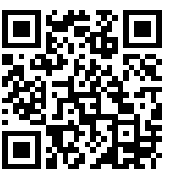

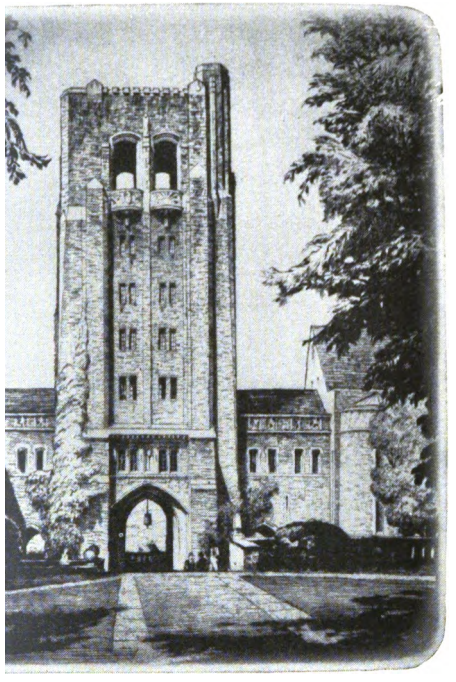

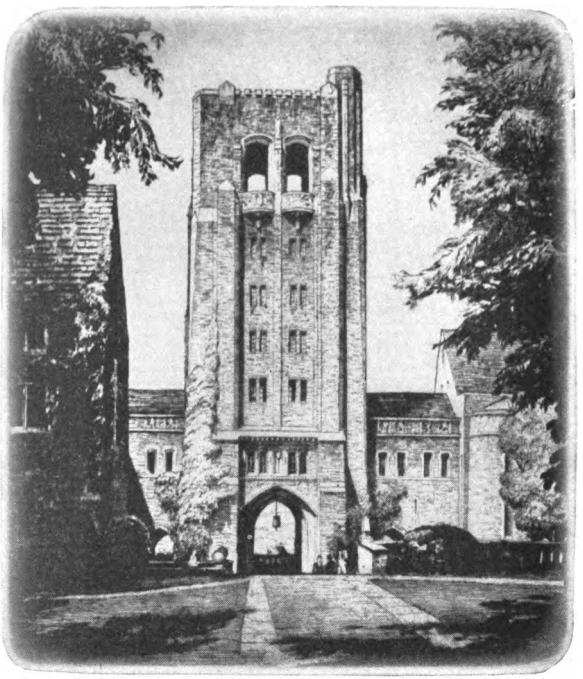

REPORTS

OF

CASES,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT;

PREPARED AND PUBLISHED

IN PURSUANCE OF A STATUTE LAW OF THE STATE.

BY THOMAS DAY.

VOLUME I.

SECOND EDITION, WITH NOTES AND REFERENCES.

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PUBLISHERS' PREFACE.

THE first edition of *Day's Reports* having long since been exhausted, the present publishers have thought that they would render an acceptable service to the profession, by publishing a new edition.—Having acquired the Copy-right to the first five volumes, they determined to increase their great original value, by the addition of notes to the principal cases; but to avoid overlaying the text with the annotations, the cases cited in the notes are taken exclusively from the later Connecticut Reports, and the Law and Equity Reports of the State of New York. The notes of the Connecticut cases, (which are distinguished by *letters*,) are by the venerable lawyer whose name the Reports bear; and those of the New York cases, (indicated by *numerals*,) are by a member of the New York bar.—These reports are of high authority, and have obtained a deserved reputation throughout the Union; and it is confidently believed, that the form in which they are now issued, will generally be deemed to enhance their value. The other volumes are in a state of forwardness, and will be speedily published.

New York, April, 1848.

REPORTER'S PREFACE.

In the origin of our government, the legislative body possessed and exercised the whole judicial power. By the gradual and regular delegation of that power, the present judiciary system has been formed.

The instrument under which the government of *Connecticut* was first organized, was a commission granted by the general court of *Massachusetts*, in *March* 1636, to *Roger Ludlow* and seven others, late freemen and members of the towns under its jurisdiction, who, with their associates, had removed to the banks of *Connecticut* river, and had there begun a plantation. The persons named in the commission were not only empowered to make, in a legislative capacity, such regulations as the peaceable and quiet ordering of the affairs of the plantation should require, but were also invested with full power and authority to hear and determine, in a judicial way, by witnesses upon oath, all those differences which might arise between party and party, and to take cognizance of misdemeanours, and punish the offenders by corporal chastisement, fine and imprisonment.(*a*) The commission was limited in its duration to one year. Within this period, the commissioners frequently assembled as a court; and from the same seats alternately promulgated laws, and dispensed, with the aid of a jury, civil and criminal justice.(*b*)

(*a*) 1 *Haz. Hist. Coll.* 321, 2. (*b*) 1 *Col. Rec.* 1 to 4.

After the commission expired, an independent government was established by the people; and the *commissioners' court* was succeeded by the *general* court. This body consisted of eight magistrates, chosen by all the freemen, and three deputies from each town or plantation; and possessed the unqualified rights of sovereignty. Their first session was at *Hartford*, on the first day of *May*, 1637. Their first public act was a declaration of offensive war against their savage neighbours, the *Pequots*.(*c*) To levy an army of ninety men; to furnish them with arms, and ammunition, and provisions; to fit out a shallop, with one or two other vessels, for a maritime expedition; and to negotiate for foreign assistance; were objects, which seem to have occupied, for a considerable period, the attention and resources of the commonwealth so far as to leave neither opportunity nor disposition for judicial controversy. In *February* 1638, however, it was ordered by the general court, that a *particular court*, should be held at *Hartford*, on the first *Tuesday* of *May*, for the trial of two persons for misdemeanors charged against them.(*d*) Thus, a tribunal subordinate to the general court was established. It consisted of an indefinite number, probably a majority at least, of the magistrates; and was afterwards held as occasion required.

By the constitution, adopted on the 14th of *January* 1639, it was provided, that there should be chosen annually, on the second *Thursday* of *April*, by all the qualified freemen, such public officers, as should be found requisite, including a governor, and at least six magistrates. The towns of *Hartford*, *Windsor*, and *Wethersfield* were severally authorized

(*c*) *Id.* 4. 1 *Trum. Hist. Conn.* 71. (*d*) 1 *Col. Rec.* 5.

to send four of their freemen, as their deputies, to every general court; and it was provided, that such other towns as should thereafter be formed and admitted into the body politic, should send as many as the court, upon the principle of apportioning the number of deputies to the number of freemen, should judge meet. There were to be, in each year, two stated sessions of the general court, one on the second *Thursday* of *April*, and the other on the second *Thursday* of *September*, to consist of the governour, or some one chosen to preside, and four other magistrates at least, with a majority of the deputies chosen. In this body the constitution vested *the supreme power of the commonwealth*, executive, legislative and judicial.(*e*)

It was not the intention of the framers of the constitution to abrogate all the existing laws and institutions. They intended only to improve what was defective, to supply what was deficient, and to render certain what was uncertain. Hence, the particular court, though not mentioned in the constitution, continued to meet, after its adoption, for the administration of justice, as it had done before. Judicial business was withdrawn from the general court, not because that high tribunal was precluded from taking cognizance of it, but because it could be dispatched in the particular court with more convenience to the public and to suitors.

At an adjourned session of the general court, in *October* 1639, the several towns under its jurisdiction were vested with the principal powers and privileges which they have since enjoyed as bodies corporate. They were also authorized to establish, within their respective limits, a *town court*, to consist of

(*e*) 1 *Col. Rec.* 220 to 224. 1 *Trum. Hist. Conn.* 523 to 535. *Append.* No. III.

three, five or seven of their chief inhabitants, chosen annually for that purpose. One of these was to be appointed moderator, and sworn. His presence was always necessary to constitute a quorum; and in case of an equi-vote, he was entitled to a casting voice. This court was to be held once in two months. Its jurisdiction was limited, as to the parties, to inhabitants of the town, and as to the causes, to matters of debt and trespass not exceeding forty shillings. From its judgment the party aggrieved might take an appeal to the particular court, provided he made application before execution was granted.(*f*)

The planters at *Poquonnock* were also authorized to choose seven men from among themselves for the trial of causes under forty shillings.(*g*) Provision was afterwards made for the establishment of a court at *New-London*, consisting of three members, with jurisdiction to the same amount.(*h*) From both of these courts an appeal lay to the particular court at *Hartford*.

During a period of several years, commencing about this time, special commissions were occasionally granted for the administration of justice in the more remote plantations.

In *May* 1642, it was resolved, that the particular court, which had thus far been held occasionally, should not be enjoined, in future, to sit oftener than once in each quarter of a year; and in *January* 1643, that court fixed upon the first *Tuesdays* of

(*f*) 1 *Col. Rec.* 30.
(*g*) *Id.* 29.
(*h*) *May* 1649. *Id.* 19, 32.

March, *June*, *September* and *December*, for its stated terms.(*i*)

In explanation of one of the articles of the constitution, it was determined by the general court, in *February* 1645, that no act of that body should pass and become a law, without the concurrence of a majority of the magistrates and a majority of the deputies present.(*j*)

At the session of the general court in *May* 1647, it became a question, what members were necessary to constitute a quorum of the particular court. Neither the articles of the constitution, nor the acts of the general court, had made any express provision on this subject. But from the requirements of the constitution with regard to the general court, an opinion prevailed, that no particular court could be held without the attendance of the governour, or deputy-governour, and at least four other magistrates. This construction was declared to be erroneous; and it was decided, that the governour, or deputy-governour, with two magistrates, had power to hold a particular court, according to law; and that in case neither the governour, nor deputy-governour, should be present, or able to sit, three magistrates, having met, and chosen one of themselves moderator, were competent to hold the court.(*k*)

The jurisdiction of the particular court extended to every subject of judicial controversy,—civil and

(*i*) 1 *Col. Rec.* 88. 94. Afterwards, whenever this court was held on one of the days appointed for its stated terms, it was called a *quarter court*; at other times, it was still called, as it ever had been, the particular court.

(*j*) 1 *Col. Rec.* 135. (*k*) *Id.* 162, 3.

criminal,—legal, equitable and prerogative. It was attended annually, and oftener if requisite, by a grand-jury, for the presentment of crimes and misdemeanors ;(*l*) and at all times, by a petit jury, for the trial of issues in fact.(*m*) In all cases, an appeal from its judgments might be taken to the general court; but in prosecutions for misdemeanors, the appellant was liable to be amerced, if in the opinion of the general court, the appeal was groundless.

Such were the judicial tribunals, and such their powers, until the union of *Connecticut* and *New Haven*, hitherto independent communities, as a colony of *Great-Britain*, under the charter of *Charles* II. This event, which took place in *May* 1665, forms a distinct and important epoch in our juridical, as well as our political history.

By the charter, the *general assembly* was substituted for the general court; to consist of a governour, a deputy-governour, twelve assistants, and such

(*l*) The first legislative provision for the attendance of a grand-jury was made in *July* 1643. At a session of the general court held at that time, an act was passed, requiring a grand-jury of twelve persons to be summoned to appear at the court in *September* annually, or as often as the governour or court should think meet, to make presentment of the breaches of any laws or orders, or any other misdemeanors, that should come to their knowledge, within the territorial jurisdiction of the government. 1 *Col. Rec.* 109. For the subsequent history of the law in relation to this subject, see the editorial notes to 1 *Stat. Conn.* tit. 83. (edit. 1808.)

(*m*) It was provided, however, that civil causes under forty shillings, should be decided by the court, without the intervention of a jury. And in other causes, the court had no inconsiderable control over the verdict. They were authorized, if they thought the jury had mistaken the evidence, to return them to a second consideration of the case; and if they still adhered to their verdict, to discharge them, and empannel another jury. They could alsoenhance or mitigate the damages at discretion. 1 *Col. Rec.* 134.

freemen, not exceeding two from a town, as the freemen of their respective towns should depute for that purpose; and to be held on the second *Thursdays* of *May* and *October*, annually.

In *October* 1665, the *court of assistants* was established; to consist of at least seven assistants; to have original cognizance of all crimes relating to life, limb or banishment; and to have appellate jurisdiction in other cases.(*n*)

At the next session of the general assembly, the colony was divided into the counties of *Hartford*, *New-Haven*, *New-London*, and *Fairfield*, and a *county court* was established in each county, to consist of three or more members, of whom one at least should be an assistant, and the others commissioners, afterwards called justices of the peace.(*o*) As those courts superseded the particular court, the probate of wills, the granting of administration, and the prerogative powers generally, which appertained to the latter court, were transferred to them.(*p*)

In *May* 1669, *a court for the trial of small causes* was established, or, more properly, perhaps, re-organized, in each town, to consist of an assistant, or a commissioner, with two at least of the selectmen.(*q*)

At the revision of the statutes in 1672, the organization, powers and duties of the several courts were more fully and precisely specified. Among the peculiar powers of the general assembly was that of granting reprieve in criminal cases. With regard to the court of assistants, it was provided, that that tri-

(*n*) 2 *Col. Rec.* 219.
(*o*) *Id.* 224, 5.
(*p*) 2 *Col. Rec.* 228.
(*q*) *Id.* 272.

bunal should consist of the governour, or deputy-governour, and at least six assistants. To the subjects of their exclusive jurisdiction was added that of divorce. The several county courts were empowered to hear and determine, by a jury or otherwise, according to law, all other causes, civil and criminal.(*r*) Any one assistant was empowered to hear and determine, without a jury, according to law, all causes arising in the county wherein he lived, wherein the debt or damage demanded by the plaintiff did not exceed forty shillings; and in those towns which were not distinguished by the residence of an assistant, the like power was committed to a commissioner and two select-men.(*s*) An appeal was allowed from the judgment of any inferior court assistant or commissioner, to the next county court, in the same county; from the judgment of a county court, to the next court of assistants; and from the court of assistants, to the general assembly; the appellant in each case, being required to give good security for the prosecution of his appeal.(*t*)

On the 31st of *October* 1687, the government of the colony was assumed by Sir *Edmund Andross*, in consequence of which the laws were suspended, and the functions of the courts of justice interrupted; but on the re-establishment of the government, by the freemen, in *May* 1689, those laws and courts were declared to have the same force, and to be invested with the same powers, as they had before.(*u*)

Anterior to *May* 1699, the deputies from the several towns had always met for the transaction of business in the same apartment with the governour

(*r*) *Stat. Col. Conn.* 17, 18. edit. 1672. (*s*) *Id.* 13.
(*t*) *Stat. Col. Conn.* 3, 4. edit. 1762.
(*u*) 3 *Col. Rec.* 201, 2. 1 *Trum. Hist. Conn.* 391. 396.

and council. By an act passed at the close of the preceding session, the general assembly was divided into two houses. The first was to consist of the governour, or, in his absence, the deputy-governour, and the assistants, to be called the *upper house;* the other was to consist of the deputies legally returned from the several towns, to be called the *lower house.* In the former, the presiding officer was to be, as previously in the whole assembly, the governour, or deputy-governour; in the latter, a speaker chosen from among themselves. Each house was empowered to appoint such officers, and to adopt such rules, as it should judge necessary for its own regulation; but no law could be passed or repealed, nor could any other act of the general assembly be done, without the concurrence of both houses.(*v*)

It was soon afterwards provided, that the semi-annual sessions of the general assembly, and of the court of assistants, in *October*, should, in future, be held at *New-Haven.*(*w*)

By an act of the general assembly in *October* 1681, the court of assistants was invested with the powers of a court of admiralty.(*x*)

In several instances, the general assembly had designated, by special resolve, the individuals of whom the court of assistants to be held next afterwards, should consist. In *May* 1703, a general law

(*v*) 3 *Col. Rec.* 323.

(*w*) *May* 1701. 3 *Col. Rec.* 361. The time appointed by law for holding the court of assistants, both at *Hartford* and *New-Haven*, was one week before the sitting of the general assembly. The ordinary business of that court in a year, could not, therefore, have occupied more than two weeks. *Id.* 342. 361.

(*x*) 3 *Col. Rec.* 132.

was passed, providing that the assistants who were to attend the court, should, from time to time, be appointed by the general assembly; that the court should ordinarily consist of seven members, five of whom should be sufficient to constitute a quorum; and that in the absence of the presiding judge, at that time selected by the general assembly, the senior assistant should preside.(*y*) This law, however, was of short duration; for in *May* 1704, it was enacted, that the governour, or deputy-governour, with six of the assistants, should have power to hold the court, at its stated terms; and that in the absence of the governour and deputy-governour, any seven of the assistants convened, the eldest presiding, should have the same power.(*z*) The court was seldom held afterwards without the attendance of more than seven members.(*a*)

By an act passed in *May* 1697, the right of review in civil actions brought by appeal from the county courts to the courts of assistants, was limited in its exercise to one instance; and in those actions the right of appeal to the general assembly was taken away.(*b*)

About this period a considerable change was effected in the organization of the county courts. In *January* 1698, it was provided, that in each county at least four of the most able and judicious freemen should be appointed justices of the peace, three *of whom* [*quorum*] with a judge appointed by the general assembly, should have power to hold the court.(*c*) Shortly afterwards, three justices of the quorum were empowered, in the absence of the judge to

(*y*) *Id.* 411. (*z*) *Id.* 463.
(*a*) See the 2d vol. of records of the court of assistants.
(*b*) 3 *Col. Rec.* 280. (*c*) 3 *Col. Rec.* 295.

hold the court.(*d*) The judge and justices of the quorum were appointed, at first, during the pleasure of the general assembly; but afterwards, with the exception of a period of about three years,(*e*) they were appointed and commissioned annually. To this court exclusively was committed the superintendance of the persons and estates of idiots and lunatics.(*f*) This was also the forum, to which alone applications for new highways, or for the alteration of old ones, extending beyond the limits of a single town, were to be made.(*g*)

Among the various subjects cognizable by the former county courts, there was one important class, which it was not thought advisable to transfer to their successors. In each county a distinct forum was established, consisting of the judge of the county court and two justices of the quorum, or, in the absence of the former, three justices of the quorum for the probate of wills, the granting of administration, and the appointing and allowing of guardians, with full power to act in all matters proper for a prerogative court. This was the origin of our *courts of probate*. Any person aggrieved by their determination had a right of appeal to the court of assistants.(*h*)

In *May* 1711, the court of assistants was superseded by a new tribunal, styled the *superior court*, consisting of one chief judge and four other judges, to be annually designated, or appointed, by the general assembly; having cognizance of all pleas of

(*d*) *Id.* 315.
(*e*) From 1711 to 1714. See 4 *Col. Rec.* 161. 277, 8.
(*f*) *May* 1699. 3 *Col. Rec.* 325, 6.
(*g*) *October* 1699. *Id.* 343, 4.
(*h*) *October* 1698. 3 *Col. Rec.* 315, 6.

the crown, and matters relating to the conservation of the peace, and the punishment of offenders, as well as of all pleas in civil causes, whether real, personal or mixed, brought before them by appeal, review, writ of error, or otherwise, according to law; and to hold two sessions in a year, at stated times, in each of the counties. The chief judge first designated was the governour, or, in his absence, the deputy-governour; and the other judges first appointed were four distinguished members of the council.(*i*) This precedent was generally followed in future appointments, except that the deputy-governour alone was constituted chief judge.(*j*)

The next change in our judiciary worthy of notice, in this place regarded the courts of probate. In *May* 1716, it was provided, that they should be held for the year ensuing, by one judge, with a clerk. A similar act was passed in *May* 1717, 1718 and 1719; in *May* 1720, it was limited to two years; and in *October* 1722, it was revived, and made perpetual. In matters of difficulty, the judge was authorized to call in the aid of two or three justices of the quorum.(*k*) The first probate districts less than a county were established in *October* 1719.(*l*)

The general assembly being the dernier resort in all matters of law, as well as a court of chancery, with original and unlimited jurisdiction, the judicial business brought before it, had, at this period of our history, increased to such a degree as to interfere with its legislative duties. To remedy this evil, it was, in the first place, provided, that no original petition should be preferred, wherein the matter in con-

(*i*) 4 *Col. Rec.* 158 to 160.
(*j*) See the list of judges subjoined.
(*k*) 5 *Col. Rec.* 46. 81. 120. 165. 219. 340.
(*l*) *Id.* 181. 183.

troversy did not exceed in value fifty pounds;(*m*) and, in the next place, a board of commissioners was established, consisting of ten members, of whom not less than seven could make a quorum, for the trial of writs of error.(*n*) These acts expired, by their own limitation, at the end of two years; and it does not appear that they were afterwards revived.(*o*)

The legislature now began to limit the right of appeal and review in actions before the county courts,(*p*) and before single ministers of justice.(*q*) The next step was to take away the right of review upon judgments in error;(*r*) then upon judgments accepting a report of auditors;(*s*) and finally, to abolish the practice in all cases.(*t*)

As a substitute for reviews, the general assembly delegated to the superior and county courts the power of granting new trials, in causes brought before them respectively, for mispleading, for the discovery of new evidence, or for other reasonable cause.(*u*)

In 1770, there was again an excessive accumula-

(*m*) *May* 1718. 5 *Col. Rec.* 116, 117.

(*n*) *October*, 1719. *Id.* 191, 2, 3.

(*o*) In *May*, 1724, however, the petitions in equity and writs of error, which were then pending, were referred to a committee of eight members, with power to hear and determine them, and to cause their judgments to be effectually executed. 5 *Col. Rec.* 417.

(*p*) *October* 1725. 5 *Col. Rec.* 499. *May* 1726. *Id.* 525. *October* 1728. *Id.* 633, 4. *May* 1737. 6 *Col. Rec.* 293.

(*q*) *May* 1717. 5 *Col. Rec.* 86. *October* 1725. *Id.* 499. *October* 1736. 6 *Col. Rec.* 267. *May* 1737. *Id.* 293. See 1 *Stat. Conn.* 35. n. 15. (edit. 1808.)

(*r*) *October* 1738. 6 *Col. Rec.* 381. made perpetual, *October* 1743. 7 *Col. Rec.* 220.

(*s*) *May* 1762. 9 *Col. Rec.* 452.

(*t*) *October* 1762. *Id.* 516. (*u*) *Ibid.*

tion of judicial business in the docket of the general assembly, consisting principally of applications for relief in equity; and another attempt was made to remedy the evil, by requiring the parties to submit their causes upon written pleas and exhibits, and by referring them, at discretion, to committees authorized to find and report the facts.(*v*) After three years experience, it was found that the beneficial results expected from these provisions had not been produced. They were, therefore repealed;(*w*) and a new measure, of a different character, was adopted. This was the delegation to the superior court and the county courts, exclusive jurisdiction of all suits for relief in equity wherein the matter in demand was within certain specified sums.(*x*) The sum at first assigned to separate the equitable jurisdiction of the superior court from that remaining in the general assembly, (otherwise than by writ of error,) was one hundred pounds. It was shortly afterwards raised to four hundred pounds;(*y*) and in *October* 1778, to eight hundred.(*z*) At the revision of the statutes in 1784, the general assembly divested itself of all original jurisdiction of suits in equity wherein the matter in controversy did not exceed sixteen hundred pounds; and beyond that sum it held concurrent jurisdiction with the superior court.(*a*) The boundary between the equitable jurisdiction of the superior court and that of the county courts, which was at first stated at twenty pounds, was also removed, at

(*v*) *May* 1770. 10 *Col. Rec.* 494. *October* 1770. *Id.* 530.

(*w*) *May* 1773. 11 *Col. Rec.* 200.

(*x*) *May* 1773. 11 *Col. Rec.* 200. and *October* 1774. *Id.* 373. being temporary acts; made perpetual, *October* 1778. 1 *State Rec.* 9, 10.

(*y*) *October*, 1774. 11 *Col. Rec.* 373.

(*z*) *State Rec. Oct. Sess.* 1778. *p.* 9, 10.

(*a*) See 1 *Stat. Conn. tit.* 128. *c.* 1. *s.* 6. *n.* 4. and *tit.* 42. *c.* 1. *s.* 25. *n.* 28.

different times, from point to point, until it was fixed, in *January* 1784, at one hundred pounds.(*b*)

Other and no less important changes soon succeeded.

The long continued practice of uniting legislative and judicial functions in the same individual, was inconsistent with the sound principles of civil polity, which prevailed at the close of the revolutionary war. An act was accordingly passed, in *May* 1784, by which the office of judge of the superior court was declared to be incompatible with a seat in the legislature of this state, or of the *United States*.(*c*)

In accordance with the same enlightened views, it was, at the same time, provided, that the judges of the superior court should thereafter hold their offices during the pleasure of the general assembly.(*d*) It is necessary, however, to observe, that this important provision had no practical effect. The legislature still continued to appoint the judges annually; and in *May* 1794, the clause alluded to was repealed.(*e*) Its restoration has been recently recommended by high authority, and urged by considerations of great moment;(*f*) and a hope may be reasonably indulged, that the period is not distant, when it shall stand as an effective guard to the sanctuary of justice.

By another section of the act of *May* 1784, the

(*b*) See the acts of *May* 1773. *October* 1774. and *October* 1778 *ubi sup.* also 1 *Stat. Conn. tit.* 42. *c.* 1. *s.* 43. *n.* 39.

(*c*) 3 *State Rec. May Sess.* 1784. *p.* 9.

(*d*) *Ibid.* (*e*) 5 *State Rec. May Sess.* 1794. *p.* 12.

(*f*) See governour *Wolcott's* speech to the legislature, *May* Session, 1817.

general assembly yielded to a more appropriate forum its cognizance of writs of error. It was enacted, that the lieutenant-governour and council should constitute *the supreme court of errors*, and should be the dernier resort in all matters of law and equity, brought, by way of error, from the judgment or decree of the superior court.(*g*) In *October* 1793, the governour was added to the court, and made the presiding judge.(*h*) Before the accession of the governour, the presence of seven members, and afterwards, of eight, was necessary to form a quorum.

In *January* and *May* 1784, the cities of *Hartford*, *New-Haven*, *New-London*, *Norwich* and *Middletown* were incorporated; in each of which a *city court* was established, consisting of the mayor and two senior aldermen, to be held monthly, and to have cognizance of all civil causes wherein the title of land is not concerned, by law cognizable by the county courts, provided the cause of action arise, and at least one of the parties live, within the limits of the city.(*i*)

From the progressive increase of the population, wealth and commerce of the state; from the numberless sources of litigation in the diversified rights and relations of an advanced state of society; and from some other incidental causes; the docket of the superior court, in the beginning of the present century, had become over-loaded. To prevent an unreasonable delay of justice, and consequent expense, to the parties, and, at the same time, to afford opportunity for deliberate decision to the court, it was pro-

(*g*) 3 *State Rec. May Sess.* 1784. *p.* 9.
(*h*) 5 *State Rec. Oct. Sess.* 1793. *p.* 6.
(*i*) *See* 1 *Stat. Conn. tit.* Cities. *in loc.*

vided, that in future, the court should consist of six members; that there should be annually two sessions in each county, one in the winter, the other in the summer; that the winter sessions should be divided into two circuits, each comprising four counties, to be held by three judges, and appropriated to the trial of issues in fact; and that the summer sessions should be held by all the judges, and appropriated to the decision of questions of law and equity, arising either on demurrer, on special verdicts, writs of error, petitions for new trial, or cases reserved.(*j*) The winter sessions being so arranged as to be held in both circuits at the same time, they might, without inconvenience, be sufficiently extended to dispatch the accumulated business.

Though the principal object of this modification of the superior court, was, in a good degree, attained; it was soon perceived, that our judiciary system had other defects, which required the interposition of the legislature.

The advantages expected to result from the excision of the popular branch from the ancient court of dernier resort, had been fully realized in the experience of twenty years. It was still a subject of just complaint, that the members of the court were elected with reference to their qualifications as legislators, rather than as judges; and though it was sometimes adorned with eminent jurists, its decisions were liable to be controled by men, whose education and mental habits had better fitted them for a different employment. Besides, the principle requiring an entire separation of legislative and judicial

(*j*) 6 *State Rec. Oct. Sess.* 1801. *p.* 13, limited to three years; continued two years longer, 7 *State Rec. May Sess.* 1804. *p.* 37.

functions, which had been wisely adopted in relation to another tribunal, was applicable here also. From these considerations, with others of a less general nature, an act was passed in *May* 1806,(*k*) by which the judicial power of the governour and council was transferred to the judges of the superior court; who were, thereafter, to constitute the supreme court of errors, and, in that capacity, to hold stated terms at *Hartford* and *New-Haven* alternately.(*l*) The number of the judges, was, at the same time, augmented from six to nine.

With reference to the business of the superior court, the state was divided into three circuits, two consisting of three counties each, and the other of two counties. It was then made the duty of the judges to allot three of their number to each circuit; in whom the law vested all the powers of the superior court; and by whom two sessions were to be held annually, in each county.

