff, and had been carried to the supreme court by the defendant upon exceptions. At the February Term, 1847, of the supreme court the case was argued, and at the February Term, 1848, of that court, without farther argument, a new trial was granted, and the case came to the county court, April Term, 1848. The county court, September Term, 1848,—Hall, J., presiding,—excluded the deposition. Exceptions by defendant.

S. Foot and *S. H. Hodges* for defendant.

Thrall & Smith and *R. Pierpoint* for plaintiff.

The opinion of the court was delivered by

Royce, Ch. J. The case, as now presented to this court, involves the single question, whether the deposition of Eunice Parker was rightly excluded. We should doubtless be warranted in affirming that decision, on the ground that the testimony of the witness does not appear, from the case as certified, to have been at all material, or even pertinent, to the issue on trial. But as this point has not been made in the argument, and the defect might probably be supplied by amendment of the case, it will be assumed, that the deposition should have been received, unless it was legally inadmissible by reason of the time and manner of taking it.

Those provisions of the statute, which authorize the taking of depositions by a justice of the peace, evidently contemplate, that the suit, for which a deposition is taken, shall be pending at the time of the taking, and that it will, in regular course, be before the court named in the caption, at the time or term designated for the trial. And such has always been the construction. Depositions may accordingly be taken by a justice after the suit is commenced by service of the writ, and before its entry in court, and after the appeal of a suit, and before its entry in the appellate court; because, in each case, the action, in the usual and legal course will be in the court, to which it is brought, or appealed, at the time mentioned in the caption for the trial. But in this instance the cause was not pending in the county court, when the deposition was *taken, nor could it then be *614 known, that it ever would be;—the parties might at least as well have expected it to be finally determined in the supreme court, where it was then pending on exceptions. We are therefore satisfied, that the justice had no authority to take the deposition; and that the party should have applied to a judge of the supreme or county court, under other provisions of the statute.

Judgment of county court affirmed.

Rufus Graves and John C. Strong v. Alanson Dyer.

(*Rutland*, Jan. Term, 1850.)

When a debtor is committed to jail upon mesne process and procures bail by way of jail bond, written and executed in the common form of a jail bond upon commitment on final process, the surety in the jail bond has the same right to surrender the debtor and may have the same benefit of pleading in his discharge the death of the debtor, in a suit commenced upon the jail bond,

that he would have had, if he had become bail by indorsing the writ, and a *scire facias* had been commenced against him.

Debt upon a jail bond, written and executed in the common form of a jail bond executed upon commitment on final process, but given by one Weeks, as principal, and the defendant, as surety, January 24, 1846, upon the commitment of Weeks to jail, upon mesne process then pending in court in favor of the plaintiffs against him, on occasion of the surrender of Weeks in court in discharge of the bail given at the time he was arrested upon the original writ. The recovery of final judgment by the plaintiffs, in the original suit, the issue of execution and return of *non est inventus* thereon, and the assignment of the jail bond by the sheriff to the plaintiffs, were alleged in the declaration in common form. The defendant pleaded, *puis darrein continuance*, the death of Weeks, the debtor, who was principal in the bond, and the tender to the plaintiffs of the costs of this suit. To this plea the plaintiffs demurred. The county court,—HALL, J., presiding,—adjudged the plea sufficient, and rendered judgment thereon for the defendant. Exceptions by plaintiffs.

*615 *Potter* for plaintiffs.

The question raised by the demurrer is, whether the surety can plead the death of the principal in his own discharge. This question depends entirely upon the statute, and by that this defence is not allowed. Rev. St. 456, sec. 18.

Foot & Hodges for defendant.

The plea sets forth a sufficient defence to the farther prosecution of the action, in the death of the principal before judgment. Compare Rev. St. p. 183, sec. 28, p. 184, sec. 37, and p. 456, sec. 18. The provisions for commitment on mesne process are merely in aid of those for taking bail in the usual form, and are not designed to give the creditor any greater advantage in one case, than he enjoys in the other. Since the sureties in the bond are expressly allowed the same privilege of surrendering the principal, before they are fixed by judgment, they should not be deprived of this privilege by his death, any more than the bail on the writ.

The opinion of the court was delivered by

ROYCE, Ch. J. The question arising upon the special plea is, whether the same matters will exonerate the defendant, as if he had indorsed the original writ. Our legislation, defining the liabilities and rights of bail on mesne process in a civil action, has generally had express reference to those only, who become bail in this latter way; and this for the reason, that such has always been the most common and frequent mode of giving such bail in this state. In no other case has the statute prescribed the kind of remedy to be pursued against the bail.

But whether bail is given in that manner, or by a jail bond on commitment of the party to prison, as in this instance, the object and policy of the law in allowing it are the same; the principal is alike subject to the control of the surety in both cases, and their relations to each other are in all respects identical. It is obvious, therefore, that the security to the plaintiff in the action should neither be enlarged, nor diminished, by the accident of bail being given in the one form or the other. And we think, the statutes do not require, that bail in the two forms should be held to different measures of liability. The surety in either form has always had the same right to surrender the principal in discharge of himself as bail. *This appears from the *616 twenty ninth section of the statute of 1797,—the statute in explanation of that section, passed November 11, 1818.—Rev. Statutes 183, sec. 28, 184. sec. 35, and 456, sec. 18. And although the bail is said to become fixed, (so as to authorize a suit to be commenced against him,) immediately upon a seasonable return of *non est inventus* on the execution against the principal, yet this right of surrendering the principal is continued down to the time of entering up final judgment against the bail. But it may happen, that the surrender cannot be made. And when this is the result of certain causes specified by statute, these causes are allowed to excuse and discharge the surety, as if the surrender were in fact made. Thus, by the fourth section of the statute of November 11, 1818, the death of the principal, before final judgment against the surety, had this effect. The same provision is continued by the present statute, sec. 28, before cited, and certain other causes for discharging the bail, without a surrender of the principal, are added by sec. 37. It is true, that these enactments are ranged under the head of "Process" in the statute, and stand in connection with the mode of giving bail by indorsing the writ, and the remedy by *scire facias* against that class of bail; while those which authorize the giving bail by a bond are placed under the head of "County Jails and Prisoners." It is also true, that the latter only profess, in terms, to entitle the sureties in such a bond to "all the privileges of delivering up the principal, in an action on the bond, or of surrendering him in court, in discharge of his bail, that are by law given to persons who indorse the original writ as bail." But may not these expressions be understood to embrace all the privileges, conferred upon the other class of bail, in relation to the delivering up and surrender of the principal?—privileges which go as well to dispense with the surrender in giving cases, as to authorize or require it in others. And if so understood, they will entitle the sureties in the bond to avail themselves of those facts, which operate to discharge an indorser of the writ without an actual surrender of his principal. And this construction being necessary, to render the statutes harmonious upon the same subject, and its justice being apparent, we think it should be sanctioned, as best comporting with the object and intention of the legislature.

The plea is accordingly adjudged sufficient, and the judgment below is affirmed.

*617 *JOHN BUCKMASTER AND NAPOLEON B. SMITH v. HORACE NEEDHAM, BENJAMIN F. NEEDHAM, LEVI NEEDHAM, LUCY NEEDHAM, HORACE ALDRICH, AND CORDELIA ALDRICH. (In Chancery.)

(*Rutland*, Jan. Term, 1850.)

Where a father conveyed to his son, by deed, one third of his farm, upon which the grantor and grantee then both resided, with a condition thereto annexed, that the deed should be void, in case the grantee should refuse to pay to the grantor thirty dollars each year, if the grantor should call for the same, it was held, that the condition should not be so construed, as to permit the annual payments to be consolidated and demanded together, after the lapse of several years, but that each sum must have been demanded by itself, and at or about the close of the year, for which it was claimed, and that any sum, not so demanded, was waived, or relinquished;—and it not appearing, that any such demand as the case required, was ever in fact made, it was held, that there had been no forfeiture of the estate by the grantee, by reason of the non-payment.

And where it appeared, in such case, that the grantee, after residing upon the farm with the grantor for several years, had removed and left the grantor in possession of the whole farm, and afterwards, and while the grantor was thus in possession, executed a mortgage deed to the orators of one third of the farm, and the reason or purpose of the removal did not appear, it was held, that the court would not presume, that the grantor was so in possession claiming title to the whole farm adversely to the grantee, as to avoid the mortgage thus executed, and that, although the possession may have been intended to be adverse to the grantee, yet that this would not affect the validity of the mortgage, unless the mortgagees, at the time of the conveyance to them, had notice of such adverse possession.

The ordinary presumption is, that a sole possession by one tenant in common is held in the right of both tenants.

Appeal from the court of chancery. On the fifteenth day of February, 1828, Benjamin Needham, Jr., conveyed to his son, Horace Needham, by deed, for the consideration, as expressed in the deed, of $1000,00, one third of his farm, on which his son then resided with him, with a condition annexed to the deed, in these words;—"The condition of the above deed is such, that whereas the said Benjamin Needham, Jr., the grantor, hath made the above deed to the said Horace Needham for the express purpose of securing to the said Horace Needham the right of the soil above
*618 de*scribed in said deed, after the decease of the said Benjamin Needham, Jr., and his wife, Alice Needham, and the said Horace Needham is to have the full possession and enjoyment of the land described above, by paying annually to the said Benjamin the sum of $30,00, or to Alice Needham, wife of the said Benjamin, if she should survive the said Benjamin, if either shall call for the same, as the case may be: Now if the said Horace Needham, his heirs, executors, or administrators, shall well and truly pay or cause to be paid to the said Benjamin, or Alice, each and every year, as long as either of them shall live, the aforesaid sum of $30,00 if they, or either of them, shall request the same, then the above deed is good and valid,—otherwise void." Horace Needham continued to reside upon the farm, with his father, until the year 1835, when he removed therefrom, leaving his father in sole possession of the whole farm,—which he retained until his decease, which was in February, 1839. On the thirtieth day of March, 1837, and while Benjamin Needham, Jr., was in possession of the whole farm, Horace Needham executed and delivered to the orators a mortgage deed of one third of the farm, to secure his indebtedness to them, therein described. Alice Needham, the wife of Benjamin Needham, Jr., named in the condition of the deed to Horace Needham, died some years previous to her husband, and he afterwards married the defendant Lucy Needham, who survived him. The other defendants were heirs of his estate. After the decease of Benjamin Needham, Jr., the commissioners, appointed by the probate court to set out the dower of the widow, Lucy Needham, severed one third of the farm, as the property of Horace Needham, and set out the dower in the residue of the farm. The orators prayed, that the defendants might be decreed to pay, to them the amount due upon their mortgage, and, in default thereof, be ordered to surrender the possession of the mortgaged premises and be foreclosed of all equity of redemption therein. The substance of the testimony taken and filed by the parties is sufficiently stated in the opinion delivered by the court. The master, to whom it was referred to ascertain and report, whether any sum, and how much, was due from Horace Needham to his father, at the time of his father's decease, reported, that he decided, that, in order to make the said Horace chargeable for the
*sum of $30,00 a year, for the use of *619
the premises, that sum should have been annually demanded of him,—and that, no such demand being proved, there was nothing due from the said Horace to the said Benjamin at the time of the said Benjamin's decease. The master also reported, that the sum due in equity from Horace Needham to the orators was $1589,76, and taxed the orators' costs at $147,10. To this report the defendants filed exceptions; but the court of chancery accepted the report, and decreed, that the representatives and heirs of Benjamin Needham, Jr., be perpetually enjoined from making any claim to the mortgaged premises, and that they surrender the possession of the premises to the orators forthwith, and that Horace Needham pay to the orators the sum reported by the master to be due in equity, and the costs, on or before the first Tuesday in September, 1849, or be foreclosed of all equity of redemption in the premises. From this decree the defendants appealed.

Thrall & Smith and *Ormsbee* for orators.

It is the obvious intention of the grantor, Benjamin Needham, Jr., in the conveyance to his son, to secure to him the ultimate fee in the land, or, in other words, the right of soil, beyond a contingency. It would seem, also, from the whole case, that there was a valuable consideration for this deed. At all events, it was such a deed, as the father had a right to make, and did make. Before the grantee, or his assigns, could be subjected to the payment of the sum of $30,00 annually, reserved by this deed, a clear and specific demand for it must have been made; and in order to keep the claim

alive from year to year, the demand must have been made from year to year, or at least it must have been so specifically made, that there could be no mistake on the part of the grantee, or his assigns, that such payment had been demanded. The testimony wholly fails to prove any such demand. Whether there was any sum due, and, if any, how much, were questions of fact, referred to the master; and his decision is conclusive.

*620 *S. H. Hodges* and *S. Foot* for defendants.

The deed, under which the complainants claim, is void, having been executed while Benjamin Needham, Jr., was in adverse possession. When a grant is voluntary, subjecting the grantee to no expense, nor liability, and is conditioned to be void upon the non-payment of money, equity will not relieve against a forfeiture occasioned by a refusal to pay the money after express demand. Such is the present case. The grant cost Horace Needham nothing; and he was subjected to no liability by it. It being a deed poll, covenant would not lie upon it; Platt on Cov. 10, 54; 2 Steph. N. P. 1068; neither would debt, nor any personal action; 3 Bl. Com. 232. Ognel's Case, 4 Co. 48 *b*. Webb v. Jiggs, 4 M. & S. 113. The only remedy for recovering the stipulated payment was to enforce the forfeiture. The stipulated payment was repeatedly demanded. The evidence shows this directly in several instances. It is true, these were after the possession was relinquished; but the condition required the payment, whether in possession, or not. And the rent was never paid. It is true, cases may be found of relief being granted after a wilful refusal to pay money, where the party was still liable to pay a debt and the security was collateral,—as in the instance of bonds and mortgages; or where he had paid a consideration, or became liable for one,—as in that of leases, which are usually by indenture, binding the lessee, or purchase by a fine,—or in the instance of devises, where the intent of the testator governs,—though this is only where there is no limitation over. But no case parallel to the present can be found. To grant the relief sought would render it necessary to give it, where the grantee had utterly refused to fulfil the condition until the death of the annuitant had satisfied him, whether it would be to his advantage. 2 Story's Eq. 1315, 1323. Reynolds v. Pitt, 19 Ves. 134. Hill v. Barclay, 18 Ves. 56. Lloyd v. Collett, 4 Ves. 689. Bracebridge v. Buckley, 2 Price 200. Rolfe v. Harris, 2 Price 206, note.

*621 *The opinion of the court was delivered by

ROYCE, Ch. J. The orators brought their bill to foreclose a mortgage executed to them, in 1837, by the defendant Horace Needham. And, to entitle them to all the relief sought against the other defendants, it was necessary to show, that Horace Needham had an estate in one third of the farm at the time of giving the mortgage. If he then had no title, the orators could only claim to hold, by operation of the covenants in the mortgage deed, the interest which, in that case, must afterwards have come to him by inheritance from Benjamin Needham, his father; and that interest was less than the one which the deed purported to convey. It is contended by the other defendants, that, at the date of the mortgage, he had no interest whatever in the farm; but that his estate, acquired under the deed from Benjamin Needham, in 1828, had been forfeited and determined, in consequence of his neglect and refusal to make the annual payments to said Benjamin, according to the condition annexed to that conveyance. There is some apparent incongruity between the different parts of that condition; and perhaps it might well be questioned, whether the non-payment of the annual thirty dollars was really intended, under any circumstances, to affect the estate of Horace after the decease of his parents. But such a question has not been raised by counsel, and this branch of the case will be determined with reference only to the concluding part of the condition. That professed to avoid the deed entirely, if any of the annual payments should be called for, and not made. And to make good this ground in the defence, it must be shown, that a cause of forfeiture occurred, and that the forfeiture was actually claimed and taken.

It is not at present deemed important to inquire, whether the deed was founded upon an actual consideration of value, beyond the annual payments provided for in the condition, or whether, aside from those payments, it was a voluntary conveyance. Such an inquiry may sometimes be important, when a party comes into a court of equity to seek relief against a forfeiture; but such was not the admitted or apparent object of the bill in this case.

It is evident, that the payments mentioned were not expected to be annually needed as means of support for the parents, and possibly they were not relied upon at all for that purpose. And hence *the annual thirty dollars was not *622 made payable absolutely, but only in the event of being called for;—like a limited amount of spending money, to be supplied at stated periods to aged parents, in case they shall see fit to require it. Neither should the condition be so construed, as to permit the sums to be consolidated, and demanded together after the lapse of several years. It was required, that each sum should be demanded by itself, and at or about the close of the year, for which it was claimed. And any sum not so demanded was waived or relinquished. Nothing in the nature of a debt would arise without the proper demand. At the same time, a sum duly demanded, and not paid, should doubtless be treated in equity as a lien upon the estate, if the forfeiture were not enforced. But it was found by the master, and must have been so considered by the chancellor, that none of these annual sums had been regularly demanded. And although there can be no doubt, that Benjamin Needham repeatedly declared they had not been paid, and pronounced the title of Horace worthless for that reason, yet we do not find it proved by the evidence before us, that any such demand, as the case required, was ever in fact made.