The supreme court of errors, however constituted, has, strictly, cognizance only of writs of error from an inferior tribunal; and accordingly, the usual mode of revising the decision of the superior court upon a point of law arising in the progress of a trial, had been, for a long time, by filing a bill of exceptions, and bringing a writ of error. But experience had shewn, that this mode was attended with many inconveniences, and sometimes rather defeated than promoted the attainment of justice. A rule was therefore adopted, at a meeting of the judges in

(*k*) 1 *Stat. Conn. tit.* 42. *c.* 14.

(*l*) By the act last referred to (*sec.* 6.) this court was to be held annually in the month of *June*. By an act passed in *May* 1811, it is to be held semi-annually, in the months of *June* and *November*. See 2 *Stat. Conn. May Sess.* 1811. *c.* 6.

May 1807, declaring that bills of exceptions should not thereafter be admitted, but that motions for new trials should, in all cases, be substituted for them.(*m*)

It was, moreover, the practice of our courts, and had been from an early period, in committing a cause to the jury, to state the points in controversy, and recapitulate, with great exactness and impartiality, the evidence, with the arguments of counsel, on both sides, without expressing their own opinion upon the questions of law; and the jury had the power of ultimately deciding such questions, without control, and without revision.(*n*) To remedy this evil, a rule was adopted requiring the presiding judge, in charging the jury, to declare to them the opinion of the court on the points of law arising in the case.(*o*) This opened the way for the party aggrieved to move for a new trial on the ground of a misdirection.

If the questions embraced by such motions are of sufficient importance, the courts in the several circuits before whom they are pending will reserve them for the consideration of the nine judges. Questions of law arising in any form, and appearing from the files, or from written documents, in causes before the superior court in the circuits, may also be referred, at the discretion of the court, or by consent of parties, to the nine judges for their advice. These cases are then argued, by counsel, at one of the stated terms of the supreme court of errors; and the opinion of the judges, though given in the form of advice, will govern the superior court at the following sessions in the circuits from which the cases were

(*m*) 3 *Day's Ca.* 29.
(*n*) *Swift's Evid.* 169.
(*o*) *Id.* 170. 3 *Day's Ca.* 28.

brought, and will be regarded, generally, as the highest evidence of the law of the land. In this way, a considerable portion of every term is occupied in hearing and determining motions for new trials, and cases reserved.

Such have been the origin and progress, and such is the present state, of our judicial establishment. In its various modifications, it has been wisely adapted to the condition of those who were to enjoy its protection. If its gradations have been numerous, they have also been easy. Seldom has any advance been made, until the experience of a temporary act had explored the way, and found it safe. Its operations have been salutary and efficient. In no community has judicial power commanded more respect from those who have beheld its exercise, or more prompt obedience from those who have felt it.

But though the science of jurisprudence has not been cultivated here without success, it has been involved in some obscurity and uncertainty from want of regular and authentic histories of the determinations of our courts. We have, unquestionably, a common law of our own. Its basis is the common law of *England;* but the superstructure has been modified, with laudable caution, to suit our peculiar circumstances. To distinguish what was applicable and to be adopted, from what was inapplicable and to be rejected, was a work to be accomplished at various times, as opportunities for decision should occur. To attain and preserve any degree of symmetry, or even consistency, in the system, it was necessary to keep in view the component parts. How ill fitted for this purpose was oral tradition! Yet thirty years have hardly elapsed since the first at-

tempt was made to collect and publish our judicial decisions.

It was among the liberal designs which distinguished the legislature of *May* 1784, to lay the foundation of a more perfect and permanent system of common law in this state, by requiring the judges of the supreme court of errors, and of the superior court, to give in writing the reasons of their decisions upon points of law, and lodge them with their respective clerks, with a view, as the statute expressly declares, that the cases might be *fully reported*.(*p*) As it was left to individual enterprise to carry this important object into effect; and as the undertaking would be attended with considerable expense, and interruption of other business, without any prospect of private advantage; no professional gentleman, for the period of a few years, appeared willing to make the requisite sacrifice. The late Mr. *Kirby*, who had been in the habit of taking notes for his own use, was at length prevailed upon to extend his views ;(*q*) and in 1789, he presented to the public a volume of reports, comprising the cases adjudged in the superior court from the year 1785 to *May* 1788, with some determinations in the supreme court of errors.

This work was well received by the profession, at home and abroad. *Connecticut* derives from it the honour of having set an example to her sister states, which it had been their just pride, and their high ad-

(*p*) See the act entitled "An act establishing the wages of the judges of the superior court," 3 *State Rec. May Sess.* 1784. *p.* 9. Since the present organization of the supreme court of errors, acts have been passed requiring each of the judges to give his reasons publicly, at the time of pronouncing judgment. 2 *Stat. Conn. October Session* 1809. *c.* 5. and *May Session* 1815. *c.* 1.

(*q*) See the *Preface* to *Kirby's Reports*, *p.* iv.

vantage to follow.(*r*) Our legislature, at once evinced their approbation of the undertaking, and gave a pledge of support to future exertion, by purchasing three hundred and fifty copies for distribution to the several towns.(*s*)

In 1798, Judge *Root* published a volume of reports, consisting principally of the decisions of the superior court, in which he at that time presided, from *July* 1789 to *June* 1793; but including also some decisions of the supreme court of errors during the same period, and a collection of earlier cases. This was succeeded, in 1802, by a second volume, from the same hand, containing the cases determined in both courts from *June* 1793 to *January* 1798.

The next attempt to serve the public in this way, was by the writer of these remarks. He confined his labours to cases decided in the dernier resort. The point of time which he selected for the commencement of his annals, was the accession to the court of a jurist, who had previously filled, with honour to the nation as well as to himself, the highest judicial station in our country. He continued his efforts until he had produced five volumes of reports, comprising the decisions of twelve years. During a suspension rendered necessary by the want of adequate encouragement, the legislature passed an act, authorizing the supreme court of errors to appoint a

(*r*) In Professor *Hoffman's* "Course of Legal Study," a valuable work lately published, the learned author has, through inadvertence, awarded this honour to another state. He observes, that "We had no reports until *Pennsylvania* set the example, in the year 1790, in the reports of *Alexander James Dallas*, Esq." *Page* 147. Mr. *Kirby* prepared his work for the press in 1788, and published it in 1789.

(*s*) 4 *State Rec. May Sess.* 1788. *p.* 53.

reporter of their decisions, and providing a moderate compensation for his services.(*t*) Under this authority, the writer, at the next term of the court, had the honour of the appointment. He immediately entered upon the duties of his office, and now offers to the public the following pages as the first-fruits of his official labours.

In the plan of the work he has endeavoured to follow the most approved models. The statements of the cases have been made from a careful inspection of the record; and the opinions of the judges have been transcribed from their notes. In exhibiting the arguments of counsel, he has aimed at distinctness and conciseness. He has sometimes stated only the points and authorities; and sometimes he has contented himself, especially where all the considerations urged are reviewed by the court, with mentioning the names of the counsel. In the marginal abstracts, he has studied perspicuity and precision; in the index, copiousness and systematic arrangement. The whole he submits, without anxiety, but not with "frigid indifference," to the judgment of a liberal profession.

Hartford, July 6th., 1817.

Thus far had the history of the judicial department of our government been concisely traced, when the first edition of this volume of reports was published. It was not long before an important

(*t*) 2 *Stat. Conn. May Session* 1814. *c.* 25. The duration of this act was at first limited to four years; at the end of which period, *viz.* in *May* 1818, it was revived and continued in force indefinitely. *Stat.* 308. *c.* 25.

change was effected in the tenure by which the judges were to hold their offices. Gov. WOLCOTT had forcibly recommended the revival of the legislative act of 1784, declaring, that the judges of the Superior Court should hold their offices during the pleasure of the General Assembly; but it was obvious, that such an act would not bind a future legislature; and it might soon be disregarded and repealed, as it had been before. The object was more effectually accomplished, and more permanently secured, by incorporating into the constitution of the State, which was adopted a short time afterwards, a provision, declaring, that the judges of the Supreme Court and of the Superior Court should hold their offices during good behavior, subject to removal, however, by impeachment, and also by the Governor, on the *address* of two thirds of the members of each house of the General Assembly. By the same instrument, the judges were made incapable of holding their offices after having arrived at the age of seventy years. *Art.* 5.

By an act of the General Assembly, passed in *October* 1818, it was provided, that after the 1st day of *June* following, the Superior Court should consist of one chief judge, and four assistant judges, to be appointed for that purpose; that these judges should constitute the Supreme Court of Errors; and that it should be their duty, from time to time, to allot to each, the county or counties in which he should hold a Superior Court. *Stat.* 311. *Oct. Sess.* 1818. *c.* 1. A new Supreme Court consisting of five judges, and a new Superior Court, consisting ordinarily of one judge, were thus constituted; and the former division of the State into distinct circuits for holding the latter court, was broken up. At the suc-

ceeding session of the legislature in 1819, it was enacted, that in all trials before the Superior Court, where the punishment, in case of conviction, is death, that court should consist of at least two judges, *viz.* the judge assigned to hold the court in that place, with the assistance of one or more of the other judges. *Stat.* 33. *Sess.* 1819. *c.* 1. By the same act it was provided, that there should be held annually, a term of the Supreme Court of Errors, in each county in the State. Such is the present organization of the Supreme Court of Errors, and of the Superior Court of this State.

The decisions reported in the first and second volumes of Connecticut Reports, were made under the former organization; those reported in the subsequent volumes, under the latter.

Since the first edition of the first volume of these reports, a period of more than thirty years has elapsed, and through the mercy of a benignant Providence, supported by the unvarying favor of the Court, and encouraged by the approbation of his professional brethren, he, who prepared that volume for publication, is still engaged in similar labours. During this period, what changes has he witnessed, on the bench and at the bar? At its commencement, REEVE, pre-eminent as a jurist, and greatly beloved for his private virtues, was at the head of the Court. His pupils in the law school, have since been his successors, in the highest seat on the bench. Of his judicial associates, one only survives—the friend and class-mate of Chancellor KENT—exhibiting a rare specimen of the *mens sana in corpore sano.* Of the five judges who composed the court, on its re-organization under the constitution, not one remains. All the present members of the court, are the re-

porter's juniors in age, though far in advance of him, in learning and talents. At the bar, the period referred to, has wrought changes not less striking. There too, one generation has passed away, and another taken its place. Though a grey-haired veteran, who was in practice at the commencement of these reports, now and then comes into Court, yet he comes rather to see how the young men of these times acquit themselves in contests which once fired his own breast, than to take any part in them himself.

In this edition, some errors, chiefly typographical, are corrected, and a few notes are inserted, containing references to the decisions upon the same or similar points.

Hartford, January, 1848.

LIST OF THE

JUDGES

OF THE SUPERIOR COURT

IN

CONNECTICUT.

ACCESSUS.			EXITUS.
May	1711	GURDON SALTONSTALL, Governor, Ch. J. (or in his absence, NATHAN GOLD, Deputy-Governor,)	1712
,,	,,	WILLIAM PITKIN,	1713
,,	,,	RICHARD CHRISTOPHERS,	1721
,,	,,	PETER BURR,	1717
,,	,,	SAMUEL EELLS,	1740
,,	1712	NATHAN GOLD, Ch. J.	1713
,,	1713	WILLIAM PITKIN, Ch. J.	1714
,,	,,	JOHN HAYNES,	"
,,	1714	NATHAN GOLD, Ch. J.	1723
,,	,,	WILLIAM PITKIN,	1715
,,	1715	JONATHAN LAW,	1716
,,	1716	JOHN HAMLIN,	1722
,,	1717	JONATHAN LAW,	1725
,,	1721	JOSEPH TALCOTT,	1722
,,	1722	NATHAN GOLD, Ch. J.	1723
,,	"	PETER BURR,	,,
,,	1723	PETER BURR, Ch. J.	1725
,,	,,	MATTHEW ALLYN,	1732
,,	,,	JOHN HOOKER,	,,
,,	1725	JONATHAN LAW, Ch. J.	1741
,,	,,	JAMES WADSWORTH,	1752
,,	1732	ROGER WOLCOTT,	1741
,,	,,	JOSEPH WHITING,	1745
,,	1740	ELISHA WILLIAMS,	1743
Oct.	1741	ROGER WOLCOTT, Ch. J.	1750
,,	,,	WILLIAM PITKIN,	1754
May	1743	EBENEZER SILLIMAN,	1766
,,	1745	JOHN BULKLEY,	1753
Nov.	1750	THOMAS FITCH, Ch. J.	1754
May	1752	SAMUEL LYNDE,	1755
Oct.	1753	DANIEL EDWARDS,	1754
May	1754	WILLIAM PITKIN, Ch. J.	1766

ACCESSUS.			EXITUS.
May	1754	ROGER WOLCOTT, Jun.	1759
,,	,,	JOSEPH FOWLER,	1760
,,	1756	DANIEL EDWARDS,	1765
Oct.	1759	BENJAMIN HALL,	1766
May	1760	ROBERT WALKER,	1772
Oct.	1765	MATTHEW GRISWOLD,	1769
May	1766	JONATHAN TRUMBULL, Ch. J.	,,
,,	,,	ELIPHALET DYER,	1789
,,	,,	ROGER SHERMAN,	,,
Oct.	1769	MATTHEW GRISWOLD, Ch. J.	1784
,,	,,	WILLIAM PITKIN,	1789
,,	1772	WILLIAM SAMUEL JOHNSON,	1774
May	1774	SAMUEL HUNTINGTON,	1784
,,	1784	SAMUEL HUNTINGTON, Ch. J.	1785
,,	,,	RICHARD LAW,	,,
,,	1785	RICHARD LAW, Ch. J.	1789
,,	,,	OLIVER ELLSWORTH,	,,
,,	1789	ANDREW ADAMS,	1793
,,	,,	JESSE ROOT,	1798
,,	,,	CHARLES CHAUNCEY,	1793
Oct.	,,	ELIPHALET DYER, Ch. J.	,,
,,	,,	ERASTUS WOLCOTT,	1792
,,	1792	JONATHAN STURGES,	1805
May	1793	ANDREW ADAMS, Ch. J.	1797
,,	,,	BENJAMIN HUNTINGTON,	1798
,,	,,	ASHER MILLER,	1795
Oct.	1795	STEPHEN MIX MITCHELL,	1807
May	1798	JESSE ROOT, Ch. J.	,,
,,	,,	JONATHAN INGERSOLL,	1801
,,	,,	TAPPING REEVE,	1814
Oct.	1801	ZEPHANIAH SWIFT,	1815
,,	,,	JOHN TRUMBULL,	
,,	1805	WILLIAM EDMOND,	
Oct.	1806	NATHANIEL SMITH,	
,,	,,	JEREMIAH GATES BRAINARD,	1829
,,	,,	SIMEON BALDWIN,	1818
May	1807	STEPHEN MIX MITCHELL, Ch. J.	1814
,,	,,	ROGER GRISWOLD,	1809
Oct.	1809	JOHN COTTON SMITH,	1811
May	1811	JONATHAN INGERSOLL,	1816
,,	1814	TAPPING REEVE, Ch. J.	1815
,,	1815	ZEPHANIAH SWIFT, Ch. J.	
,,	,,	CALVIN GODDARD,	1818
,,	,,	STEPHEN TITUS HOSMER, Ch. J.	
(1)	1816	JAMES GOULD,	
	1818	JOHN THOMPSON PETERS	1834
	1818	ASA CHAPMAN,	1825

(1) The list of Judges terminated at this date, in the first edition of this volume. It is continued in this edition, down to the present time.

ACCESSUS.		EXITUS.
1819	STEPHEN TITUS HOSMER,	1833
(2)1819	WILLIAM BRISTOL,	1826
1826	JAMES LANMAN,	1829
1826	DAVID DAGGETT,	
1829	CLARK BISSELL,	1839
1833	DAVID DAGGETT, Ch. J.	1834
1833	SAMUEL CHURCH,	
1834	THOMAS SCOTT WILLIAMS, Ch. J.	
1834	JABEZ WILLIAMS HUNTINGTON,	1840
1834	HENRY MATSON WAIT,	
1839	ROGER MINOT SHERMAN,	1842
1840	WILLIAM LUCIUS STORRS,	
1842	JOEL HINMAN,	

(2) At this date, all the judges received commissions, to hold their offices during good behaviour, pursuant to the Constitution of the State.

JUDGES

OF THE

SUPREME COURT OF ERRORS,

DURING THE PERIOD OF THIS VOLUME OF REPORTS.

Hon. TAPPING REEVE, Ch. J.(*a*)
ZEPHANIAH SWIFT, Ch. J.(*b*)
JOHN TRUMBULL,
WILLIAM EDMOND,
NATHANIEL SMITH,
JEREMIAH GATES BRAINARD,
SIMEON BALDWIN,
JONATHAN INGERSOLL,(*c*)
CALVIN GODDARD,
STEPHEN TITUS HOSMER,
JAMES GOULD.(*d*)

(*a*) By an act passed by the General Assembly at its session in *May* 1811, it was declared, that after the rising of that body in *May* 1812, no person should be appointed, by the legislature, to any civil office, who should have arrived to the age of seventy years, that of justice of the peace excepted. *Stat.* 63, 4. *May Sess.* 1811. *c.* 17.

During the session of the General Assembly in *May* 1814, the following communication from the Hon. STEPHEN M. MITCHELL, late Chief Judge, was received, by His Excellency, Governour *Smith*, and was by him communicated to both Houses:

"*Wethersfield*, *May* 13th 1814.

"SIR,

"I conceive it my duty to inform the Honourable Legislature of the State, that "I have arrived at the period of life, which by law renders me ineligible to a seat on the "bench of the Superior Court.

"In thus taking leave of public life, I would express my warmest gratitude to the Legis- "lature, for the public confidence heretofore reposed in me, and my wishes for the welfare "and prosperity of the State; and am,

"With every sentiment of esteem and respect,
"Your Excellency's most obedt. and
"Very humble serv't.
"STEPHEN MIX MITCHELL."

The Hon. TAPPING REEVE, one of the Judges of the Superior Court, was thereupon appointed Chief Judge; but no appointment was made to fill the vacancy occasioned by his promotion; and it was provided, by a legislative act, that the superior court, for the year then ensuing, should consist of a Chief Judge and seven Assistant Judges, and no more. *Stat.* 160. *May Sess.* 1814. *c.* 12.

At the session of the General Assembly in *May* 1815, Ch. J. *Reeve* communicated to that body, through Gov. *Smith*, the fact, that he had arrived at the age which disqualified him for a reappointment to office; and he accordingly retired from the court.

(*b*) Appointed in *May* 1815, in the place of Ch. J. *Reeve*.

(*c*) Resigned in *May* 1816, having been elected Lieutenant-Governor of the State.

(*d*) Appointed in *May* 1816, to fill the vacancy occasioned by the resignation of Judge *Ingersoll*.

☞ The edition of the statutes of *Connecticut*, referred to in this volume of reports, (when not otherwise distinguished,) is that of 1808.

A

TABLE OF CASES

REPORTED IN THIS VOLUME.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT,

IN JUNE TERM, 1814.

The town of CANAAN *against* The GREENWOODS TURNPIKE COMPANY:

IN ERROR.

A turnpike company are competent to bring a complaint on the stat. *tit.* 29. *s.* 7. against a town for the repair of bridges on the company's road.

The *Greenwoods turnpike company* brought a complaint before the county court against the town of *C.* upon the stat. *tit.* 29. *s.* 7. for the repair of two bridges on the company's road in that town, and obtained a decree finding it to be the duty of the town to repair the bridges, and ordering the town to repair them accordingly, by a specified time, and thereafter to keep them in repair. In 1808 the company brought another similar complaint against the town for the same cause, and obtained a similar decree. A third complaint being afterwards pending between the same parties, it was held that the former decrees were conclusive evidence of the duty of the town to repair and maintain the bridges.

The principle upon which the stat. *tit.* 166. *c.* 2. *s.* 3. proceeds, is, that the act of building and repairing bridges by a turnpike company is a practical construction of their grant, thereby assuming them as their own, and waiving all claim against the town. If, therefore, a turnpike company originally built any bridges on their road claiming them to belong to the town, and afterwards kept up such claim against the town, the statute as to such bridges does not apply.

The statute applies only to cases which were dubious and liable to be contested at the time it was passed, and not to cases in which the right and duty had been previously settled by legal adjudications.

The company can be bound by such a practical construction only as they have uniformly made of their grant down to the time when the statute was enacted.

THE Turnpike Company brought their complaint before the county court for *Litchfield* county against the town of *Canaan*,

Hartford, June, 1814.

Canaan v. Greenwoods Turnpike Company.

alleging that within said town there are two bridges on their turnpike road over rivers upon which it is, and ever hath been by law the duty of the town to build and maintain bridges; that said bridges are ruinous and out of repair; and that said town though requested, wholly neglected and refused to repair them; and praying the court to order that said town should forthwith make all needful repairs thereon. In their complaint the company further stated, that in the year 1806, they brought a former complaint against said town, stating that said bridges were then out of repair, that it was the duty of the town to make and repair them, and praying for an order accordingly; that on trial the court then found the facts in said complaint true; and that it was the duty of said town to build, maintain, and keep said bridges in repair; and made their order and decree, that said town should, by the first day of April then next, *and thereafter*, maintain and keep said bridges in good and sufficient repair. And said company further stated, that afterwards in the year 1808, they brought another complaint, stating that said bridges were then out of repair, averring, as before, that it was the duty of said town to repair them, and praying for relief; and that said court, on trial of the last mentioned complaint, found all the facts stated therein true and proved; and again adjudged, that it was by law the duty of the town to build and maintain said bridges, and made their order and decree thereon accordingly.

The petition and complaint now in question came before said court at their sessions in *September*, 1811. The town of *Canaan* appeared, and entered their plea and answer to the petition. They first recited the act of incorporation of the turnpike company, passed in *October*, 1798, which contains no provision relative to the building, maintaining or repairing of any bridges on the road; and then they averred, that in pursuance of said act, the company in the year 1799, made and completed said road, built both of said bridges, and kept the same in repair at their own sole expense, and for their sole use and benefit, till the year 1806. They denied that there was any record of the judgment and decree stated, as passed in 1808; and demurred to the residue of the complaint. The company in their replication affirmed, that there was such a record, averred that their complaint

was sufficient, and demurred to the residue of the plea. The respondents joined in the demurer.

The court found that there was such a record as alleged in the complaint; they adjudged that part of the complaint to which the respondents demurred to be sufficent in the law; and that part of the plea to which the petitioners demurred to be insufficient. And having also enquired into the several matters and things in said complaint alleged, and fully heard the parties thereon, they found all the allegations in the complaint to be true; and that it was by law the duty of the town of *Canaan* to keep and maintain said bridges in good and sufficient repair; and made their order thereon accordingly.

From this judgment and decree of the county court the respondents brought their writ of error before the superior court in *Litchfield* county, at *August* term, 1812. The superior court adjudged, that in the judgment referred to, there was nothing erroneous. Upon this adjudication of the superior court the present writ of error is brought.

N. B. Benedict for the plaintiffs in error. 1. The judgment of the court below proceeded on the ground that the decrees of the county court in 1806 and 1808 were conclusive evidence of the liability of the town. I contend, that those decrees were not evidence of any sort to support this complaint. First, it is not competent to a corporation to bring a complaint against a town for not repairing bridges, the statute having given such right only to some *person* or *persons*. *Tit.* 29. *s.* 7.

Secondly, admitting the competency of the turnpike company to bring the complaint, yet as it is in the nature of a public prosecution for a public injury, the prosecutor cannot thereby acquire the rights of a party to a private suit. If the former decrees are evidence in favour of the turnpike company, they are equally so in favour of every man in the community.

Thirdly, the former complaints and decrees regarded specific grievances which existed at the time. They have spent their force, and their object has been attained. The present complaint regards a new and distinct grievance. The cause of action is not the same.

Hartford, June, 1814.

Canaan v. Greenwoods Turnpike Company.

Fourthly, the decrees were not admissible on the ground that the matter in dispute was a question of public right. The rule alluded to is applicable only where the grant from which the right is supposed to be derived is unknown; and in that case, even *reputation* is evidence. *Reed* v. *Jackson*, 1 *East* 357. But here the rights and duties of the parties are prescribed by the statute, and the act of incorporation recited in the record. Can they be better ascertained by resorting to a decree of the county court?

2. The former decrees of the county court being out of the question, the statute of *May*, 1807, (*a*) applies. The act of incorporation is silent as to the building and repairing of bridges; and the turnpike company built the bridges in question. Consequently, the liability to repair them is conclusively fixed upon the turnpike company. And here it may be admitted, that the decrees of the county court were evidence; yet as the statutory evidence in question is *conclusive*, it would be of no avail. The highest possible degree of evidence would not justify a finding in opposition to evidence which has by statute been declared conclusive.

Gould, for the defendants in error, after making some preliminary observations as to the general liability of towns to repair bridges, contended, 1. That the turnpike company had a right to bring the complaint in question. Any party injured by the violation of a public statute may prosecute upon it. This company had a direct and substantial interest in the maintenance of the bridges on their road; it was the duty of the town, by virtue of a public statute, to maintain them, and in case of neglect, the same statute prescribed a mode of redress; the interest of the company, by the neglect of the town, had been defeated; and the remedy resorted to was the one, and the only one, which the statute prescribed. The right of turnpike companies to institute and sustain such a proceeding, is supported by the uniform usage of the county courts, and has been sanctioned by repeated decisions of the superior court.

Further, the proceeding in question is in the nature of a *civil* action to obtain redress for a private wrong; and this at once evinces the competency of the company to bring the

(*a*) *Tit.* 166. *c.* 2. *s.* 3. recited in 4 *Day's Ca.* 200. *n.*

complaint, and shews that the decree must afterwards have the same effect between the same parties as other judgments in civil actions.

2. The decrees of the county court in 1806 and 1808, while they remain in force, are conclusive evidence of the liability of the town. Those decrees were passed by a court of competent jurisdiction; the precise point now in question was there adjudicated upon and settled; and the parties are the same. Whether the county court erred in making the decrees cannot be enquired into in this case.

3. The act of *May*, 1807, does not apply. The turnpike company have always resisted their own liability to maintain these bridges, and have kept up a continual claim against the town. They have given no practical construction of their grant against themselves.

Further, the decree of the county court in 1808 was passed since the statute; and in that decree, which has never been reversed, this point, as well as the general question of liability, must have been adjudicated upon.

Again, this case does not come within the statute, because it does not appear that these bridges were built in pursuance of any vote of the company. Agents not authorized by a vote of the company could do no act to bind the company.

TRUMBULL, J. [After stating the case.] The decision of this case depends on the construction of our own statutes respecting bridges and turnpike roads.

The general statute respecting bridges enacts, "That the inhabitants of the several towns in this state shall make, build, keep and maintain in good and sufficient repair, all the needful highways and bridges within their respective townships; unless it belongs to any particular person or persons to maintain such bridge in any particular case." *Tit.* 29. *s.* 1. There can be no doubt but these bridges come within the purview of this act, and that it is the duty of the inhabitants of the town of *Canaan* to build and maintain them, unless they can throw the burden on some other person according to the proviso.

Nor can any doubt arise as to the sufficiency of the complaint. By the same statute, when the inhabitants of any town shall neglect or refuse to repair any bridge, across a

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river in a public highway within the bounds of such town, whereby the public travel is obstructed or imcommoded, on complaint thereof to the county court by any person or persons, said court is empowered and directed to enquire and adjudicate upon the same. Should the whole that is stated relative to the former applications, judgments and orders, be rejected as surplusage, sufficient allegations would remain in the complaint to warrant the court in sustaining it, and proceeding to final hearing and adjudication.

The first question which arises in this case, is, whether the decisions of the county court, in 1806 and 1808, are conclusive between the parties, and thereby the respondents are in law estopped to deny, that it is the duty of the town of *Canaan* to maintain and repair said bridges.

On both the former complaints, the same point was in issue as in the present, *viz.* whether it is the duty of the town of *Canaan* to maintain and keep these bridges in repair; in both, the court adjudged that the duty by law is fixed upon the town; both judgments are in force and unreversed; and the parties in all the cases are the same.

It is agreed, that a judgment of court which settles a right or interest, title or duty, is conclusive between the same parties, so long as it remains unreversed and in force on the record; unless it can be shown, that since the passing of the judgment, the right or duty of the parties has been altered and varied by some subsequent transaction or occurrence. To cite, authorities as to this point, however easy, is unnecessary.

But it has been urged, that in this kind of process, the complainant is not properly a party; that the right of entering the complaint is given to all persons, whether they have any interest in the decision of the question, or not; and that a corporation, or incorporated company, cannot be a common informer.