And since a valid cause of forfeiture could only arise upon demand and non-payment, it follows, that no such cause was established. This ground of defence must therefore be overruled; and it will be immaterial, so far as the title of Horace was concerned, whether Benjamin Needham ever designed, or attempted, to enforce a forfeiture.

The remaining ground of defence is, that Benjamin Needham was in possession of the entire farm, holding adversely to Horace, when the mortgage was executed: and that it was thereby rendered void under the statute. The evidence to make out such an adverse possession at that time is derived from the fact, that Horace had removed from the farm some two years before, leaving the whole possession with Benjamin,—and from various declarations of the latter, in effect denying that Horace retained any title, or interest, in the farm. It is claimed, that the removal should be treated as an absolute abandonment on the part of Horace. But the testimony is silent as to the cause and purpose of that act; and a sole possession by one tenant in common is not presumed to be adverse to the co-tenant. The ordinary presumption is, that such a possession is held in the right of both tenants. And although
*623 this presumption *may be rebutted by evidence, yet, to render void a deed of the tenant out of possession to a third person, such tenant, or his grantee, should be affected with notice of the adverse holding, at the time of the conveyance. The doctrine on this point, as established between landlord and tenant, is obviously applicable to cases like the present. But most, if not all, of the hostile declarations of Benjamin Needham, which are relied on as having characterized his possession, appear to have been made after the orators received their mortgage. And hence, although the possession may have been intended to be adverse to the title of Horace, there was not seasonable and sufficient notice of it to him or the orators to avoid the mortgage. Hall v. Dewey et al., 10 Vt. 593.

The decree of the chancellor is affirmed.

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*624 *WASHINGTON COUNTY.

APRIL TERM, 1850.

[Continued from ante, page 537.]

JOHN STEARNS v. ALBERT DILLINGHAM.

(*Washington*, April Term, 1850.)

To enable the owner of goods to waive the tort and sue in *assumpsit*, when they have been wrongfully taken from him, the goods must have been converted into money.[1]

When sheep break from the enclosure of their owner into an adjoining pasture, and there remain for some considerable time, the owner of the pasture cannot, of his own mere motion, waive the tort and sue in *assumpsit* for the pasturing of the sheep. To authorize this there must have been what would amount to the consent of both parties, that it should be considered as matter resting in contract.

Where it appeared, that the plaintiff's sheep from time to time broke into the defendant's pasture through the plaintiff's fence, and the defendant sent word to the plaintiff, that he must take care of them, and the plaintiff said to the messenger, that he did not know what he should do with the sheep, and that he expected he should have to pay the defendant for the sheep running in his pasture, and this was told to the defendant by the messenger, and the defendant continued to drive the sheep from his pasture, whenever he saw them there, as well after the message was sent to the plaintiff, as before, but made no more personal complaint to the plaintiff respecting them, it was held, that these facts did not show any assent to make the pasturing of the sheep matter of contract, and that the defendant could not recover of the plaintiff for pasturing the sheep, in an action of book account, or *assumpsit*.

Book account. Judgment to account was rendered, and an auditor was appointed, who reported, that the defendant presented an account against the plaintiff, for pasturing his sheep, in reference to which he found the facts as follows. The parties, in 1842, were occupants of adjoining land, and the plaintiff's sheep, to the number of two hundred, or over, broke

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[1] At common law, an action of *assumpsit* for chattels had and received by wrong does not lie. Lockwood v. Boom Co., (Mich.) 4 N. W. Rep. 292. An unauthorized withholding or conversion of property will not support an action for money had and received; but if the property has been sold by the wrong-doer, the tort may be waived, and such action may be brought for the proceeds. Smith v. Jernigan, (Ala.) 8 South. Rep. 515. The extent to which the doctrine of waiving torts and suing in *assumpsit* has been carried in this state is to allow the owner of property, where it has been tortiously taken and converted into money, to maintain an action for money had and received against the wrong-doer. Scott v. Lance, 21 Vt. 507. There must be a conversion of the property into money, or its equivalent. Kidney v. Persons, 41 Vt. 336. Saville v. Welch, (Vt.) 5 Atl. Rep. 491. Where a pledgee of property sold it, before he had any right to, for a harness, receiving no money, he was not liable in *assumpsit*. Id. Otherwise, where a promissory note or negotiable paper has been received for property wrongfully taken and converted. Kidney v. Persons, supra. The conversion into money may sometimes be presumed, as where property has been received which is salable, and time has elapsed without accounting for it. Manufacturing Co. v. Buck, 18 Vt. 238. Where a tenant in common of crops is guilty of conversion in refusing to recognize the right of his co-tenant, the latter may waive the tort, and bring *assumpsit*. Loomis v. O'Neal, (Mich.) 41 N. W. Rep. 701.

Where *assumpsit* is brought for the value of chattels, in a case where an action of tort is the proper remedy, but no objection is made, a judgment obtained will be as conclusive of the issues involved as though the proper action had been brought. Jennings v. Sheldon, (Mich.) 6 N. W. Rep. 96. Where *assumpsit* is brought against one for the purchase price of timber wrongfully cut on the plaintiff's land, the latter cannot afterwards maintain an action against an assignee of the timber for conversion. Nield v. Burton, (Mich.) 12 N. W. Rep. 906. Where the owner of goods wrongfully taken has waived the tort, and recovered in an action *ex contractu* against some of the tort-feasors, he is precluded from maintaining trover against the others. Terry v. Munger, 2 N. Y. Supp. 348. But where one sued on a contract of sale, and afterwards abandoned the action before judgment, and brought trover for the goods sold, claiming that the vendee had been guilty of fraud, it was held that, in order to disclose error, the record must show that, when plaintiff brought his action on the contract of sale, he knew of the fraud. Foundry Co. v. Hersee, (N. Y.) 9 N. E. Rep. 487.

over the division fence which it was the duty of the plaintiff to keep in repair, and depastured upon the defendant's land *625 for a considerable *share of the season. In August the defendant sent word to the plaintiff by one Stanley, who was in the employment of the plaintiff, that he must take care of his sheep. Stanley delivered the message, and the plaintiff said to Stanley, that "he did not know what to do with them—that he expected he should have to pay Dillingham for his sheep running there,"—but sent no word to the defendant in relation to the subject. Stanley reported to the defendant the language of the plaintiff, about paying him, &c., within a day or two after the conversation was had. The sheep continued to run in the defendant's pasture occasionally through the season. No farther complaint was made by the defendant to the plaintiff on the subject; but the defendant was always in the habit of driving the sheep out, whenever seen by him in the pasture, as well after as before this conversation. In the course of the next spring the defendant requested the plaintiff to pay him for pasturing his sheep the season before; and the plaintiff said he was willing to pay what it was worth, and offered $5,00,—which the defendant refused to accept, insisting that the sum offered was insufficient. There was no other contract between the parties. The auditor reported, that if, from these facts, the defendant was entitled to recover for the pasturage, either in this action, or *assumpsit*, he found a balance due to the defendant of $2,62; but that otherwise there was a balance due to the plaintiff of $10,72. The county court,—REDFIELD, J., presiding,—rendered judgment for the defendant, upon the report, for the sum found due by the auditor. Exceptions by plaintiff.

T. P. Redfield for plaintiff.

The plaintiff was, as to the defendant, a tort feasor, and, as such, liable in an action of trespass. This was not a case, where the defendant might, at his election, "waive the tort" and bring *assumpsit*. McCrillis v. Banks et ux., 19 Vt. 442. Peach v. Mills, 14 Vt. 371. Blanchard v. Butterfield, 12 Vt. 451. Jones v. Hoar, 5 Pick. 285. Centre Turnp. Co. v. Smith, 12 Vt. 212. 12 Pick. 120. Has any thing been done by the parties, by which this tort has become merged in contract? The remark which the plaintiff made to Stanley had no tendency to prove it,—for the plaintiff neither admitted his liability, nor promised to pay, and *626 the remark *was made to a stranger, with no expectation that it would be repeated to the defendant. The offer of the $5,00 having been rejected by the defendant, is not evidence to charge the plaintiff. Chit. on Cont. 8. 3 T. R. 653. The defendant could not have relied upon the declaration of Stanley, and suffered the sheep to remain, expecting pay for their keeping, for he treated them as in his close wrongfully and drove them out.

P. Dillingham for defendant.

We insist, that the defendant could maintain *assumpsit* against the plaintiff for the amount of benefit he derived from his sheep depasturing on the defendant's farm. If there was no express agreement, there was a clear and satisfactory assent on the part of the plaintiff, that the subject matter of the defendant's claim should be treated and adjusted as a matter of contract between them. It is obvious, that the plaintiff did not mean, by his declaration to Stanley, that he expected to pay damages as a trespasser, but to pay for the benefit he received. In the subsequent conversation between the parties in reference to it, they both treated it as matter of contract, and desired to settle it on the principle of a *quantum meruit*, and only failed, because they could not agree upon the equitable value of the pasturing. Baillie v. Cazelet, 4 T. R. 579. Bennett v. Francis, 2 B. & P. 550. Jones v. Hoar, 5 Pick. 289. There is a class of cases, where, without the assent of the wrong doer, the injured party may waive a tort and sue in *assumpsit*. This right is confined to those cases, where, by reason of the wrong done, property is acquired that benefits the wrong doer; here, if the wrong is forgiven, the injured party may sue and recover in trespass for the value of the property to the tort feasor. Hambly v Trott, Cowp. 375. And this may be done,—1. When the thing wrongfully taken has been converted into money; 1 T. R. 387; 2 B. & P. 550; 15 Pick. 302; N. Ch. 95;—2. When the thing has been changed or converted into other property and sold for money; 4 Pick. 449; 13 N. H. 449; 12 Pick. 120;—3. When waiving the tort and sueing in *assumpsit* works no injury to the other party; 8 Bing. 43; 1 B. & C. 94;—4. In all cases, where one takes property belonging to another, without contract, and uses it for his own benefit. 3 N. H. 384; Chit. on Cont. 22, 33.

*The opinion of the court was de- *627 livered by

BENNETT, J. The law is too well settled, to admit of discussion, that, to enable the owner of goods to waive the tort and sue in *assumpsit*, where they have been wrongfully taken from him, the goods must have been converted into money. The rule is the same, where the trespass consisted in breaking the plaintiff's freehold and cutting and carrying away the trees standing thereon. The trees must have been sold by the defendant. If, however, in England, the defendant, when sued in *assumpsit*, elect to bring money into court, under a rule obtained for that purpose, this would conclude him from objecting to the form of action. In effect, it would be an admission of the contract, as set up in the declaration. Bennett v. Francis, 2 B. & P. 550, is of this character. Probably the same result would follow from a plea of tender.

The plaintiff, in the present case, was guilty of breaking the defendant's freehold and depasturing the same. The defendant cannot, of his own mere motion, waive the tort, and sue in *assumpsit* for the pasturing of the plaintiff's sheep. To authorize this, there must have been what would amount to the consent of both parties, that it should be considered as matter resting in contract.

While goods, which have been wrongfully taken, are in the custody of the defendant, the action may, by contract, be converted

into an action for goods sold and delivered. This is in accordance with well established cases; and probably the true ground upon which they rest is, that the subsequent assent, to treat the matter as resting in contract, has relation back to the time the goods were taken, and, in legal effect, converts it into a sale of the goods, at the request of the defendant.

Is there enough in this case, found by the auditor, to convert the defendant's claim into contract? If not, it must still rest in tort. The plaintiff's sheep from time to time broke into the defendant's lot through the plaintiff's fence. Word was sent to him to take care of them; but he did not, and the sheep continued to break in, and the defendant continued to turn them out, as well after the word was sent, as before,—though he made no more personal complaint to the plaintiff about them. When word was sent to the plaintiff, to take care of his sheep, he sent no word back to the defendant, but simply remarked, that he did not know what he should do with *628 *them, and that he expected he should have to pay Dillingham for the running of his sheep in his pasture. These facts do not show any assent to make the pasturing of the sheep matter of contract. The expression, that the plaintiff expected he should have to pay Dillingham, might well refer to his liability as a tort feasor, and I think did. He sent no word to the defendant about the sheep, and the defendant continued to turn them out, when they got in, as before. There are no facts reported by the auditor, from which it can be claimed, that the parties understood, that the plaintiff was to be liable upon any implied promise to pay for the pasturing of his sheep.

We think, then, this claim cannot be allowed to the defendant in this action, and the judgment of the county court must be reversed; and, disallowing this item, judgment must be entered for the plaintiff for $10,72, and interest on that sum, and costs.

NEWELL KINSMAN v. GEORGE W. PAGE.

(*Washington*, April Term, 1850.)

When a fact is averred in pleading, as existing, which is continuous in its nature, it is to be taken as continuing, unless the contrary be averred, and, if the contrary be true, it should be replied by the opposite party.

To an action of debt upon a judgment it is a good plea in bar, that execution issued upon the judgment declared upon, and the defendant, by virtue thereof, was arrested and committed to prison, without averring, that the defendant remained in prison until the commencement of the present action. Any facts, which show that the debtor has been discharged from imprisonment, without satisfaction of the judgment, should be replied by the plaintiff.

The *dictum* of CHIPMAN, Ch. J., in Farnsworth v. Tilton, 1 D. Ch. 297, that to an action of debt on judgment it is in no case sufficient to plead in bar a commitment only, denied.

Debt upon a judgment. To the second and fourth pleas in bar of the defendant the plaintiff demurred. The second plea was, that execution issued, in due form of law, upon the judgment described *in the declaration, and that the de- *629 fendant was arrested and committed to prison by virtue thereof. In the fourth plea, after averring the commitment, as in the second plea, it was alleged, that the defendant, upon the commitment, gave a jail bond, in due form of law, and was thereupon admitted to the liberties of the prison, and that he departed therefrom, whereby the bond became forfeited to the sheriff and his assigns. The county court, November Term, 1847,—REDFIELD, J., presiding,—adjudged these pleas insufficient. Exceptions by defendant. Judgment was rendered for the plaintiff at a subsequent term and the case passed to the supreme court for revision.

T. P. Redfield for defendant.

It is admitted, in the pleading, that the defendant was arrested and committed to jail on the judgment, which is now sued, and that he has given a jail bond. The arrest is, at common law, a satisfaction of the debt. By the arrest and commitment and the taking of the jail bond, the judgment is merged in the bond. The creditor can recur to his judgment in two cases only, which are provided by statute;—1. When the defendant has been admitted to the poor debtor's oath, and thus cancelled the bond;—2. When, after three months' imprisonment, the creditor releases the debtor and discharges the bond; Rev. St. 460, §§ 41, 42. If the debtor passes out of the prison liberties, it is not a voluntary escape on his part,—for if so, he might be retaken; Jaques v. Withy, 1 T. R. 557. Baily v. Kimbal, 1 D. Ch. 151. But this cannot be; Jameson v. Isaacs, 12 Vt. 611. Willard v. Lull, 20 Vt. 373. The defendant having pleaded, that he was duly committed to prison, if the plaintiff claim, that the contingencies have happened, by which the statute allows him to proceed against the property of the defendant, he should reply that fact.

N. Kinsman pro se.

The second plea is bad, because it only alleges the commitment of the defendant, without averring any satisfaction of the judgment, or that the defendant escaped by consent and direction of the plaintiff. *The fourth plea is also bad, for not *630 alleging satisfaction of the judgment. Nothing will operate to vacate a judgment, when the defendant is committed on execution, except satisfaction of the execution, or an escape of the debtor by consent of the creditor. And, by statute, the creditor may release his debtor from imprisonment, after he has been committed three months, and still leave the judgment in full force. The defendant's giving a bond to the sheriff does not alter the case; the bond is only a security for the sheriff, and if the debtor escape, the plaintiff has, at his election, a remedy on the judgment. 1 D. Ch. 297.

The opinion of the court was delivered by

BENNETT, J. This is an action of debt on judgment, to which the defendant in the county court pleaded several pleas, to two of which, the second and fourth, the plain-

tiff demurred and the county court adjudged the pleas insufficient. We shall only pass upon the second plea, as that must lead to a reversal of the judgment of the county court.

This plea, after admitting the judgment, as described in the declaration, proceeds to allege the issuing of the execution in due form of law against the property and body of the defendant, and a commitment of his body to the keeper of the jail of the county within said prison, and a subsequent return of the execution to the proper office. It must be admitted by all, that so long as the body remains in custody, the right of action on the judgment is suspended. The body of the debtor is held as a pledge, and, in one sense, may be treated as a *quasi* satisfaction of the debt. So long as it continues in prison, the creditor can have no other remedy. The only question, then, on this plea, is, whether it was incumbent upon the pleader to have alleged, that the body of the debtor still remained in prison until the time of the commencement of the present action.

In regard to pleas in abatement, the highest degree of certainty is required; and it has sometimes been said, that it must be so great, as to lead to the exclusion of a conclusion. In regard to pleas in bar, rejoinders, and such other pleadings, on the part of the defendant, as go to the merits of the action, the lowest degree of certainty is allowable, which the rules of pleading will in any case tolerate,—and less certainty, than is required in declarations,
*631 repli*cations, and other pleadings on the part of the plaintiff. Can it, then, be necessary, that the defendant should anticipate, in his plea, matter appropriate for a replication, and negate it?

If the defendant had been discharged by the plaintiff, or had escaped from prison without having paid the debt, either would be a good replication. If, to a plea of the statute of limitations, the plaintiff reply, that the defendant left the state before the right of action accrued, it will, I apprehend, be intended, that he continued to remain out of the state, without any distinct averment to that effect: and if he did not, it should be so averred in the rejoinder to the plaintiff's replication. In the case of Day v. Abbott, 15 Vt. 632, the defendant pleaded in offset a certain judgment, which he had obtained against the plaintiff, and to this the plaintiff replied, that the defendant, being indebted to one Keith in $200, on the twentieth of November, 1839, to secure him that sum, and what he might thereafter owe him, assigned the judgment to Keith, of which the plaintiff the same day had notice. There was no averment in the replication, that Keith's debt remained due and unsatisfied at the time the replication was filed. It was held, that if the assignee's interest had ceased in the judgment, it should have come out in a rejoinder to the replication; and the replication was held good upon demurrer. The principle seems to be, that where a fact is averred in pleading, as existing, which is continuous in its nature, it is to be taken as continuing, unless the contrary be averred; and that, when averred, it should come from the opposing party. We think the principle well applies to the plea in question.

The plea alleges, that on a given day the defendant was committed to jail. If the defendant has been discharged by the plaintiff, or by taking the poor debtor's oath, or has escaped from prison, or been released by the sheriff, this is all new matter, and forms distinct and material matter for a new issue; and we think it should be brought out in a replication. In the case of Farnsworth v. Tilton, 1 D. Ch. 297, the plaintiff replied an escape; and though CHIPMAN, Ch. J., advances the position, that a plea, stating a commitment of the debtor in execution, without showing that he still remained a prisoner, is bad, yet no such opinion was called for by the case before the court; and however much we are disposed to reverence the memory and admire the learning of the late Ch. Jus-
*tice CHIPMAN, yet we are inclined to *632
think this opinion unsound. It is certainly opposed to the principle assumed by the court in the case of Day v. Abbott, before cited.

As this plea is an answer to the action, it is not necessary, to dispose of the case, to consider the fourth plea. The judgment of the county court is reversed; and the plaintiff has liberty to plead anew, upon the usual terms as to costs.

AMPLIUS BLAKE AND HIRAM C. MCINTYRE v. ESTATE OF SETH K. KIMBALL.

(*Washington*, April Term, 1850.)

After an appeal has been taken from the probate court, and the bond for the appeal has been filed by the appellant and approved by the court, and the appeal allowed, the probate court have not power to order or permit that bond to be cancelled and another bond to be substituted for it.

Appeal from the court of probate. The suit was referred, under a rule from the county court, and a report returned in favor of the plaintiff. But it appeared from the report, that, at the hearing before the referee, O. H. Smith was offered as a witness on the part of the plaintiffs, and was objected to, for the reason that he was surety upon the bond, which was filed in the probate court for the prosecution of this appeal, at the time the appeal was allowed, which was in October, 1846; and that said Smith thereupon produced that bond before the referee, with a certificate upon it, signed by the register of the court of probate, that it had been cancelled,—another bond having been substituted therefor, by order of the court of probate, May 7, 1849, on application of the persons signing the first bond. The witness was still objected to; but the referee, intending to decide according to law, overruled the objection and admitted the witness to testify. The county court accepted the report. Exceptions by defendant.

Peck & Colby for defendant.

O. H. Smith for plaintiffs.

*The opinion of the court was deliv- *633
ered by

BENNETT, J. Though this case comes up

upon the report of a referee, yet it appears, he intended to decide according to law; and the only question is, was O. H. Smith a competent witness for the plaintiffs?

He was clearly interested in the event of the suit, unless his interest had been removed by what took place on the day of the reference. The appeal was taken in October, 1846, and the witness, on that occasion, had executed to the probate court a bond, in common form, as surety for the appellants for costs, &c., which should arise from the appeal. Upon the application of the signers of the bond, the probate court, on the seventh of May, 1849, decreed, that this bond should be held for nought. We think this was beyond the powers of that court.

It is the duty of the probate court, before an appeal is allowed, to take a bond to secure the payment of costs and intervening damages; and when this is done, the case may rightfully pass to the county court. Though the bond may be taken to the adverse party, or to the probate court, yet, if taken to the court, it enures to the use of the party. The bond is to be to the satisfaction of the probate court; and so far the court act judicially. But when the bond has been approved, and the appeal allowed, the duties of the probate court in relation to it are only ministerial, that is, of safe keeping for the use of the party, for whom it was taken; and the court, upon being indemnified against costs, are bound to permit the bond to be put in suit. When the bond has been approved, and the appeal allowed, the powers of the probate court over it have been spent; and if it become insufficient, pending the appeal, the probate court cannot order a new bond. It might probably be incident to the powers of the county court, in such case, to order additional security.

We think the decree of the probate court, upon the application of the signers of the bond, vacating it, was extra judicial, and of course without effect. The fact, that the probate court on that occasion took a new bond, cannot aid in giving jurisdiction to decree the first bond null and void. It is not necessary to decide, whether this second bond is valid, or not. It is sufficient, that the first bond is still in force.

*634 *It has been asked, if this proceeding in the probate court does not restore the competency of the witness, how can it be done? If it cannot be done in the county court, by an order for new bail, under a rule that an *exoneretur* be entered upon the bond filed in the probate court, or under a rule for substituting another surety in his place, as was done in the case of a replevin bond in Bailey v. Bailey et al., 1 Bing. 92, it is sufficient to say, that the bond was entered into voluntarily by the witness, by the procurement of the party, who wishes to use him; and if his competency cannot be restored, it is but the common case, where a witness becomes interested in the event of a suit by the conjoined act of the witness and the party who wishes to use him; and certainly the party in such case should not complain. It is his own act, that has rendered the witness incompetent.

The judgment of the county court, accepting the report, is reversed, and the case remanded to that court, to be farther proceeded with.

Levi T. Whitney and Lenox Titus v. Isaiah Silver.

(*Washington*, April Term, 1850.)

Audita querela is the proper remedy, where a judgment of a justice of the peace has been rendered without notice, the defendant being out of the state at the time of the service of the writ, and where no recognizance was taken, conditioned to refund to the defendant such sum as might be recovered by him by writ of review.

Where mesne process is issued against two joint contractors, and is regularly served upon one of them, and service is made upon the other by leaving a copy at his usual place of abode within this state, he being absent from the state at the time and not returning nor receiving any notice of the suit previous to judgment being rendered therein, the defendant, upon whom the process is regularly served, cannot, by his appearance in the suit or any agreement he may make in reference to it, bind his co defendant, so as to entitle the plaintiff to take judgment against both, without notice in fact to the other defendant, or giving a recognizance, conditioned to refund such sum as may be recovered *by him by writ of re- *635 view. And it makes no difference, in this respect, that the absent defendant was merely surety for the other defendant in the contract in suit.

There is no case, in which one joint contractor has power to appear for another, where such other contractor has had no personal notice of the suit. Bennett, J.

Audita querela. The complainants alleged, that the defendant, Silver, sued out a writ of attachment against them, declaring in *assumpsit*, returnable April 28, 1846, before a justice of the peace, and caused it to be served upon Whitney, by attaching his property and giving him personal notice thereof, and upon Titus, by a nominal attachment of property and leaving a copy at his residence in Montpelier, in the hands of his wife; that at the return day of the writ Whitney appeared and agreed with the plaintiff's attorney, that the suit should be continued to May 18, 1846, and that on that day Whitney agreed to a continuance to July 6, 1846, and that then, Whitney being prevented, by accident and mistake, from appearing and defending the suit, judgment was rendered therein by the justice, against the complainants, by default; that the complainant Titus had no notice of the commencement or pendency of said suit, until after the rendition of the judgment, but was, at the time the suit was commenced, without this state, and so continued, until after the rendition of the judgment; and that the defendant had taken out execution against the complainants, upon said judgment, without any recognizance being entered into by the defendant, or by any one in his behalf, conditioned to refund such sum as might be recovered by writ of review, and had delivered the execution to an officer for service. Plea, the general issue, and trial by the court, November Term, 1849,—Redfield, J., presiding. It appeared in evidence, that the complainant Titus was out of the state, at the time of the service of the writ in the original suit, and continued out of the state until after the rendi-

tion of judgment, and had no notice in fact of the suit, having his residence at Montpelier, and no bond, or recognizance, was entered into, agreeably to the provisions of the Revised Statutes, chap. 26, sec. 27. The writ and record of the judgment described in the complaint were given in evidence. Upon the original writ there were two agreements in writing, for the continuances mentioned in the complaint, both of
*636 *which were signed by the attorney of the plaintiff in that suit and by Whitney, in his own name. Whitney mistook the day, to which the suit was finally continued, and did not appear upon that day. It appeared, that Titus was merely the surety of Whitney, in the contract upon which that suit was predicated. The court decided, that *audita querela* would not lie in this case, and rendered judgment for the defendant. Exceptions by plaintiffs.

F. F. Merrill and *S. B. Colby* for plaintiffs.

J. A. Vail for defendant.

The opinion of the court was delivered by

BENNETT, J. The county court held, that the facts detailed in this case would not sustain an *audita querela;* and this is now the only question before us. It has been settled, that in an action upon a joint contract against two or more, where all have been duly served with process and are properly brought by means of the process and the service of it before the court, one of the co-defendants may employ an attorney for all, or may appear and control the suit as to all the defendants. This proceeds upon the ground of an implied authority. The case of Scott v. Larkin, 13 Vt. 112, is of this description. But the question is, will this principle extend to a case like the present?

Titus was out of the state at the time of the service of the writ, and continued to be so, until after the judgment against him and Whitney; and he had no notice in fact of the suit, having his residence in Montpelier, and no bond was given under the provisions of the Revised Statutes, chap. 26, sec. 27, before the execution issued. In the case of Marvin v. Wilkins, 1 Aik. 107, it was held, that an *audita querela* is the proper remedy, where a judgment of a justice of the peace has been rendered without notice, the defendant being out of the state at the time of the service of the writ, and where no recognizance was given for a review, in pursuance of the requisitions of the statute. That case is an authority for sustaining the present action, unless the case is to be distinguished in principle from it, upon the ground that it was an action against Titus and Whitney upon a joint contract.

*637 *It has been settled, that the *audita querela* should be brought by all the defendants upon the record; and therefore Whitney is properly made a party, though he may have no personal cause of complaint. We think it will not do to hold, that Titus was bound by the appearance of Whitney. He had no power to waive notice to Titus, and thus bring him before the court, subject to the same proceedings, as if he had been personally served with process, or had had notice in point of fact of the service made in the case. I am not aware of any case, in which it has been held, that one joint contractor has power to appear for another, when such other contractor has had no personal notice of the suit.

It has always been held, that, in case of partners, each partner is entitled to a complete service of the writ. If service is made by an attested copy of the writ, each partner is entitled to a copy; and if not so served, it is good matter in abatement; and I apprehend one partner cannot bind the firm by a confession of judgment; and it has been held, that one partner cannot bind the firm by a submission to arbitration,—as in the case of Stead v. Salt, 3 Bing. 101,—though on this point there may have been some difference of opinion

The fact, that Titus was but a surety for Whitney, certainly cannot make for the defendant in the *audita querela*. The surety may be the only responsible person; and he may also have a defence peculiar to himself. To hold that the principal can waive notice to the surety, by his appearing to the action and agreeing to a continuance, or that notice to the principal is *ipso facto* notice to the surety, would open a door for much fraud, to be practiced by an insolvent principal upon a solvent surety.

It would seem to follow, if a co-contractor can appear and control a suit as to all, where a part have had no notice, that a judgment of a sister state should bind those not served with personal notice;—yet it is well settled, that such a judgment would not bind them *in personam*, though it might bind them *in rem*.

We think this case, upon principle, must stand upon the same ground, as if Titus had been the sole defendant in the original action; and, upon the authority of the case of Marvin v. Wilkins, the judgment of the county court, in that view, was erroneous.

*We might add, that in the present *638
case there was no attempt on the part of Whitney to appear for any one but himself. All that the record shows is, that the name of L. T. Whitney is signed to an agreement to continue the cause twice. He does not profess to sign the agreement for the defendants, nor to appear for them; and I apprehend, in a case like this, we should regard it as only his own personal appearance.

The judgment of the county court is reversed; and as the cause was tried by the court upon the general issue, it must be remanded to that court, to be farther proceeded with; as well as for the assessment of damages.

It is not necessary for the court to decide, whether, upon the case now made, the complainants are entitled to have the judgment and execution set aside, or only the execution.

*639 *ORLEANS COUNTY

AUGUST TERM, 1850.

[Continued from ante, page 560.]

FRANCIS JOHNSON v. ALFRED A. BURNHAM.

(*Orleans*, Aug. Term, 1850.)

An officer, who charges a greater amount of fees, than is allowed by law, for serving a writ, and who receives the amount so charged from the plaintiff in that suit, while that suit is pending in court, is liable to the plaintiff, from whom he so receives payment, for the penalty imposed by statute for receiving illegal fees, notwithstanding the plaintiff subsequently obtained judgment in his favor, in the suit in which the fees were charged, and the fees, as charged by the officer, were taxed in the bill of cost and paid to the attorney of the plaintiff by the defendant in that suit.

This was an action against the defendant for taking more than legal fees for serving a writ in favor of the plaintiff upon one Norton. Plea, the general issue, and trial by the court, June Term, 1850,—POLAND, J., presiding. On trial the facts appeared as follows. The writ in favor of the plaintiff against Norton was served by the defendant in October, 1846, and upon the writ the defendant taxed his fees, as follows;—"Travel, $0,60; 2 copies, $6,00; paid clerk, $0,20." The plaintiff proved, that the copies would amount to no more than eighty five cents each, making an excess, in the defendant's charge for the copies, of $4,30. The suit in favor of the plaintiff against Norton was entered in Orange county court, and while it was there pending the defendant called upon the plaintiff to pay his fees for serving the writ; and the plaintiff paid them, as charged on the writ. This payment was made in the autumn of 1847; and this suit was commenced against the defendant in the autumn of 1848. The plaintiff obtained final judgment in his suit against Norton at the June Term, 1848, of Orange county court; and in his taxation of costs in that suit against Norton the service of the writ was taxed and allowed at the same sum charged by the de-
*640 fendant on the writ, as *above stated.

An execution was subsequently issued upon the judgment in favor of the plantiff against Norton, and the amount of the judgment was collected and paid to the plaintiff's attorney in that suit, April 6, 1849. Upon these facts the county court rendered judgment for the defendant. Exceptions by plaintiff.

C. W. Prentiss, for plaintiff, cited Dunlap v. Curtis, 10 Mass. 210.

Bartlett & Bingham, for defendant, insisted, that the plaintiff was not the party aggrieved by the taking of the illegal fees by the defendant, and so could not sustain this action.

The opinion of the court was delivered by

BENNETT, J. This is a most palpable case of taking illegal fees by the defendant. The copies were charged at three dollars each, when the case shows, that each copy, at the rate of charge fixed by the statute, would amount only to eighty five cents. The facts were all before the defendant; and as it is to be taken, that every man knows the law, no question can arise as to the *scienter* and motives of the defendant.

The only question, which can be made, is, whether the plaintiff is the party aggrieved. The sixteenth section of chap. 106 of the Revised Statutes provides, that if any officer, or other person, shall receive any greater fees, than is provided by law, he shall pay to the person aggrieved ten dollars for each dollar excess of fees, so received, and in the same proportion for a greater or less sum. The plaintiff is the only person, who has paid the defendant the money. The defendant served the writ on Norton upon the credit of the plaintiff, and while the suit against Norton was pending he presented his account to the plaintiff for payment and the plaintiff paid him. The extortion, to be punished by a penalty against an officer, who receives more than lawful fees by color of his office, implies a right in the officer to demand fees of the person who pays them. The officer had no claim for fees against Norton, and none could be demanded of him by the defendant, under color of his office. The defendant received the illegal fees from the plaintiff, and from no other source. *The right of *641
action was complete, when the money was paid, and the statute of limitation would then commence running.