I agree, that this turnpike company cannot be admitted to prosecute merely as a common informer, and that they have no right to complain of the insufficiency of bridges on any other road than their own. But they have a direct interest in the support of those bridges; it is on the ground of their interest only, that they have a right to sustain their complaint; and on account of that interest, they are as much

a party in this kind of process, as if contending in an action at law, or a petition in chancery. But I shall by no means concede, that these adjudications are not conclusive on the respondents, as to their duty to maintain these bridges, and decisive against them, whenever the same question arises in any court whether they are litigating with the same parties or others. Their duty has become *res adjudicata*, and cannot again be called in question.

A judgment, decree, sentence, or order, passed by a court of competent jurisdiction, which transfers, creates or changes a title, or any interest in estate real or personal, or which settles and determines a contested right, or which fixes a duty on one of the parties litigant, is not only final as to the parties themselves and all claiming by or under them, but furnishes conclusive evidence to all mankind, that the right, interest or duty belongs to the party to whom the court adjudged it. It is admissible evidence in favour of any person, who may be interested to prove the existence of such right or duty as a fact. A record imports absolute verity, and is conclusive as to every point directly decided, and every material fact expressly found. No evidence can be admitted to impugn or contradict it, so long as it remains in force and unreversed.

A title to real estate by judgment in a court of law, or transfer by decree of chancery, is as valid against all mankind, as a title by deed, will or descent. A recovery of damages in trover vests the property of the articles converted in the defendant. *Adams* v. *Broughton*, 2 *Stra.* 1078.

Indeed, a recovery in value in any personal action, as book-debt, assumpsit, trespass, &c. has the same effect in transferring the property.

So a title to land may be acquired by estoppel on record. *Trevian* v. *Lawrence & al.* 1 *Salk.* 276. "A man may be estopped by verdict on record; as in trespass, if the defendant prescribes for common, and the plaintiff traverses the prescription, the defendant may say that in a former action by the plaintiff against the defendant the same prescription was found against the plaintiff." *Com. Dig. tit.* Estoppel, A.

Every matter of estoppel may be given in evidence, and when so given, if the jury find contrary thereto, the verdict

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is bad. 7 *Bac. Abr. tit.* Verdict, U. *Iseham* v. *Morrice*, *Cro. Car.* 110.

Where the estoppel is of such a nature as creates an interest in, or works upon the estate of the land, the court and jury as well as the parties, are bound by it; the jury cannot find a verdict against it; it runs with the land into whose hands soever the land comes; and an ejectment is maintainable on the mer e estoppel. *Trevian* v. *Lawrence*, 2 *Ld. Raym.* 1051. S. C. 1 *Salk.* 276. S. C. 3 *Salk.* 151. S. C. 6 *Mod.* 256. *Holman* v. *Hore*, 3 *Salk.* 152.

The sentence of a court of admiralty in a case of prize is conclusive on all mankind as to all matters expressly found and points directly decided in it [*Doug.* 554.]—not (as is sometimes alleged) on the ground that all men are actually parties in the trial, which is a technical fiction and impossible in fact, but because the decree of that court, operates *in rem*, and according to the established law of nations, effects a transfer of the property; and because no other court can re-examine the truth of the facts it expressly finds, or reverse its decrees. So the decrees of chancery, and of the exchequer court, are equally conclusive when given *in rem*. *Stewart* v. *Warner*, 1 *Day's Ca.* 142.

So also the decree of a court of probate is conclusive on all persons concerned, whether they are actually parties to the decree or not. *Goodrich* v. *Thompson*, 4 *Day's Ca.* 221.

So is the sentence of the spiritual court in a cause within its jurisdiction. A matter which has been directly determined by their sentence cannot be gainsayed; their sentence is conclusive, and no evidence shall be admitted to prove the contrary; but this is to be intended only in the point directly tried, and not of any collateral matter, collected from their sentence by inference. *Blackham's* case, 1 *Salk.* 290.

A county court in this state is not only established as a court of common pleas, but is vested by our statutes, with all the powers of a court of general sessions of the peace. Its authority in case of roads and bridges properly belongs to that jurisdiction; the process is according to the forms of that court; and the complaint is not in the nature of a civil action.

But the orders of a court of sessions are conclusive of a

right, so long as they remain in force, that is, until they are quashed or superseded.

"If a man be adjudged the father of a bastard child, it is an estoppel to him, and all men, to say the contrary, but any man may aver that he is the father." 3 *Salk.* 261.

"An order by two justices for the removal of a pauper, if reversed by the sessions on appeal, is conclusive between the two contending parishes, and forever settles the question as to them, that the parish to which he was sent is *not* the place of his settlement; but if the order be confirmed, it is conclusive as to all persons, it is an adjudication that it *is* the place of his legal settlement, and that parish is forever estopped to say the contrary, and the order is final and conclusive as to all the world." This point is directly adjudged in *Swanscomb* and *Shensfield*, 2 *Salk.* 492., in *Harrow* and *Ryslip*, 2 *Salk.* 524., S. C. 3 *Salk.* 261., S. C. 5 *Mod.* 416., in *Mynton* and *Stony Stratford*, 2 *Salk.* 527., in *Little Bitham* and *Somerby*, 1 *Stra.* 232., and in many other reports too numerous to be quoted. (*a*) (1)

See the opinions given by this court as to the effect of a record when admitted in evidence, in the cases of *Church* v. *Leavenworth*, and *Ryer* v. *Atwater* and *Wright*, in 4 *Day's Ca.* 274. 431. See also *Peake's Rep.* 59., *per* Lord *Ellenborough.—It is conclusive as to the right.*

But it is needless to urge this principle farther, as I think it cannot be doubted that the decisions relied on, are between

(*a*) See further as to the effect of a former judgment or decree, *Betts* v. *Starr*, 5 *C. R.* 550. *Dennison* v. *Hyde* & al. 6 *C. R.* 508. *Fowler* v. *Savage* & al. 3 *C. R.* 90. *Willey* v. *Paulk* & al. 6 *C. R.* 74. *Pinney* v. *Barnes*, 17 *C. R.* 420. As to estoppel by judgment or decree, see *Smith* v. *Sherwood*, 4 *C. R.* 276. *Crandall* v. *Gallup* & al. 12 *C. R.* 365. *Bradford* v. *Bradford*, 5 *C. R.* 127.

(1) The New York cases which illustrate the principal point decided in the text, viz, the conclusive effect of a former judgment, by a court of competent jurisdiction, upon the same question, as between the same parties and their privies, are numerous.—The most important are, *Gardner* v. *Buckbee*, 3 *Cowen R.* 120; *Bent* v. *Sternburgh*, 4 *Cowen R.* 559; *Jackson* v. *Hoffman*, 9 *Cowen R.* 271; *Jackson* v. *Wood*, 8 *Wend. R.* 9; *Ethridge* v. *Osborn*, 12 *Wend R.* 399; *Bradstreet* v. *Clark*, 12 *Id.* 602; and *The People* v. *Mercein*, 25 *Wend. R.* 64. These cases unqualifiedly adopt the rule laid down in *The Duchess of Kingston's* case,—the leading case on this head of the law,—that a former judgment, by a court of concurrent jurisdiction, "directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court;" and they extend the rule to the privies of the parties to such former judgment.

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the same parties. Whoever brings a suit, bill or complaint, is a party plaintiff, and whoever is bound to appear and make answer or defend, is in law the party defendant.

I will further observe, as to the present question, that the decree in the year 1808 is in full force, and even should it be deemed erroneous, is binding on the parties till reversed; and that it is not pretended, that the duty, then adjudged, has been since varied or affected, by any subsequent transaction, occurrence or statute.

The only question, which remains to be decided in this case, is, whether the superior court erred in adjudging the plea of the respondents insufficient in law, as to that part of it to which the complainants have demurred.

This part of the plea recites the act of incorporation of said turnpike company, in which no clause respecting bridges [*10] *on said road is contained, nor any designation as to building and maintaining them—and then states, that in pursuance of that act said turnpike company, in the year 1799, made and completed said road, and built both of said bridges, and ever after kept them in repair at their sole expense till the year 1806; that said bridges were built by said company for their sole use and benefit; and that there are other bridges across the same streams, which answer all the purposes of the town, and which are by them maintained in repair.

However informal this plea may be, it is evident that the respondents meant in connection with the facts stated, to plead and rely upon the statute of *May*, 1807, of which, being a public act, the court are bound to take notice.

It is therein enacted, by a clause in the following words, "That in all cases where the incorporating act of any turnpike company does not designate what bridges on their road shall be built by them, and those which shall be built by the town where situated; and such company in building and putting such road in repair, have built any bridge, or bridges, which otherwise might have belonged to the town where situated to have built, it shall be *conclusive evidence*, that such bridge *originally belonged* to such company to build and keep in repair." *Tit.* 166. *c.* 2.

In the case of the town of *Waterbury* v. *Clark*, 4 *Day's Ca.* 198., this court adjudged, that the true construction of this statute is, "that whenever any turnpike company shall have

erected any bridges on their road, without making any claim against the town whose duty it might have been to build and maintain them, the act of building them shall be considered as a practical construction of their own grant by the company themselves, and a waiver of all claim against the town ;"— and that "the obvious intent of the legislature is to apply its provisions to those cases, where the company make bridges *as their own*, and thereby assume them as theirs," and ought not to be allowed "to depart from their own construction." See the above report, pages 210 and 211.

Two things seem unquestionable in considering this statute; first, that it can apply only to cases, which were dubious and liable to be contested, at the time it was passed, and not to cases in which the right and duty had been previously settled by legal adjudications; and secondly, that the company can [*11] be bound in justice, by such a practical construction only, as they have uniformly made of their grant, down to the time when the statute was enacted.

In the foregoing case of *Waterbury* against *Clark*, this court decided, that the statute did not apply, because although the company had erected the bridge at their own charge, yet they had kept up their claim against the town, and instituted a suit for the recovery of their expenses in building it. I can perceive no difference in principle between that case and the present.

Had the company built these bridges, and maintained them at their own charge, till the passing of this statute, without having ever in any legal manner made their claim against the town of *Canaan*, that it was its duty to build and maintain them, I should hold the case to be clearly within the statute. But before the passing of this act, the company had claimed in express words in their complaint in 1806, that "at the time of making said road, and at all times after, it was the duty of that town to build said bridges, and keep them in sufficient repair;" and the truth and justice of their claim had been settled and decided in their favour, by the only court competent for the trial of the cause. On these facts it cannot possibly be pretended, that this company have given any practical construction of their grant against themselves, or waived their claim against the town of *Canaan*.

By the statute, the building of a bridge by any turnpike company is declared to be conclusive evidence, that such

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bridge belonged originally to the company to build and keep in repair.

The adjudications of the court before and after the passing of the statute, as conclusively decide in regard to these bridges, that it is the duty of the town to build and repair them.

As the statute declares only, that the act of building shall be conclusive evidence that such bridge belonged originally to the company, every intervening fact or circumstance must be admissible, to show that whatever might have been the case *originally*, the duty did not continue to lie on the company to maintain them. But I see no necessity of resting the decision on any minutely critical distinctions. Taking every thing most strongly in favour of the respondents, we have conclusive

[*12] *evidence on one side, balanced, to say the least, by conclusive evidence on the other. Now an estoppel against an estoppel always sets the matter again at large; each mutually destroys the other; and the point must be decided as though neither had existed. *Com. Dig. tit.* Estoppel, E. 9. *Law of Evidence*, 88 &c.

If both be in this case laid aside, it is clearly the duty of the town, as has been already observed, by the general law to build and keep in repair the bridges in question.

For these reasons I am of opinion, that in the judgment of the superior court there is nothing erroneous.

In this opinion REEVE, Ch. J., BRAINARD and BALDWIN, Js. concurred.

INGERSOLL, J. It appears to me, that the decree passed by the county court in the year 1808, recited in this writ of error, was erroneous, whatever may be said of the one passed in the year 1806. The statute passed in the year 1807, unquestionably in my mind, made the turnpike company liable to repair these bridges. This judgment or decree, erroneous as it may be, is still however unreversed, and is in full force; and the question is, whether it is conclusive upon the plaintiffs in error, and so fixes on them the liability to repair these bridges, as that they never can contest their liability again. A judgment is conclusive on the plaintiff, if he brings a second action for the same cause, matter and thing. But if he has a distinct cause of action against the defendant, depending on the same principles on which the first judgment was given,

and the circumstances of the case are precisely the same with those of the first case, yet the former judgment cannot be pleaded in bar of a suit brought on the second cause of action. The first judgment, to be sure, will be a precedent in all cases under the same circumstances; but it will be no more conclusive on the defendant, than it would on a party in another suit. This principle must hold good in all penal actions. A man is guilty of a breach of a penal statute, and is sued by a common informer, and judgment is given against him. He is guilty a second time of exactly the same offence, and is sued by the same plaintiff again. Can it be said, that the first judgment is conclusive as to the rights of the parties? No * more so in my opinion, than if the second plaintiff was a different person from the first. This is so clear a principle to my mind, that if a question were made on it, it would not bear an argument. Apply these principles to the case under consideration. The turnpike company had no greater right to make the complaint, and to bring the process against the plaintiffs in error, than any individual had. It is not indeed like a suit between party and party. No damages are recoverable, but the bridges only are ordered to be put in repair. In this respect, it is more like a public prosecution, than a private suit. Whether the judgments or decrees might have been given in evidence, it is not necessary to say. But if they might have been given in evidence, I think on no principle is the evidence conclusive against the plaintiffs in error. So far as a judgment of a county court is a precedent, these decrees are precedents. But I believe, it will not be contended, that judgments of county courts are such stubborn precedents, as that this court will be bound by them.

[*13]

I therefore am of opinion, that the judgment ought to be reversed.

SWIFT, SMITH and EDMOND, Js. concurred in opinion with Judge *Ingersoll*.

Judgment affirmed.

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SACKET *against* MEAD, administrator of *Holmes*.

Where the estate of a deceased person has been represented insolvent, and settled as an insolvent estate, a creditor who had neglected to exhibit his claim within the time limited for that purpose, having discovered and shewn to the administrator other estate not before inventoried, may sustain an action at law against the administrator for the recovery of such claim.

THIS was an action of debt on bond against the defendant, as administrator of the goods and estate of *Isaac Holmes*, jun. deceased.

The defendant pleaded in bar that the estate was represented insolvent; that commissioners were appointed; that a time was limited for the creditors to exhibit and prove their claim; that the commissioners entered upon the duties of their appointment, gave due notice to the creditors, and, at the expiration of the time limited, made their report to the court of probate containing a list of all the claims by them
[*14] * allowed; that their report was accepted; that the estate proved to be, and ever since hath been, insolvent, and insufficient to pay the claims allowed; that the estate had been sold by order of the court of probate, and the avails paid over to the creditors, whose claims had been exhibited and allowed, in such manner and proportion as the law requires; that all the goods, chattels, credits and estate of the deceased had been thus administered; and that the bond in suit was never presented to the commissioners, nor allowed by them.

To this plea the plaintiff replied, "that subsequent to all the proceedings regarding the settlement of said estate, the defendant, as administrator on said estate, had shewn and exhibited to him other and further estate of the deceased not before discovered, and not before put into the inventory of said estate, of more value and greater amount than sufficient to pay all the just debts then due and demandable from said estate, which estate so shewn and exhibited to the defendant, was by him, as administrator on said estate, taken possession of and retained as the property of the deceased, and still remains in his hands unappropriated." The replication then proceeded to set out the condition of the bond, and alledged a breach, detailing the circumstances.

To this replication there was a special demurrer, assigning for cause that the replication was double and inconsistent. A joinder in demurrer closed the pleadings; and the

question of law arising thereon was reserved for the opinion of all the Judges.

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R. M. Sherman and *Chapman*, for the defendant, abandoning the causes of special demurrer, argued the case as standing upon a general demurrer. They contended, that where the estate of a deceased person has been represented insolvent, and has been proceeded with as an insolvent estate, an action at law will not lie against the administrator on a claim not exhibited to commissioners within the time limited for that purpose, although the plaintiff, after the expiration of such time, may have discovered property of the deceased not before inventoried sufficient to pay all the debts. Our statute regarding the settlement of insolvent estates (*a*) is an entire departure from the *English* law. The leading princi-
* ple which it establishes is that of *average*. If the present ac- [*15]
tion goes to defeat this primary object, it ought not to be sustained. It is clear that no average can be made without ascertaining precisely the amount of debts, of property, and of expenses of settling the estate. This can be done only by commissioners. The various questions necessary to be decided in order to strike an average could never be brought before a jury.

The legislature have expressly prohibited all process at law against an administrator on an insolvent estate while the same is depending in the court of probate.(*b*) The object of this prohibition is to prevent a waste of the estate by litigation in the common law courts. Such expenses absorb the estate wantonly and uselessly. Here the maxim peculiarly applies, *Interest reipublicæ ut sit finis litium*. The cases of *Nelson* v. *Hubbel*, 2 *Root*, 421. and *Leavenworth* v. *Jones*, 2 *Root* 423. are in point to establish the principle contended for by the defendant.

It is immaterial by whom the property is discovered. As soon as it is shewn to the administrator the bar is removed, so as to let in creditors who have not exhibited their claims, to prove them before the commissioners, and to receive their average; also to let in other creditors with them, if the estate be sufficient, to a further dividend. Then all the creditors will receive the same amount. This course is in perfect ac-

(a) *Tit.* 61. *c.* 1. (b) *Tit* 61. *c.* 1. *s.* 4.

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cordance with the principles of our system. But it would essentially violate those principles to sustain a suit against the administrator, on the original cause of action, without the intervention of commissioners.

But it will be said, that the administrator may refuse to inventory the new discovered property; and in that case, shall the creditor be without remedy? No; let him sue on the probate bond, and assign the neglect of the administrator as a breach. The rule of damages will be the amount of the property; and the sum recovered will be disposed of in the same manner as the avails of the property would have been, if the administrator had done his duty.

Sherwood and *N. Smith*, contra. There is no question but that the plaintiff has a valid and just claim, and that the [*16] *administrator has assets. And though the plaintiff's claim may have been barred by the limitation, yet by the discovery of property not before inventoried he has since brought himself within the saving clause of the statute,(*a*) and the bar is removed. Then why should he not recover? It is said, this action is not the proper remedy. The objection against it is, that it goes to defeat the principle of *average*. But how is this made out? The administrator stands on precisely the same ground with regard to this creditor, that he did with regard to the creditors in general when he first took upon himself the administration. If he apprehends that the estate may still be insolvent, he may represent it so now as well as in the first instance, and have commissioners appointed. He may now as well as then be protected from a judgment against him for the whole claim. But the new discovered property may render the estate solvent; and if the administrator, conscious that it is so, no longer treats it as an insolvent estate, why should he not be liable? Why should not a creditor, who has a just claim which is not barred, be permitted to sue for it, and recover the whole?

Further, the principle assumed by the defendant, if admit-

(*a*) The limitation is in these words: "And whatsoever creditor shall not make out his or her claims with such commissioners before the full expiration of the time set and limited for that purpose as aforesaid, such creditor shall forever after be debarred of his or her debt." Then follows the saving clause in these words—"Unless he or she can shew or find some other or further estate of the deceased, not before discovered and put into the inventory." *Tit.* 61. *c.* 1. *s.* 6.

ted, would only require a stay of execution until a new average could be made: it would not defeat a right of recovery.

According to the course of proceeding proposed by the plaintiff, the administrator may always be protected, if he does his duty. But suppose there should be a breach of duty on the part of the administrator, how is the creditor, in the course proposed by the defendant, to obtain redress? Suppose the administrator should refuse to inventory new discovered estate, what remedy has the creditor? It is said, he may sue on the probate bond. But no suit can be brought on the probate bond without the consent of the judge. To him this creditor does not appear to be a creditor, nor to have any interest. If he alleges that the administrator is in possession of new discovered estate, the administrator may deny it; and [*17] will the court of probate then proceed to try the question?

But waiving difficulties of this nature, suppose a suit to be brought and sustained on the probate bond; what advantage would such a suit have over the present? The administrator would stand on no better ground. It would be no better for the creditor.

BALDWIN, J. This record presents the claim of a creditor, on an estate which had been proceeded with and settled as insolvent, who had not made out his claim with the commissioners, before the expiration of the time limited, and now rests his title to recover, on shewing further estate not before discovered or put into the inventory.

The action is against the administrator in common form, upon the debt thus barred. In bar of this action, the administrator pleads the settlement of the estate as an insolvent estate, in the court of probate; and the neglect of the plaintiff to make out his claim with the commissioners, before the expiration of the time limited.

The plaintiff replies, that after the settlement in the court of probate, other estate not before inventoried, was shewn to the defendant, and came to his hands as administrator on said estate, and still remains in his hands as the estate of the deceased unappropriated, more than sufficient to pay all the debts against said estate; and then points out the nature of his claim, and that the administrator had notice of it.

To this replication the defendant demurs, and the plaintiff joins in demurrer.

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The question of law is reserved by the superior court for our advice.

The pleadings close in a special demurrer, on the ground of duplicity; but, as that point was abandoned in the argument, it is unnecessary to notice it.

Whether the plaintiff in such case is entitled to recover is the only subject of enquiry.

A proper decision of this question, depends on the due construction of our statutes respecting the settlement of the estates of persons deceased.

On this subject certain leading principles are admitted by all. If the estate is solvent, all debts, without preference,
[*18] * are to be paid in full; and although the administrator may on a solvent estate, for his own safety, obtain a limitation to the exhibition of claims, he is, notwithstanding such limitation, immediately liable to the suits of creditors.

Every estate is presumed to be solvent and will be treated as such, until the administrator, upon a fair comparison of the amount of debts, with the value of property within his knowledge, shall represent it otherwise to the court of probate. When so represented, suits at law are stayed, during its pendency. The court limits a time for the exhibition of claims, appoints commissioners to adjust them, and on their report, the estate is distributed by an equal average. When an estate is thus settled, every creditor who has neglected to make out his claim with the commissioners within the time limited is forever barred of his debt: "unless he can shew estate of the deceased, not before discovered, or put into the inventory." If, then, the creditor can shew such estate, the bar is removed; but the statute gives no direction with respect to the extent or mode of relief. The general principles of our system for the settlement of estates must then be our guide.

As to the *extent* of his relief, there is now, I believe, no diversity of opinion. If the estate discovered is sufficient to pay all the debts, whether exhibited before or not, the whole must be paid. If less is discovered than will discharge the whole, the creditor barred is entitled to so much as will make his equal to former dividends, and the remainder is to be equally divided upon all the debts. This course, I understand, has been sanctioned by judicial authority.

The *mode* of relief has hitherto been a subject on which our courts have differed. In the case of ***Leavenworth*** v.

Jones, in the year 1789, on a similar state of pleadings, the superior court adjudged the replication sufficient, and that the plaintiff recover the amount of his debt. Their judgment was reversed in the supreme court of errors, on the ground, that an administrator on an insolvent estate, which appears to have been settled in the court of probate, is not liable to any suit, except for neglect, and misconduct in the settlement, specially set forth in the plaintiff's declaration. This construction, it appears to me, entirely defeats the saving of the statute; for it is not often contended on the discovery of new estate, that the administrator has been guilty of neglect or misconduct, and the settlement on record may appear fair and complete. Let the estate discovered, then, be ever so great, the administrator on the reasons given, is protected from all suits.

[*19]

The case of *Nelson* v. *Hubbel*, 2 *Root* 421., discloses facts, which show, that the plaintiff was not entitled to recover under the saving clause; for the estate claimed, as the basis of his right, had been discovered by the administrator, and inventoried, and distributed in the settlement recorded, long before any discovery or claim by the plaintiff. He could not, therefore, recover on any principle; and so was the judgment of the court. The reporter, indeed, seems to doubt whether the mode of relief pursued in that case was proper; and suggests that after causing the administrator to inventory the new estate, the *creditor* ought to move the court of probate to open the commission for the examination of his claim. Others have contended, that the only remedy is by suit on the probate bond. Others again, that a new administration *de bonis non* is the proper course. As I know of no judicial decision which has pointed out the course proper to be taken in such case, we are at liberty to take that which is most analogous to our general system of settling estates.

The administrator, having proceeded in the court of probate to a final settlement of the estate as insolvent, and paid the dividend, the estate is no longer pending before the commissioners. Their powers have ceased. All proceedings are at an end, unless further estate is shewn to the administrator. When this is done, after such final settlement, the administrator must commence a new course of administration. He must inventory the estate, and compare its value with the amount of debts. If he finds it evidently sufficient to satisfy

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all the debts known to him, he may and ought to treat the estate thenceforth as solvent. But, as all the creditors who were barred, have an equal right to share in the new discovered estate, he ought to present the same to the court of probate, and, for his own safety, obtain a new limitation for the exhibition of claims. He may, also, on such comparison, if he deems it proper, represent the estate still to be insolvent, and obtain a new commission, as well as a new limitation. The *creditor* has no more control of the estate thus discovered,

[*20] * or of the proceedings of the administrator in this stage of the settlement, than he had at the time the administrator was at first appointed. The administrator, having the control, may treat the estate as solvent, and if he does so, will, of course, be liable to the demands and suits of the creditors in the same manner as every administrator on a solvent estate is liable. He may, at any time, arrest their progress, whenever he finds it necessary to represent the estate insolvent.

This is a plain and safe path for the administrator. It preserves entire the analogy of our system, and secures equally the rights of all.

In the case before us, it appears by the record, that the new discovered estate has long been in the hands of the administrator, and that it is sufficient to discharge all the debts in full. This being admitted, the only question is, whether a suit like this is a proper mode for the creditor to pursue to obtain his debt?

If the view I have taken of the subject is correct, I think it of course follows, that this action ought to be sustained. I need not contend, that this is the only remedy. An administrator may so conduct by refusing to receive and inventory the estate discovered, or by neglecting to proceed thereon, as to render himself liable on his bond. Perhaps, too, the creditor may, on the refusal or neglect of the first administrator, to administer on the new estate, obtain for himself administration *de bonis non*. But it is not a bar to this action, that other courses might have been pursued.

I am of opinion that the replication is sufficient, and that we advise accordingly.

SWIFT, TRUMBULL, SMITH and INGERSOLL, Js. were of the same opinion.

BRAINARD, J. dissented.

EDMOND, J. When an estate is represented insolvent, and so appears to the judge of probate, and proceedings have been regularly had thereon, the court of probate and administrator must proceed with it as an insolvent estate, until the settlement is finally completed. The mode of settlement is not to commence *de novo* upon any and every discovery of other or further estate, not before discovered and put into the [*21] inventory. The admission of such a principle, would involve the settlement of estates in endless and insuperable difficulties. The statute makes it the duty of the administrator, to represent the condition and circumstances of the estate to the judge of probate. The judge appoints appraisers, to appraise the estate. He also appoints commissioners, who have full power to receive and examine *all* the claims of the several creditors; allows a time for the purpose; and if, on the report of the commissioners, the estate appears to be insolvent, the judge proceeds to order and set out to the widow (if any) such necessary household goods as are by law exempted from execution to be her own property, also her dower, and orders a sale of the residue of the estate. Out of the avails of such sale, the judge orders "full payment of the debts due to this state and for sickness, necessary funeral expenses and incident charges of settling and selling the estate; and the residue to be paid to the several creditors who have made out and evidenced their claims according to the direction of this act [that is, before the commissioners] in proportion to the sums to them respectively owing." (*a*) The commissioners are cloathed not only with full power, but exclusive and conclusive jurisdiction in relation to *all* claims against an insolvent estate, excepting only where the administrator "shall contest the proof of any debt at common law," and "except for debts due to this state, and for sickness and funeral charges," or where a person aggrieved by the doings of the commissioners shall file his motion praying for a review before the judge of probate and two justices, one of whom shall be of the quorum. (*b*) In all other cases of claims on an insolvent estate, the jurisdiction of the common law courts is expressly taken away by the 4th section of the same act, which provides, "that no process in law (except in the cases I have mentioned) shall be admitted or allowed against the executors

(*a*) *Tit.* 61. *c.* 1 *s.* 3. (*b*) *Ch.* 2. *s.* 2.

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or administrators of any insolvent estate so long as the same shall be depending as aforesaid." In this case, the plaintiff has not by his pleadings brought his case within any of the exceptions contained in the act to entitle him to process or judgment against the administrator, or sufficient to give jurisdiction to this court.

[*22] * But should it be admitted, that the law is so, that when other or further estate is discovered and shewn to the administrator on an insolvent estate, sufficient to render the estate of the deceased solvent, the administrator is bound so to represent it, and proceed anew in the settlement; and that on such discovery of estate, when the administrator has taken it into his hands, every creditor may immediately institute a suit; yet the replication in this case is, in my opinion, insufficient. It contains no express allegation of solvency. The allegation on which the plaintiff relies to show that notwithstanding the proceedings had, as stated in the defendant's plea in bar, he is entitled to recover, is in these words: "That subsequent to all the proceedings regarding the settlement of the estate as stated in the defendant's plea in bar, the defendant or administrator had shown and exhibited to him other and further estate of the deceased, not before discovered, and not before put into the inventory of said estate, of *more value, and greater amount than sufficient to pay all the just debts then due and demandable from said estate.*" This allegation is too vague and indefinite. An issue formed thereon, and found, would not necessarily lead to any useful result, or be a bar, if found for the administrator, against another suit brought by the plaintiff or any other creditor. The trial of such an issue would impose upon the jury the necessity of ascertaining with precision the amount in value of the estate of the deceased at the time of his death, at least of the new discovered estate, and, what would be much more difficult, the amount and value of all the just debts then due and demandable from the estate of the deceased; which could only be done by balancing books, making set-offs, adjusting claims, and doing the whole work of appraisers and commissioners; for without this, the issue could never be rightfully determined; and after all this enquiry, although they might find that the estate so discovered was sufficient for payment of debts, yet unless they found it of *more value and greater amount*, they must find a verdict for the defendant.

But were the pleadings correct, I can discover no necessity for supporting actions against administrators under the circumstances disclosed in this case. This administrator, it appears, has taken into his hands the new discovered estate; he is bound to represent the circumstances of it to the judge; * it remains with the administrator unappropriated, until the estate discovered is appraised, and debts ascertained, in a legal way. Whether the estate will prove insolvent, or otherwise, cannot be known. It remains depending; and no process for the recovery of debts is admissible. If the administrator is dilatory, or neglects his duty, for every breach of duty he is answerable on his probate bond. This is a remedy open to every creditor. But adopt the mode here contended for, and an administrator on an insolvent estate can never be safe. The instant that other and further estate is shewn to him, before he can examine the title, and represent the circumstances of it to the judge as the law directs, every creditor may institute his suit; the liquidation of all claims be taken from commissioners, the only proper forum in cases of insolvency; and the estate be wasted in defending against claims, which the administrator has authority neither to allow nor pay. For these and other reasons which might be given, I should advise that judgment be given for the defendant.

[*23]

REEVE, Ch. J. The statute of this state has provided, that in case of insolvent estates, the creditors of every description, with the exception of debts due to the public, sickness debts, and funeral expenses, and costs of settling the estate, shall be paid *pari passu*. The excepted debts must be paid in full. That all creditors should be paid equally is a prominent feature of the statute; and this principle must be preserved entire; and any construction of the statute, or any proceeding thereon, which will defeat this principle, or embarrass it, ought to be rejected: for it is as much a principle that creditors should have the estate equally according to their respective debts, as it is that the executor should be answerable to the extent of assets, and no further; or that the whole estate, both real and personal, shall be applied to the payment of debts before a volunteer shall take any part of it.

That this provision may be carried into effect, the statute provides, that when the executor is apprehensive that the estate is insolvent, he may represent to the court of probate

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that this is the case. The court then appoints commissioners to examine the claims; which commissioners are a court for hearing, trying, and adjusting all the claims against the estate. They have final jurisdiction over such claims, except * that in case any person is aggrieved where the demand is above seventy dollars, he may have a review before the judge of probate and two justices *quorum unus*, and then their determination is final. It is apparent that every claim must be allowed by this tribunal; and no provision is made for the recovery of any debt until it is allowed. The principle, I think, is a clear one, that unless the debt is allowed by the commissioners, or the court of probate on a review, after an estate is represented insolvent, there can be no recovery of it. Unless there is something in the case which makes it to differ from ordinary cases, it will be admitted, that this must be the course; for no suit can be maintained at law, so long as the insolvent estate is pending before the court of probate, against any executor or administrator. In such case, it is the duty of the executor, under the direction of the court of probate, to sell the whole estate, real and personal. By this means it is ascertained what the estate produces; and the amount of debts is known by the allowance of commissioners. The court then strikes the average, and the executor is bound to pay to each creditor the sum allotted to him; and these proceedings render it certain that the executor has assets in his hands to this amount; and thus the business is closed, if nothing else takes place; and every creditor that has not exhibited his claim is barred from any demand against the executor, unless he can shew or find some other estate not before discovered or put into the inventory.

It has been supposed by some, that he who discovers this estate is alone entitled to the benefit of it, as a reward for his diligence. This idea is wholly inadmissible; for in many cases it would defeat the principle of average, whereas the object of the law is to preserve that principle entire; for the estate discovered might be sufficient to pay the whole debt of the discoverer, so that whilst *A.* *B.* and *C.* who exhibited their claims, receive only 50 cents on the dollar, *D.* the discoverer, receives 100.

Again, there may be a surplus after all the debt of *D.* is paid. Now, it is an established principle that a volunteer can never be entitled to any thing as long as a creditor remains unpaid.

This surplus ought to be applied to the payment of the creditors who have received only 50 cents on the dollar. But how can this be accomplished? There is no way provided for them to recover their debts but through the medium of the court of probate; and whoever is in possession of the discovered estate, will, for any thing that I can conceive, retain it, unless some creditor appears that has not exhibited his claim. But there is no such creditor. They have all exhibited their claims, and have all received their average. [*25]

It may be said, that these creditors may sue the person who holds the estate as executor *de son tort*, and recover of him to the amount of assets. But I apprehend this never can be done; and that no such character as executor *de son tort* can possibly exist in our law where the estate is insolvent. A suit against an executor *de son tort* is altogether a common law proceeding, and a recovery and judgment must be wholly governed by it. There can be no average judgment; and he who first obtains judgment will be preferred to every other creditor in the same degree. If *D.* who did not exhibit, or *A.* who did, should sue the executor *de son tort*, who has assets enough to pay them, then they will take; and thus *A.* and *D.* recover the whole demand out of the estate of the insolvent debtor, whilst *B.* and *C.* receive 50 cents on the dollar only. This defeats the principle of average; and it is impossible to conceive of such a character, and his liability at common law, where the estate is insolvent, without perceiving that the unequal distribution of the insolvent debtor's estate will be the consequence in many cases, on the hypothesis that the holder of the property might be sued as executor *de son tort*.

I therefore conclude, that the true construction of the statute is, that when new estate is discovered not before inventoried, those who have not exhibited their claims have a right to have it applied to the payment of their debts as much as if they had discovered it.

Upon the idea of a reward for diligence, what would become of estate discovered by some person who was not a creditor? The reasonable ground is, that when it appears that there is other estate, the creditors who lost all benefit of the estate by their neglect, may now avail themselves of this discovery. The words of the statute are such as furnish no ground to conclude, that all are to be excluded from the benefit of the estate unless they had made the discovery; for the

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words are, that the creditor who does not exhibit his claim within the time limited shall be barred, "unless he or she can shew or find some other or further estate of the deceased not before discovered and put into the inventory;" or, in other words, prove that there is other estate which has not been inventoried. If he or she can do this, they are to have the benefit of the estate.

One question then arises, how? I ought to have observed, that the statute has provided that where a judgment is recovered against the executor the execution is stayed; and when the proceedings are finished in the court of probate, this is to be averaged also, and execution goes out for the average. This provision must refer to judgments obtained against the executor before a representation of insolvency; for no suit can be maintained, or judgment obtained, whilst the insolvent estate is pending; and it cannot relate to a judgment obtained after the business is closed in the court of probate, because the statute provides, that the execution shall be stayed whilst the insolvent estate is pending, subject to the average made when it is closed.

Since, then, creditors are to have the benefit of the estate before volunteers, those who did exhibit, as well as those who did not, within the time limited, are entitled to the new discovered estate. The question is, how is this to be done?

If when the average was struck the statute had spent itself, and the proceedings must be at common law when new estate is found, then indeed no principle intended to be secured by the statute is violated. If the suit is brought, it must be brought before the common law courts; and all the proceedings must be as the common law directs. The executor must pay debts according to the rank recognized by the common law, and must pay them in full without reference to any average; and so judgment may be rendered for the whole debt, and the executor be bound to pay to the amount of assets in his hands to the proper claimant; and if sued by a creditor, when he has paid all that has come to his hands, may plead *plene administravit*.

Upon this hypothesis, if the estate which is discovered is real, he will not be answerable; for real estate is not assets in the hands of an executor. It will descend to the heirs, and in their hands will be liable to creditors of a certain description, *viz.* judgment and specialty creditors, but not to

simple contract creditors; and when they are paid, however large the real estate may be which remains, the heir will hold it, not being liable to pay simple contract creditors, however numerous they may be.

Whoever attends to our statute respecting the estates of deceased persons must, I think, be satisfied, that the legislature never meant that the common law of *England* in these respects should be admitted. They formed a system on this subject utterly diverse from the common law; and doubtless intended that it should operate upon all the property of the deceased. They meant to subject the real as well as the personal property, to the whole extent of it, to the payment of debts. They intended in every case of insolvency, that the estate of the insolvent should be equally distributed among the creditors. They meant to discard the idea, that one honest debt should be paid according to a certain established rank among debts, whilst another honest debt remained unpaid. They meant that a volunteer should in no case receive the benefit of the deceased's estate, either real or personal, whilst creditors were not paid through a deficiency of assets by reason of the volunteer's taking the estate. They meant in case of a representation of insolvency, that all the claims of creditors should be adjusted by commissioners, as the statute directs, before any demand should be enforced in a court of law.

I apprehend, that the mode contended for by the plaintiff must often defeat the intention of the legislature in every one of the before mentioned cases, and always in the last, if a creditor can enforce a claim in a court of law before that claim has been adjusted by commissioners.

There is no intimation in the statute, that upon new estate being discovered, it is the duty of the executor to represent the estate insolvent again. It has been already so represented; and it is not the fact of its being insolvent that makes it necessary to take the steps pointed out by the statute, but its being represented so. It may in any event turn out to be a solvent estate, but if represented as insolvent these steps must be taken.

When we examine what the law requires of the executor or administrator, it will point out the method that should be adopted. They are directed to make an inventory of the deceased's estate, and penalties are inflicted upon them if they do not. They have also a power to represent the estate in-

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solvent; and if they do, commissioners must adjust the claims, and as fast as they obtain knowledge of any estate they must inventory it. If, then, the estate is represented insolvent, commissioners are appointed, and the creditors all bring in their claims, they are adjusted, and an average is struck, and the creditors receive 50 cents on the dollar; then it is discovered that there is other estate; surely, it will not be contended, that the executor is not bound to inventory this estate, and for the benefit of the creditors who have received their dividend. Otherwise, it will be enjoyed by volunteers, whilst the creditors who are entitled to this estate are not paid. The executor, if he does his duty according to the tenour of his bond, will inventory this estate, as the statute directs that all such estate shall be sold by the executor for the payment of the creditors. It must then be applied to the payment of the creditors who have received a dividend of 50 cents on the dollar; for there are no other creditors. Having once represented the estate insolvent, there is no necessity of repeating the representation. If upon this, further estate being discovered, there is a creditor who has not before exhibited his claim, the bar on his claim by reason of his not having exhibited it before is now taken away; and this is all that is intended.

But has not the estate of the deceased been represented insolvent; and must not this as well as other claims be adjusted by commissioners? The words of the statute are very explicit, that when estate is represented to be insolvent, all the claims of creditors are to be adjusted by commissioners, and no suit can be maintained upon any until this is done. The mode of ascertaining all claims is prescribed by the statute; and all that is effected by the clause is letting in the creditors where there is new discovered estate who have not exhibited their claims, so that they may now have all the benefit of them. But there is no intimation that these claims can be enforced in any other way than all other claims are enforced. Nay, it is impossible that they should be; for all claims against the estate must be adjusted by commissioners, and these are claims. There can be no conceivable reason why these claims are not to be ascertained in the same manner that other claims are. As the executor was bound in the first instance to exhibit an inventory of all the estate that

came to his knowledge; so too is he bound to exhibit to the court an inventory of the new discovered estate. And as the estate has been represented insolvent, and as there may be creditors who have not exhibited their claims who now have a right so to do, the court will re-appoint the former commissioners, or appoint new commissioners, to examine any claims of creditors that may be exhibited. *D.* who never exhibited before, exhibits a claim, and it is allowed. The new discovered property is sold. *D.* is allowed as much as *A.*, *B.* and *C. viz.* 50 cents on the dollar, and there is yet money on hand. There is a second dividend among all the creditors *A.*, *B.*, *C.* and *D.* of 25 cents on the dollar, perhaps 50 cents, and perhaps there is a surplus, which will be distributed to the volunteers who are by law entitled to it.

If this course is taken, the whole estate is operated upon in the manner the statute directs. No feature in our law is defaced. The whole estate, both real and personal, is applied to payment of debts; and volunteers take nothing unless there is a surplus after paying debts. The average law is preserved entire. There is no preference of one debt over another. Every claim is adjusted by the commissioners, and eventually settled in the court of probate without appeal, as it is most apparent it was the intention of the legislature it should be.

The question now arises, what is to be done when this estate is discovered? It certainly would be unreasonable to sue the executor without it is made known to him that such estate is discovered. Upon its being made known to him, it becomes his duty to inventory it; and if he does, every thing will be done of course as pointed out.

But if he refuses, what is the remedy? This is answered by enquiring what would be the remedy if the executor, after having proved the will, undertaken the trust, and given bonds to perform his duty, should refuse to inventory the deceased's estate, or any particular part of it? The remedy in such case is most apparent, by suit on the bond given to the court of probate, as trustee for the creditors and others interested.

How much is to be recovered upon the bond? *D.* who has discovered the estate, holds a demand of 100 dollars only, and the estate discovered is of the value of 1000 dollars.

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This is also answered by enquiring what would be the rule of damages, if he had refused to inventory any of the estate? Unquestionably, it would be the value of the estate; which, when recovered, would go to the benefit of all the creditors, and, as the case might be, to the benefit of the heirs; for the suit when brought must be for the benefit of every person for whom the plaintiff was trustee. And the money when recovered is in the hands of the judge to be distributed *pari passu* among the creditors. In the case put, first deduct the costs, and give to *D.* the costs and an equal share with *A.*, *B.* and *C.*; and then make a second dividend, and, if the debts are paid, distribute to those volunteers to whom it belongs.

I cannot conceive of any reasonable objection to this mode of conducting the business. Why should the judgment be only to the amount of the debt of that creditor who brings forward the suit when there is more due from the executor to the creditors? Why should not the plaintiff recover all that is due? He is trustee for all the other creditors as well as for the one who brings the suit.

So too, where there is a refusal to inventory a part of the estate in the first instance, or the new discovered estate in the last instance, and yet there is no insolvency, nor representation of insolvency. Enough has been inventoried to pay all the debts, so that no creditor has any claim; but legatees have, who will be defeated in whole or in part, because the estate was not inventoried. One legatee procures a suit on the bond, whose legacy is 100 dollars. He recovers, and on the principle that there is estate of the value of 1000 dollars which ought to have been inventoried. Shall the recovery in this case be only 100 dollars? This would be the case if the suit was in his name; for that would be the extent of the injury to him. But it is in the name of a trustee, who is as much entitled for the *cestuy que trusts* to 1000 as to 100 dollars. Why then should he not recover the whole? To my mind it is apparent that he would; and I can conceive of no necessity of having as many suits as there are legatees.

This is precisely the course taken in a court of chancery, where, for good reasons, an executor is sometimes compelled to give bonds for the faithful discharge of his duty, and he fails; the bond is sued, and all for which he is liable to any person is recovered, where a single creditor is the applicant

for the suit. After recovery, notice is made out to all creditors to produce their claims, which are settled in chancery; and after paying the prosecuting creditor his actual costs, the rest is divided *pari passu* among the creditors or legatees, as the case is. And so, too, in all cases of equitable assets is the recovery, where it is necessary to go into chancery.

And why should not this be the case? If the suit is only for the benefit of him who procures the suit, when a second creditor, or second legatee comes, there must be a second suit, and so on; whereas the whole may be determined in one suit.

I can conceive of but one event in which it would be proper to institute a second suit; and that is, when it is discovered that there has been a failure, which was not known at the time of the first suit. When the bond was sued, it was known that a span of horses, a coachee and library were not inventoried; and further, there was a complete recovery. But it is now discovered, that there was a large quantity of plate which was not inventoried. In such case, there must be a second suit.

It is not necessary that any creditor should apply for a suit on the bond. The trustee, the judge of probate, may bring a suit on the bond, if he chooses; and, upon the principle that no more is to be recovered than what a creditor is entitled to at whose request the suit is brought, nothing more could be recovered in such case. The money recovered on the suit is in the hands of the judge as trustee for those to whom it belongs, and it is his duty to pay it out.

And in the case of new discovered estate, if the executor refuses to do his duty, and on the application of a creditor a suit is brought, the court must first indemnify the creditor by paying him his actual costs, then pay him an average sum equal to the sums received by the creditors who did exhibit; and if any thing remains, make a second dividend among the creditors. In this way, every principle of law is preserved unhurt, and every object of the statute is attained, and complete justice is done.

Judgment for the plaintiff.

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Selleck v. French.

SELLECK and others *against* FRENCH:

IN ERROR.

In an action of book-debt for certain advancements made by the plaintiff for the defendant's use, it appearing that there has not been mutual dealings between the parties, that the debt was due, and payment had been unreasonably delayed; it was held that interest was allowable, though the account was unliquidated, and there had been no agreement to pay interest, nor could it be claimed by virtue of any particular custom.

In what other cases interest may be allowed.

THIS was an action of book-debt, brought by *French* against the plaintiffs in error, as administrators of the estate of *James Selleck*, deceased. In the superior court, the cause was referred to auditors, who found that the deceased was indebted to the plaintiff the sum of 135 dollars 71 cents; which sum was composed of 99 dollars 63 cents principal, and 36 dollars 8 cents interest. From a remonstrance to the auditors' report, and the finding of the court thereon, it appeared that the plaintiff's account was unliquidated; that there had been no agreement to pay interest; and that the plaintiff was not a merchant, and had no right to charge interest by virtue of any particular custom. An allegation in the remonstrance that there were mutual dealings between the parties was found to be not true. The court accepted the report of auditors, and rendered judgment for the plaintiff accordingly. To reverse that judgment the present writ of error is brought.

R. M. Sherman and *Bissell*, for the plaintiffs in error, contended that interest ought not to have been allowed. They cited *De Haviland* v. *Bowerbank*, 1 *Campb.* 50. *De Bernales* v. *Fuller & al.* 2 *Campb.* 426. *Gordon* v. *Swan*, 12 *East* 419. *Walker* v. *Constable*, 1 *Bos. & Pull.* 307. *Blaney* v. *Hendrick & al.* 3 *Wils.* 206. S. C. 2 *Bla. Rep.* 761. 2 *Com. Contr.* 206. 2 *New Rep.* 206. n. (1). (*Day's edit.*) *Swift's Ev.* 84,-85.

J. Backus for the defendant in error.

SWIFT, J. This was an action of book-debt; and the only question arising in the case is, whether interest ought to be allowed.

It appears that a sum was due to the plaintiff for advance-

ments; that there had been no mutual dealings; that the debt had not been liquidated by the parties; and that there was no special agreement or custom to pay interest. Interest was * allowed by the court; and to this the defendant objects, because there was no contract or custom to pay it.

Interest by our law is allowed on the ground of some contract express or implied to pay it, or as damage for the breach of some contract, or the violation of some duty.

1. Interest will be allowed in all cases where there is an express contract to pay it.

2. The law will imply a contract to pay interest where such has been the usage of trade, or the course of dealings between the parties. Where it is known to be the custom of merchants or others to charge interest on their accounts for goods sold after a certain term of credit, the law will presume the purchaser promises to pay such interest. So where in accounts, settled interest has been charged and allowed, and the account afterwards continued, it will be presumed that interest was agreed to be paid.

3. Where there is a written contract to pay money or other thing on a day certain, and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of notes and bills of exchange. Though a policy of insurance contains no certain day on which the losses are to be paid, yet interest will be computed from the time the money becomes due.

4. Where goods are sold and delivered, to be paid for on a day certain, and are charged on book, interest will be allowed after the term of credit has expired. If partial payments are made, interest will be allowed on the balance, though the account is unliquidated.

5. Where one has received money for the use of another, and it was his duty to pay it over, interest is recoverable for the time of the delay; but if the holder of money for another is guilty of no neglect or delay, he will not be chargeable with interest.

6. Where money is obtained by fraud or deceit, and the party injured, waiving the tort, brings his action on the implied promise, interest will be allowed as damages.

7. Where an account has been liquidated, and the balance ascertained by the parties, interest will be allowed thereon, unless there should be some agreement to delay the payment.

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8. Where articles are delivered, or sevices performed, and charged on book, and no time of payment agreed on; yet if it appear from the nature of the transaction that they were to be paid for in a reasonable time, and not to rest on book as a mutual account; then if payment be unreasonably delayed, interest will be recoverable as damages, though partial payments have been made, and the account has not been liquidated. If one should make advances for the benefit and at the request of another, or a mechanic should perform some considerable piece of work, as building a house, or a farmer should sell the produce of his farm, as his wheat, beef, &c. it could not be presumed that they were to rest on the footing of a mutual account on book, but that payment was to be made when the advancements were closed, the work completed, and the produce delivered; of course, interest would be chargeable on such accounts if unreasonably delayed, though partial payments have been made, and the accounts were unsettled; for here has been a breach of contract.

9. But where there are current accounts founded on mutual dealings, unless there be some promise or usage to pay interest, it will not be allowed; for in such cases no time of payment is stipulated, each party is making payment, the balance is constantly varying, it is understood that the demands are to remain on book, and the presumption is that interest is not to be allowed: Such is the case of farmers, and mechanics, in their mutual intercourse.

Such are the principles which have been long established in this state. In *England* there have been contradictory decisions; but it has been lately decided, that interest ought to be allowed only, where there is a written contract for the payment of money on a day certain, as on bills of exchange, and promissory notes; or where there has been an express contract; or where a contract can be presumed from the usage of trade, or course of dealings between the parties; or where it can be proved that the money has been used, and interest actually made. *De Haviland* v. *Bowerbank*, 1 *Campb.* 50. *De Bernales* v. *Fuller & al.* 2 *Campb.* 426. Interest has been refused in actions for money obtained by fraud; (*Crockford* v. *Winter*, 1 *Campb.* 129.)—for money received to the plaintiff's use; *De Bernales* v. *Fuller & al.* 2 *Campb.* 426.)—for goods sold and delivered payable at a certain time; (*Gordon* v. *Swan*, 2 *Campb.* 429. n.)—on liquidated accounts, and on pol-

icies of insurance. *Kingston* v. *M'Intosh*, 1 *Campb.* 518. But where goods have been sold to be paid for on a certain day in a bill of exchange, if the bill is not delivered, interest is allowed, because the bill would have drawn interest. *Becher* v. *Jones*, 2 *Campb.* 428. n. *Porter & al.* v. *Palsgrave*, 2 *Campb.* 472. *Boyce & al.* v. *Warburton*, 2 *Campb.* 480. These rules do not appear to be either founded in justice, or consistent with each other. There is the same reason to allow interest for not paying money by the time it is due in the case of policies of insurance as of notes and bills of exchange; in the case of parol as of written contracts. Why should a man be liable to pay interest on a contract to deliver a *bill of exchange* in payment for goods on a certain day, and not be liable on a contract to pay the *money* for goods on a certain day? It is as valuable to receive money in hand, as a bill drawing interest. Why should the defendant be liable to pay interest, if it can be proved that he has made interest by the use of it, and not liable if he has made none? It is immaterial to the plaintiff what use the defendant has made of the money; the injury to him is the being kept out of the use of it himself.

In this case, it appears that there were not mutual dealings; the advancements were all on the part of the plaintiff.

It is not denied, that the debt was due, and the payment unreasonably delayed; of course, the defendant became liable to pay the interest, though the account was not settled, and there was no promise or usage to pay it. (*a*)(1)

The other Judges were of the same opinion.

Judgment affirmed.

(*a*) For other cases in which interest has been allowed, see *Bowen* & al. v. *Huntington*, 3 *C. R.* 423. *Adams* v. *Spalding* & al. 12. *C. R.* 350. *Rowland* v. *Isaacs*, 15 *C. R.* 115. In what cases it has not been allowed, see *Wells* v. *Abernethy*, 5 *C. R.* 222. *Thompson* v. *Stewart*, 3 *C. R.* 182. *Coit* v. *Tracy*, 9 *C. R.* 15. *Rose* v. *City of Bridgeport*, 17 *C. R.* 243.

(1) The subject of interest was elaborately discussed by the Supreme Court of the State of New York, in *Reid* v. *The Renssellaer Glass Factory*, 3 *Cowen R.* 393; and by the Court for the Correction of Errors, in the same case, in error, 5 *Cowen R.* 587. Its history is traced, by a careful review of the English and American decisions; and the rules deducible from the adjudged cases, are classified and arranged under appropriate heads. That, and *Reab* v. *McAlister*, 8 *Wend. R.* 109, are the leading cases, on this head, in New York. And see *Meech* v. *Smith*, 7 *Wend. R.* 315, 318; and *Esterly* v. *Cole*, 1 *Barbour's Supr. Ct. R.* 235. For the doctrines of Equity, as to interest, see *Gray* v. *Thompson*, 1 *John. Ch. R.* 82; *Methodist Epis. Church* v. *Jaques*, Id. 450; *Hart* v. *Ten Eyck*, 2

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Couch *against* Gorham.

A testator having devised his estate to his sons *A. B.* and *C.*, to his daughters *D.* and *E.*, and to three grand-children, the children of a deceased son, and to their heirs and assigns forever, in certain proportions, added the following clause, "and my will further is, that if either of my said sons without issue, then in such case the share given to such deceased son shall go and vest in the surviving brethren, and those that legally represent them." Held that on the death of *B.* without issue, the surviving brethren took his share by executory devise, notwithstanding any conveyance made by him.

THIS was an action of ejectment. The defendant pleaded the general issue, which was closed to the court under the statute. (*a*) The cause was tried at *Fairfield*, *December* term, 1813, before *Reeve*, *Smith*, and *Baldwin*, Js. On the trial the question of title arose on the construction of the will of *Samuel Couch*, deceased; the material part of which was as follows: "All the residue and remainder of my estate I give, devise and bequeath unto my sons *Josiah*, *Zebulon*, *Benjamin*, *David* and *Nehemiah*, and unto my daughters *Abigail* and *Naomi*, and to my three grand-children, the children of my deceased son *Samuel*, *viz. Joshua*, *Elizabeth*, and *Rachel*, and to their heirs and assigns forever, in such manner and proportion that my said sons shall be equal, and share an equal share and part in my said estate with each other, and that my said daughters *Abigail* and *Naomi* shall each of them have one third as much of my said estate as each of my said sons, and that my said grand-children

Id. 108; *Consequa* v. *Fanning*, 3 Id. 601; *Livingston* v. *Livingston*, 4 Id. 293; *Miller* v. *Burroughs*, Id. 436; *Munise* v. *Cox*, 5 Id. 534; *Mumford* v. *Murray*, 6 Id. 17. 452; *Campbell* v. *Mesier*, Id. 21; *Glen* v. *Fisher*, Id. 33, 37; *Williams* v. *Storrs*, Id. 358; *Richards* v. *Salter*, Id. 445; *Clarkson* v. *Depeyster*, *Hopkin's Ch. R.* 424; *Hunn* v. *Norton*, Id. 344; *Ellis* v. *Craig*, 7 *John. Ch. R.* 7; *Wilkes* v. *Rogers*, 6 *John. Ch. R.* 566; *Mower* v. *Kipp*, 2 *Edw. Ch. R.* 165; *Gillespie* v. *The Mayor &c. of N. Y.*, 3 Id. 512; *Hosford* v. *Nichols*, 1 *Paige Ch. R.* 220; *Van Valkenburgh* v. *Fuller*, 6 Id. 10; *In the matter of Murray*, Id. 204; *Bell* v. *The Mayor &c. of N. Y.*, 10 Id. 49; *Beacham* v. *Eckford's Executors*, 2 *Sandford's Ch. R.* 116; *Suarrez* v. *The Mayor &c. of N. Y.*, Id. 173; *Stevenson* v. *Maxwell*, Id. 273; *Janeway* v. *Green*, Id. 415; *The New York Life Ins. & Trust Co.* v. *Manning*, 3 Id. 58; *Burtis* v. *Dodge*, 1 *Barbour's Ch. R.* 77; and *Aldrich* v. *Reynolds*, *Id.* 613. And for the equitable doctrine as to compound interest, see *Connecticut* v. *Jackson*, 1 *John. Ch. R.* 13; *Schieffelin* v. *Stewart*, Id. 620; *Stoughton* v. *Lynch*, 2 Id. 209; *Evertson* v. *Tappen*, 5 Id. 517; *Van Benschooten* v. *Lawton*, 6 Id. 313; *Clarkson* v. *Depeyster*, *Hopkin's Ch. R.* 424; *Moury* v. *Bishop*, 5 *Paige R.* 98; and *Quackenbush* v. *Leonard*, 9 Id. 334.