The fact, that the illegal fees were subsequently taxed in the bill of costs against Norton, and collected by the attorney from him, cannot affect the merits of the question. If they were corruptly taxed by the attorney of the plaintiff in that action, or by the clerk, a new offence would arise under the previous sections of the statute, and the defendant in that action would be the party aggrieved and might well sue for the penalty.

The judgment of the county court is reversed, and the cause remanded to the county court.

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*DISTRICT COURT OF THE UNIT- *642
ED STATES, FOR THE DISTRICT OF VERMONT.

JUNE, 1842.

IN THE MATTER OF EDSON COMSTOCK.

(*District Court U. S., D. Vermont*, June, 1842.)

There is no distinction, under the bankrupt law, between a judgment in an action arising *ex delicto* and a judgment in an action arising *ex contractu*; they are both debts, within the meaning of the law, and both proveable against the estate of the bankrupt. And the decision of this question is not affected by the fact, that in the action *ex delicto* it is adjudged by the court, and certified upon the execution, that the cause of action arose from the wilful and malicious act or neglect of the party.

A creditor, who does not elect to prove his debt under the proceedings in bankruptcy, has a right to pursue such remedies as are afforded to him by the state law, against the bankrupt, certainly until the bankrupt has obtained his certificate of discharge in bankruptcy; and if he be imprisoned, by virtue of process issuing from the

state court, after he have filed his petition and been decreed a bankrupt, it is not competent for the district court of the United States to order his discharge from such imprisonment, previous to his obtaining his certificate of discharge as a bankrupt.

Whether, after the bankrupt has obtained his certificate of discharge, the district court can order him discharged from such imprisonment, or whether he must proceed by *audita querela*, or otherwise, in the state court, *quære*.†

The petitioner applied to be discharged from imprisonment on an execution issued on a judgment rendered against him by the supreme court of Vermont. He alleged, that on the thirtieth of March, 1842, after the recovery of the judgment, he filed *643 his petition, in due *form, to be declared a bankrupt, and on the twenty fourth of May, 1842, was declared a bankrupt accordingly; that on the fourth of April, 1842, he was arrested and committed to jail on the execution, and was still held in custody. It appeared from a copy of the execution annexed to the petition, that the judgment was rendered in an action founded on tort, the cause of which was adjudged and certified to have accrued from the wilful and malicious act of the petitioner.

H. Carpenter for petitioner.

L. B. Vilas for creditor.

The opinion of the court was delivered by

PRENTISS, J. The distinction which has been insisted upon in this case, between a judgment rendered in an action on tort, and a judgment rendered in an action on contract, is wholly unavailable, as against this application. The right of the petitioner to be discharged from imprisonment, if any such right exist, cannot be affected by any consideration of that nature. There is no distinction, under the bankrupt law, between a judgment in an action arising *ex delicto*, and a judgment in an action arising *ex contractu*. They are both debts within the meaning of the law, and both proveable against the estate of the bankrupt. In this case, the judgment, though rendered in an action founded on tort, was rendered before the decree of bankruptcy, and was consequently a subsisting debt, which might be proved, like any other subsistng debt, under the bankruptcy, and like any such debt, whether proved or not, will be barred by the bankrupt's certificate of discharge.

It is true, that by the law of this state, when a party is committed to jail on an execution issued upon a judgment rendered in an action founded on tort, and it is adjudged by the court and certified upon the execution, that the cause of action arose from the wilful and malicious act or neglect of the party, he can be admitted neither to the liberties of the prison, nor to the benefit of the poor debtor's oath. This law has existed many years in the state, and has had, as has been justly said by counsel, a very beneficial tendency. It has, no doubt, proved a salutary restraint against the commission of *malicious *644 and mischievous trespasses. The imimprisonment, to which it subjects evil disposed persons, destitute of the means of making compensation in damages, or concealing and withholding their means to do so, operates as a punishment upon them, and is a great security against injuries to property, and other injuries of a personal nature, which do not amount to public offences, and cannot be treated and punished as such. I have always regarded the law as a very judicious one, and as not at all oppressive, since power is vested in the courts, after an imprisonment suited to the aggravation of the case, on application made for the purpose, to remove the disability and allow the party the privilege of the poor debtor's oath. It may be, as has been urged, that the efficiency of this law will be much impaired, and its benefits in a measure lost to the community, if it is held to be in the power of any party, after judgment against him for a malicious tort, to discharge himself from the judgment by availing himself of the benefit of the bankrupt law. This, if true, might be a very proper argument to address to the national legislature, who have full power over the bankrupt law, but can have no weight with a judicial tribunal, whose business it is to say, not what the law ought to be, but what it is.

Considering, then, a judgment recovered in an action on tort, as to the purposes of the bankrupt act, as not distinguishable from a judgment recovered in an action on contract, but both alike proveable under the act, the main questions are, whether the petitioner, upon the facts appearing in the case, is entitled to be discharged from custody, and whether it is competent for this court to order his discharge.

The right of the petitioner to be discharged rests upon a general right of exemption, claimed and assumed to accrue immediately upon the decree of bankruptcy, from arrest and imprisonment for all debts proveable under the bankruptcy. It is certain, that no such right of exemption is expressly given by the bankrupt act, and it appears to me to be equally plain, that none is impliedly given. The provisions of the act, instead of implying, seem clearly to negative, any such right, as against a creditor, like the one in the present case, who does not choose to come in and prove his debt.

The act declares, "that no creditor, or other person, coming in and proving his debt, or other claim, shall be allowed to maintain *any suit at law or in *645 equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby."

This provision evidently implies an option on the part of any creditor either to come in and prove his debt under the bankruptcy, or to pursue his remedy against the

† See Comstock v. Grout, 17 Vt. 512, where the decision of the supreme court of this state, discharging Comstock from imprisonment, upon *audita querela* brought by him after he had obtained his certificate of discharge in bankruptcy, is reported. See, also, the decision of STORY, J., in the matter of Cheney, 5 Law Rep. 19, and the decision of SPRAGUE, J., in the matter of Winthrop, 5 Law Rep. 24.

bankrupt at law. It clearly supposes a right in the creditor to take either course; for instead of taking away the remedy at law as to all creditors, who have the right to come in and prove their debts, it takes it away only as to such creditors who actually come in and prove their debts. By the terms of the provision, proof under the bankruptcy is a waiver and relinquishment of all right of action or execution against the bankrupt, and no suit or proceeding whatever can be had against him, either at law or in equity. The proof itself operates as a discontinuance of any suit pending, and is a surrender of any judgment recovered for the debt proved; and if the bankrupt is in custody, either on mesne process or execution, he will of course be entitled to be immediately discharged from such custody.

The act, like the English bankrupt law, allows the creditor to elect, whether he will come in and prove his debt, or take his remedy at law. This right of election is an established doctrine of the courts of equity in England, and has been invariably recognized and acted upon by them. They hold, that where a creditor comes in under the commission of bankruptcy and proves his debt, it is an election to take his remedy for the debt under the commission; and they will not allow him to imprison the bankrupt for not paying the debt, and if the bankrupt is imprisoned, they will discharge him out of custody. On the other hand, where a creditor elects to proceed at law, they will not allow him to prove his debt under the commission. Thus, if a creditor, after the issuing of the commission, take the bankrupt in execution, apprised of the disposition of the effects, and knowing that there may be a certificate, he is deemed to have made his election, and will not be allowed to prove his debt, or if he proves it, the court will order the debt to be set aside and disallowed. The principle is, that
*646 the creditor may elect either to *proceed at law, taking his chance of being ultimately defeated by a certificate, or come in and take his remedy under the bankruptcy.

It has been argued, that it would be unreasonable, after the bankrupt has surrendered all his estate, and thereby divested himself of all his means to pay his creditors, that any of them should be at liberty to arrest and hold him in prison. But it should be remembered, as has been once before observed, that the question is not, what the law ought to be, but what the law is. It should be remembered, also, that the bankruptcy in most cases, as in this, is the voluntary act of the bankrupt himself, without the concurrence and perhaps against the will of his creditors; and that whether he has acted fairly and surrendered all his property is a question, which the creditors, in reason and justice, have a right to make, and which the act allows them to make. The decree of bankruptcy decides nothing in regard to this question. It divests, to be sure, the bankrupt of his estate, and the creditors who prove their debts, and thereby waive all other remedy, will have the benefit, to the exclusion of all others, of so much, at least, as he discloses and surrenders; but he may, notwithstanding, never entitle himself to a certificate of discharge, and may never obtain one.

The act provides, that if the bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of the act, or shall wilfully refuse or omit to comply with any orders or directions of the court, or shall admit a false or fictitious debt against his estate, or shall, after the passing of the act, have applied trust funds to his own use, or, being a merchant, banker, factor, broker, underwriter, or marine insurer, shall not have kept proper books of account, he shall not be entitled to any discharge or certificate. Any one of these things will prevent his obtaining a certificate; and who can say, in advance, that a certificate will not be refused him? How, then, can any creditors, except such as elect to come in under the bankruptcy, and thereby preclude themselves, under the positive provision of the act, from any other remedy, be prevented from pursuing, in the mean time, their ordinary remedy at law?

But when a certificate is obtained, it is not absolutely conclusive in favor of the bankrupt. The act declares, that the certificate, *when duly granted, shall, *647 in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of the bankrupt, which are proveable under the act, and shall and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever; and the same shall be conclusive evidence of itself in favor of the bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property, or rights of property, contrary to the provisions of the act. The certificate may be impeached, and its effect wholly avoided, by proof of fraud or wilful concealment of property by the bankrupt; and how can any court say, beforehand, that such proof will not be produced by the creditor, whenever the certificate is set up against him?

If the certificate only, and nothing short of it, will bar the remedy at law of a creditor, who does not come in and prove his debt, and even that may be impeached and avoided, it would seem to be very clear, that his right to proceed at law remains unimpaired and unaffected, until the validity of the certificate is tried and decided against him. This right to proceed against the bankrupt by original writ or execution must carry along with it all the incidents legitimately belonging to such process, and if by the state laws the person of the bankrupt may be arrested and imprisoned by virtue of such process, on what ground can any court interpose in his behalf, before a certificate is granted, and discharge him out of custody either on mesne or final process? Except as against the property belonging to the bankrupt at the time of the decree of bankruptcy, which by force of the decree alone, and without any reference to the event of a certificate being granted or refused, is *ipso facto* transferred from him and vested absolutely in the assignee, so that he has no longer any title to it, the creditor remains in the possession, and may

avail himself, of all the rights which the laws of the state give him; and neither this nor any other court, until a certificate of discharge, can release the bankrupt from arrest or imprisonment for a debt which is proveable but not proved, any more than they can release him from arrest or imprisonment for any claim which is not proveable.

After a certificate is granted to the bankrupt, the act provides no mode for his discharge from custody on mesne process
*648 or execution, *nor does it give any express authority to this or any other court to discharge him. In this particular the act differs not only from the English bankrupt laws, but from the former bankrupt law of this country. By the English laws, if the bankrupt was prosecuted for any debt due before the bankruptcy, he might be discharged on common bail, and plead his certificate; if taken in execution, or detained in prison, on a judgment obtained before the allowance of his certificate, so that he had no opportunity to plead it, any one of the judges of the court, in which the judgment was obtained, might discharge him from custody. Under the former bankrupt law of this country, when the bankrupt was sued and arrested, he might appear and plead without bail, and give his certificate in evidence; when taken in execution, or detained in prison, on a judgment obtained before his certificate was allowed, any one of the judges of the court, in which the judgment was obtained, or any court, judge, or justice, within the district where the bankrupt was detained, having power to award or allow the writ of *habeas corpus*, might order his discharge.

No such provision, nor indeed any provision whatever on the subject, as I have said, is contained in the existing bankrupt act; and whether, after the bankrupt has obtained his certificate, this court can interfere in a summary way in his behalf, and relieve him from imprisonment on the process of a state court, as well against a creditor who has not proved as one who has proved his debt, or whether the bankrupt must proceed by motion, *audita querela*, or bill in equity, as the case may require, in the state courts, it is not necessary, nor do I mean, now, to express any opinion. It may be well to observe, however, that whatever may be necessary to the full and complete exercise of the jurisdiction conferred by the bankrupt act, this court has power to do or order to be done. If, therefore, in any stage of the proceedings in bankruptcy, the personal presence of the bankrupt is necessary before the court, or a commissioner, the court may undoubtedly order him to be brought up for the special purpose for which he is wanted, to be remanded when the special purpose is answered.

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*649 *OCTOBER TERM, 1844.

IN THE MATTER OF EPHRAIM CHASE.

(*District Court U. S., D. Vermont*, Oct. Term, 1844.)

Where it appeared, that a bankrupt was insolvent on the first day of February, 1842, the day the bankrupt law went into operation, and that he made a voluntary confession of judgment on that day, in favor of one of his creditors, for a sum in damages exceeding the value of all his attachable property, and that all his property was taken the same evening, by virtue of an execution upon such judgment, and afterwards was sold thereon, and that this was done by the bankrupt for the mere purpose of compelling another of his creditors to make a deduction in the rent of a certain farm, which the bankrupt then occupied as his tenant, and which rent was to become due March 1, 1842, and if that could not be effected, then to defeat entirely the debt of that creditor, the debtor contemplating bankruptcy as the ultimate resort, and the petition in bankruptcy was filed March 30, 1842, the district court refused to grant to the bankrupt his discharge, notwithstanding the debt, upon which the judgment was confessed, was actually due at that time to the creditor in whose favor the confession was made.

This was a petition filed by Ephraim Chase, who had been duly decreed a bankrupt, for his discharge. The material facts are stated in the opinion delivered by the court.

S. H. Hodges for petitioner.

E. Edgerton for creditors.

The opinion of the court was delivered by

PRENTISS, J. The case, without going into unnecessary details, is shortly this The bankrupt, on the first of February, 1842, as appears from his schedule, was deeply insolvent, being indebted to
*various creditors to the amount of *650 four thousand dollars, or more. Among the creditors was the firm of A. R. Vail & Co., to whom the bankrupt was indebted in a large sum. In the afternoon of the first of February the bankrupt confessed a judgment to A. R. Vail & Co. for the sum of $1624,71, embracing the amount of certain notes given originally to them and two or three notes executed to other persons and indorsed to them. Execution was immediately taken out on the judgment and in the evening of the same day was levied on all the property of the bankrupt liable to attachment, or execution. The property was sold on the execution for $1124,71, besides the costs of levy and sale.

It is to be borne in mind, that the confession of judgment by the bankrupt was without any previous attachment, and for a sum sufficient to cover all his property, with the power to issue immediate execution. Execution was immediately issued, and all his property, except household furniture and other property exempt from attachment, was immediately taken upon it. From the manner of the transaction, the suddenness and haste with which the proceedings were begun and carried through, the transaction, from the very statement of it, connected with the fact of the utter insolvency of the bankrupt, is liable to very strong suspicion.

But let us see how the case stands on the testimony; for it is proof, and not suspicion without proof, that is to decide it. There is no reason to doubt, that the debt of A. R. Vail & Co. was a *bona fide* debt; and it is true, that Aaron R. Vail, one of the company, says he called on the bankrupt for security, and that the judgment

was confessed on his request, as a means of saving cost. This testimony might be material, if the judgment had been for an amount covering only a part of the bankrupt's property; but the judgment being for an amount sufficient to absorb the whole of his property, and he being necessarily conscious, that it must take the whole to satisfy it, it is immaterial, whether it was given on the request and at the instance of the creditors, or not. But admitting it to be material, and that the request was accompanied with such a degree of urgency and importunity on the part of the creditors, as would, under ordinary circumstances, repel the presumption of the confession being voluntary, yet the question is, whether the confession was really made in consequence of that importunity, or with a view, *entertained and acted upon altogether independent of it, of defeating the rights of other creditors. This is a question of intention, and the intention is to be collected from all the circumstances of the case. If they clearly indicate an intention, on the part of the bankrupt, to give a preference, or to have all his property put beyond the reach of his other creditors by means of the judgment, the request or importunity of the creditors can avail nothing.