(*a*) *Tit.* 6. *c.* 1. *s.* 8.

shall together have half as much of my said estate as each of my said sons, and that my said grand-son *Joshua* shall have the one half of that half given to my aforesaid grand-children; only it is my will, that what of my estate I have already given to my said sons *David* and *Nehemiah* shall be reckoned and computed to them severally towards their respective shares aforesaid. And my will further is, that if either of my said sons without issue, then in such case the share and part given to such deceased son shall go and vest in his surviving brethren, or those that legally represent them." *Benjamin* died without issue about one year before the commencement of the action. The defendant claims under a deed from him executed about thirty years before his death. The plaintiff is one of the surviving brethren. On these facts the court found for the plaintiff. The defendant moved for a new trial; and the question of law was reserved for the advice of all the Judges.

R. M. Sherman in support of the motion. By the general devise, the property is given in fee simple. Unless the testa- [*37]
*tor has limited the operation of the general clause, the title of the plaintiff must fail. It is claimed that he has done this, by the proviso, "that if either of his sons without issue," &c.

It has ever been admitted in former discussions of counsel in this case, that the words omitted by the testator cannot be supplied; but that his intention must be collected from the will as it reads, without the aid of conjecture; and it has been contended, that his apparent intention was, that if any of his sons should *ever* die without issue, *his* share should go to his surviving brethren. It is admitted, that several words in this clause, especially the words "deceased" and "surviving" shew, that the death of the individual whose part should go over was in the view of the testator; but that intent would be as well answered by supposing the words "be dead" were omitted, as the words "shall die," or any other which may be conjectured. Other words in the clause clearly shew, that the testator was providing for the disposition of the shares of those sons named in the will, who should "be dead" at the time the estate should vest, *viz.* at his own decease. On no other construction, can the words "their legal representatives" have any meaning at all. If a son

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should die without issue in the life-time of the testator, and after him others, leaving issue, the share of such son would go to such issue, as legal representatives, and to the brethren who should be still living. All these, in regard to the one who first died without issue, would be "surviving brethren;" and the issue of those who died before the testator would be "legal representatives;" according to his ideas. But if we suppose the testator had in view the case which has happened, *viz.* the death of a son without issue after his own death, the words of the clause cannot be satisfied; as the *survivors* must all be *still* living, and consequently cannot have *legal representatives* in any sense, *legal* or *popular*. This construction is corroborated by the devise being to the devisees, "their heirs and *assigns*," which strongly imports an intention that they should have the power of alienation in fee. The proportions also, which are established between the sons already advanced and the other devisees, would be disturbed by the construction of the plaintiff, as the estates already given in advancement were *not liable* to be defeated by dying without [*38] * issue. It has been suggested, that the power to sell the estate of *Zebulon* which is given to *Nehemiah*, need not have been conferred, if *Zebulon* had owned an absolute fee. It might, however, be rather inferred, as the estates are declared by the testator to be alike, that *Zebulon* had an absolute fee, and not a defeasible life-estate; else why should it be sold for his support at all? It is very obvious, that *Nehemiah* could have no power to sell, unless specially conferred by the will.

The estate claimed by the plaintiff being by executory devise, every fair construction ought to be given in support of the defendant's right; as executory devises, incapable of being barred or aliened till the event happens on which they depend, are opposed to sound policy, and reluctantly tolerated by the law.

Sherwood and *Bissell*, contra. The general question in this case is, what estate *Benjamin Couch* took under the will? This question depends on the construction of the clause—"if either of my sons without issue" &c. In determining the construction, the intent of the testator, apparent upon the will, must unquestionably govern. Was it his intent to guard against intestacy; or to make a disposition of his es-

tate to take effect after his death? That he had the latter object principally in view is evident, not only from the situation of the devisor, and the consideration that this must be the object of every testator, but from other circumstances. No provision was made in the case of the death of his daughters or grand-children. It was manifestly his intention to debar the daughters from the part given to the sons, and to preserve the estate in the name of the family. This object is best effected by the construction claimed by the plaintiff. On the other ground, as soon as the sons took any thing under the will, they took a fee; and if a son had then died without issue, the daughters would have been his heirs. The construction claimed by the plaintiff preserves the proportions, which the testator intended should be preserved. No son took a fee by the event of having issue; but a fee was given to the issue, if there were any. The grand-children took but half as much as a son, but took a fee.

The word "die" is the only one which can be implied from the words expressed. If this be implied, the sons took [*39] only a fee defeasible in the event of dying without issue. *Holmes* v. *Williams*, 1 *Root*, 335. *Porter* v. *Bradley*, 3 *Term Rep.* 146. *Wilkinson* v. *South*, 7 *Term Rep.* 555. *Roe d. Sheers & al.* v. *Jeffery*, 7 *Term Rep.* 589. If so, the limitation over could not be destroyed by the first taker. His alienation is inoperative; of course, the plaintiff is entitled to recover.

INGERSOLL, J. The question in this case arose on the following clause of the will of *Samuel Couch*, the testator, *viz.* "And my will further is, that if either of my said sons *without issue*, then in such case, the share and part given to such deceased son shall go and vest in his surviving brethren, or those that legally represent them." The court below understood the will in the same sense as if the word *die* had been inserted next before the words "without issue," supposing it to have been the manifest intent of the testator, that in the event of one of the sons dying without issue all his brethren surviving, or their representatives, should take his share, and gave judgment for the plaintiff, one of the surviving brethren of *Benjamin*. If the words "die without issue" had been expressed in the will, there is no question but the surviving brethren of *Benjamin*, or their representatives, must

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have taken the estate, notwithstanding any conveyance that might have been made by him. They would have taken the estate as by an executory devise, wherein a fee may be limited after a fee. That such was the intent of the testator, I think, may be inferred from the whole will taken together. He was making provision for all his children, and meant not that any of his estate should be undevised. It was, indeed, ingeniously argued by the counsel in favour of a new trial, that probably it was the intent of the testator, that the estate should go over to the surviving brethren in the event of the devisee of it dying without issue in *the life time of the testator*. But it is a conclusive answer to this construction, that if it were to prevail, this part given to *Benjamin* might, on his so dying leaving issue, have been undisposed of, and have been subject to a distribution among all the heirs. This certainly could not have been the intent of the testator.

On the whole, I am clearly of opinion, that it was the
[*40] * manifest intent of the testator, that if any one of the sons should die without issue, after having taken the estate, that is, after the death of the testator, in such case his surviving brethren should be entitled to his share. (*a*) I therefore think, that the construction put on this will by the superior court was right, and would not advise a new trial.

In this opinion all the other Judges concurred, except REEVE, Ch. J., who dissented.

New trial not to be granted.

GRUMON *against* RAYMOND and BETTS.

To lay a foundation for issuing a search-warrant to search for stolen goods, and to arrest the person suspected of the theft, there must be an oath by the applicant that his goods have been stolen, and that he strongly suspects that they are concealed in a specific place, and that they were stolen by a person distinctly pointed out; and the warrant must describe the goods, designate the suspected place and person, and direct the officer to search such place, and arrest such person, only.

If the preliminary requisites be omitted, or if the warrant be general, the proceeding is *coram non judice*, and the magistrate who issues the warrant, and the officer who executes it, are liable in trespass to the party injured.

THIS was an action of trespass *vi et armis*, alleging an unlawful arrest and imprisonment of the plaintiff by the defendants.

(*a*) See *Morgan* v. *Morgan*, 5 *Day*, 517. *Hudson* v. *Wadsworth*, 8 *C. R.* 348.

The cause was tried at *Fairfield*, *December* term 1813, before *Reeve*, *Smith* and *Baldwin*, Js. On the trial the case was as follows. The defendant *Raymond* was a justice of the peace for *Fairfield* county, and the defendant *Betts* was a constable of the town of *Wilton*. On the 1st of *January* 1813, one *Terrel* exhibited to *Raymond*, as a justice of the peace, a complaint in writing, setting forth that on the same day two bags of the value of one dollar, marked A. C. and M. M. were feloniously stolen from the complainant, and that they were somewhere concealed; and praying that a warrant might issue to search for the bags and the felon that had stolen them, &c. The justice thereupon issued a warrant in these words: "To the sheriff of the county of *Fairfield*, or his deputy, or either of the constables of the town of *Wilton*, *Greeting*. Whereas *Dunning Terrel* of *Wilton*, *Fairfield* county, has this day, by writing under oath, exhibited to me the subscribing authority, his complaint, that at said *Wilton*, on the 1st of *January* 1813, two bags were feloniously taken and stolen from the complainant, from the house belonging to *A.* * and *Z. Raymond* in said *Wilton*, of the value of one dollar, [*41] marked A. C. and M. M. and that several persons are suspected of taking said bags, and that they are concealed at *Aaron Hyatt's* in said *Wilton*, or some other place or house in said *Wilton;* and said *Terrel* prays for a warrant to search after and recover said bags, as by complaint appears. These are, therefore, by authority of the State of *Connecticut*, to command you forthwith diligently to search the premises of *Aaron Hyatt* in said *Wilton*, and other suspected places, houses, stores or barns in said *Wilton*, for said bags, and also to search such persons as are suspected; and if you shall find said bags and the person suspected, you are to take said bags, and arrest the person suspected, and him have forthwith before me, the subscribing authority, at my dwelling-house in *Wilton* aforesaid, to be dealt with as the law directs. Dated at *Wilton*, on this 1st day of *January*, 1813. *Zadock Raymond*, Justice of peace." This warrant being put into the hands of *Betts* to serve and return, he searched the store of *Aaron Hyatt*, and found two bags marked M. M. and one marked A. G., and arrested five suspected persons, of whom *Grumon*, the plaintiff, was one, and brought them before justice *Raymond*. The persons arrested demurred to the complaint and warrant; and the justice adjudged the

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same to be insufficient, and taxed costs against the complainant. There appeared to have been no violence used, the constable having made the arrest by a gentle imposition of hands, and the justice having done nothing more than issue the warrant, and hold the plaintiff to trial on its return. On these facts it was contended, that the warrant was a sufficient justification to *Betts* for what he had done, and that no action would lie against justice *Raymond* for issuing the warrant, and holding the plaintiff to trial thereon. It was further contended by justice *Raymond*, that if he was liable in any form of action, trespass *vi et armis* was not sustainable, but that the action should have been case. But the court, in their charge to the jury, instructed them, that the action of trespass would lie against both of the defendants; and that the warrant was illegal, and afforded no justification either to the justice or the officer; and that they must both be found guilty. The jury accordingly found a verdict for the plaintiff; and the defendants moved for a new trial on
[*42] * the ground of a misdirection. The questions arising on this motion were reserved for the opinion of all the Judges.

Sherwood and *N. Smith* for the defendant *Raymond*, and *Bissell* for the defendant *Betts*, argued in support of the motion. They contended, 1. That the justice in issuing the warrant, and in rendering judgment, on the return of that warrant, that the complaint was insufficient, acted judicially, and therefore was not liable in any form of action. A magistrate, acting in his judicial capacity, is not liable in a civil action even for corruption, much less for an error in judgment. The issuing of a search-warrant is a subject clearly within the jurisdiction of a justice of the peace. It is his duty, as well as his right, to judge whether upon the facts stated in the complaint a search-warrant ought to issue. 2 *Hale's P. C.* 150. 2 *Hawk. P. C. c.* 13. *s.* 20. 4 *Burn's Just.* 104. 2 *Swift's Syst.* 115, 116. *Frisbie* v. *Butler*, *Kirb.* 213. *Phelps* v. *Sill*, 1 *Day's Ca.* 315, 329.

2. That though the justice might have erred in issuing the warrant, yet the process was not irregular. It appears from the record of the justice, which makes a part of this case, that there was a complaint exhibited to him in writing; that this complaint was sworn to by the complainant; that it alleged a felony to have been committed; that it specified

the property stolen, and the time when, and the place where, it was stolen; and pointed out the place where the complainant suspected it to be concealed. Here a sufficient foundation was laid to authorize the justice to act in the case.

3. That admitting the process to be irregular, yet as it was issued by competent authority, the *officer* is not liable for executing it. The person making the complaint, and directing the arrest, is alone responsible. 2 *Swift's Syst.* 58, 96. *Parsons* v. *Lloyd*, 3 *Wils.* 345, 6. *Samuel* v. *Payne*, *Doug.* 360.

It was also stated as one of the points in this case, that the action as against the justice was misconceived; but this point was not much insisted upon.

R. M. Sherman, contra, insisted that the whole proceeding saw *cornam non judice*, and afforded no protection either to the justice or the officer. He referred to the cases cited in *2 *Wils.* 385, 6. and to the case of *Entick* v. *Carrington & al.* 2 *Wils.* 275. [*43]

Reeve, Ch. J. That this warrant was such as no justice ought to have issued will be admitted; for it is not only a warrant to search for stolen goods supposed to be concealed in a particular place, but it is a warrant to search all suspected places, stores, shops and barns in *Wilton*. Where those suspected places were in *Wilton* is not pointed out, or by whom suspected: so that all the dwelling-houses and out-houses within the town of *Wilton* were by this warrant made liable to search. The officer also was directed to search suspected persons, and arrest them. By whom they were suspected, whether by the justice, the officer, or complainant, is not mentioned; so that every citizen of the *United States* within the jurisdiction of the justice to try for theft, was liable to be arrested and carried before the justice for trial. The warrant was this: Search every house, store or barn within the town of *Wilton*, that is suspected of having certain bags concealed in it, said to be stolen, and all persons who are suspected of having stolen them. This is a general search-warrant, which has always been determined to be illegal, not only in cases of searching for stolen goods, but in all other cases.

In all the history of legal proceedings there is no such warrant to be found as to arrest all suspected persons; for in

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those general warrants issued by Lord *Halifax*, as secretary of state, in search of libels, the persons to be arrested were pointed out in every warrant; but is was to ransack a man's house, and to bring all his books, papers, &c. before Lord *Halifax*. A number of suits were brought against those employed by Lord *Halifax* for having executed these warrants; and in every instance, the plaintiff prevailed, and recovered exemplary damages, by verdicts of the jury; which verdicts were approbated by the court; for in all the applications for new trials, they refused them.

It cannot be said, that those cases differed from the present one; that in this case the justice had jurisdiction over theft, and might issue a proper warrant in the case; and having issued an improper one, it is only an error in judgment respecting a subject over which he has jurisdiction, and therefore [*44] *he cannot be accountable; but that Lord *Halifax*, as secretary of state, had no jurisdiction over the subject matter. This is not the case. A secretary of state has power to commit for treason and seditious libels upon a proper warrant. *Rex* v. *Kendall* and *Row*, *Skinn.* 596. S. C. 1 *Salk.* 347. S. C. 1 *Ld. Raym.* 65. *Rex* v. *Wyndham*, 1 *Stra.* 2 *Searche's* case, 1 *Leon.* 70. *pl.* 93. *Yaxley's* case, *Carth.* 291. *Hellyard's* case, 2 *Leon.* 175. *pl.* 213. 2 *Hawk. P. C. ç.* 16. *s.* 4. And this doctrine was held to be correct by the court who tried the cases. 2 *Wils.* 288. The ground on which the defendants were held liable was not that the secretary had no jurisdiction in case of libels against the government, but that he had no jurisdiction to issue such a process; for there must be not only a jurisdiction of the subject matter, but also a jurisdiction of the process. This point was expressly determined in the case of *Martin* v. *Marshall* and *Key*, *Hob.* 63. In a case tried by the mayor of *York*, the action brought was trespass *vi et armis*. The mayor of *York* was judge of a court of limited jurisdiction, and issued a process which was illegal. Though he had full jurisdiction over the subject matter tried, yet the court held him liable; for, say the court, the judge had a limited jurisdiction of the subject matter, but had no jurisdiction of such process as was issued. This doctrine was recognized as correct in *Perkin* v. *Proctor & al.* 2 *Wils.* 386. where the court say, there must be jurisdiction of the *process* as well as of the person and cause.

In the principal case, the law knows of no such process as

one to arrest all suspected persons, and bring them before a court for trial. It is an idea not to be endured for a moment. It would open a door for the gratification of the most malignant passions, if such process issued by a magistrate should skreen him from damages.

As there is no such process known to the law as the record presents, no person could be arrested under it. The case, then, stands on no better ground than it would if there had been no process, and a verbal direction had been given to arrest all suspected persons, and bring them before the justice. But the magistrate who issued a verbal process to arrest was held liable in trespass; and this is recognized as good law in 2 *Wils.* 386.

[*45] * Should it be asked, if a justice issues a warrant which has some defect in it, so that the person arrested cannot be held by it, is the justice liable? I answer, he is not, if he aims at issuing a process which the law recognizes, and fails through some oversight or mistake. If he should attempt to issue an attachment against the goods, estate or person of a debtor, and direct the officer for want of property to take the debtor, and him have before the court &c., and it should be so defective as to abate, the justice would not be liable; for he had jurisdiction over that kind of process which he issued. But if he should direct the officer, for want of property, to take the body of the debtor, and put him in irons, and confine him in *Newgate*, he would be liable; for the law knows of no such process.

Where there is a want of jurisdiction over the persons, as in the *Marshalsea* case, 10 *Co.* 70.; or over the cause, as if a justice should try a man for murder; or over the process, as in the case cited from *Hobart;* it is the same as though there was no court. It is *coram non judice.*

From the case of *Entick* v. *Carrington*, 2 *Wils.* 275. we have the opinion of the Chief Justice, that if a warrant which is against law be granted, such as no justice of the peace or other magistrate, high or low, has power to issue, the justice who issues and the officer who executes it are liable in an action of trespass. And no man can hesitate to say, that the law knows of no such warrant as one to arrest suspected persons without naming them, without any complaint, against any person, leaving it to the officer to suspect whom he pleases, or to arrest every person that any other person suspects.

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But there is another point of light in which this subject may be viewed. The justice never had any jurisdiction of the subject matter. This purports to be a search-warrant for stolen goods; and the law requires, that before any justice can have power to issue a warrant in such case, certain requisites be complied with.

It is comparatively of modern date that such a warrant could, under any circumstances, issue. In the time of Lord *Coke* it could not be done. 4 *Inst.* 176, 7. But it is now allowed of under certain circumstances. There must be an oath by the applicant that he has had his goods stolen, and strongly suspects that they are concealed in such a place;

[*46] * and the warrant cannot give a direction to search any other place than the particular place pointed out.

By the complaint on record in writing, it does not appear, that any oath was made, that the bags were stolen; nor that any place was pointed out where they were concealed; both of which were necessary, and without them no warrant could issue.

But it is said, that from the warrant under the hand of the justice it appears, that there was an oath that the bags were stolen; and that they were concealed at *Aaron Hyatt's*, or some other place. It is true, the justice so says; but it will be remarked, that he says, "as will appear by the complaint;" and upon examination of that, there is no oath ever made that there was any felony, or any place pointed out where the stolen bags were supposed to be; so that the justice had no jurisdiction over the case so as to issue a search-warrant.

But admitting that the warrant under the hand of the justice presents to us correctly the facts, it will not help the defendants; for there is no place pointed out, only at *Aaron Hyatt's or somewhere else*, which is equivalent to saying, that they were somewhere concealed. This would not be sufficient to warrant the issuing of a search-warrant.

If it should be contended, that it would authorise the issuing of a warrant to search *Aaron Hyatt's*, yet it laid no foundation to search any other place, for no other place is mentioned; and notwithstanding this, the warrant directs all suspected places in *Wilton* to be searched, whether houses, barns or stores; and under a warrant so issued the plaintiff was arrested.

It is no uncommon thing where there is a court of limited jurisdiction, that their jurisdiction depends upon the existence of certain things, and for want of these the court has no jurisdiction; and every thing done by the court, where these are wanting, is *coram non judice;* and the judge and officer are, in such case, liable in trespass to any person who may be arrested by a warrant issuing from the court.

There is a notable case in 2 *Stra.* 993. which fully establishes this doctrine. It is the case of *Smith* v. *Bouchier* and others, *viz.* the vice-chancellor of the university of *Oxford*, the judge, gaoler and party. The question arose upon a * custom, that a plaintiff making oath that he has a personal [*47] action against any person within the precincts of the university, and that he believes the defendant will not appear, but run away, the judge may award a warrant to arrest him, and detain him until security is given for answering the complaint. On the 7th of *August* 1731, the defendant *Bouchier*, having the privilege of the university, made a complaint to the defendant *Shippen*, the vice-chancellor, of a personal action against the plaintiff *Smith*, to his damage 1000*l.*, according to his estimation, and that he suspected that the plaintiff *Smith* would run away. He took his oath of and upon the truth of the premises; upon which a warrant was granted to the other defendants, who arrested *Smith*, and kept him in prison eight days for want of sureties.

Here, it will be observed, the requisite was, that the plaintiff should swear to his *belief* that the defendant would run away, whereas the oath was, that he *suspected*. The court held, that it was necessary, to give jurisdiction to the court, that he should swear to his belief; and because he did not, all that was done was *coram non judice*, and void. The vice-chancellor, judge, officer and party were, therefore, all held to be liable in an action of trespass and false imprisonment.

As in that case there was no jurisdiction without an oath that the plaintiff believed; so in this case there is no jurisdiction without an oath that the bags were concealed in some specific place. As there was no such oath, the justice had no jurisdiction. This case is precisely in point.

When this case is viewed in either point of light, the case is with the plaintiff; for although the justice had jurisdiction of the subject matter of theft, yet he had no jurisdiction

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over such a process. It was unknown in law and illegal, and could not be issued by any magistrate high or low, as is expressed by Lord *Camden*, without making that magistrate liable, provided any person was arrested under it.

As to the warrant to search for stolen goods; this could in no case be issued, unless certain requisites had been observed, which were not observed in this case, and of course the justice had no jurisdiction in the case. (*a*) (1)

The justice, therefore, was liable to this action, and the officer also who executed it; for although an officer is not [*48] *always liable when he executes an improper warrant; yet this is in a case where it does not appear on the face of the warrant that it is illegal. It may, for any thing that the officer can discover, be legal; and in such case, it is his duty to obey, and to presume that it is lawful. But an officer is bound to know the law; and when the warrant, on the face of it, appears to be illegal, and he executes it, he is liable to the person arrested. Such was the present case.

This point has for many years, and in many cases, been so decided by the superior court of this state; and the same point was so decided by the circuit court of the *United States*, in the case of the sheriff of *Hartford* county, where a protection was granted by the General Assembly to one *Huntington* to attend upon a petition which he had pending before the General Assembly. In the protection, it did not appear what the nature of that petition was, though it was in fact a petition by him as an insolvent debtor. It was con-

(*a*) See *Hall* v. *Howd*, 10 *C. R.* 514. *Prince* v. *Thomas*, 11 *C. R.* 472. *Holcomb* v. *Cornish*, 8 *C. R.* 375. *Allen* v. *Gray* & al 11 *C. R.* 95. *Dyer* v. *Smith*, 12 *C. R.* 384.

(1) No intendments are made in favour of the jurisdiction of inferior Courts, or of officers proceeding summarily under a special Statutory authority, but every material fact, necessary to confer jurisdiction on such Court or Officer, must be distinctly averred and proved.—In *The People ex. rel. Van Valkenburgh* v. *The Recorder of Albany*, 6 *Hill R.* 429. BRONSON, J. said, "the more I see of these summary proceedings, the more fully am I convinced that they should be carefully watched." In *Hill* v. *Stocking*, 6 *Hill R.* 314, the same learned Judge said, "these summary proceedings must be carefully watched, or they will be turned into the means of working injustice and oppression:" and in *Whitney* v. *Shufelt*, 1 *Denio R.* 594, JEWETT, J. stated it as a general principle, that "the party who invokes the exercise of the jurisdiction of an inferior tribunal, must, in justifying, aver the actual existence of the material facts upon which the jurisdiction depends."—To the same effect are, *Matter of Bliss*, 7 *Hill* 187; *Matter of Faulkner*, 4 Id. 598; *Ex parte Robinson*, 21 *Wend.* 672; *Ex parte Haynes*, 18 Id. 611; and *Halliday* v. *Noble*, 1 *Barbour's Supr. Ct. R.* 187.

tended, that the Assembly could not constitutionally grant the petition, and of course had no authority to allow a protection in a case over which they had no jurisdiction. The circuit court decided, that the Assembly had power to grant the protection; but they also decided, that supposing they had not, yet it did not appear what the nature of the petition was, on which the protection was granted; and it might be a petition in chancery, which, by the laws of the land, they were a court appointed to decide;(*a*) and the sheriff was not to make any indecent conjectures that it was in a case where they had no jurisdiction, when it might be allowed in a case where they had jurisdiction. The sheriff, then, having executed a process which he was bound to obey, it was admitted by all, that he could not be liable; and also, if it was one which on the face of it was illegal, his duty would have required that he should not execute it.

I am for these reasons of opinion that there ought not to be a new trial.

In this opinion the other Judges severally concurred.

New trial not to be granted.

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*LEWIS *against* HAWLEY: [*49]

IN ERROR.

A petition for a new trial on the ground of surprise and newly discovered evidence, being an address to the discretion of the court, a writ of error will not lie on a judgment or decree in such case refusing a new trial.

THIS was a petition brought by *Lewis* to the superior court, for a new trial of an action of slander, in which *Hawley* had recovered a verdict and judgment against him.(*b*) The petition was voluminous, detailing all the evidence exhibited by *Hawley* on the trial, alleging falsehood, mistake, fraud and surprise, and averring newly discovered and material evidence. To this peti-

(*a*) The General Assembly of this State has original jurisdiction of suits in equity "where the value of the matter or things in demand exceeds the sum of five thousand three hundred and thirty five dollars." Vide *Stat. tit.* 128. *c.* 1. *s.* 6. 2 *Swift's Syst.* 420.

(*b*) Vide 2 *Day's Ca.* 495.

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tion there was a demurrer. The court adjudged the petition insufficient; whereupon this writ of error was brought.

N. Smith, for the plaintiff in error, went into a minute and elaborate discussion of the allegations in the petition, contending that a new trial ought to have been granted.

Daggett and *R. M. Sherman* for the defendant in error, met the question on the merits of the petition, and insisted that the petitioner had not shewn himself entitled to the relief which he sought. They also contended,

2. That this being an application to the *discretion* of the court below, a writ of error will not lie to revise their decision. The act of the court in refusing a new trial is analogous to their refusing to reserve a motion, or a case stated; which clearly could not be the subject of a writ of error. They cited and relied upon *Granger* v. *Bissell*, 2 *Day's Ca.* 364, 368.

In reply, it was said, that a petition for a new trial had, in this state, always been treated as an original suit, and had all the incidents of an original suit. The discretion which the court are to exercise is a sound and legal discretion, subject to established rules. In *Granger* v. *Bissell* no reasons are given; and it does not appear from the *case* on what ground it was decided. A casual remark of the reporter in a marginal note is too loose an authority to govern the decision of this Court.

[*50] *BRAINARD, J. A petition for a new trial on the ground of surprise and newly discovered evidence is an address to the sound discretion of the court. The court in fact are presumed to possess the whole of the testimony offered on the trial. They have a full view of the case as it appeared to them; with which they are to compare the surprise and newly discovered evidence stated; and, if called to it by demurrer, to judge of the nature and extent of the one, and of the importance and relevancy of the other. These are to be tested by the discretion of the court, of which error is not predicable.(*a*)(1)

(*a*) See *White* v. *Trinity Church*, 5 *C. R.* 187. *Magill* v. *Lyman* & al. 6 *C. R.* 59. *Chambers* & al. *v. Campbell*, 15 *C. R.* 427.

(1) In the *People* v. *The Superior Court of the City of New-York*, 10 *Wend. R.* 292, the Supreme Court awarded a peremptory Mandamus, commanding the Superior Court to vacate a rule, granting a new trial on the ground of newly discovered evidence, it appearing by the return to an alternative mandamus, that

Our statute(*b*) on the subject directs the courts for mispleading, or discovery of new evidence, or other cause, to grant new trials as shall by them be judged reasonable, and proper, submitting to and relying on the sound discretion of the court. This, in the present case, I am bound to presume, has been duly and properly exercised. I am, therefore, of opinion that in the judgment complained of there is nothing erroneous.

INGERSOLL, J. gave no opinion, having been of counsel in the cause previous to his appointment to the bench.

The other Judges severally concurred in the opinion delivered by Judge *Brainard*.