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We have already stated the manner of the transaction; now let us look to some other circumstances, which attended it. Besides there appearing to be no unwillingness to make the confession, but a very ready acquiesence and compliance on the part of the bankrupt, it is evident, that he knew, at the time of the confession, that the execution would be levied the same evening. He told Harrison Ballard, in the evening, before the officer came, that he wanted to pay him, as he expected his creditors would break upon him; and he accordingly forth with turned out to Ballard a cow, and at the same time turned out to his brother forty bushels of corn in the ear. After the officer had arrived, he told Marcus Bartlett, that he had expected him, and had tried to give Bartlett a hint of it before. And Aaron R. Vail, one of the creditors, says he thinks the bankrupt might have understood, that the execution was to be levied the same evening after the confession of the judgment.

But farther, the bankrupt told William B. Haskins, who went to see that the officer did not take some grain the bankrupt had turned out to him, that the creditors would not take any thing he did not want they should take. He also told Ballard, at the time he turned out the cow to him, that the creditors would not take any property, which was turned out to him, or his brother, though it remained there.

The testimony, thus far, gives the transaction the appearance, at least, of being a very amicable one; for it shows, that the bankrupt supposed, and acted under the belief, that there was a very good understanding subsisting between him and the execution creditors. Indeed, the transaction seems to have very little of an adverse character about it. When the officer came, who, as we have seen, was not an unexpected, and, I should judge, not an unacceptable visitor, the bankrupt, anticipating the wishes of this usually unwelcome functionary of the law, very promptly lighted his lantern and went *with him to the barn, lighting him to where the property was. This, to be sure, of itself, is not a very important circumstance, but, being one of the characteristics of the transaction, disclosed by the testimony, it is not unworthy of notice with the others.

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But the most material part of the testimony remains to be stated. It appears, that the bankrupt, at the time of the confession of judgment, held a lease from Caleb Paris of a farm in Danby, for the term of six years from the first of March, 1837, at an annual rent of $700,00. Besides the rent for the year 1842, which was unpaid, he was indebted to Paris in the sum of $500,00, for cattle received from him by virtue of the lease. When the latter sum would be payable does not appear; but the rent would become due the first of March, and the lease would not expire until one year from that time.

Now, Stephen Roberts testifies, that, before the property was taken in execution, the bankrupt told him, that unless he could make an arrangement with Paris, and get a reduction of the rent, he should not pay him, though he could; and after the property was taken, he told the witness, he expected to have the property back, if he succeeded in making an arrangement with Paris, which he thought he should be able to do. Allen Roberts also testifies, that the bankrupt told him, that he did not know but he should have all the property back, if he could make an arrangement with Paris. And Caleb Buffum says, that after the property was taken, the bankrupt told him, that he could not afford to pay so much rent for the farm; that he would give $350,00 for the year's rent then due, and had the money in his pocket to pay it, and would give $400,00 a year for the remainder of the term. On the witness' inquiring how he could carry on the farm without the stock and tools, he replied, that he could have back the property, which had been taken, whenever he pleased. Now, upon this testimony, can any one be at a loss concerning the motive and object of the bankrupt, in giving the confession of judgment? Was it not to bring Paris to terms, and force him to reduce the rent of the farm, by presenting to him the alternative of doing so or getting nothing?

The testimony of Vail, one of the execution creditors, goes rather to confirm this view of the case, than otherwise. He says, there *was no understanding with the bankrupt, that he should have back the property levied upon, except through an arrangement proposed by A. R. Vail & Co. to Paris, that if he would reduce the rent of the farm to three hundred and fifty or four hundred dollars, they would become responsible for the rent, and the property might go back into the hands of the bankrupt; which proposition, Vail says, was made at the suggestion of the bankrupt after the levy of the execution. This proves, that after the execution was served, and all the property of the bankrupt was secured by seizure upon it, a prop-

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osition to reduce the rent, and have the property go back into the hands of the bankrupt, was in fact made to Paris. Now, was this proposition the offspring of a mere afterthought, first suggested after the levy of the execution, or did it originate in a preconceived design, existing at and before the confession of judgment? If no such design is proved to have been entertained by the creditors, the presumption is strong from the testimony, that the bankrupt had the matter then in contemplation; for, before the property was taken, and. we may conclude, before the confession of judgment, for one followed the other almost immediately, he told Stephen Roberts, as we have already seen, that unless he could make an arrangement with Paris. and get a reduction of the rent, he should not pay him. Taking, then, the declarations of the bankrupt before and after the confession of judgment, and putting them together, I think it must be inferred, that he consented to the judgment willingly, knowing that all his property would be immediately taken in execution, and expecting by that means to get the rent reduced, and then have the property restored to him.

There is another part of the testimony, which ought not to be omitted. It appears, that thirteen cows seized on the execution were afterwards returned to the bankrupt, kept by him ten or twelve days, and then sold by him to a clerk in the store of one of the execution creditors. The bankrupt, on his examination, says the cows were returned to him in consequence of a question arising, whether the cows belonged to him or to Paris; that he sold them to make a payment on the execution; and that after the sale they were driven away in the night time, for the purpose of concealing from Paris where they were.

From all the circumstances of the *654 case, I repeat, I am forced to *the conclusion, that the confession of judgment was voluntary on the part of the bankrupt, and was given for the purpose of compelling Paris to reduce the rent of the farm, and, if that could not be effected, then to defeat his debt entirely, contemplating bankruptcy as the ultimate resort. The confession of judgment was on the first of February, the day the bankrupt law went into operation; the rent became due to Paris the first of March, and the petition in bankruptcy was filed the thirtieth of March; all following on in regular succession, and all taking place within the space of two months. From the view I have taken of the case, it follows, that the bankrupt is not entitled to a discharge; and a discharge is accordingly refused him.

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*655 *MAY TERM, 1847.

UNITED STATES v. ONE SORREL HORSE.

(*District Court U. S., D. Vermont*, May Term, 1847.)

A horse, brought from an adjacent foreign territory into the United States for the purpose of sale, or of being kept here, either for use or sale, is within the sense and object of the first section of the statute of 1821, which provides, that every person, coming into the United States from an adjacent foreign territory, with "merchandize" subject to duty, shall deliver at the office of the collector of customs a manifest of the merchandize. But a horse brought in, not for any such purpose, but as a mere instrument of conveyance in the prosecution of a temporary journey on business, or a visit, is not brought in as merchandize, and is therefore not within the purview of the statute.

Reasonable cause, sufficient to justify seizure, means probable cause; it imports a seizure under circumstances which warrant suspicion.

This was an information against a horse, seized as forfeited for having been imported or brought from Canada into the United States in violation of the revenue laws thereof. The facts constituting the alleged importation, as specially found by the jury, under the direction of the court, were, that the horse was driven by the claimant, harnessed before another horse, in a single sleigh containing no goods, wares, or merchandize subject to duty, from Canada into the district of Vermont, not for sale or to be kept in the country for use, but in the prosecution of a journey to the state of Maine, on business of a temporary nature, with the intention of returning with the horses and sleigh to the claimant's place of residence in Canada, immediately after the accomplishment of his business. The question was, whether, upon the facts so found, there having been no report or entry made, manifest delivered, or duties paid, the horse was liable to seizure and forfeiture.

C. Linsley, district attorney, for United States.

L. B. Peck for claimant.

*PRENTISS, J. The forfeiture claimed *656 in this case, if it can be claimed under any of the provisions of the revenue laws, must be claimed under the provisions of the act of 1821. The ninety fourth section of the act of 1799 is confined, by its terms, to importations of "horses, cattle, sheep, swine, or other beasts," by water, in vessels or boats; and the one hundred and sixth section of the same act is applicable only to cases of "vessels, boats, rafts, and carriages," arriving in districts on the northern and northwestern boundaries of the United States, "containing goods, wares, or merchandise subject to duty."

The first section of the act of 1821 is broad enough to embrace, and undoubtedly does embrace, every mode whatever of importing or bringing into the United States, from an adjacent foreign territory, merchandize subject to duty, either by land or by water. It provides, that every person, coming into the United States from an adjacent foreign country, with merchandize subject to duty, shall deliver at the office of the collector of customs a manifest of the merchandize; and, on neglect to do so, the merchandize, imported or brought in, shall be forfeited.

Horses may not be usually included in the term "merchandize;" but being objects of trade and commerce, they may be called merchandize, within the meaning and intention of the act, whenever they are imported or brought into the country as such. A horse brought from an adjacent

foreign territory into the United States for the purpose of sale, or of being kept here either for use or sale, horses being subject to duty, is within the sense and object of the act. But a horse brought in, not for any such purpose, but as a mere instrument of conveyance in the prosecution of a temporary journey on business, or a visit, is not brought in as merchandize, and is therefore not within the purview of the act. To hold otherwise would be to adopt a construction, which would not only be particularly embarrassing and vexatious in its effects upon the ordinary intercourse between the residents on the opposite sides of the frontier line, but would be productive of much inconvenience in its more general operation. The case under consideration, then, on the facts found by the jury, being not within the meaning, intention, or policy of the act, the horse in question was not subject to seizure and forfeiture.

*657 *It was said in argument, that this construction of the act would open the way to fraudulent evasions of the law, and exposes the officers of the customs to peril in the execution of their duties. To be sure, it may be difficult always to know what the intention of a traveller is, in regard to the horse he is riding or driving. The real purpose may be different from the ostensible or professed purpose; but in every case the officers will act as the circumstances may require. If they make a seizure, exercising reasonable discretion in the matter, they will incur no hazard; for they will be protected from an action by a certificate of reasonable cause. The objection of fraud or evasion, then, supposing a different construction of the act not absolutely precluded by the considerations which have been presented, is of little weight, since the officers of the customs are at liberty to make seizure, and will be protected in doing so, in every case where there is reasonable cause of suspicion. There must be judgment therefore on the verdict for the claimant.

A motion for a certificate of probable cause was subsequently filed.

PRENTISS, J. The motion for a certificate of reasonable cause for the seizure has been in some measure anticipated in the remarks made upon the merits of the case.

Reasonable cause must be understood to mean the same as probable cause. "Probable cause," says MARSHALL, Ch. J., "does not mean *prima facie* evidence, or evidence which, in the absence of exculpatory proof, would justify condemnation. It means less than evidence which would justify condemnation. It imports a seizure made under circumstances, which warrant suspicion. This is its legal sense." Locke v. United States, 7 Cranch 339. Again he says: "A doubt as to the true construction of the law is as reasonable a cause for seizure, as a doubt respecting the fact." United States v. Riddle, 5 Cranch 311.

Adopting the definition of reasonable cause thus given, the facts attending the case, supposing there to have been no ground for doubt as to the law, afforded reasonable cause for the seizure. The seizing officer had such information beforehand, from Canada, of the design to bring the horse, which was a valuable and saleable *horse, into the United *658 States, as would naturally induce a belief, that an evasion of the revenue laws was intended; and, when brought in, the horse was driven before another horse in a single sleigh, with a harness upon him made of the cheapest materials, appearing to have been put together to answer a temporary purpose, with one person only, and no loading in the sleigh, in a manner to warrant suspicion. A certificate, therefore, ought to be granted.

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*CIRCUIT COURT OF THE UNIT- *659 ED STATES, FOR THE DISTRICT OF VERMONT.

MAY TERM, 1849.

PETER HATFIELD v. IRA BUSHNELL.

(Circuit Court U. S., D. Vermont, May Term, 1849.)

An action of ejectment, pending in the circuit court of the United States in Vermont, does not abate by the death of the plaintiff before judgment; but his administrator may, under the provisions of the thirty first section of the judiciary act of Congress of 1789, become a party to the suit and prosecute the same to final judgment,—the cause of action, by the local law, surviving to the personal representative.

And jurisdiction of the action having once vested in the court, it continues and may be exercised, notwithstanding the administrator may be a citizen of Vermont, residing in the same state with the defendant. The administrator is not to be considered as an original party to the action for the purpose of this or any other question; but he enters in the right and merely as the representative of such original party.

This was an action of ejectment to recover lands claimed by the plaintiff, an alien, and subject of Great Britain. The plaintiff having died intestate pending the action, and letters of administration on his estate having been granted by the court of probate in Vermont, the administrator, a resident citizen of Vermont, appeared, and, the death being suggested on the record, moved for leave to enter and prosecute the action. The defendant objected to the leave being granted, and filed a motion to dismiss the action.

S. S. Phelps and *C. D. Kasson* for administrator.

A. Peck for defendant.

PRENTISS, J. The act of Congress of 1789, commonly called "the judiciary act," provides, "that where any suit shall be depending in any court of the United States, and either of the parties shall die be- *660 *fore final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment," &c.

The act, it will be perceived, extends to

every action, and saves it from abatement by the death of the parties, where the cause of action survives, whatever may be the nature of the action. Whether, or not, in any particular case, the cause of action survives must depend altogether upon the local law. With that question the act of Congress has nothing to do. It does not profess to say what causes of action, nor of course what particular forms of action, shall or shall not survive, but refers this to the laws of the respective states. If, in the present case, the cause of action, by the law of Vermont, survives to the personal representative, and he might sue originally upon it, the action does not abate by the death of the plaintiff, but may be prosecuted by his administrator.

By the law of Vermont, (Rev. St., c. 48, §§ 10, 12, 17,) actions of ejectment to recover the seisin and possession of lands, as well as many other actions, which would abate by the common law, and the causes of action, survive; and any such action may be commenced, or, when commenced in the life time of the deceased party, may be prosecuted, by the executor or administrator. The lands are in the nature of assets for the payment of debts, and for that reason the executor or administrator is the only party primarily and for a time, at least, entitled to maintain an action to recover them. Neither the heir or devisee can sue, until the lands have been assigned to him by a decree of the court of probate, or the time allowed the executor or administrator for the payment of debts has elapsed. The cause of action in this case, therefore, surviving by the law of Vermont, the administrator, under the act of Congress, has a legal right to become a party to the suit and proceed in it to judgment.

It is objected, however, that the administrator is a citizen of Vermont, resident in the same state with the defendant, and that the court cannot exercise jurisdiction in a case, such as this will be if the administrator become a party, between citizens of the same state. But it is to be observed, that the administrator, if admitted, is not to be considered in the light of an original party to the action for the purpose of this or any other question. The action was com-
*661 *menced and regularly pending in the life time of his intestate, who was the original party, and he comes in, not in his own right, but in the right and merely as representative of such original party. It is in this special character, and under these special circumstances, that he appears and prosecutes. As was said in the case of Green v. Watkins, 6 Wheat. 260, the death of the party neither raises any new cause or right of action, nor produces any change in the condition of the cause, or in the rights of the parties. If these remain the same as before, why does not the jurisdiction continue the same as before, irrespective of the citizenship of the personal representative?

It is well settled, that if the jurisdiction of the circuit court be once vested in a suit between citizens of different states, a subsequent change of domicil of the parties, *pendente lite*, either by the defendant removing into the state where the plaintiff resided, or by the plaintiff removing into the state where the defendant resided and the suit was brought, will not divest the jurisdiction. Morgan's Heirs v. Morgan, 2 Wheat. 290. Cameron v. McRoberts, 3 Ib. 591. Thomas v. Newton, Pet. C. C. 444. And where a judgment has been recovered in the circuit court in a suit at law between citizens of different states, a bill in equity for an injunction to stay execution on the judgment may be entertained by the court, although the adverse parties to the judgment have, subsequent to the judgment, become citizens of the same state. Dunn v. Clarke, 8 Pet. 1. The doctrine, upon which these cases rest, is, that where the jurisdiction has once attached, no subsequent change in the relation or condition of the parties in the progress of the cause, or after judgment, will deprive the court of jurisdiction over the cause, or over any proceeding touching the execution of the judgment. On this doctrine, an executor, or administrator, may bring a *scire facias* in the circuit court to revive a judgment recovered therein in a suit brought by the testator or intestate, or to have execution against the bail in the suit, or, if no judgment be recovered in the suit so brought, but it be still pending, may of course become a party to and prosecute the same, although he may be a citizen of the same state with the adverse party, and for that cause incompetent to bring in such court an original suit against him.

The deceased plaintiff was an alien, and the court had jurisdic*tion of the *662 action. The administrator comes in, as has been already said, merely as the representative of the deceased plaintiff, and prosecutes as such. Thus coming in to prosecute to judgment a suit already pending, however it might be in a suit originally commenced by him, his residence, or citizenship, whether in the same state with the defendant or a different one, is immaterial. To hold otherwise might render the provision of the act of congress in a measure nugatory. The local law of the state may not allow the appointment of a person as administrator, who resides out of the state; or if it does, the court of probate may refuse to appoint such person; and no letters of administration, but such as are granted in this state, will give any authority to sue or prosecute here.