Judgment affirmed.

the party asking for the new trial was chargeable with *laches*, and that the evidence alleged to be newly discovered was *cumulative*. *Savage*, *Ch. J.*, delivering the opinion of the Court, said, "the discretion to be exercised by an inferior Court, in granting new trials for newly discovered testimony, is not an *arbitrary*, but a *legal* discretion, and is therefore subject to review by this Court."—And see the same case, on the application for an alternative mandamus, 5 *Wend. R.* 114. *In the People* v. *The New York Common Pleas*, 18 *Wend. R.* 534, where, on a demurrer to the declaration for the cause that its caption was of a day anterior to the accruing of the cause of action, the Court of Common Pleas had given judgment for the plaintiff and also allowed him to amend the declaration so as to cure the defect, and had refused leave to the defendant to plead to the amended declaration, the Supreme Court awarded a mandamus, directing the Common Pleas either to vacate so much of their order as gave the plaintiff leave to amend, or so much thereof as refused the defendant leave to plead. In *Ogden* v. *Payne & Holmes*, 5 *Cowen R.* 15, the defendant moved, at the circuit on an affidavit of the absence of a material witness to put off the trial, which the Circuit Judge denied; and the defendant declining to appear, the plaintiff took an inquest.—The Court set aside the inquest and granted a new trial; holding, that the Circuit Judge, in the exercise of a sound legal discretion, should have postponed the trial. In *Mercer* v. *Sayre*, 7 *Johns. R.* 306, while the plaintiff's counsel was summing up the cause to the jury, the defendant's counsel discovered new and material evidence, which he offered to produce; but the Court refused to admit it.—On a motion for a new trial, it was held, that the Judge had a discretion to admit the evidence, and that, in the exercise of a sound discretion, it ought to have been received; and a new trial was ordered.

(*b*) *Stat. tit.* 6 *c.* 1. *s.* 13.

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Wheeler v. Wheeler.

WHEELER *against* WHEELER:

IN ERROR.

Where a decree of probate ordering a sale of real estate for the payment of debts had been set aside on appeal, and a subsequent decree was made for the same purpose; it was held to be no objection to the last decree that real estate had been sold under the first, and the avails paid over to the creditors in full satisfaction of their claims; for assuming that no debts were due to such creditors at the date of the last decree, and that the money paid over to them cannot be recovered back, the administrator becomes a creditor for the amount, and the sale ought to be made to pay him.

An appeal being taken from a decree of probate ordering a sale of real estate to the amount of 1930*l.* for the payment of debts, one of the reasons of appeal was, that in this sum an allowance of 120*l.* to the widow was included; but as the fact alleged did not distinctly appear, and as it had been found by a former decree of probate from which no appeal had been taken, that the personal estate had been duly administered upon, and applied to the payment of debts, and that the sum of 1930*l.* remained after such application, the objection was overruled, and the order of sale affirmed.

THIS was an appeal from a decree of the court of probate for *Stonington* district, passed *August* 13th, 1812. The decree was as follows: "Whereas in the settlement of the estate of *Shepard Wheeler*, late of *Stonington*, deceased, represented insolvent, it appeared by the return of commissioners, that the sum of 1930*l.* was due from said estate, and an order was given by said court to one *John Denison* to sell so much of the real estate of said deceased as would raise said sum, as per order dated *March* 7th, 1800; and that said *Denison*, pursuant to said order, did sell the same accordingly: And whereas an appeal having been taken on the appointment of said *Denison* to sell said estate by said court, and also on the acceptance of his returns, the doings of the court of probate have been duly set aside and rendered void by the judgment on said appeal: (*a*) And whereas upon the reversal of the doings of said court of probate, said estate remains unsettled and the debts unpaid, and the personal estate being deficient to raise the sum of 1930*l.* for the payment of said debts: Now, on application of *Shepard Wheeler*, the present administrator, for liberty to sell as much of the real estate of the deceased as will, with the personal estate, pay the debts due from said estate, said administrator is hereby authoriz-

(*a*) See the case of *Swan* v. *Wheeler*, 4 *Day's Ca.* 137 to 141.

ed and empowered to sell at public sale so much of the real estate of the said deceased as will raise said sum of 1930*l.* for the payment of said debts, and incident charges of sale &c., and make return to this court."

The following facts were stated by the appellant in assigning the reasons of appeal: 1. That the estate in question being represented insolvent, commissioners were appointed, who made report of the debts by them allowed amounting to [*52] 1966*l.* which report was accepted by the court of probate on the 4th of *March* 1800; and immediately thereafter the administrator paid to the several creditors the full amount of their several debts, and took their several receipts, which were lodged on the files of the court of probate. 2. That to make out the sum of 1930*l.* for the payment of which a sale of real estate was ordered, an allowance to the widow of 120*l.* was included. It was also alleged in the assignment of reasons, that it did not appear, that the whole personal estate of the deceased had been applied to the payment of debts prior to the order of sale. The appellee in reply averred, that before the first order of sale, the court of probate found and adjudged, that the personal estate of the deceased had been duly administered upon and applied to the payment of the debts, and that the sum of 1930*l.* still remained to be paid; which finding and decree of the court of probate had never been appealed from, or set aside. These facts were admitted by the pleadings.

The superior court affirmed the decree appealed from; and on that judgment this writ of error is brought.

Daggett and *Goddard* for the plaintiff in error, contended,

1. That the debts against the estate of *Shepard Wheeler*, deceased, having been paid, there was no authority in the court of probate to order a sale of lands.

2. That the order of the court of probate to sell lands to the amount of 1930*l.*, part of which was an allowance of 120*l.* to the widow, is not warranted by law. *Stat. tit.* 60. *c.* 1. *s.* 22.

Cleaveland for the defendant in error.

SMITH, J. It appears from the record, that as long ago as the year 1800, land was sold, by an order of the

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court of probate, for the payment of debts; and that the money was paid over to the creditors, their receipts taken in full, and lodged with the court of probate. It appears also, that the order under which such sale was made, was set aside by the superior court, on appeal, whereby the sale was rendered void. The question for this court to decide

[*53] * is, whether under the above circumstances the order now in question could be made, in order to raise money for the payment of those debts, which were apparently satisfied by the former sale?

It has been argued, that the creditors were all paid, and their receipts taken in full, so that there were now no debts due for which lands could be sold. It was also argued, that these moneys having been paid over voluntarily to the creditors, and being no more than was justly due to them, could not be recovered back.

It does not, however, appear to me necessary to go into an investigation of these questions; because if it were admitted that there were now no debts due to the former creditors, and that the moneys formerly paid them could not be recovered back, it would follow that the administrator would become the creditor, and the land ought to be sold to pay him. Surely it cannot be contended, that an estate is to be exempt from the payment of just debts, by means of any mistake which may intervene in the sale of real estate.

Another ground of objection to the decree of the court of probate was, that an allowance to the widow of 120*l.* was included with the debts to make out the sum of 1930*l.* for the payment of which the lands were ordered to be sold. Whether this objection has any foundation in point of fact does not very clearly appear from the record. The debts allowed by commissioners amount to 1966*l.*, and the personal estate appears to have been administered upon and applied before the order of sale was made. Now, whether the sum found and reported by the commissioners, and that which was allowed to the widow, were first united, and the personal estate applied to them indiscriminately, leaving the sum of 1930*l.*; or whether the personal estate was applied to pay the sum allowed to the widow, distinctly, in the first place, and the remainder applied to pay the debts, is uncertain, and cannot be determined by the record. Nor do

I feel very solicitous to search after this fact, because I find it to be expressly stated and admitted, that the court of probate did adjudge, that the personal estate had been duly administered upon, and applied to the payment of debts, and that the sum of 1930*l.* remained due after such application.—

* This was a former adjudication of the court of probate from which no appeal was taken, and must, therefore, conclude the parties. It is, therefore, too late to dispute the fact that such an amount of debts was due. [*54]

The other Judges were of the same opinion.

Judgment affirmed.(*a*)

CLARK and others *against* RICHARDS.

The owner of a vessel usually employed in transporting property from one port to another in the *United States*, is, like other carriers for hire, liable to the proprietor of goods put on board for transportation, for any loss or damage accruing to them through the insufficiency of the vessel, or the negligence of the master.

It is sufficient to subject the owner for the acts of the master, that the latter is in fact master with the privity of the owner, without any special appointment.

A special contract entered into between the shipper of goods and the master of a vessel regarding the time and manner of transportation, the price of freight, allowance for demurrage &c. will not supersede or discharge the general liability of the owner for loss or damage.

Qu. Whether the registry of the transfer of a vessel in the books of the custom-house is conclusive evidence of title in the vendee?

Qu. Whether the mortgagee of a vessel, who has not taken possession, nor exercised any act of ownership, is to be deemed in law the owner, so far as to subject him for the acts of the master?

THIS was an action on the case. The declaration alleged, that the defendant was owner of a sloop called the *Sea-flower*, which was usually employed to transport for hire, goods, wares and merchandize, from one port to another in the *United States*, whereof *Charles Whipple* was master; that the plaintiffs put on board this sloop at *Norwich*, on the 24th of *July* 1812, a large quantity of cheese to be transported thence to *Philadelphia*, for hire; and that on the voyage much of the cheese was lost and the residue greatly

(*a*) See *Brown* & al. v. *Lanman*, 1 *C. R.* 467. *Wattles* v. *Hyde* & al. 9 *C. R.* 10. *Griffin* v. *Pratt* & al. 3 *C. R.* 513. *Mitchell* v. *Hazen*, 4 *C. R.* 495.

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injured, by reason of the leaky and insufficient state of the sloop, which was not seaworthy, and the careless manner of storing and carrying the cheese, and the negligent and improper conduct of the defendant and the master.

The cause was tried at *Windham*, *September* term 1813, before *Reeve*, *Edmond*, and *Smith*, Js. It appeared on the trial from the custom-house books in *New-London*, that the defendant was sole owner of the sloop *Sea-flower;* and that he purchased her on the 12th of *May* 1812, of *Charles Whipple*, who was master and owner prior to that time, and master ever since. It appeared also, that the defendant gave bonds

[*55] * for the vessel to be employed in the coasting business previous to her proceeding on the voyage mentioned in the declaration. A written contract was also given in evidence, entered into by the plaintiffs and *Whipple* before the lading of the vessel for the voyage, which was as follows:

"*New-London*, *July* 22*d*, 1812.

We agree to furnish Capt. *Charles Whipple* with a freight of cheese to *Philadelphia*, to be put on board the sloop *Sea-flower* of *New-London*, at *Norwich*, on *Monday* next. Said vessel is to be stowed as full as shall be judged safe for the cheese to go; and the said Capt. *Whipple* is to proceed to said port as soon as possible, and to lie fourteen market days for the sale of the cheese; and if the cheese be not sold in said time, said vessel is to lie on the demurrage of five dollars per day. In consideration the freighting party is to pay seven dollars per thousand, said *Whipple* is to have the vessel complete for putting the cheese on board.

J. M'Loomis
Josiah Tilden,
Charles Whipple, owner of the sloop and master."

This contract remained in the hands of *Whipple;* the plaintiffs having no copy or counterpart. It did not appear that the defendant had any knowledge of it.

In the further progress of the cause, the defendant claimed, and produced parol testimony to prove, that he had never taken possession of the vessel, nor used her in any way whatever, nor employed *Whipple* as master. He also claimed, but did not produce any written documents to shew, that his title to the vessel was by mortgage only. He thereupon insisted, that he was not by law liable for any damage which had hap-

pened to the cargo from any cause whatever. But the court charged the jury in substance as follows: Gentlemen of the jury, certain questions of law are raised by the counsel in this case. The court are of opinion, that by the transfer of the vessel, which is not denied to be a genuine instrument, the defendant is owner of the vessel; and that by law the owner is liable for any loss that arises from the negligence or mismanagement of the master in transporting property put on board from port to port in the *United States*, in the usual course of the business in which the vessel is employed, * either on the express contract made, or one implied by law; [*56] and that in this case it is an immaterial enquiry whether the vessel was a common carrier or not; for in either case, the liability would be the same on the claim of *negligence*. And although the declaration proceeds on the ground of the defendant's being a common carrier, it is substantially a declaration on the other ground. The case will therefore turn on the question of fact;—in the first place, was there any damage? And if you find there was, the next enquiry is, was it owing to the vessel's not being seaworthy, and in a disordered state; or was it owing to some other cause which would produce the damage, if the vessel were in a good state? If you find that any of the damage complained of arose from the stowing of the cheese, and that that was done by the plaintiffs, you will not for that reason subject the defendant.

The jury found a verdict for the plaintiffs; and the defendant moved for a new trial on the ground of a misdirection.

Cleaveland in support of the motion, 1. The only evidence of ownership in the defendant was derived from the custom-house books. But the registry of a vessel does not prove ownership; it is not even *prima facie* evidence of a transfer. 14 *East* 226. 2 *Taun.* 5.

2. Admitting the defendant to have been the registered owner of the vessel, yet as he was never in possession of her, nor used her in any way, nor employed *Whipple* as master, he could not be liable for *Whipple's* acts. *Whipple* was in no sense the servant of the defendant. *Frazier* v. *Marsh*, 13 *East* 238. S. C. 2 *Campb.* 517.

3. The defendant was not liable on the implied undertaking

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of a common carrier; because here was an express contract entered into between the plaintiffs and the master. If this contract has not been fulfilled, the plaintiffs may have their remedy upon it. The defendant was no party to it. *Whipple* signed as *owner* and master.

4. He was proceeding to discuss the point, whether the mortgagee of a vessel, who has not taken possession, is to be deemed in law the owner of it so far as to subject him for the acts of the master; when *Smith*, J. observed, that it did [*57] * not appear from the case that the defendant stood in that situation; he made such a claim, but did not support it by proof.

Goddard, contra. 1. The custom-house books, connected with the facts found, were conclusive evidence of title in the defendant. *Campden* v. *Anderson*, 5 *Term Rep.* 709. *Westerdell* v. *Dale*, 7 *Term Rep.* 306. *The Sisters*, 5 *Rob. Adm. Rep.* 138. [155.]

2. The title of the defendant being established, he is liable as owner, for the acts of the master. *Abbott* 119. *et seq.* In the first place, the owner of this vessel was a common carrier, and liable in the same manner as common carriers by land are, for the loss or damage of goods entrusted to their care. 2 *Com. Contr.* 320. *et seq.* But secondly, whether the defendant is to be considered as a common carrier or not, he is at any rate liable for want of sea-worthiness in the vessel, and want of ordinary care in the master. *Lyon & al* v. *Mells*, 5 *East* 428. *Putnam* v. *Wood*, 3 *Mass. Rep.* 481.

3. The special contract entered into between the plaintiffs and *Whipple* can have no bearing upon this case; it would not supersede, nor in any way affect, the defendant's liability as owner.

Edmond, J. [After stating the principal facts.] In arguing the case before this Court several exceptions are taken and objections urged by the counsel for the defendant to the charge given by the court.

It is contended that the court, in giving their opinion to the jury, that by the transfer of the vessel the defendant is owner, proceeded erroneously, on the ground that the custom-house books were conclusive evidence of ownership; whereas on all the facts stated in the motion, whether the defendant

was owner or not was a question of fact to be left to the jury without any expression by the court of their opinion thereon.

In the second place, it was contended that the defendant was mortgagee merely, and never had been in possession; and that the mortgagee of a vessel out of possession is in no case liable.

The first of these exceptions is not warranted by the * premises; and the second is founded on the assumption of a fact entirely out of the case, as no legal testimony was adduced to shew that the defendant's title was by mortgage. [*58]

It does not appear from the motion in this case, that the defendant on the circuit contested the truth of the matters alleged to appear on the custom-house books at *New-London*, or denied in any way his being purchaser and owner, and that he gave bond, &c. Indeed, he admitted it, if not expressly, by necessary implication, by resting his defence on the claim that "his title to the vessel was by mortgage only, and that he had never taken possession of, or used her in any way whatever, or employed *Whipple* as master." The question of fact, therefore, raised before the court and jury was not whether the *title* to the vessel was in the defendant by a regular conveyance;—*that* was admitted;—but whether that title was by mortgage, and whether the defendant was in possession, and employed the captain.

It appears further from the motion, that although the defendant claimed, he did not produce any written document to shew, that his title was by mortgage; or, in other words, he failed to make good his claim, as the proof offered in support of it was wholly inadmissible as against the plaintiffs, who were neither parties nor privies to the bill of sale. Without considering the custom-house books, therefore, as conclusive evidence, the court were warranted in the opinion given to the jury in the charge, *viz.* "that by the transfer of the vessel, which is not denied to be a genuine instrument, the defendant is owner of the vessel." In this view of the case presented by the motion, it becomes unnecessary to discuss or decide the question raised by the counsel, whether the custom-house books are conclusive evidence of ownership; and equally so to discuss or decide the question, whether a mortgagee out of possession is in any case liable.

In the argument before this Court, it was further urged,

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that inasmuch as the defendant in the trial claimed, and produced parol testimony to prove, that as he had never taken possession of the vessel, or used her in any way whatever, or employed *Whipple* as master, he could not be made liable; that there must be possession, the employment of a master, and the setting up of the ship by the owner, to subject him. In respect to this claim, it may be observed, that the defend-

[*59]

ant's *ownership being established, as in the present case, and *Whipple* being in fact master with the privity of the defendant, whether by his special appointment or not is immaterial; this is a sufficient setting up of the vessel; the master is in fact the agent of the owner, and as such, his possession is the possession of the owner.

As to the principle laid down by the court, "that the owner is liable for any loss that arises from the negligence or mismanagement of the master in transporting property put on board from port to port in the *United States*, in the usual course of the business in which the vessel is employed, either on the express contract, or one implied by law," it is sufficient barely to remark, that the general responsibility of owners or principals for the acts of their agents necessarily results from the relation in which they stand to each other.

They, like all other carriers for hire, are liable to the proprietor of goods put on board for transportation, for their loss, or any injury they may sustain from negligence in the owner, or his captain; and that whether the contract is made by themselves, or their agent the captain in the usual course of his employ.

In regard to the contract between the plaintiffs and *Whipple* given in evidence, it contains no stipulation of which the plaintiffs, had it been placed in their hands, could have availed themselves to obtain an indemnity for the injuries complained of in this declaration, *viz.* injuries arising from the insufficiency of the vessel, and the carelessness, negligence and mismanagement of the defendant and his captain. Consequently, the existence of such a contract with *Whipple*, admitting the defendant had subscribed it himself, would be no bar to the present action.

For these reasons I am satisfied a new trial ought not to be granted.(a)

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Clark v. Richards.

In this opinion the other Judges severally concurred.

New trial not to be granted.

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*WHITING and others *against* FARRAND and others. [*60]

Where goods are contracted for, which are not delivered, but are to be sent to the purchaser, if the vendor send them in the mode of conveyance agreed on by the parties, or directed by the purchaser; or, if no agreement be made, or direction given, in the usual mode; or if the purchaser being informed of the mode assents to it; or if there have been sales and conveyances of other goods and the vendor continues to send them in the same mode; then the goods are at the risk of the purchaser during the passage.

If one partner withdraw himself from the copartnership, thereby causing its dissolution, he continues liable for the non-performance of an executory contract previously entered into by the copartnership, in the same form of action, as well as to the same extent, as though no dissolution had taken place.

THIS was an action of *assumpsit* for books sold and delivered by the plaintiffs to the defendants, in pursuance of a written contract previously entered into between the parties. The cause was tried at *New-Haven January* term, 1814, before *Reeve*, *Trumbull*, and *Ingersoll*, Js. The contract produced on the trial was in substance as follows. By the 1st article, the plaintiffs engaged to purchase of the defendants 300 copies of *Milner's Church History* in four volumes 8vo.; 100 copies of *Taylor* and *Hampton on the Atonement* in one volume 12mo.; and 400 copies of *Trumbull's History of the United States* in one volume 8vo.; at certain prices. By the 2d article, the defendants, under the firm of *Farrand*, *Mallory* & Co., engaged to purchase of the plaintiffs 300 copies of *Newton's Works* in six volumes 8 vo.; of *Hamilton's Works* 300 copies of the edition in three volumes royal 12mo., and 150 copies of that in three volumes medium 8vo.; and 200 copies of *Shuckford's Connexions*, in three volumes 8vo.; at certain prices. The 3d, 4th and 5th articles contained some stipulations of minor importance, which it is unnecessary to state. The 6th article was as follows: "The credit on purchases shall be nine months from the shipment of the articles, and payable in negotiable notes at six and twelve months,

(a) See *Richards* v. *Gilbert*, 5 *Day*, 415. *Williams* & al. v. *Grant* & al. *post*, 487. *Crosby* & al. v. *Fitch* & al. 12 *C. R.* 410. *Hall* v. *The Connecticut River Steamboat Company*, 13 *C. R.* 319. *Hale* v. *The New Jersey Steam Navigation Company*, 15 *C. R.* 539.

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unless otherwise agreed." This contract was entered into in *April* 1810. The plaintiffs were booksellers in *New-York*, and *Farrand, Mallory* & Co. in *Boston*. On the 10th of *July* 1810, *Farrand* sold out his interest in the latter concern, whereby that firm was dissolved; of which the plaintiffs had immediate notice. The business was continued under the firm of *D. Mallory* & Co., and all the accounts of the former firm were transferred to the books of the latter. A part of the books specified in the 1st article of the contract, *viz.* the first and second volumes of *Newton's Works*, had been shipped by the plaintiffs to the defendants at *Boston*, before the dissolution; and the plaintiffs afterwards continued to ship the other books in fulfilment of the contract to the care of *D. Mallory* & Co. transmitting, [*61] *at each shipment, an invoice thereof in the name of *Farrand, Mallory* & Co. On the 30th of *November* 1810, the plaintiffs shipped by the sloop *China*, a regular coasting vessel, the books for which this action was brought, consisting of *Hamilton's Works* and the 5th volume of *Newton's Works;* and on the same day, the plaintiffs forwarded by mail a letter addressed to *Farrand, Mallory* & Co., *Boston*, giving advice of the shipment, and enclosing an invoice and bill of lading. The *China* sailed soon afterwards for *Boston*; but after being a long time at sea she was wrecked, and the books were lost. The usual mode of transporting property from *New-York* to *Boston* is by water as well as by land. In transporting the books under this contract from one to the other, the parties had uniformly sent them by water; and no objection had been made to that mode of conveyance. When any of the books mentioned in the contract were received from the plaintiffs by *Farrand, Mallory* & Co. before the dissolution, they were passed to the credit of the plaintiffs on the books of that firm. After the dissolution, as such books were from time to time received, they were passed to the credit of the plaintiffs on the books of *D. Mallory*, & Co.; and among others, the invoice of books by the *China* was so entered under date of *September* 20th, 1811. Upon these facts, the plaintiffs claimed, that the books in question became the property of the defendants upon the shipment, and were thereafter wholly at their risk; and that the plaintiffs, therefore, were entitled to recover the amount of the invoice, with interest after the expiration of nine months from the time of shipment. This claim was resisted on the part of the defendants

generally; and on the part of *Farrand*, a distinct claim was set up. He contended, that although he might be liable in another form of action for not fulfilling the contract, yet he was not liable for the books delivered under the contract after he had left the firm of *Farrand, Mallory* & Co., and notice of the dissolution had been duly given to the plaintiffs. The court in their charge instructed the jury, that the defendants were liable in the manner claimed by the plaintiffs; and the jury found a verdict for the plaintiffs accordingly. The defendants thereupon moved for a new trial; and the motion was reserved for the advice of all the Judges.

[*62] **Staples*, in support of the motion, contended, 1. That the defendants were not liable for the books shipped by the *China*. They were not the property of the defendants until delivery, either actual or virtual. An actual delivery to the defendants is not claimed. The bare act of shipment was not a virtual delivery; and the attending circumstances requisite to make it such were here wanting. The shipment was made without orders. No notice was given to the defendants that the books were ready for delivery. The defendants had no opportunity to examine them, as they ought to have had, to see if the printing and paper, and the execution generally, were such as the contract contemplated, and as they were bound to accept. For aught that appears in the case, the defendants might have had justifiable grounds for refusing to accept the books, if they had been actually tendered to them. Further, the defendants ought to have had notice that the books were ready, that they might appoint an agent to receive them, or give instructions as to the mode of conveyance.

Again, there was no sufficient notice of the shipment. The plaintiffs in their letter of advice did not name the vessel or master; nor did they specify the time of shipment, or the terms.

2. That at any rate, *Farrand* was not liable. He had withdrawn from the copartnership, and this was known to the plaintiffs, before the shipment. He had a right to withdraw; and after notice given, he could no longer be charged as a partner. He might be liable for the non-fulfilment of a contract entered into by the firm while he was a partner; but he could not be charged with goods delivered to a mer-

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cantile house with which he had ceased to have any concern. The liability of *Farrand* on this latter ground may be tested by enquiring whether if *D. Mallory* & Co. had given their notes for the books in question, pursuant to the 6th article of the agreement, he could be sued on such notes.*

[*63]

* *Daggett* and *N. Smith*, contra, contended, 1. That the books in question, by virtue of the contract between the parties, became the property of the defendants as soon as they were ready for delivery. The contract was an order for the goods; and when they were done, it belonged to the defendants to take them away.

Further, there was to be a *credit* given by the plaintiffs. There must necessarily have been a corresponding *indebtedness* on the part of the defendants. After the credit on the one hand, and the indebtedness on the other, commenced, the property was surely in the defendants.

Again, the contract designated the mode of conveyance which was adopted. The books were to be *shipped*. This is, then, the case of a vendee ordering goods by a particular mode of conveyance; with regard to which the law is well settled. *Vale* v. *Bayle*, *Cowp.* 294. *Dutton* v. *Solomonson*, 3 *Bos. & Pull.* 584.

It is not necessary, however, to take this ground; for if no particular instructions are given as to the mode of conveyance, the vendor may send the goods in the ordinary mode, and a delivery to the carrier will vest the property in the vendee. 3 *P. Wms.* 186. case cited *ibid.* *Cook* v. *Ludlow*, 2 *New Rep.* 119. The principal case is much strengthened by the fact that there had been previous dealings of the same nature between the parties, and the same mode of conveyance had been adopted, and tacitly approved of by the defendants.

2. That *Farrand* could not affect the rights of the plaintiffs by withdrawing from the firm.

* It was also contended, on the part of the defendants, that the contract had been put an end to, previous to the shipment. This point depended on the construction of a correspondence which had passed between the parties. But as the court in their decision have taken no notice of this point, the reporter has, in conformity to his general plan, excluded such correspondence from the statement of the case, and omitted the arguments of counsel upon its effect.

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SWIFT, J. This was an action to recover payment for books contracted to be delivered to the defendants. It appears that the books were shipped from *New-York* for *Boston* by a packet in the usual course of trade, but were lost on the passage. The defendants, in the first place, contend, that the books were not at their risk, and they are not liable for the loss.

Where a contract is made for the sale of goods which are not delivered, but are to be sent to the purchaser, if the vendor send them in the mode of conveyance agreed on by the parties, or directed by the purchaser; or if no agreement be made or direction given, in the usual mode; or if the purchaser being informed of the mode, assents to it; or if there have been sales and conveyances of other goods, and the vendor continues to send them in the same mode; then the goods are at the risk of the purchaser during their passage. In this case, it appears from the contract, that the books were to be sent by water, as interest was to be computed from a certain time after the *shipment;* that this was the usual mode of conveyance from *New-York* to *Boston;* that the defendants were duly informed of the shipment of the books, and assented to that mode of conveyance by giving credit for them; and that sundry other parcels of books on the same contract had been shipped by the plaintiffs, and received by the defendants. Of course, the books in question, when shipped, were at the risk of the defendants, and they are liable to pay for them, though lost on the passage. (*a*)

[*64]

It is further insisted on by the defendants, that their copartnership was dissolved prior to the delivery of the books; and that the plaintiffs could not afterwards deliver them, and bring this action to recover payment for them, but that their remedy is by an action for a breach of contract arising from the dissolution of the copartnership.

Copartners may dissolve their connexion at pleasure, and this is no violation of any subsisting contracts with others; for they may, and they are bound to perform them in the same manner as if no dissolution had taken place. No action can ever be sustained against them stating a mere dissolution of the partnership as a breach of contract, for they can perform it notwithstanding such dissolution. In the present

(*a*) See *Smith* v. *Loomis*, 7 *C. R.* 110. *Higgins* v. *Emmons & al.* 5 *C. R.* 76.

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case, the contract being executory, the plaintiffs could have no right of action till they had performed on their part. If then a dissolution of the copartnership by the defendants could prevent the plaintiffs from delivering the books, and excuse the defendants from receiving or becoming chargeable for them, it would be in the power of a partnership, by its own act of dissolution, to destroy a previous and subsisting contract. This would be directly subversive of the principles on which all copartnerships are founded.

In this opinion the other Judges severally concurred.

New trial not to be granted.

[*65]

*NORTON *against* STRONG.

The rights and duties of a conservator, and the jurisdiction of the county court, in relation to the ward's estate, cease upon his death.

Nor has the conservator a lien upon the estate of the ward for disbursements made in his life-time for his support, so as to entitle the former to retain possession against the executor of the latter.

THIS was an action of trover for a quantity of hay and corn-ears.

The cause was tried at *Haddam*, *July* term, 1813, before *Swift*, *Brainard* and *Baldwin*, Js. On the trial, it appeared, that the hay and corn in question had been raised by shares on the farm of *Noah Norton*, deceased, and put into his house and barn; that at the time of his death, which happened in *December* 1807, and for a long time previous, the plaintiff was and had been his conservator, duly appointed; and that at the death of *Noah*, the plaintiff was in possession of the hay and corn no otherwise than as such conservator. It also appeared, that the defendant was *Noah's* lawful executor, and had acted as such from the time of his death; and in that capacity he claimed right to the possession of the property, and had taken and inventoried the same. And the plaintiff, to prove that he was the owner of the property, offered in evidence an authenticated copy of his account with *Noah*, consisting of numerous items of debit for necessaries furnished and services rendered to *Noah* in his life-time, and for his funeral expenses, and of credit for the rents and produce of his land, stating a balance due to the plaintiff of 84 dol-

lars 80 cents; which account was exhibited by the plaintiff to the county court on the 29th of *March* 1808, and by that court accepted and ordered to be lodged on file. It was admitted, that when the account was so exhibited and allowed, the defendant was not present, and had not been notified to be present. To the admission of this evidence the defendant objected, contending that at the death of *Noah*, the plaintiff's right, as conservator, to the custody of the property in question ceased, and that he could no longer detain it from the executor. The court decided, that the account was inadmissible; and directed the jury to find a verdict for the defendant. The jury having found accordingly, the plaintiff moved for a new trial; and the questions of law arising on such motion were reserved for the advice of all the Judges.

Daggett and *E. Huntington*, in support of the motion, contended, that the plaintiff's account, allowed by the county court, was admissible to shew that the plaintiff had either an [*66] absolute or a qualified property in the hay and corn; either of which is sufficient to sustain trover. The statute (*a*) commits to the conservator the management and control of his ward's person and estate, and requires the conservator to provide for the support of the ward out of the ward's estate. In the discharge of this trust, however, it will often become necessary for the conservator to advance his own money. For such advancements he is entitled, upon general principles, and by the analogies of law, to a lien upon the property of the ward in his hands. The lien having once attached, it will continue, notwithstanding the death of the ward, until the conservator's account is settled, and his advancements reimbursed. The county court is the forum established by statute for settling the conservator's account. If the conservatorship continues until the death of the ward, the conservator's account must necessarily be settled after that event. As the superior court cannot settle the conservator's account, the only proper mode of informing them what advancements he has made is by an authenticated copy of the account as adjusted and allowed by the county court. And it is no objection to the admission of such evidence, that the executor was not cited in when the account was exhibited to the

(*a*) *Tit.* 88. *c.* 1. *s.* 4.

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county court. There is no such process known in the law; nor is there any need of it. The conservator is the agent of the county court to execute the trust delegated to him. The county court call him to account at their pleasure. They are the curators of all persons under conservators, and will take care of their rights.

Hosmer and *Staples*, contra, insisted that the account offered in evidence was properly rejected.

It is part of the case that the plaintiff never had the ownership or actual possession of the property in question. His claim must rest solely on his relation to *Noah Norton*. It is an obvious and conclusive answer to this claim, that the relation ended with *Noah's* death. At that moment the office of conservator ceased; and the whole of the personal estate of the deceased vested in the executor, and he only was entitled to the possession of it. The rights and [*67] *duties of a conservator under the laws of this state are like those of a committee of lunatic in *England*, who has no interest in the estate of the ward during his life, and whose guardianship ceases upon his death. *Cocks* v. *Darson*, *Hob.* 215. *Selw. N. P.* 727. 1 *Fonb. Eq.* 53, 4.

But it is said, that the plaintiff had a *lien* upon the property for advancements which he had made. It is not pretended that this claim is sanctioned by any statute, adjudged case, *dictum* or custom. Nor is there any necessity or reason for it; because the conservator is invested with the management and control of the ward's estate for the purpose of providing for his support out it; and he is never obliged to advance his own money. Besides, it was impossible, from the very nature of a lien, that he should have one in this case; for he had at no time actual possession, and if he ever had a constructive possession, it was at an end before the alleged conversion. Nor is he entitled to any priority. The statute gives him none; the common law certainly gives him none. And if he had a priority, *non sequiter* that he could withold from the executor his testator's property. He must, in that case, exhibit his claim, like other creditors, and the court of probate would order payment in full. Besides, it does not appear but that this estate was solvent; and if so, there could be no priority among the claims of the creditors.

Further, in order to make this account admissible, the

plaintiff must shew, that the county court had summary and conclusive jurisdiction, which was regularly exercised; and that the allowance of his account gave him an interest in the personal estate of the deceased paramount to the executor's. There is nothing in the statute, which sanctions either branch of this position. The conservator is, indeed, accountable to the county court for the due execution of his trust; but the plaintiff's case requires something more than this; he demands the interposition of the county court, and that in a summary way, to enforce a claim in his favour against the estate of the ward, after the relation is at an end.

It is equally difficult to assign a reason why the county court should have jurisdiction of the plaintiff's claim, and why the court of probate should not have. In the next place, if the county court had jurisdiction, it was not regularly exercised, no notice having been given to the executor. The proceeding was *ex parte;* and the executor cannot be concluded by it. *Buchanan* v. *Rucker*, 1 *Campb.* 63. It may be added, that there was no trial, nor judgment, in the county court. The plaintiff exhibited an account, unsupported by any proof,—not even by his own oath; and the court accepted it, and ordered it to be lodged on file. This acceptance did not affect the property, which was already in the hands of the executor. It did not establish or pass a title. A transcript of such account proves nothing in this case.

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EDMOND, J. [After stating the case.] The testimony rejected must have been offered on the ground, that if admitted, it would conduce to prove one or both of two propositions, *viz.* either that by the exhibition of the account by the conservator, in which mention of the corn and hay is made, and the acceptance of it by the court, the hay and corn vested in the plaintiff as his property; or that it would conduce to shew that the plaintiff, in his capacity of conservator, had become a creditor to the estate of *Noah*, and as such, had a lien upon the property, and a right to the possession until his claim should be satisfied.

The admissibility of the testimony in support of the first proposition will depend on the answer which ought to be given to this question: Can a conservator, or county court, or both together, *after the death* of an idiot, distracted or impotent person, do any act to change the state of the property

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of such idiot, &c. from what it was at the time of his death, so as to constitute the conservator the owner?—In other words, could the county court and conservator, after the death of *Noah*, by any act of theirs, vest the corn and hay in question in the plaintiff?

And the admissibility of the testimony, offered to prove the second proposition, *viz.* That the plaintiff was a creditor, and, as such, had a lien on the property, &c. may be decided by settling the question, Has a conservator, after the death of an idiot, &c. being a creditor, a lien on the estate of the deceased, and a right to retain the possession until his claim is satisfied?

To answer the first question, if we bring into view at the same time the 4th and 5th sections of the act for relieving and ordering idiots, &c. (*tit.* 88. *c.* 1.) which contain all
[*69] * that relates to the power of a conservator, and the 22d section of the act for the settlement of testate and intestate estates (*tit.* 60. *c.* 1.) (*a*) a bare inspection of them, will at once shew, that the authority given to the court of probate to order the sale of the real estate of a deceased person, where the personal estate is insufficient for the payment of debts, and the authority given to the county court and conservator where the debts exceed the personal estate, to order the sale of real estate, are nearly similar. That they are paramount authorities will not be questioned. It will appear equally obvious, that the powers given in each cannot be exercised by the court of probate and executor on one hand, and the county court on the other, in relation to the same estate at the same time.

It follows, if you suffer the county court and conservator, or either of them, to interfere in any respect with the estate of the idiot, &c. after his decease, for a moment, there is no limitation in point of time of their powers. You subject the estate to the incompatible claims of conservator and executor; and introduce the insupportable mischief of conflicting

(*a*) The section here referred to is as follows: "That when the debts and charges allowed by the court of probate in the settlement of any intestate estate (or of any testate estate, where sufficient provision is not made by the will of the testator) shall exceed the personal estate, it shall be lawful for the judges of such courts respectively to order the sale of so much of the real estate as shall be sufficient to pay the same, with the incident charges of sale, in such manner as shall appear to them to be most for the benefit of such estates, which sales shall be good and sufficient in the law."

jurisdictions. This may be sufficient to shew the absurdity of permitting the county court to extend its jurisdiction over the estate beyond the period of the idiot's life. We are not to admit the idea in the construction of statutes, that the legislature intended to establish two distinct jurisdictions, with powers in relation to the same subject utterly irreconcilable. Viewing the statutes referred to, with an eye to the objects for which they were enacted, and nothing to my mind can be plainer, than that necessary provision for the idiot, &c. *during his life or disability*, is the sole object of the one, and a just settlement of his and all other estates *after death*, the great object of the other. An idiot, distracted or impotent person with an estate is essential to the application of the former. Until these are found existing at the same time, there is * nothing to which the act can apply. When the idiot is provided for *for life*, the act has accomplished its object; there is no further occasion for a conservator or court to provide for his person, or to stand between his estate and strangers; it passes to other hands, and the law provides new representatives. Draw the line of jurisdiction, then, as it ought to be drawn, and as the framers of the law manifestly intended to draw it, and every difficulty, real or imaginary, must vanish. When death renders the cares of the county court and conservator no longer necessary, they may retire from their labours; let the court of probate and executor succeed; and, if the conservator has been faithful to his trust, the law will secure to him a just recompence for his services. As respects the first question, therefore, I am well satisfied that neither the conservator nor county court, nor both together, could do any act *after the death of Noah* to vest the title to the corn and hay in the plaintiff; that the plaintiff's account could furnish no evidence of ownership; and to that point was inadmissible. (*a*)

[*70]

To the second question, whether a conservator after the death of an idiot, &c. being a creditor, has a lien on the estate of the deceased, and a right to retain the possession until paid? In examining this question, I look at the statute for the *powers*, *rights* and *duties*, of a *conservator*, together with his liabilities and exemptions, as he stands related by his appointment to the person and estate of the idiot, and

(*a*) See *Spalding* v. *Butts* & al. 5 *C. R.* 427.

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see what his privileges are, without attempting to search for or draw inferences from analogous cases; and indeed I know of none; and I find they are contained in few words: "He is to take care of and oversee such idiots, distracted and impotent persons and their estate for their support," and be accountable for his management of this trust, when ordered by the county court. This is the whole commission. Now it is manifest at once from inspection, that the statute by any *express words*, neither gives him a priority of claim, if he should have any claims, nor creates a lien on the estate he is to oversee other than what any creditor has on the estate of his debtor. And why he should have a lien I have not been able to discover. Is he bound, because he is conservator, to advance a single cent out of his own pocket, or to contract a single debt on his own credit? Certainly not. Does he,

[*71] *by accepting the trust, subject himself to be sued, and made responsible for existing debts? This, I think, will not be pretended. How then, should it be asked, is he to provide for the support of the idiot? He may not be able instantly to dispose of personal estate; there may be none, as the case may be; the county court may not be in session, &c. The answer to my mind is obvious. He may do just what a servant might do for the idiot; take up on his credit articles necessary to his support. An idiot, as well as an infant, is liable for necessaries; or if the conservator has what the idiot stands in need of to spare, deliver them, and charge as other creditors do, till the estate, or some part of it, can be turned into money.

But it still may be objected, for his personal services at least he ought to have a lien; otherwise, if the estate in the hands of an executor proves insufficient to pay all the debts, he may suffer loss by being subjected to an average. This too would be the case with all the creditors unpaid. But there is an answer much more satisfactory to my mind, and that is, the case put could never happen, unless from the gross negligence, or wilful fraud of the conservator himself. It is his duty to examine into the situation of the idiot's estate, and whenever he discovers that outstanding debts, including his own, exceed the personal estate, so that creditors cannot collect their dues without taking land, to save the cost of suits, to apply to the county court, and to obtain an order of sale of so much of the land as may be necessary, together with the personal estate, to settle all the debts; and when the

whole estate is thus expended, if the idiot be still living, the further care of his person devolves on the select-men, at the expense of the town, or state. But if the conservator, after knowing (and he ought to know how it is,) that the debts outstanding amount to as much as the *whole estate*, should continue to disburse of his own property, and make charges to any amount, or to apply the personal estate on hand to the support of the idiot; this, so far from entitling him to a preference in his claim, would be such a palpable fraud on the other creditors, that in point of strict justice (if that was obtainable) the whole deficiency of estate, thus occasioned, however and by whomsoever the estate is settled, ought to fall upon the conservator for a violation of his trust. This *being so, the danger of an average is the worst possible [*72] reason that could be urged in support of a lien in favour of a conservator. Add to this the admission of the principle, that a conservator has a lien, is wholly unnecessary to the discharge of his duty. If a stranger intermeddles, he may bring suits. An infant may sue by his guardian, or an idiot by his next friend, or overseer; and either may be sued, notifying the parent, guardian, and overseer or master.

Further, adopt the doctrine of a lien upon the estate in favour of the conservator, and the estate is completely locked up against the claims of every other creditor, if the conservator so elect. From the moment of his appointment, he has only to make advances, or render services, and he becomes a privileged creditor, has a lien on the whole estate, and is entitled to the possession. The amount of his claim is known only to himself. No tender can be made with safety. If a creditor attaches, he is brought up in trover or trespass; if he levies an execution, he is equally exposed; if the debtor dies, neither executor nor administrator can intermeddle to settle the estate, until the conservator thinks proper to make out his claims, and have them liquidated and adjusted by the county court, and that without the privity of the executor or heir; and if he pleases, has carved out his portion to his own satisfaction.

From these several considerations, and others which might be urged, I am satisfied, that a conservator, from the circumstance of being a creditor to the estate, acquires no lien whatever upon the property to entitle him to the possession; that the admission of such a principle is not warranted by

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law; is unnecessary to a conservator, if he is faithful to his trust; might be injurious to other creditors; obstruct the regular administration of justice; and unreasonably delay the settlement of estates; and therefore, that the account offered to prove the plaintiff a creditor, &c. was properly rejected by the court.

In this opinion SWIFT, TRUMBULL, SMITH, BRAINARD and INGERSOLL, Js. severally concurred.

BALDWIN, J. The question presented by this case arises under the provisions of the "act for relieving and ordering [*73] *of idiots, impotent, distracted and idle persons." (*a*) By that statute, if such persons have any estate, it is made the peculiar duty of the county court, to order and dispose thereof, for their support; or the court may appoint a conservator to take care of their *persons and estates*, who, by the express provisions of the act, shall be *accountable to said court* for their management. The county court are further authorized, if upon liquidation of the accounts exhibited, they exceed the personal estate, to order the sale of real estate to pay them.

The statute gives to the county courts a power over such persons, and their estate, analogous to that of the court of probate over the estates of persons deceased, and over the persons and estates of infants. Both the county courts and the courts of probate exercise their powers, by agents who are expressly by law accountable to the tribunal, by which they were respectively appointed. The county court is, in this instance, by statute, the peculiar tribunal for the settlement of the conservator's accounts, as much so as the court of probate is the peculiar tribunal for the settlement of an administrator's or a guardian's account. No other tribunal can make the proper allowances, and liquidate and adjust the accounts.

I am aware that our statute respecting guardians, authorizes a settlement either with the court of probate, or the ward when of age. The statute in question has no such provision. The county court then seem to be the only tribunal, that can adjust and settle the accounts; and it appears to me, that the evidence of such settlement, is peculiarly proper when the claims of the conservator, respecting the execution of his trust, are controverted.

(*a*) *Tit.* 88. *c.* 1.

But it is claimed, that the evidence offered in this case is irrelevant, because a credit to himself as conservator, is illegal, and will not give him title to the property. I need not discuss the question, whether a credit by the conservator of this personal property, at the appraisal of the select-men and with the approbation of the court, will transfer the title. A suitor need not have the absolute property of the thing in controversy, to enable him to maintain trover. As conservator the plaintiff had the exclusive possession of this * property, during the life of *Noah Norton*. He had a right to alienate it, and dispose of it, for the support of his ward; and had, in my opinion, a lien upon it in his hands for his compensation for the care and management of the property; for all advancements on account of his ward; and particularly so, for the expense of gathering the corn, hay and other articles, which compose the items of his demand. The account offered clearly shews facts to establish the lien, if not the transfer of the property.

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In was urged in argument, that a conservator can never be a creditor: That so long as he has means, he ought always to furnish himself with cash, and never advance his own. I admit he may do so; but prudent management would forbid the rigid application of such a principle. He ought not to sacrifice the crops in the field, rather than advance the expense of harvesting; nor suffer his ward to starve, while looking a market for his property. His management must be prudent, and such as the court that appointed him will sanction. The sale of real estate can only be made to discharge advancements. This implies that advancements may lawfully be made.

It is objected to the settlement that it was made *ex parte*, and after the death of *Noah Norton*, when the powers of the conservator had ceased. From the nature of such a trust, it must generally continue, during the life of the ward. The conservator, as the agent of the court, bound to render his account to them, must of course do it afterwards, and receive their orders respecting the property in his hands unexpended. This seems to me the regular course; and that the administrator has no right to the property till such settlement is made, and order obtained. It would be dangerous to say, that the conservator's power ceased the moment his ward died. The object of his appointment was to protect the

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property as well as the person. His trust as to the person has ended; but he is still bound to take care of the property, till legally discharged of his trust, by accounting with the court, and receiving their final order. For this purpose he must have right to the custody of the property, as well as a lien for all his legal dues as conservator or trustee.

The principle contended for, that he must give up the property, settle his claims with the administrator, and look [*75] *to him for a balance, is not expressly required by the statute, and appears to me so unreasonable, that I cannot believe it a sound construction. It would subject the conservator to great delay, and possibly, to an average loss by insolvency, on advancements made upon the deposit of property in his hands. He is not bound to submit his claim for services, or advances, to any other tribunal than the county court which appointed him. They alone have power to settle the trust, not as judges between litigating parties, but by virtue of the peculiar summary powers expressly given them by statute for that purpose. They are the guardians of the rights of the impotent subject, and of all concerned. A settlement between them and the conservator, is not then, in the usual meaning of that expression, *ex parte*. They are settling with their own agent, in the same manner as the court of probate does with his.

In this view of the subject, I am of opinion that the evidence offered ought to have been received; and because it was rejected, I advise a new trial.

REEVE, Ch. J. concurred in the opinion delivered by Judge *Baldwin*.

New trial not to be granted.

STOCKING *against* SAGE and Others.

Where a master of a vessel, after his return from a voyage, had settled the accounts of the voyage with the owners, and paid over to them the freight money, on their promising to indemnify him against a contract which he had entered into during the voyage; held that book-debt would not lie for trouble and expenses to which he was afterwards subjected in consequence of such contract, but that the remedy must be on the special promise.

THIS was an action of book-debt. The cause was tried at *Haddam*, *December* term, 1813, before *Mitchell*, Ch. J.

and *Trumbull* and *Ingersoll*, Js. On the trial the plaintiff offered evidence to prove the following facts: That in the year 1799, the defendants were owners of the schooner *Fox*, which they fitted out for a voyage, and constituted the plaintiff master, directing him to go and make as good a voyage as he could for them. He went to the island of *Martinique* in the *West-Indies*, and sold his outward cargo. He then made a contract with the house of *Riguandou* & Co. to go to *North Carolina*, and there purchase a deck-load of cattle for that house, and return with the same to *Martinique*. *Riguandou* & Co. advanced to him 1000 dollars for the purchase of cattle and the layings-in, the inboard cargo on such voyage being for account of the owners. He proceeded to *North Carolina*, purchased the cattle, and set sail on his return to *Martinique*. On the return voyage he was captured by a *French* privateer. He retook his vessel; but owing to the capture and injuries from the sea, he was obliged to go to *Antigua*, and there sell the cattle, the avails of which were sufficient to pay the freight only. He then returned to *Middletown*, and informed the defendants of all his proceedings during his absence. Having in his hands the sum of 1043 dollars, retained as freight of the cattle from the sales, he claimed to hold that sum until he could settle his account with *Riguandou* & Co. The defendants, however, insisted upon receiving the money, and promised to indemnify the plaintiff, and to pay all cost and charges to which he might be put on account of his contract with *Riguandou* & Co. He accordingly paid it over to the defendants, and settled the accounts of the voyage with them. In the year 1810, he was in the island of *Martinique*, and was there attached at the suit of *Riguandou* & Co. on the contract aforesaid, and was obliged to pay large sums of money to counsel, interpreters, and notaries, and for other expenses in his defence. Ultimately he obtained judgment in his favour. For the plaintiff's time, services and expenses relating to that suit, the present action was brought.

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The counsel for the defendants objected to the evidence, on the ground that the action of book-debt would not lie, such services and expenses not being proper charges on book; nor would the special promise stated be proved by the oath of the plaintiff. The court rejected the evidence; and the defen-

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dants obtained a verdict. The plaintiff moved for a new trial, and the question was reserved for the opinion of all the Judges.

C. Whittelsey in support of the motion. 1. The defendants are clearly liable to the plaintiff in some form of action, for the services and expenses in question. The plaintiff contracted with *Riguandou* & Co. as the *agent* of the defend-
[*77] ants, * and it was within the scope of his authority to do so. His only instructions were "to make the best voyage he could," leaving every thing to his discretion; and his agency continued until the whole transaction was closed. Placed in this situation, and acting according to the best of his judgment, he is entitled to protection. 5 *Bac. Abr.* 599. (*Wilson's edit.*) And if in the performance of his duty he has been brought into a law-suit, in which he has been obliged to expend large sums of money, justice requires that he should be indemnified. The whole transaction was for the defendant's account; and as the profits go to them, they must sustain the loss. The settlement of the voyage is conclusive to shew that the plaintiff acted completely within the scope of his authority. By claiming and receiving the freight money, the defendants adopted his acts.

2. The action of book-debt lies. This form of action was not given by statute, but is common law remedy. The statute (*a*) contemplates book-debt as an existing and well known remedy, and proceeds to limit the time for bringing the action, and to regulate the mode of proof, trial and judgment. The only difference between our action of book-debt and the *English* action of debt on simple contract, is, that in the latter the charges are set out in the declaration, (*b*) and in the former profert is made of the book. After oyer, the book becomes a part of the declaration, and the actions are then precisely alike. The question then is, would debt on simple contract lie? Anciently, this was the common action for goods sold and delivered, and for work and labour done; and though in modern times *assumpsit*, enjoying some advantages, has taken its place in practice, yet the nature of the action is not changed. Debt lies to recover money due upon a legal liability, or upon an implied undertaking.—1 *Chitt.* 101, 2. 1 *Selw. N. P.* 556. 1 *Roll. Abr.* 593. *pl.* 25.

(*a*) *Tit.* 25. *c.* 1. (*b*) *Regist. Brev.* 139.

Cro. Car. 539. *Com. Dig. tit.* Debt. A. *Jenk. Cent.* 332. *Cro. Eliz.* 880. All the old cases shew, that debt will lie where *indebitatus assumpsit* will lie. *Doug.* 6. *per Buller*, J.

The only objections worthy of notice to the action of book-debt in this case, are 1st, that the defendant has not due notice of the claim; and 2dly, that the plaintiff is allowed to support his claim by his oath. In answer to the first objection it is sufficient to remark, that the defendant, [*78 by praying oyer, and putting the plaintiff's account on the record, has more complete notice of the claim than he would have according to the *English* practice in an action of *assumpsit*. With regard to the second objection, it may be observed, in the first place, that if the statute has given that mode of proof, the court cannot enquire into the wisdom or propriety of it. But if they could, this objection ought not to lie against the nature of the action; for the claim may be supported by common law proof, and in some cases must be from necessity; as where the contract is made by an agent, and the money advanced, goods delivered, or services performed, by him.

Hosmer, contra. 1. The *special promise* was not chargeable on book; nor could it be proved by the oath of the party. *Swift's Ev.* 84. 2 *Swift's Syst.* 168. *Peck* v. *Jones*, *Kirb.* 289. *Johnson* v. *Gunn*, 2 *Root* 130.

2. The plaintiff has no claim by *implied contract;* and if he had, he could not recover in book-debt.

SMITH, J. It seems in this case, that the plaintiff paid over the 1043 dollars relying on the promise of the defendants to indemnify him from all cost and charges to which he might be subjected on account of the contract which he made in *Martinique;* and it is expressly stated, that *they settled the accounts of the voyage.* These facts being stated and admitted, there can be no ground for the action of book-debt, but the remedy must be on the contract. (*a*)

In this opinion the other Judges severally concurred.

New trial not to be granted.

(*a*) See *Bradley* v. *Goodyeer*, 1 *Day* 104. *Beach* v. *Mills*, 5 *C. R.* 493. *Terrill* v. *Beecher*, 9 *C. R.* 344. *Green* v. *Pratt* & al, 11 *C. R.* 205. *Seeley* & al. v. *North*, 16 *C. R.* 92.

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Chalker v. Chalker.

JEREMIAH CHALKER *against* STEPHEN CHALKER.

The appointment of an overseer must be for a reasonable time expressly limited; otherwise it is void.

Where an estate of freehold is granted upon condition in deed, and there is a breach of the condition, an actual entry or claim by the grantor is necessary in order to revest the estate.

The bringing an action of disseisin is not a claim within the meaning of the law, nor a sufficient substitute for entry.

Where there is a forfeiture of an estate of freehold upon condition, for non-payment of an annuity, if the grantor subsequently accept the sum due, such acceptance is in law a waiver of the forfeiture; and a forfeiture once waived can never afterwards be claimed.

THIS was an action of disseisin, to recover certain lands specified in the declaration. Issue was joined on the plea of *No wrong nor disseisin*. The cause was tried at *Haddam*, *December* term, 1813, before *Mitchell*, Ch. J. and *Trumbull* and *Ingersoll*, Js.

The defendant in proof of title to the lands in question, produced in evidence a deed, duly executed by the plaintiff, on the 25th of *October* 1805, in which the plaintiff, in consideration of his love and affection for *Anne*, widow of his brother *Stephen Chalker*, deceased, and the children of said *Stephen* and *Anne*, granted and conveyed the premises to said *Anne* and said children, and their heirs forever, with covenants of seisin and warranty, to which a condition was annexed in these words: "Provided nevertheless, and these presents are so conditioned, that the said *Anne*, and the children of said *Anne* and *Stephen* shall annually pay to said *Jeremiah* the sum of fifty dollars, during his natural life, but on default of such payment yearly, or annual payment of said fifty dollars, to said *Jeremiah*, this instrument shall be void, and of none effect." It appeared that the annual payments were duly made until *October* 1808, but that the money for the year ending the 25th of said *October* remained unpaid until the 30th of said *October*, when the same was paid to said *Jeremiah*, the plaintiff, who received and gave his receipt for the same; and afterwards, in the same manner, received the annuity due *October* 1809. It was also proved, that the select-men of *Durham*, by their instrument in writing, dated *May* 15th, 1807, under their hands, appointed *Jabez Chalker* overseer of the plaintiff, to advise and order him in the management of his business from and after the date of said in-

strument, without limitation of time; and that said *Jabez* accepted the appointment, and in said capacity, on said 30th of *October* 1808, refused to receive said fifty dollars, and claimed that said lands had revested in the plaintiff by the terms of said deed. Upon these facts the court charged the jury, that although the money was not paid until the 30th of *October* 1808, yet the estate had not so revested in the plaintiff that he could sustain this action without having first made entry upon a claim to the lands; and that said appointment of overseer was, on said 30th of *October*, void and of no effect, and said *Jeremiah*, notwithstanding the same, might well receive said money, and waive said forfeiture. In pursuance of this direction, the jury found a verdict for the defendant. The plaintiff thereupon moved for a new trial; and the questions arising on such motion were reserved for the advice of all the Judges.

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Staples, in support of the motion, contended, 1. That at the time the payment of 50 dollars was made to *Jeremiah Chalker*, *viz.* on the 30th of *October* 1808, he was under an overseer, and could not legally receive it. The statute(*a*) has not limited the time for which an overseer may be appointed, but has expressly authorized the select-men to make the appointment for such time as they shall think proper. But if it was not good, it was only *voidable;* and no one but *Jeremiah* has any right to complain. He, if aggrieved, may apply to the next county court for relief;(*b*) but until they grant relief, the appointment is valid.

2. That whether *Jeremiah* was or was not under an overseer, if the money was not paid at the day, the estate revested in him, and a subsequent payment could not devest it, and set up the deed.

3. That in this case there was no need of an entry or claim previous to bringing the action. To shew what is an entry and what a claim, he referred to 2 *Black. Com.* 312 to 316. 3 *Black. Com.* 175.; to shew in what cases this is a remedy, to *Litt. sect.* 347. *Co. Litt.* 214. *b. Cruise's Dig. tit.* 13. *c.* 2. *s.* 42. [2nd vol. p. 49.] 1 *Wms. Saund.* 287. *n.* (16). *Shep. Touch.* 154.; and then insisted, that this doctrine is inapplicable in *Connecticut*, where livery of seisin and attornment are unknown to the law; where the heir, upon descent

(*a*) *Tit.* 88. *c.* 1. *s.* 8. (*b*) *Sect.* 15.