The sum of the whole matter, therefore, is, that an action of ejectment, pending in this court, does not abate by the death of the plaintiff before judgment, but his administrator may, under the provisions of the thirty first section of the judiciary act of 1789, become a party to the suit, and prosecute the same to final judgment, the cause of action, by the local law, surviving to the personal representative; and jurisdiction of the action having once vested, it continues, and may be exercised, notwithstanding the administrator may be a citizen of Vermont, residing in the same state with the defendant. How far the right to recover may be affected, if at all, where the administrator comes in, as in this case, in right of an alien, a subject of Great Britain, whose title may or may not be held under the ninth article of the treaty of 1794, is a matter proper to be decided, not on a pre-

liminary motion, but on the trial of the merits. The motion of the defendant to dismiss the action is consequently denied, and the motion of the administrator for leave to enter and prosecute allowed.

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*663 *DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF VERMONT.

MAY TERM, 1849.

UNITED STATES v. THE MARGARET YATES, &c.

(*District Court U. S., D. Vermont*, May Term, 1849.)

A vessel not enrolled and licensed, but engaged exclusively in the foreign trade, does not become forfeit by having foreign goods on board.

An allegation, in an information against a vessel and cargo, that the master neither did nor would deliver a true manifest of the merchandize, but on the contrary delivered a false and fraudulent invoice of the merchandize, with a view to evade the revenue laws and defraud the United States, does not present a case within the act of congress of 1821.

Such an allegation presents a case within the 67th and 106th sections of the act of congress of 1799, and when the offence proved, under such allegation, consists in the omission to insert in the manifest a part of the merchandize, and it appears, that this proceeded altogether from mistake, and was wholly unintentional, the alleged fraudulent intent is disproved and a sufficient defence established.

It would seem to be a principle of the revenue code, applicable at least to all importations in vessels, if not to importations in general, that a penalty, or forfeiture, is not to be incurred for a mere mistake in the manifest, report, or entry, either in the quantity or value of the goods imported, without fraud, misconduct, or culpable negligence.

This was an information against a vessel and cargo of lumber seized upon the waters of Lake Champlain. The information contained several counts, but all but two were abandoned. One of the counts relied upon charged a forfeiture of the vessel for having on board articles of merchandize of foreign growth and manufacture, without being enrolled and licensed. The other count, after stating that the merchandize, consisting of scantling, boards, and plank subject to duty, was brought and imported in the vessel, from Canada, an adjacent foreign territory, into the United States, alleged, that neither the master, nor any other person, did or would deliver a true manifest of the merchandize, but on *664 the contrary, the mas*ter did deliver to the collector, with a view to evade the revenue laws and defraud the United States, a false and fraudulent invoice of the merchandise so on board the vessel, and thereby fraudulently represented the quantity of the scantling, boards and plank less than their true and actual quantity, and their value less than their true and actual value, against the form of the statute, &c. It apeared in evidence, that the articles of merchandize on board the vessel were of the growth and manufacture of Canada, that the vessel was not enrolled and licensed, and was employed in transporting lumber directly from Phillipsburg in Canada to Whitehall in New York. It farther appeared, that the master of the vessel, on arriving in the United States from Canada, stopped at the custom house and delivered a manifest; but the officer, finding, on going on board the vessel, more lumber than was specified in the manifest, immediately seized both lumber and vessel. The manifest specified 3652 pieces of scantling, 219 pieces of boards, and 100 pieces of two inch plank; but there were also on board 300 pieces of plank, called culled plank, not mentioned. The agent of the claimant testified, the objection to the testimony being overruled, that he made out the manifest from a book containing entries of all the lumber, and handed the manifest to the master of the vessel, to be delivered at the custom house; that he intended to include, and supposed he had included, all the lumber, but in transcribing from the book omitted, by mistake, the 300 pieces of culled plank. The jury were directed, that they could not find a forfeiture of the vessel under the first count; and that if they were satisfied from the evidence given, that the omission in the manifest of the 300 pieces of plank, which was the only cause of seizure proved under the other count, was accidental and unintentional, a mere clerical mistake in making out the manifest, they could not find a forfeiture either of the vessel, or the merchandize, under that count. A verdict being returned for the claimant on both counts, the district attorney, in behalf of the United States, moved for a new trial, on the ground of the admission of improper evidence and misdirection to the jury

C. Linsley, district attorney, for United States.

S. Foot for claimant.

*PRENTISS, J. The case presents *665 two principal questions, quite distinct in their nature, arising under the two different counts in the information. The question arising under the first count, and the one first in order, is, whether the facts proved would warrant the finding of a forfeiture of the vessel under that count.

The sixth section of the act of February 18, 1793, provides that "vessels of twenty tons or upwards, other than such as are registered, trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, or if of less than twenty tons, and not less than five tons, without a license, if laden with goods the growth or manufacture of the United States only, shall pay at every port the same fees and tonage as foreign vessels; and if she have on board any articles of foreign growth or manufacture, other than sea stores, she and her tackle, lading, &c., shall be forfeited."

This provision applies to vessels employed in the domestic trade; that is, to vessels "trading between district and district, or between different places in the same district." Now, the proof was, that the vessel seized was engaged, not in the domestic, but in the foreign trade—in trading between Canada and the United States. Such trading is lawful, and every vessel employed in it.

only stopping in the district first entered in the United States and complying with the revenue regulations thereof, may be unladen in the same or any other district. It is true, that by the act of March 2, 1831, it is provided, that any boat, sloop, or other vessel of the United States navigating the waters on the northern, northeastern, and northwestern frontiers, otherwise than by sea, shall be enrolled and licensed, and shall thereby be entitled to be employed either in the coasting or foreign trade. But this act does not profess otherwise to alter the navigation laws, but leaves them in all other respects as they were. It provides no penalty or forfeiture for their breach or violation, its object being simply to give to vessels enrolled and licensed, on these inland waters, the privileges as well of registered as of enrolled and licensed vessels, so that they may be employed as well in the foreign as in the domestic trade. The vessel in question, therefore, although not enrolled and licensed, did not become forfeited by having foreign goods on board, it being engaged exclusively in the foreign trade.

*666 *The question arising under the other count in the information is, whether the evidence, showing the omission in the manifest of a part of the cargo of the vessel to have been by mistake, was properly admissible, and consequently whether the direction given to the jury, that, if the omission was accidental and unintentional, a mere clerical mistake in making out the manifest, no forfeiture had been incurred, was right. In considering this question, and as a preliminary step to a decision upon it, it becomes necessary to inquire, within what particular provision of the acts of congress, if within any, does the case stated in the count properly fall? Does it come within the act of March 2, 1821, as was insisted in the argument, or within the provision of some other of the revenue acts?

The act of 1821 provides that it shall be the duty of the master of any vessel, except registered vessels, and of any person having the charge of any boat, canoe, or raft, and of the conductor or driver of any carriage or sleigh, and of every other person, coming from any foreign territory adjacent to the United States, into the United States, with merchandize subject to duty, to deliver, immediately on arriving in the United States, a manifest of the cargo or loading, of the vessel, &c., or of the merchandize, at the office of any collector or deputy collector nearest to the boundary line; which manifest shall be verified by oath, stating that the manifest contains a full, just and true account of the kinds, qualities, and values of all the merchandize, so brought from such foreign territory; and if the master or other person having charge of the vessel, &c., or bringing the merchandize, shall neglect or refuse to deliver the manifest herein required, or pass by, or avoid, such office, the merchandize subject to duty, and so imported, shall be forfeited, together with the vessel, &c.; and the master, &c., shall be subject to pay a penalty of four times the value of the merchandize imported.

The forfeiture imposed by this act, which it will be perceived is a very heavy one, would seem, from the terms of the act, to be incurred only by neglecting or refusing to deliver a manifest, or passing by or avoiding the collector's office. Now, the information does not allege, that the master of the vessel neglected or refused to deliver a manifest, or that he passed by or avoided the collector's office. It impliedly admits, as the proof was, that a manifest was delivered, though *not one *667 containing a full account of all the cargo. It neither negatives the delivery of a manifest, nor does it so much as allege the delivery of a false and fraudulent manifest. The allegation is, that the master neither did nor would deliver a true manifest of the merchandize, but, on the contrary, delivered a false and fraudulent invoice of the merchandize, with a view to defraud, &c. The act requires, not an invoice, but a manifest to be delivered; and as these are treated in the revenue laws as different things, and cannot be regarded as synonymous or identical in legal meaning, the delivery of a false and fraudulent invoice, as alleged, whatever consequence might attach to the delivery of a false and frauduent manifest, is no offence against the act. In any view, that can be taken, therefore, the case stated in the information does not appear to come within the act of 1821. If the charge in the information, instead of being in the form it has assumed, and applying generally to the whole cargo, had been confined to the part of which no account was given, and the allegation had been simply, that no manifest was delivered, it would have presented a question deserving consideration, whether the case might not be treated as within the act. Still, if it might be so treated, it would seem, that there could be no forfeiture of the merchandize, of which a manifest was delivered.

If the case stated in the information is not within the act of 1821, it must, if within any enactment, be within the one hundred and sixth section of the act of 1799, which provides, that all vessels, boats, rafts, and carriages, arriving in the districts on the northern and northwestern boundaries of the United States, containing goods subject to duty, shall be reported, and shall be accompanied with like manifests, and like entries shall be made, as in case of goods imported in vessels from the sea, and, generally, such importations shall be subject to like regulations, penalties, and forfeitures, as in other districts. Among the provisions of the act, thus extended to the districts on the northern and northwestern frontiers, are those of the sixty sixth and sixty seventh sections. These sections provide for cases where goods entered are not invoiced according to their actual cost and where packages of goods entered differ in their contents from the entry; and the forfeiture in the cases, differing greatly from that imposed by the act of 1821, is limited in the one to the goods so not invoiced according to their actual *cost, and in the other *668 to the goods contained in the package or packages so differing in their contents from the entry.

Supposing the case to come within either of these provisions—and it would probably be considered within the sense and spirit of that of the sixty seventh section if within either—there is no doubt whatever, that the matter allowed to be given in evidence on the part of the claimant was properly admitted, and the direction given to the jury upon it consequently right.

The sixty sixth section makes the forfeiture, where goods entered are not invoiced according to their actual cost, dependent on their being not so invoiced "with design to evade the whole or a part of the duties thereon." And the sixty seventh section provides, that the forfeiture, where packages of goods entered differ in their contents from the entry, shall not be incurred, if it shall be made to appear, "that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue." The same provision is contained in the twenty fourth and fifty seventh sections, which, among other things, impose a penalty, or forfeiture, on the master of a vessel, for importing goods not included or described in the manifest, or where goods found on board shall not agree with the report, or manifest. From these provisions of the general collection act, it would seem to be a principle of the revenue code, applicable at least to all importations in vessels, if not to importations in general, that a penalty, or forfeiture, is not to be incurred for a mere mistake in the manifest, report, or entry, either in the quantity or value of the goods imported, without fraud, misconduct, or culpable negligence. If the case, where a manifest omits a part of the goods imported in a vessel, or the case where a manifest undervalues the goods, can in any form of allegation be brought within the act of 1821, it would seem, that the act, in either case, the manifest being made by it a substitute for the reports and entry, must be construed in subserviency to the principle applicable to them.

But looking to the case in the form in which it is presented in the information, and supposing it to be of such a nature as would subject the merchandize in whole or in part to forfeiture, and not merely the master of the vessel to a pecuniary penalty, the question in the case, independent of any special statute provision, would appear to be free from doubt. It is conceded, that where the commis*sion or *669 omission of an act is made *per se* an offence, or is of itself an actual violation of a law, of which there are numerous instances under the revenue and other laws, it is in general no defense, that the commission or omission of the act arose from accident or mistake and was unintentional. In such cases, arising under the revenue laws, relief from the penalty, or forfeiture, on the ground of accident or mistake, or of there being no fraud or wilful negligence, can be obtained only by application to the secretary of the treasury for its remission. But the law is otherwise, where the intent constitutes an essential part of the offense, as it does in many cases under the revenue as well as other laws, and as it is plainly made to do by the form of allegation in the present case.

The information, as we have seen, does not charge a neglect or refusal to deliver a manifest. It alleges, that the master neither did nor would deliver a true manifest, but delivered a false and fraudulent invoice of the merchandize, with a design to evade the revenue laws and defraud the United States, and thereby fraudulently represented the quantity of merchandize less than its true and actual quantity, and its value less than its true and actual value. Here is a charge of actual fraud, which certainly could not be committed without an actual fraudulent intent. Indeed, an actual fraudulent intent is alleged in express and positive terms, and forms the very essence of the charge. If, then, the omission in the manifest, or in what is called the invoice, of a part of the merchandize, which was the fraud relied upon in proof, proceeded altogether from mistake, and was wholly unintentional, the fact, if established, disproved the alleged fraudulent intent, and, on common principles, aside from any positive enactment, was of course a good defence.

From the views which have been taken of the case, it follows, that a new trial must be denied, and that judgment must be entered upon the verdict.

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*SUPREME COURT RULE. *670

FRANKLIN CO. SUPREME COURT,
January Term, 1851.

In petition for new trials, it will be allowed the petitionee to take testimony in reply to that which is served upon him in the petition, and it shall be always upon reasonable notice to the adverse party, and in the form of depositions, omitting the cause for taking. And in like manner, the petitioner may, if he desire, take testimony in reply to that taken by the petitionee. And in all cases of petitions for new trials, the testimony upon which it is founded, and by which it is intended to be supported, shall be served upon the petitionee with the original petition.

STEPHEN ROYCE,
CHIEF JUDGE.
ISAAC F. REDFIELD,
DANIEL KELLOGG,
ASSISTANT JUDGES.

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held, that these facts did not show any assent to make the pasturing of the sheep matter of
*676 contract, *and that the defendant could not recover of the plaintiff for pasturing the sheep, in an action of book account, or *assumpsit*. —Ib.

See BANKRUPTCY 2; DEED 14, 15; PROMISSORY NOTES 2; SALE 8; SCHOOL DISTRICT 4.

ATTACHMENT.

1. To make a deed of the equity of redemption of the grantor in real estate available against an attaching creditor of the grantor, proof of a registry of the deed in the proper office, or notice to the attaching creditor, before his attachment, of the existence of the deed, must appear.—Slocum v. Catlin et al., 137.

2. Where personal property is sold, upon condition that the title shall not vest in the vendee, unless he pay the price agreed upon by a specified time, the vendee has no attachable interest in the property, or its increase, until performance of the condition.—Buckmaster v. Smith, 203.

3. If, after the time for payment of the price has expired, the price not being paid, a creditor of the vendee attach the property, he cannot defeat the vendor's right to sustain an action of trover against him for the property, by tendering to him the amount, which the vendee agreed to pay, and the interest thereon.—Ib.

4. In such action of trover, brought by the vendor against the attaching creditor of the vendee, the rule of damages is the value of the property at the time of the attachment.—Ib.

5. Where the property sold, in such case, was a mare, it was held, that the vendor continued also to be the owner of the colts, brought by her, until performance of the condition.—Ib.

See BAILMENT 1, 2; EXCEPTIONS 2; SALE 10; TRESPASS 3-6, 8; TRUSTEE PROCESS 2.

ATTORNEY.

1. Communications made by a party to one who is acting as his counsel in the commencement and management of a suit, but who has not been admitted as an attorney, and who is not a clerk in the office of an attorney, are not privileged, although he may be pursuing the study of the law under the direction and instruction of one who is an attorney.—Holman v. Kimball, 555.

See LIEN 2.

AUDITA QUERELA.

1. When *audita querela* is brought, alleging the fraudulent misconduct of the party in obtaining a judgment, the judgment itself cannot be regarded as an estoppel upon the inquiry, but the whole subject is necessarily open to examination, as a mere matter *in pais*. Therefore, in such case, the party seeking to impeach the judgment may give in evidence the original files in the former case, and may call as a witness the justice of the peace, who rendered the judgment, to prove the manner in which the minutes upon the files were made, and by whom they were made.—Paddleford v. Bancroft et al., 529.

*677 *2. If a case be continued without the appearance of the defendant, and without his consent, and with no statutory or other legal ground for such continuance, it operates a discontinuance, and no legal judgment can thereafter be taken in the case without the consent of the defendant, and if a judgment be taken, after the suit is so discontinued, it will be vacated by *audita querela*.—Ib.

3. Where a creditor commenced a suit against his debtor during the pendency, in the district court, of the application of the debtor for his discharge under the bankrupt act of 1841, and the debtor had personal notice of the suit, but neglected to appear at the return day of the writ, and thereupon the creditor, for the purpose of evading the effect of the certificate of discharge, when obtained, without legal cause, and without the consent or knowledge of the debtor, caused the suit to be continued from time to time, until after the debtor had obtained his certificate, and then procured a judgment to be entered by default, it was held, that the judgment thus obtained would be vacated upon *audita querela*.—Ib.

4. *Audita querela* is the proper remedy, where a judgment of a justice of the peace has been rendered without notice, the defendant being out of the state at the time of the service of the writ, and where no recognizance was taken, conditioned to refund to the defendant such sum as might be recovered by him by writ of review.—Whitney et al. v. Silver, 634.

AUDITOR, See BOOK ACCOUNT.

AUTHORIZED OFFICER, See PROCESS, 3, 4.

BAIL.

1. A sheriff, who arrests a debtor upon mesne process, may himself become bail for such debtor, by indorsing his own name upon the back of the writ, in the manner required by statute.—Meriam et al. v. Armstrong, 26.

2. A sheriff, who arrests a debtor upon mesne process, and then becomes bail by indorsing his own name upon the writ, and returns, that he has thus become bail, is estopped, when *scire facias* is brought by the creditor against him as such bail, from contesting his legal competency thus to become bail upon process served by himself.—Ib.

3. The requirement of the statute,—Rev. St. c. 28, § 28,—that a writ of *scire facias* against bail shall be brought within one year after the rendition of the judgment against the principal, is not to be regarded as a statute of limitation upon the plaintiff's remedy to enforce a right already due from the surety, but as a condition, which the plaintiff must perform, in order to create a claim against the surety.—Strong v. Edgerton, 249.

4. *Quære*, Whether such writ of *scire facias* must not only be made and signed, but served upon the surety, within the year.—Ib.

5. But if the writ be made and signed within the year, but be made returnable at such a time, that it cannot be legally served within the year, it is not a compliance with the statute.—Ib.

*6. Therefore, where the writ was made and *678 signed within the year, and was made returnable before a justice of the peace more than sixty days after the expiration of the year, it was held not a compliance with the statute.—Ib.

7. When a debtor is committed to jail upon mesne process and procures bail by way of jail bond, written and executed in the common form of a jail bond upon commitment on final process, the surety in the jail bond has the same right to surrender the debtor and may have the same benefit of pleading in his discharge the death of the debtor, in a suit commenced upon the jail bond, that he would have had, if he had become bail by indorsing the writ, and a *scire facias* had been commenced against him.—Graves et al. v. Dyer, 614.

BAILMENT.

1. A bailment of property, with a power of sale, is a personal trust to the bailee, which he cannot delegate.—Hunt v. Douglass, 128.

2. A. delivered a horse to B., for B. to use, with the power of sale; B. exchanged the horse with C. for another horse, and C. agreed, that he would pay to A. $15,00, as the difference between them, and the horse which C. received was to remain the property of A., until the $15,00 was paid; but B. at the same time told C., that he might trade away the horse, provided he kept the security good. C. accordingly exchanged horses three several times, and the horse, which he obtained upon the third exchange, was attached by the defendant as the property of C. It did not appear, that A. had ratified the acts of C., in exchanging for that horse, and it was held, that therefore the property in the

if the location of the corner of the town should ever be changed, and the division line between them be changed accordingly, the party, who should, in pursuance of this contract, have occupied land, which in fact was owned by the other party, should pay rent, after a rate agreed upon for each acre, for the land so occupied, it was held, that this did not create between them the relation of landlord and tenant, and that, upon the true location of the division line being ascertained, the party owning land in the occupancy of the other, under the agreement, might sustain ejectment against the occupant, without giving six months notice to quit.—Ib.

14. But it was held, that the agreement between them was a sufficient license to the occupant to continue in possession of the land, while the contract continued unrevoked, and that no action could be sustained by the owner of the land against him, without first giving reasonable notice of his intention to commence such suit.—Ib.

*689 *15. The act of the plaintiff, in such case, in turning his cattle upon the land previous to the commencement of the suit,—he having subsequently erected his portion of the division fence, as required by the contract,—cannot be considered notice of a revocation of the contract.—Ib.

16. A promissory note, payable in "half blooded merino wool," is not answered by the delivery of wool, of which a portion is of a less degree of fineness than half blooded merino, and an equal portion is of a greater degree of fineness than the standard, so that the whole quantity, taken together, would be of the average degree of fineness required. All the wool delivered must be at least of the degree of fineness required by the contract. —Perry v. Smith, 301.

17. The plaintiff and defendant entered into an agreement, by which the plaintiff was to manufacture into cloth for the defendant a quantity of wool, the cloth to be delivered to the defendant and to become his property as soon as it was manufactured, and the defendant agreed, that he would send the cloth to market, and cause it to be sold, and would pay to the plaintiff, for the purpose of defraying the expenses of manufacturing, one third of the money received in advance for the cloth, upon its being consigned to market, and would also pay to the plaintiff the residue of the money obtained for the cloth, after deducting forty-four cents for every pound of wool so delivered by the defendant, and the interest and cost of freight. And it was held, that a breach of the contract on the part of the plaintiff, in converting to his own use a portion of the cloth manufactured, previous to a demand by him upon the defendant for the money, would not discharge the defendant from his liability to pay to the plaintiff one third of the money received in advance upon the consignment of the cloth for sale; but the defendant must recover compensation, by a cross action, for such conversion of the cloth by the plaintiff.—Hammond v. Buckmaster, 375.

18. A contract cannot be rescinded by one party, for the default of the other, unless both parties can be placed in the same situation, in which they were before the contract was made.—Ib.

19. Interest is only recoverable as damages for the detention of money, which the party ought to pay, unless there is an express contract to pay interest.—Abbott v. Wilmot, 437.

20. When a party agrees to pay money after his return from a particular place, he is entitled to a reasonable time after his return, within which to make the payment.—Ib.

21. When there is no express contract to pay interest, and the creditor receives the principal without making any claim for interest, his neglect to make such claim for some years, and until after controversy has arisen between the parties in respect to other matters, is sufficient evidence of a waiver of any claim, which he might have had for interest.—Ib.

See Action 1; Book Account; Evidence 1, 2; Guaranty; Promissory Notes 3, 4; Sale 9; School District 1, 2.

*CORPORATION. *690

1. The pledgee of stock in a private corporation is not regarded as so far the owner of the stock, as to be entitled to notice of the meetings of the corporation.—McDaniels v. Flower Brook Manuf. Co., 274.

2. Every reasonable intendment is to be made in favor of the regularity of the proceedings of a private corporation in their corporate acts.—Ib.

3. Where the by-laws of a corporation required the meetings to be held at the counting room of the corporation, and it appeared from the records, that a meeting was held at the dwelling house of the general agent and clerk, without stating, that it was at the counting room of the corporation, and there was no other evidence in reference thereto, it was held, that the court would presume, that their counting room was, for the time being, at that place.—Ib.

4. After the Revised Statutes of this state came in force, the Flower Brook Manufacturing Co., a private corporation, at a meeting regularly held, voted, that "the agent be instructed" to execute a mortgage of the real estate of the corporation to a creditor. One William Wallace was then the general agent of the corporation and executed the deed in question in pursuance of the vote. The granting part of the deed was in these words,—"that the Flower Brook Manufacturing Co., by William Wallace, their agent, a corporation," &c. "in consideration" &c. "do give, grant" &c.; all the covenants were in the name of the corporation: the *testimonium* clause was in these words,—"in witness whereof we have hereunto set our hand and seal," &c.; and the deed was signed "William Wallace, Agent for Flower Brook Manufacturing Co." And it was held, that this sufficiently appeared to be the deed of the corporation and to be executed in the name of the corporation.—Ib.

5. And the certificate of the acknowledgment of this deed being in these words,—"Personally appeared William Wallace, agent of the Flower Brook Manufacturing Co., signer and sealer of the above written instrument, and acknowledged the same to be his free act and deed,"—it was held, that it sufficiently appeared, that the acknowledgment was made by Wallace on the part and behalf of the corporation.—Ib.

6. Under the Revised Statutes of this state it is not essential to the validity of the deed of the real estate of a corporation, that it should recite the vote of the corporation, authorizing their agent to execute the deed.—Ib.

See Rail Road; Winooski Turnpike Co.

COSTS.

1. To entitle the plaintiff, in an action of trespass *quare clausum fregit*, to recover full costs, under the statute of this state, when the costs exceed the damages, the plaintiff's right of title, or right of possession, must be brought in question upon the trial.—Powers et al. v. Leach, 226.

2. But if, from the permanent nature of the erections made by the plaintiff upon the land, it is obvious, that he committed the acts, which proved to have been a trespass upon the plaintiff's right of possession, under a claim of right of title, and the plaintiff, upon trial, prove his own title and possession, the court will *intend, that *691 the defendant required the plaintiff to prove his case upon all points,—possession, as well as fact of trespass,—and will allow the plaintiff his full costs. It makes no difference, in this respect, whether the defendant require the plaintiff to prove his own title and possession, or set up a counter claim of title, or right of possession, in himself.—Ib.

3. *Quære*, Whether the attempt, on the part of the defendant, to show license from the plaintiff to do the acts complained of, is to be regarded as bringing in question the plaintiff's right of possession. This, per Redfield, J., must depend upon the question, whether the trespass complained of was an unequivocal act of possession on the part of the defendant.—Ib.

COVENANT.

CRIMINAL LAW.

DAMAGES.

use, but has no application to a case, where a person takes and maintains possession of a few acres of land in an uncultivated township, for the mere purpose of thereby gaining a title to the entire township by possession, to the exclusion of the rightful owners.—Chandler v. Spear, 388.

5. Under the Revised Statutes of this state, if no administrator be appointed upon the estate of a deceased person, his heirs may maintain
*699 ejectment, to recover *land to which he had title, without an order of distribution being made by the probate court.—Buck et al. v. Squiers, 484.

See CONTRACT 13; HIGHWAYS 16; JURISDICTION 4, 5.

ESTOPPEL.

1. In order to estop a party from proving a fact, because the fact had been found against him in a former suit, it must appear clearly, that the precise question was adjudicated in such suit. If the record relied upon leave this in doubt, there can be no estoppel.— Aiken et al., q. t., v. Peck, 255.

See AUDITA QUERELA 1; BAIL 2; BOOK ACCOUNT 13, 14; JURISDICTION 2.

EVIDENCE.

1. Declarations made by the owner of a farm in the presence of the occupant of the farm, and during his occupancy, and assented to by the occupant, at the time, as to the terms upon which the occupant is managing the farm, may be proved by the occupant, in a suit in his favor against an attaching officer, for taking the products of the farm as the property of the owner, for the purpose of showing, that the occupant, by the contract between him and the owner, was entitled to an undivided half of the produce of the farm.—White v. Morton, 15.

2. Declarations of the owner of a farm, while the farm is in the occupancy of another person, with whom the owner labors in carrying on the farm, made in connection with some act of the owner in carrying on the farm, may be proved by the occupant of the farm, in a suit between him and another person, for the purpose of proving the contract, under which the farm was occupied.—Ib.

3. Upon the trial of an action for an assault and battery, where the defendant relies upon a prior assault by the plaintiff as a justification, the defendant will not be allowed to give in evidence the record of a conviction of the plaintiff, criminally, for such prior assault.—Robinson v. Wilson, 35.

4. Where one offered as a witness is incompetent through interest, and he executes a release of his interest to the party calling him, and the act is apparently for the advantage of the party, the law will presume his assent to it, and a delivery of the instrument to his attorney will be sufficient.—Porter et al. v. Munger, 191.

5. The original record of a judgment rendered by the supreme court is competent evidence in the county court for the purpose of proving such judgment.—Paul v. Slason et al., 231.

6. Where controversy was had between the parties, upon trial, in reference to the quality of certain wool, and a witness was called, by the defendant, to testify as to the quality of certain wool which was shown to him by a third person, in whose care the wool in question was, and it appeared, that the only knowledge, which the witness had, that the wool seen by him was the wool in controversy, was founded upon the declaration of such third person to him, that such was the fact, and no other testimony, to prove the identity, was offered, it was held, that the witness was properly excluded by the county court.—Perry v. Smith, 301.

*700 *7. The plaintiff, to prove his title to land, offered in evidence an office copy of a deed in his chain of title, which contained no appearance upon its face, that the original deed was sealed by the grantor, and it did not appear, that possession of the land had ever been taken under the deed. *Held*, that the copy was not competent evidence.—Williams v. Bass, 352.

8. The antiquity, alone, of a deed, apparently defective, is not sufficient to justify the presumption of its due execution.—Ib.

9. Neither can such presumption be raised from the fact that the deed was acknowledged and recorded,—the record showing only an imperfect deed.—Ib.

10. The plaintiff furnished money to be expended by S. in the purchase of flour, and S. was to repay the money, with interest, and to allow the plaintiff a barrel of flour for every one hundred barrels purchased; and the flour was purchased and invoiced in the name of the plaintiff and was to remain his until sold and paid for. In an action brought by the plaintiff to recover the price of the flour, when sold, S. having released to the plaintiff all claim which he had in the suit, both to the damages and costs, and the plaintiff having released to S. all claim on account of the costs and expenses in the suit, and the attorney who commenced the suit having released his lien upon the costs for his services and expenditures, it was held, that S. was thereby rendered a competent witness for the plaintiff.—Heald v. Warren, 409.

11. Parol evidence is admissible, to show that the sum, expressed in a deed to be the consideration for the conveyance, and which was received by the grantor, was in fact received by him as the consideration for the conveyance and also as payment of a debt then due to him from the grantee. —Harwood v. Estate of Harwood, 507.

12. Where a promissory note was assigned to a firm, as collateral security for a debt due to the firm from the payee, and, upon the trial of a suit instituted by the firm, in the name of the payee, upon the note, one member of the firm executed to his co-partners an assignment of all his interest in the note, or suit, and in the debt due to the firm from the payee of the note, and his co-partners thereupon released him from all liability for costs, &c., in the suit, it was held, that he was thereby rendered a competent witness on the part of the plaintiff.—Blake v. Buchanan, 548.

13. In an action, brought to recover back money paid by the plaintiff, as usury, to the defendant, upon a note signed by the plaintiff, and by several other persons as sureties for the plaintiff, one of the sureties is a competent witness for the plaintiff, notwithstanding he may have agreed to indemnify another surety against the note.—Nichols et al. v. Bellows, 581.

See ACTIONS PENAL 1; ATTORNEY 1; AUDITA QUERELA 1; BOOK ACCOUNT 11; CERTIFICATE OF MALICIOUS ACT 2-4; CONTRACT 1, 5; COVENANT 6; DEED 12, 14; FRAUD 1-3; HIGHWAYS 8; JUDGMENT 4; PARTNERSHIP 4; PAYMENT 1; SCHOOL DISTRICT 8; TAXES 7; TRESPASS 12, 15.

*EXCEPTIONS. *701

1. The statement in the bill of exceptions in an action of trover, that evidence was given tending to prove, that the plaintiff was owner of the property sued for, and that the jury were instructed that, if they believed the testimony in the case, the plaintiff was entitled to recover, and that a verdict was thereupon returned for the plaintiff, will not justify this court in assuming, that the plaintiff was owner of the goods.—Bourne v. Merritt, 429.

2. Although the goods sued for in such case are appropriate articles for use as household furniture, yet if it do not appear from the bill of exceptions, that they had ever been used by the plaintiff for such purpose, or were intended by him for such use, this court will not assume, that they were exempted from attachment and execution.—Ib.

3. Where it appears from the bill of exceptions in such case, that the plaintiff delivered the goods to a third person, to keep for the plaintiff, and at the same time informed him, that he might hold them, until he was indemnified by the plaintiff against a certain liability, and that the testimony of one witness tended to prove, that he understood, that such liability had been discharged, and that no evidence was given tending to show, that such third person ever made any claim to the property, and that the jury, under instructions that, if they

believed the testimony, the plaintiff was entitled to recover, returned a verdict for the plaintiff, this court cannot assume, that such third person had not a special property in the goods, as against the plaintiff. The question, whether, or not, such special interest existed, should have been submitted to the jury, for them to decide.—Ib.

4. The statute,—Rev. St., c. 25, sec. 37,—which requires that exceptions, taken upon the trial of any case in the county court, shall be filed with the clerk within thirty days after the rising of the court, at which the judgment was rendered, has reference only to the final judgment in the case.—Thetford v. Hubbard, 440.

See CERTIORARI 5.

EXECUTION.

1. Where one of two defendants, in an action *ex contractu*, suffers default, and judgment is rendered against the other defendant upon hearing, and he enters a review, the effect is to vacate the judgment as to both defendants, notwithstanding a separate judgment may have been entered upon the record against the defendant who was defaulted; and if execution issue upon such separate judgment, against the defendant who was defaulted, and the defendant be committed to jail and execute a jail bond, such commitment is illegal, and no action can be sustained upon the jail bond.—Downer v. Dana et al., 22.

2. The execution debtor, or those who claim under him, cannot object to the validity of the levy of the execution upon the debtor's equity of redemption in mortgaged premises, that the mortgage debt was stated, in the officer's return of the levy, at less than the true amount. The error does not operate an injury to the debtor, but to the creditor, and of this the debtor cannot complain.—Slocum v. Catlin et al., 137.

*702 *3. Each debtor in an execution is to be regarded as liable for the whole debt, *in solido;* and the officer having the execution to levy is not bound to regard any equities subsisting between the debtors themselves, or between the debtors and their other creditors.—Warren v. Edgerton, 199.

4. An officer, who is about to levy an execution upon the land of one of several execution debtors, cannot be required to regard the offer of such debtor to expose to him the personal property of his co-debtors and to indemnify him for levying the execution, for its entire amount, upon such personal property.—Ib.

5. A. purchased of B. land, which was then subject to attachment in a suit against B., C. and D., then pending, in favor of another person. Judgment having been obtained against all the defendants in that suit, the officer holding the execution demanded of B. payment of its amount. B. offered to expose to the officer personal property of C. and D., the other execution debtors, sufficient to satisfy the execution, and A. and B. offered to indemnify the officer, if he would levy upon such personal property. The officer declined to do so, but levied the execution, for its full amount, upon the land which B. had conveyed to A., and A., to redeem the land, was compelled to pay the amount due, with the officer's fees for the levy. *Held*, that A. could not maintain an action against the officer for levying the execution upon the land, or for falsely returning, that the execution debtors had neglected to expose personal property sufficient to satisfy the execution.—Ib.

6. When an execution is levied upon land, the title will become absolute in the creditor, unless the debtor, or his legal representative, tender and pay to the clerk, or justice, who issued the execution, the amount due upon the execution, with the costs of levy, within the six months allowed by the statute for redemption. It is not sufficient, that the money is tendered to the creditor personally, and not accepted by him.—Chandler v. Sawtell et al., 318.

7. Where land adjoining upon a highway was levied upon, and the second line in the description defined the eastern boundary as extending from a certain point north nineteen degrees west, three chains and seventy five links, "to the road," and the northern limit was then described as running south thirty three degrees west, "in the line of the road," three chains and fifteen links, and thence the closing line run south six degrees west, eighty two links, to the place of beginning, it was held, that the levy did not include any portion of what was then recognized as the highway.—Cole v. Haynes et al., 588.

See AMENDMENT 1; DEBT 2; EX'RS & ADM'RS 2; TROVER 1.

EXECUTORS AND ADMINISTRATORS.

1. Under the provisions of chap. 50, sec. 12 of the Revised Statutes, executors and administrators are placed upon the same ground with other suitors, as it respects their liability for costs, which may be adjudged against them.—O'Hear v. Skeeles, 152.

2. Where a creditor of an estate appealed from a decision of commissioners allowing a balance against him in favor of the estate, and in the county court he *recovered judgment *703 in his favor for damages and costs, it was held, that execution for the costs was properly issued by the county court against the administrator personally, as for his own debt.—Ib.

3. In an action of ejectment, commenced by an administrator May 9, 1849, the defendant pleaded in abatement, that the administrator had not, at the time of bringing his suit, given any administration bond; the plaintiff replied, that such bond had been given; and issue was joined. It appeared by the record of the probate court of May 8, 1849, that a decree was made on that day, that the plaintiff be appointed administrator, and that he give bond, before entering upon the duties of his appointment, and it was then recited, that it appeared to the court, that he had executed such bond, and it was then stated, that the court thereupon decreed, that he "be and hereby is appointed administrator." *Held*, that it sufficiently appeared by the record, that the administration bond was executed May 8, 1849, and that an interlineation, made in the record upon a subsequent day, that said bond was received and filed in said court May 26, 1849, was no part of the record of what was done May 8, 1849, and could have little tendency to show, that the bond was not in fact executed on that day.—Clark, Adm'r, v. Tabor, 595.

4. But it appearing by parol evidence, that the probate court, on the 8th of May, 1849, determined the amount of the bond and who should sign it, and then informed the administrator, that if the bond were executed and delivered to one S., it should have the same effect as if returned to the judge of probate, and that the bond was in fact executed and delivered to S. on the eighth of May, but not delivered to the judge of probate until the twenty sixth of May, it was held, that the bond, for all legal purposes, should be considered as executed on the eighth of May.—Ib.

See CHANCERY 4–10; JURISDICTION 2.

FENCE VIEWERS, See JURISDICTION 5.

FORFEITURE, See REVENUE LAWS OF THE UNITED STATES.

FRAUD.

1. Where land is conveyed by a deed with covenants of warranty, and a creditor of the grantor, claiming that the deed is fraudulent, causes an execution in his favor to be levied upon the land as the property of the grantor, the grantor is a competent witness for the grantee, to prove that the deed was not fraudulent, in an action of ejectment brought by the grantee against one who claims title under the levy.—Warner v. Percy, 155.

2. And when the defendant, in such case, proves, that the grantor was indebted to the execution creditor, at the time the deed was executed, and claims, that the deed was executed with the fraudulent intent to avoid that debt, it is competent for

PROBATE COURT.

1. Courts of probate, in this state, have the entire and exclusive jurisdiction of the settlement of estates, to the same extent, that jurisdiction of matters of contract, or tort, *inter vivos*, is given to the common law courts. The court of chancery has not concurrent jurisdiction, in this respect, with the probate court, and will not interfere in the settlement of estates, except to aid the jurisdiction of the probate court in those points only, wherein its functions and powers are inadequate to the purposes of perfect justice, and then in the same degree, and for the same reason, that it interferes in other cases, where the principal jurisdiction is in the courts of common law.—Heirs of Adams v. Adams et al., Adm'rs, 50.

2. Unreasonable delay, in the probate court, in proceeding with the settlement of an estate, is no ground for calling in the aid of the court of chancery.—Ib.

3. Nor will the court of chancery interfere to grant relief, where some of the parties affected by a decree of the probate court were infants, and had no proper guardians appointed, at the time the decree passed.—Ib.

4. The mere fact, that an administrator, rendering his account in the probate court, will not produce the books and papers of his intestate, and is not compelled by the probate court to do so, is no reason why the court of chancery should interfere in the settlement of the estate.—Ib.

5. But when there are claims existing between the administrator, or executor, and the estate which he represents, the court of chancery has jurisdiction to examine and adjust them, and the allowance of the claim by the commissioners will not, on account of the defect in parties at the hearing before them,—the administrator representing both debtor and creditor,—be a bar to its re-examination by the court of chancery.—Ib.

6. Claims against an administrator, for money and property of the estate, which have come into his hands during the administration, are exclusively within the jurisdiction of the probate court.—Ib.

7. The neglect of an administrator to cause an inventory and appraisal to be made of the choses in action of the intestate is of no importance in any court.—Ib.

8. The entire subject of advancement is within the jurisdiction of the probate court.—Ib.

9. Where administrators have received money as compensation for trespasses committed by a third person upon the land of the intestate, the court of chancery, to avoid all doubt, may take jurisdiction, so far as to cause an account to be taken in that court for the amount so received,—although it would seem, that this matter might be adjusted in the probate court.—Ib.

10. The commissioners have no jurisdiction of claims in behalf of the estate, except as offsets to adversary claims; and if those claims are *718 abandoned by the *claimant before final judgment, the offset cannot become the basis of a separate judgment.—Allen, Adm'r, v. Rice, 333.

11. After an appeal has been taken from the probate court, and the bond for the appeal has been filed by the appellant and approved by the court, and the appeal allowed, the probate court have not power to order or permit that bond to be cancelled and another bond to be substituted for it.—Blake et al. v. Estate of Kimball, 632.

PROCESS.

1. A deputy sheriff cannot serve process in favor of the town, of which he is a rateable inhabitant, although the sheriff, under whom he acts, is at the time an inhabitant of another town, and has no property or interest in the town in favor of which the process issues.—Lyman v. Burlington, 131.

2. But this does not apply to a citation, or order of notice, appended to a petition for a writ of *certiorari*. Service of such a notice may be made by any person.—Ib.

3. An infant, under the age of twenty one years, may receive a special deputation from the sheriff, to serve a particular writ, under chap. 11, sec. 8, of the Revised Statutes. POLAND, J., dissenting.—Barrett v. Seward, 176.

4. An infant, under the age of twenty one years, cannot be specially authorized to serve mesne process, by the magistrate signing it.—Harvey v. Hall, 211.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. By the law of this state, the obligation of the maker of a promissory note for a sum certain, payable in specific property at a day named, when payment is not made at the day, is not a liability in damages for the non-fulfillment of the contract, but a mere duty to pay money.—Perry v. Smith, 301.

2. And the amount due upon a note of this description, after the day of payment has passed without delivery of the specified property, may be recovered by the payee in an action for money had and received.—Ib.

3. An order drawn for 87,89 without any mark ($) expressing dollars, is not void, as being unintelligible. The court will intend, that the figures were used, as whole numbers and decimals, to express the currency of the United States.—Northrop v. Sanborn, 433.

4. The plaintiff drew an order upon the defendant, directing him to pay to one C. a certain sum, to be accounted for on settlement between them. The defendant, upon the order being presented to him, wrote upon it an agreement to pay to C. such sum, as should be due from him to the plaintiff after settlement. The plaintiff and defendant subsequently attempted to make a settlement, and failing to do so, the plaintiff commenced this action of book account against the defendant, before a justice of the peace, and recovered judgment, and the defendant appealed. After the appeal was taken, the defendant paid to C. the *full amount of the order, which exceeded *719 the sum which was due from him to the plaintiff. *Held*, that the defendant might recover judgment, in this action, against the plaintiff for the amount of the excess so paid.—Ib.

5. Under the Revised Statutes, chap. 13, sec. 68, a town may sell the office of first constable at auction, in open town meeting, to the highest bidder, and, after having elected the purchaser to the office, may collect from him the amount of a promissory note, given by him for the price.—Thetford v. Hubbard, 440.

6. The firm of Carter, Coolidge & Co., a partnership consisting of Carter, Coolidge & Childs, was dissolved by the death of Coolidge. Subsequently the defendants executed a promissory note, which was made payable "to the late firm of Carter, Coolidge & Co." Childs sold his interest in the note to Carter, and then Carter indorsed the note, without recourse, in the name of Carter, Coolidge & Co., to the plaintiff. *Held*, that the plaintiff thereby acquired the legal interest in the note, and might sustain an action thereon in his own name, as indorsee.—Douglass v. Hall et al., 451.

7. The indorsement of a promissory note, waiving notice, does not excuse the indorsee from de-

SALE.

1. Where a contract for the sale of property is entire, and the delivery of the property and the payment of the purchase money are concurrent acts, to be performed at the same time, neither party can maintain an action upon the contract, without averring performance, or an offer to perform, upon his part.—Jones v. Marsh, 144.

2. Where the vendor, in such case, promises to deliver the property at a specified time and place, and the vendee promises to pay for it upon delivery, these promises are dependent upon each other; the vendor is not compelled to part with his property without payment, nor the vendee to pay the money, without receiving the property. —Ib.

3. And where the vendee, in such case, has advanced a portion of the purchase money, but has not performed the residue of his contract by payment upon delivery, and the vendor has re-sold the property, and has thereby incurred a loss to a greater amount than the sum advanced by the vendee, the vendee cannot recover back the sum so advanced by him, either on a count upon the contract, not averring performance on his part, nor on a count for money had and received.—Ib.

4. If the vendor, in such case, attend, with his property, at the time and place specified, ready to deliver the same, and the vendee do not appear, for the purpose of performing his part of the contract, the vendor may, after waiting a reasonable time, re-sell the property.—Ib.

5. Where personal property is sold, upon condition that the title shall not vest in the vendee, unless he pay the price agreed upon by a specified time, the vendee has no attachable interest in the property, or its increase, until performance of the condition.—Buckmaster v. Smith, 203.

6. If, after the time for payment of the price has expired, the price not being paid, a creditor of the vendee attach the property, he cannot defeat the vendor's right to sustain an action of trover against him for the property, by tendering to him the amount, which the vendee agreed to pay, and the interest thereon.—Ib.

7. In such action of trover, brought by the vendor against the attaching creditor of the vendee, the rule of damages is the value of the property at the time of the attachment.—Ib.

8. Where the property sold, in such case, was a mare, it was held, that the vendor continued also to be the owner of the colts, brought by her, until performance of the condition.—Ib.

9. The plaintiff, March 9, 1846, bargained to purchase of the defendant a quantity of pine timber, then lying upon the bank of a river, and which the parties expected would be floated off by the overflow of the water that spring, at a specified price for each thousand feet,—the quantity to be
*723 ascertained by meas*urement to be made by certain persons agreed upon, and the plaintiff to furnish two steerage plank for each box which the timber should make, when rafted; and the plaintiff promised, that, so soon as the timber should be surveyed, he would deliver to the defendant "a promissory note of hand," signed by the plaintiff and one H., for the price of the timber and steerage plank, payable one half by the fifteenth of July, 1846, and the other half by the fifteenth of October, 1846, with interest after July 15, 1846, and to be made payable at some bank in Boston, if the defendant so desired; and it was also agreed, that, if the timber did not float, and the defendant could not put it fairly afloat, he should delay payment and interest, until he should put the timber afloat; and it was also agreed, that if any part of the timber could not, by reasonable expense, be put afloat that spring, the plaintiff should have the same time to pay for that portion, after it should be put afloat, as he was to have for that part rafted that spring, and that, if any part of the timber could not be floated in season to take to market so soon as the next autumn, on so much of said timber payment and interest should be delayed until July 15, 1847. The timber was not floated, so that it could be taken to market in 1846. And it was held, that the plaintiff was bound, by the agreement, when the price of the timber was ascertained by measurement, to execute and deliver to the defendant an absolute, negotiable note for the price of the timber, payable one half July 15, 1846, and the residue October 15, 1846, with interest after July 15, 1846, without stating therein any of the conditions, in reference to the payment, which were embraced within the original agreement.—Scott v. Morse et al., 466.

10. If the purchaser of personal property remove it from the possession of the vendee to premises occupied by a third person, by permission of the owner of the premises, it is a sufficient change of the possession of the property, as against the creditors of the vendor, although the owner of the premises, to which the property was removed, were not informed of the sale.—Bailey v. Quint, 474.

See AGENT 1; BAILMENT, 1, 2; BOOK ACCOUNT, 1; TRUSTEE PROCESS, 1, 2.

SCHOOL DISTRICT.

1. The plaintiffs proposed to sell to the defendants, who were a school district, certain land, upon which a school house was to be erected, with the restriction, that the front of the school house, when erected, should be upon a line with the front of a certain meeting house, and that no building should be erected upon the land, in front of the school house and meeting house. This proposition was made in school meeting, and the district thereupon voted to instruct their prudential committee to purchase the land. The purchase was made accordingly; and in the deed, executed by the plaintiffs to the defendants, the restriction was expressed to be, that no erections should be made upon said land between the school house and the highway. In the declaration in an action of assumpsit, brought by the plaintiffs to recover the price, which the defendants agreed to pay for the land, this restriction was expressed in the words used in the deed. *Held*, that there was no variance between the contract declared upon and that proved.—Dix et al. v. Sch. Dist. No. 2 in Wilmington, 309.

*2. At the time the proposal for the sale *724 was made to the district, the land had been unenclosed for some years, and open for the public, and one restriction, imposed by the plaintiffs in their proposal, was, that the land should be kept open. In the deed it was expressed, that the land should remain as a public common. And in the declaration the restriction was expressed as in the deed. *Held*, that this difference constituted no objection to the plaintiff's recovery,—that the deed only imposed upon the district the obligation to keep the land open, as it then was.—Ib.

3. *Held*, also, that the plaintiffs, in such suit, were properly allowed by the county court to prove the terms, upon which they so offered to sell the land to the district.—Ib.

4. And where it appeared, in such case, that the selectmen of the town, in pursuance of a vote of the district, had located the school house upon the land in question, and that the district voted "to instruct the prudential committee to purchase the land designated by the selectmen for the location of a school house,—at the price of $100," and that the prudential committee had purchased the land at the specified price, but in the deed, which was accepted by the prudential committee, certain restrictions were expressed, viz., that the district should hold the land for the purpose of erecting a school house thereon, and that the school house should be so located, that the front should be upon a line with the front of a meeting house standing near, and that no erections should be placed upon the land, between the school house and the highway, but the land should remain as a public common, it was held, that these restrictions did not defeat or impair the object of the purchase, and that the prudential committee had power to accept a deed containing such restrictions, and that the plaintiffs might recover from the district the

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