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cast, may bring ejectment, without entry; and where it has been established as a general maxim with regard to real estate, that ownership draws after it the possession.(*a*) Here an estate of freeeold may begin and end without ceremony as well as a lease for years. Adopt then the *principle* of

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* Lord *Coke*, and the doctrine resulting from it under our law will be totally diverse from the *English* doctrine. What Lord *Coke* says of a lease for years in *England* is precisely applicable to the deed in question: "By the breach of the condition, it was *ipso facto*, *without any entry*, void." *Co. Litt.* 214. *b.*

Further, if a claim were necessary in order to revest the estate in the grantor after condition broken, the bringing an action claiming the land is sufficient.

*Hosmer** contra, contended, 1. That the estate granted, by breach of the condition was *defeasible* only, and could not be defeated without *entry* or *claim*. He defined a *condition in deed* to be "where an estate of freehold is granted, on a qualification annexed, whereby the same *may* be defeated;" and a *limitation* to be "where an estate is limited by the words of its creation, so that on the happening of the event specified, it *must* be defeated." 2 *Black. Com.* 154, 5. The former is created by words of condition without limitation, such as "upon condition," "provided," &c.; the latter is created by words of limitation, such as "so long as," "while," "until," &c. The effect of a limitation is an *absolute* defeasance of the estate *by operation of law;* the effect of a condition broken is to render the estate defeasible at the option, and by entry, of the grantor. *Litt. sect.* 328, 9, 30. 380. 325. 350. 1. *Co. Litt.* 217. *b.* 218. *a. b.* 2 *Black. Com.* 155. 1 *Swift's Syst.* 264. *Doe* d. *Lockwood* v. *Clarke*, 8 *East* 185. *The People* v. *Brown*, 1 *Caines* 426. *Lincoln and Kennebeck Bank* v. *Drummond*, 5 *Mass. Rep.* 321. He then insisted, that this was a condition in contradistinction to a limitation; and that of course, a breach of the condition, without entry or claim, would not devest the grantee of his title.

(*a*) Vide *Hillhouse* v. *Chester*, 3 *Day's Ca.* 166. *Bush* v. *Bradley*, 4 *Day's Ca.* 298, 306.

* *R. M. Sherman* was to have argued on the same side, but was under the necessity of leaving town before the case came on.

2. That the forfeiture was dispensed with by reception of rent after breach of the condition. After enforcing this proposition, he examined into the objection that the plaintiff at the time of receiving the rent was under an overseer; contending, first, that the appointment was void; (*a*) and secondly * that if the plaintiff were under an overseer, still he had right to receive the money and the waiver was of legal operation.

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3. That the reception of the rent on a day posterior to the breach, in prevention of an odious forfeiture, will be considered as conclusive evidence of a precedent agreement to postpone payment.

Lastly, that a new trial will not be granted against equity, when it is apparent that chancery will compel a re-execution of the deed.

TRUMBULL, J. [After stating the case.] Upon this motion three questions are presented; 1. Whether this appointment of the overseer was void? 2. Whether, supposing it void, an entry on the land is by law necessary in order to revest the estate; and whether the plaintiff by accepting said payment on said 30th day of *October*, hath by law waived the forfeiture to which he was entitled by the neglect of payment on the 25th, and thereby lost his right of entry and claim? 3. Whether an entry or claim on said lands by the plaintiff was necessary, before he could sustain an action of disseisin, according to the principles and practice adopted in this state?

The power given to the select men by our statute, to adjudge by a summary decision, that any person in their town is likely to be reduced to want by idleness, mismanagement and bad husbandry, and to disable him from making any bargain or contract, by the appointment of an overseer to order him in the management of his business, is so extensive in its nature, so liable to abuse, and so derogatory to the liberty of the subject, that it ought never to be extended, beyond what is clearly warranted by a strict construction of the statute. It is in terms declared to be for the purpose of reforming its object, and the appointment is expressly to be made for such time or times as the select-men shall think

(*a*) 1 *Root* 246. *Waters* v. *Waterman*, 2 *Root* 214.

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proper. An appointment to take place from its date, and continue without limitation, is not an appointment for a term of time, but for the joint lives of the disabled person and his overseer. See *Waters* v. *Waterman*, 2 *Root*, 214., where such an appointment was declared to be illegal. *Johnson* v. [*83] *Stanley* and others, 1 *Root* 245. 1 *Swift's Syst.* 122. *Knapp* v. *Lockwood*, 3 *Day's Ca.* 131.

It seems also evident from the whole purview of the laws on this subject, that it could not be the intention of the legislature, to empower the select-men to make unlimited appointments. The statute neither gives to them nor their successors any power to annul their proceedings, and restore the party to his ability of making contracts, and managing his own affairs. His only remedy is by complaint to the next county court, in the county where he dwells; which can only be the next court after the appointment; and should he omit, or fail in that application, he is left wholly without remedy, even in case of his reformation, unless we give such construction to the statute, that the appointment must be made for a reasonable and limited time, and cease when that is expired. See statute, *tit.* Idiots, *c.* 1. *s.* 8, 15 and 16.

I am therefore clearly of opinion, that the appointment in the present case is not conformable to the statute, and is therefore illegal and void.(*a*) But I do not hold that select-men cannot appoint overseers for a longer time than their own continuance in office. The statute gives them the power of determining the time, and they may have good reasons in particular instances, to adjudge a greater period proper and necessary. It is sufficient that they decide reasonably on the causes and matters before them. No sentence of any court becomes void, merely on the expiration of the judge's commission.

In respect to the necessity of actual entry or claim in order to take advantage of the forfeiture and revest the estate, it may be proper to enquire what were the rules of common law as to seisin and transfers of land, what alterations have been made in them by the *English* statutes, and what in this state, by our own statutes, or practice.

In the early periods of *English* jurisprudence, the want of public registers, the ignorance of forms, and general incapacity of the common people to read or write, were supplied by

(*a*) See *Strong* v. *Birchard*, 5 *C. R.* 357. *Parmelee* v. *Baldwin* & al., *post* 313. *Mix* v. *Peck* & al., 13 *C. R.* 244.

solemnities, ceremonies and notoriety in their transactions, and particularly in the transfer of real estate. Lands were aliened by making livery and seisin in public before witnesses. When written forms of conveyance were introduced every practicable solemnity was required. *The feoffor affixed his seal to the instrument, and formally delivered it to the use of the feoffee. At a later period, his signature was added, by making his mark or writing his name. Still the deed of feoffment did not convey the land. It was only in nature of evidence that an actual feoffment had been made. Livery of seisin only could vest the title in the feoffee, and was still equally necessary, in all cases wherein actual seisin could be delivered. *Littleton*, *sec.* 66. 2 *Black. Com.* 311. Hence the distinction between things corporeal which lie only in livery, and incorporeal rights which lie in grant, and pass by the delivery of the deed. The mere delivery of a deed of feoffment, without livery and seisin, gave to the feoffee a licence to enter, and nothing more; by such entry he held only as tenant at will; he who gave the deed might turn him out when he pleased, and the land descended to the heirs of the feoffor, in case of his decease before actual livery made. *Co. Litt. sec.* 70. *p.* 57. *a.*

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All acts required to be done *in pais* for conveying or confirming an estate, must be avoided or annulled by some act of equal solemnity and notoriety. Every assurance, contract or agreement must be dissolved by matter of as high nature. 5 *Co. Rep.* 26. *a.* An estate of freehold being created by livery cannot be determined without entry. 3 *Co. Rep.* 65. *a.*

There is a diversity between a condition, that requireth a reentry, and a limitation that *ipso facto* determines the estate without any entry. If a man make a gift in tail, or a lease for life, upon condition, that if the donee or lessee goeth not to *Rome* before such a day, the gift or lease shall cease or be void, the estate cannot cease before an entry; for an estate of freehold cannot begin nor end without ceremony. *Co. Litt.* 214. *b.* 10 *Co. Rep.* 41. *b.* 42. *a.*

"Although the words of the condition are, that upon payment of the money, the estate shall cease and shall be void, yet the estate shall not be revested in the grantor without claim; for the estate of inheritance cannot be determined by condition without entry or claim." 2 *Co. Rep.* 53. *b.* "So if land be devised to a man and his heirs on condition that if he pay not twenty pounds by such a day, his estate shall cease and be void; the

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money is not paid, the estate shall not be vested in the heir before an entry." *Co. Litt.* 218. *a.*

"When an estate is strictly speaking upon condition in deed, as if granted expressly upon condition to be void, upon the payment of 40*l.* by the grantor, or so that the grantee continues unmarried, or provided he goes to *York*, &c. the law permits it to endure beyond the time when such contingency happens, unless the grantor, or his heirs or assigns, take advantage of the breach of the condition, and make either an entry or claim to avoid the estate." 2 *Black. Com.* 155.

By the word "claim," in the foregoing authorities is intended such claim as is called in our books *continual claim*, and is in judgment of law equivalent to actual entry. It is explained by *Littleton*, *sect.* 417., &c. This claim has the same effect with, and in all respects amounts to, a legal entry. 3 *Black. Com.* 175.

In the present case, by the breach of the condition, the plaintiff acquired only a right to re-enter on the land, of which he has never taken advantage.

But it is said, that these rules of law are obsolete; that freehold estates in *England* are not now created by livery and seisin, neither were they so created in the time of Lord *Coke;* that since the statute of *Henry* the 8th for turning uses into possession, such estates are created and conveyed, by covenant to stand seised to uses, by deed of bargain and sale with enrollment, or by the more usual conveyance of lease and release; in all of which cases, the freehold is aliened and transferred without livery of seisin; and hence it is argued, that it may consequently be devested without entry or claim.

But that statute does not in any respect alter the nature of freehold estates. It enacts, "that when any person shall be *seised* of lands, &c. to the use of any other person or body politic, the person or corporation entitled to the use, in fee simple or otherwise, shall from thenceforth stand and be *seised*, and be deemed and judged in lawful *seisin* and possession, of such estate to all intents," &c. By this clause, the seisin of the trustee becomes the seisin of the *cestui que use;* but it is clear, that the trustee must first have the actual seisin before the statute can operate to transfer it to him, who has the use. Nor was such kind of transfer unknown to the common law; as if land be leased to *A.* for years, re-

mainder to *B.* in fee, or for life, and livery of seisin be made to *A.*, *B.* becomes by that livery seised of the remainder, * and the freehold immediately vests in him according to the grant. *Littleton, sect.* 60. Yet in this case *A.*, the lessee for years, could not hold the seisin of the land, as that is contrary to the nature of his estate, any more than the trustee could continue to hold it, after the passing of the statute. In each case, the lessee or trustee is merely the instrument of conveyance and transfer. This statute has, indeed, given efficacy to those new forms of conveyance which I have mentioned. In them the covenant, bargain or lease vests the use, and then the statute vests the seisin and possession in him, who has the use by the deed. Hence a conveyance by bargain and sale, or lease and release, is said to amount to a feoffment, to be equivalent to livery of seisin, and to supply its place; for where there is already a possession, either derived from a privity of estate, or vested by the statute, any farther delivery of possession would be useless. "It shall be vain," says *Littleton, sect.* 460., "to make an estate by livery and seisin to another, where he hath possession of the same land by the lease of the same man before." See *Cro. Jac.* 604. and 696. 2 *Black. Com. chap.* 20.

Although the statute in this manner transferred the title, and vested the seisin of a freehold, without livery, still an actual entry was necessary to devest it. The ingenuity of the courts was exercised to invent some equivalent or substitute, that might save the trouble and formality, which attended the making of actual entry. This they effected not by varying or discarding any rule of the common law, but by introducing a fictitious process for trying titles in the action of ejectment. In that action, proof of actual entry is still necessary, and indeed so absolutely requisite, that ejectment cannot be maintained for an advowson, a rent, a common, or other incorporeal hereditament, where no entry in fact can be made; nor in any case where the right of entry is taken away by descent, or otherwise. *Newman* v. *Holdmyfast*, 1 *Stra.* 54. *Herbert* v. *Laughluyn*, *Cro. Car.* 492. This proof is obtained by compelling the defendant to confess on record, an actual lease, entry and ouster, neither of which ever existed in fact. See 3 *Black. Com. chap.* 11.

Thus the principle of common law, that no estate of freehold can be devested without entry, has ever been holden

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inviolable. Such an estate is never revested in the grantor *by the mere breach of the condition. The title conveyed is not void, though the deed so express the condition, but is only voidable by an act of the grantor, taking advantage of the condition, and re-possessing himself of the estate. Until he become in this manner revested, he may, by a subsequent acceptance of the sum due by the condition, or any other equivalent act, waive the forfeiture at his pleasure, and can never take advantage of it after such waiver. *Co. Litt.* 218. *a. Wood's Inst.* 182. 2 *Black. Com.* 156. *Shep. Touch.* 150. *Doe* d. *Lockwood* v. *Clark*, 8 *East's Rep.* 185. *Goodright* d. *Walter* v. *Davids*, *Cowp.* 805. 1 *Swifts Syst.* 264., &c.

But it is alleged, that however these points may be considered in the courts of *Westminister*, the rule of law is wholly different in this state; that with us, he who has the right of possession is vested with the legal possession, and ownership is equivalent to seisin; that a freehold lies in grant, and passes by the mere delivery of the deed of conveyance; that in this respect, there is no distinction between property real and personal; and that these essential alterations have been brought about by the practice and decisions of our courts, and by a common law or general custom framed and established by ourselves, for our sole use and benefit, and different from the law of any other state or country.

It is true, that by reason of the small comparative value of lands at the first settlement of *Connecticut*, many loose customs were introduced respecting them, which are frequently stated in the preambles of our earlier laws, and occasioned the enacting of a complete code on the subject; establishing the tenures of real estate, the evidences of title, the rules of descent, and the modes of alienation. See our statute book, *tit.* Lands. In this collection, almost every general question respecting them is settled by positive statutes. Where the statute is silent, the case must be decided by the principles of the common law.

The distinction between the *English* rule and our own is thus laid down in the case of *Bush* against *Bradley* in 4 *Day's Ca.* 306. "Seisin is necessary in their law, and nothing but ownership in ours. We have always considered ownership of real property sufficient to maintain an action of trespass against every intruder, but by the *English* law actual

possession by entry is necessary. We have always considered ownership, as giving a right to possession of real property, as much so, as ownership of personal property. Ownership in the one case draws after it the possession, as much as ownership in the other; and whenever the right of possession is lost, all title and ownership are lost." All this is true, if we take the word, *ownership*, in its strictest legal sense. But it is a mistake to suppose from this, that our courts have arbitrarily discarded the rules of the common law on this subject. For I hold that in this state, we have adhered to them as strictly in all these points, as have been done in *England;* and that every deviation is either directly enacted in express words, or clearly deducible from the legal construction of our own statutes.

Our form of deeds for the conveyance of lands in fee is copied from the *English* deed of bargain and sale, with the addition of covenants of seisin and warranty. By the statute of 27 *Henry* 8. *c.* 16. "No lands or hereditaments shall pass whereby any estate of inheritance or freehold shall be made, or any use thereof, by reason only of any bargain and sale, except the bargain and sale be made by writing indented, and enrolled in one of the courts at *Westminster*, &c., within six months after the date of said writing." Till enrollment nothing except the use passes by the deed, and the freehold is still in the bargainor. But upon enrollment the estate vests immediately by the statute of uses, without livery of seisin, and the bargainee, by relation, becomes seised from the delivery of the deed. The freehold and seisin in this case pass by the enrollment in connexion with the statute. *Bellingham* v. *Alsop*, *Cro. Jac.* 52. *Co. Litt.* 147. *b.* 2 *Black. Com.* 338.

In this state, the freehold of lands becomes vested, without livery of seisin, by a record of the title or conveyance in the public register of the town, in which the lands are situated. This is effected by virtue of sundry statutes.

In the year 1667, just after the reception of our charter from the crown, and the union of the colonies of *Connecticut* and *New-Haven*, a statute was passed whereby it was enacted, That any person, who then stood possessed in his own right in fee simple of any houses or lands, and should not be interrupted by the prosecution of any adverse claim before

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the last of *November* 1668, should have power to enter and record the same to himself, his heirs and assigns forever; and the record (attested in the manner therein prescribed) should be a sufficient and legal evidence, to every such person, for the holding the same firm to him, his heirs and assigns forever. *Tit.* Lands, *chap.* 3. Previous statutes were then in force, which ordered that all grants, bargains, sales and mortgages of houses and lands should be recorded in the register of the town, and thereon be sufficient and legal evidence for holding the same in fee. Subsequent statutes use the same expressions as to the validity of such records, and declare them to be sufficient evidence to the grantees for holding the lands to them and their heirs and assigns forever. *Tit.* Town Clerks, *chap.* 1. *sect.* 3, 4, 5, 7, and 9.*

The operative words of the statute of uses, That such persons as have the use, shall *stand and be seised* and *be judged in lawful seisin and estate* of the lands, are not more strong and effectual to supply the want of livery and seisin, than the words in ours, that the record shall be sufficient evidence for *holding the lands firmly in fee.* In this view of the subject, I agree in the proposition, that we have adopted all the beneficial principles of the statute of uses. By virtue of our statutes, a grantee in possession, under a deed so recorded,

* The colony of *Massachusetts*, in *October* 1640, passed an act requiring all *mortgages*, and other grants of real estate *where the grantor remains in possession*, to be acknowledged before some magistrate, and recorded; otherwise, the conveyance should be of no force, except as against the grantor and his heirs. By another act passed in *May* 1652, it was provided, that no sale or alienation of real estate should be valid, "except the same be done by deed in writing, under hand and seal, and delivered, *and possession given upon part in the name of the whole*, by the seller, or his attorney so authorized under hand and seal; unless the said deed be acknowledged and recorded according to law." *Col. & Prov. Laws*, p. 85, 86. [*edit. of* 1814.] Here two modes of alienation were established; one by *livery of seisin*, and the other by *acknowledgment and recording*, as had been previously required in case of mortgages; but in no case were the execution and delivery of the deed alone sufficient. In *March* 1784, an act was passed, providing "that all deeds or other conveyances of lands, &c. signed and sealed by the party or parties granting the same, and acknowledged by such grantor or grantors before a justice, &c. and recorded at length in the registry of deeds, &c. shall be valid to pass the same, *without any other act or ceremony in the law whatever.*" *Stat. Mass.* vol. 1. p. 132, 3, [*edit. of* 1807.] Here acknowledgment and recording were required, and livery of seisin dispensed with, *in all cases*; and thus the law remains. R.

is not liable to be evicted by the grantor, or any other person, but has evidence of his title against all mankind. By settled construction the record is holden equivalent to livery of seisin, and is indeed much preferable in point of certainty and notoriety. 1 *Swift's Syst.* 213, 307, 308.

It was the policy of our ancestors, that all titles to real estate should be established by record. Thus, when land is taken and set off to the creditor by levy of execution, the title in fee is vested by recording in the register of the town, and in the clerk's office, of the court whence the execution issued. *Tit.* Execution, *chap.* 1. Hence if *B.* purchase by deed, or levy an execution on the land of *A.*, but neglect to record his deed or levy in a reasonable time, and *C.* make a subsequent levy of a second execution, or without knowledge of the claims of *B.*, purchase the same land and take a deed *bona fide* from *A.*, the original owner, and procure his levy or deed to be fully recorded, the title of *B.* is for ever lost and avoided; not that *B.* has forfeited his right by laches and negligence, but because it was merely inchoate, and *C.* who is in equal equity, is first vested with a complete title by record. So the title of an heir to the particular lands to him allotted in the division of an intestate estate, is vested in him by recording the distribution in the court of probate. *Tit.* Estates testate and intestate. Actual entry and possession by the intestate in his life-time is never required in claims by descent; for the intestate, if owner, must by our statutes have been legally vested with the estate to hold to him, and his heirs forever, and this title will appear on record. A complete substitute and equivalent is thus furnished for the maxim of common law, *seisina facit stipitem.* See 3 *Day's Ca.* 210.

Our deed of quit-claim is partly copied from what is termed the *concord* in a fine levied of lands. It cannot take effect as a release unless the grantee be in possession, but is good by way of bar and estoppel, against the grantor and all who claim under him, and in case the grantor had title, it is valid to hold the estate against all persons, upon being duly recorded, in the same manner as a deed of bargain and sale.

But we have no statute, which aids, or affects any title, that must commence and accrue by entry or re-entry. Such are all titles acquired by forfeiture on breach of conditions;

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they must be judged by the rules of common law, and actual entry or claim is still necessary.

I have entered more largely into this subject, than I at first intended, because on the fullest re-examination I have had leisure to make, I cannot accede to the position that our real estates lie in grant or that any other title passes by the mere delivery of the deed, except a title by estoppel against the grantor and his heirs only. See *tit.* Town Clerks, *c.* 1. *s.* 9.

But laying aside all consideration of the necessity of entry or claim, the plaintiff must, on another ground, manifestly fail of supporting his title. Before any act claiming to take advantage of the forfeiture, he has, by voluntary agreement, accepted of the defendant the annual sum then due, and executed to him his discharge. This acceptance was by law a waiver of the forfeiture; and a forfeiture once waived can never afterwards be claimed by the party. "When a man will take advantage of a condition, if he may enter, he must enter, and when he cannot enter he must make a claim; and the reason is, for that a freehold and inheritance shall not cease without entry or claim; and also the feoffor or grantor may waive the condition at his pleasure." *Co. Litt.* 218. *a.* Lessor cannot enter for a forfeiture against his own acceptance of rent. 3 *Salk.* 3. Where the forfeiture is once waived the court will not assist it. *Cowp.* 805.

In estates of freehold on condition, a subsequent acceptance of the sum due, the non-payment of which had caused a forfeiture, is adjudged in law a waiver, in all instances where the party accepting had knowledge at the time of his acceptance, that a forfeiture was incurred. Distinctions in case of chattel interests, of the receipt of rent due and recoverable by action of debt, and perhaps some others, may be found in the books, but none that can affect the present question. See *Litt. sect.* 341. *Co. Litt.* 211. *b. Cowp.* 243. 803. 2 *Term Rep.* 425. 2 *Stra.* 900. 2 *Salk.* 597.

It is finally urged, that the charge in the present case is incorrect, for that the plaintiff may maintain his action of disseisin upon the breach of condition and forfeiture, without previous entry, and that the service of his writ is a sufficient claim to support it. If the principles above stated be just, this point was not before the court, its decision could

not be material in the case, nor a mistake a sufficient ground for a new trial. The plaintiff having waived the forfeiture, by twice subsequently accepting the annual rents, had lost all right to enter on the lands, or make claim by any act or in any manner whatsoever. Whether, in case he had claimed the forfeiture and refused to accept the payments, he could have maintained this action without previous entry, is the question now started; and I am of opinion, that by the rules of law it must be answered in the negative.

Our action of disseisin is often called action of ejectment, but with a considerable degree of inaccuracy. It is a very beneficial process, and supplies the place of every form of action, real, possessory and mixed, for recovering the seisin or possession of lands, if we except the writ of right, which does not lie in this state; and though it comprehends the original writ of ejectment, which was given to a lessor for years to recover possession of his land when dispossessed; [See 3 *Black. Comm.* 201.] yet it has no single quality resembling the modern *English* action of ejectment for trying the title, and is wholly unincumbered with its fictions, notices, and rules for confessing lease, entry and ouster, which never existed in fact, and which we should never admit in practice.

In the present case, the defendant was well seised and possessed of the lands under the deed, and had the complete title in fee vested in him, subject only to be devested in consequence of non-payment of the annuity. All agree, that it is in the power of the plaintiff to waive the forfeiture. In such case, no new conveyance to the defendant is necessary; for his title still continues vested by the deed. The fee cannot lie in abeyance, waiting for the plaintiff to make his election, whether to claim or waive the forfeiture. If he enter on the land and claim it as forfeited, the defendant is thereby devested, and the plaintiff vested anew by his entry, and not before.

In all cases where the right or title of the plaintiff accrues upon his entry or re-entry on lands, an actual entry is necessary in order to revest the estate. A confession of lease, entry and ouster in an action of ejectment, is not a confession of any entry sufficient to make out the plaintiff's title but he must prove actual entry, possession and ouster. *Bac. Abr.*

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tit. Ejectment, D. 1 *Saund.* 310. 1 *Ventr.* 248. 1 *Mod. Rep.* 10. *Cro. Jac.* 511. 2 *Stra.* 1087., &c.

It is true, that by the statute, 4 *Geo.* 2. *chap.* 28. in cases for non-payment of rent, the landlord may, without any formal re-entry, serve a declaration in ejectment, and it is enacted that such service shall stand instead of a demand and re-entry: and I think, in order to render the service of a declaration, in our action of disseisin, a substitute for an actual entry in cases like the present, a positive statute of this state must be equally necessary; for the common law knows of no such equivalent.

For these reasons, I am of opinion, that the charge was correct, and no new trial ought to be granted.

In this opinion the other Judges severally concurred.—EDMOND, J. having at first expressed some doubts, afterwards declared himself entirely satisfied with the decision.

New trial not to be granted.

HAWLEY *against* BELDEN.

B. entered into a contract with *A.* to put a certain part of a turnpike road and causeway into full and complete repair, to the acceptance of commissioners, by the 1st of *July* 1810, and to pay damages in case of failure. This contract having been fulfilled in part only, *C.*, on the 19th of *October* 1810, covenanted with *A.*, that the road and causeway should be done, and completed according to *B*'s contract, by the first of *June* 1811; and that if any work done by *B.* should previously fail, and want repairs, it should be immediately repaired. In an action brought by *A.* against *C.* for damages, averring that the work done by *B.* failed and wanted repairs on the 20th of *October* 1810, the plaintiff offered evidence to prove that after the 1st of *June* 1811, the causeway in question fell down, through the insufficiency of the materials and defective construction, and not from any external cause: Held to be admissible.

For the purpose of shewing the amount of damages in such case, the plaintiff offered evidence of the labour and expense which he had bestowed and laid out on the road towards completing it: Held to be admissible.

The defendant, to shew a fulfilment of the contract on his part, offered to prove, that on the 8th of *October* 1810, the commissioners on the road gave a certificate, that the road was so far completed as to authorize the collection of toll; the commissioners reserving to themselves the right of directing such repairs thereafter as they should judge necessary to complete the road agreeably to contracts and former instructions of commissioners. The defendant also offered to prove, that on the same day, the commissioners ordered repairs to be made on the road; and that one of the commissioners, on the 1st of *July* 1811, went on the road, and having inspected it, made no order for repairing the same. Held that such evidence was inadmissible.

THIS was an action on the case. The declaration first

stated an agreement entered into on the 11th of *April* 1810, between the plaintiff on the one part, and *T. Woodruff* and *J. Belden*, jun. on the other, the material parts of which were as follows: "That the said *T. Woodruff* and *J. Belden*, jun. engage and promise that they will, on or before the 1st day of *July* next, put the road and causeway, at a place called the *Stepping-Stones* on the *Middletown* and *Berlin* turnpike road, which was assessed in company or together, (and which was attempted to be built by Capt. *Joseph W. Alsop*,) into full and complete repair, to the acceptance of the commissioners on said road; that is to say, the said *T. Woodruff* and *J. Belden*, jun. are to put the road east of the bridge in good repair, (as above.) They are to begin to widen the causeway on the west side of the bridge at the 8th staunching on the north side of the causeway from the said bridge, and to give the said causeway an equal flair from said staunching to the hill west to a width not less than 42 feet at said hill. The road to be well raised from the hill to the place where the causeway begins to widen as above. The road on the south side of the causeway west of said bridge, and east of the point where the widening begins, which is now fallen down, is to be rebuilt by said *T. Woodruff* and *J. Belden*, jun., and is by them warranted to stand for three years after the same shall be accepted. The walls on both sides of the causeway west of the bridge until they arrive at the place where the road begins to widen (as above) are to be raised by the said *J. Woodruff* and *J. Belden*, jun. with stone to a sufficient height, and the causeway between the same they agree to conform to the bridge in the manner pointed out by the gentlemen who equalized the road into shares; and they engage to replace the dirt next to the abutment in such manner, and at such time, as said *Hawley* shall direct, while repairing the west abutment of said bridge; always provided, that the said *Hawley* is to repair the said abutment while the said *T. Woodruff* and *J. Belden*, jun. are at work on their causeway west of said bridge." The contract then contained several stipulations on the part of the plaintiff, on which nothing turned, and concluded thus: "And the said *T. Woodruff*, *J. Belden*, jun. and *Hawley* hereby engage to pay all damages that shall accrue in consequence of either party failing on his part of said contract." The declaration then stated, that said *T. Woodruff* and *J. Belden*, jun. having

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done some work in pursuance of their contract, but not having fulfilled the same on their part, the defendant, father of said *J. Belden*, jun., for the consideration of 200 dollars, on the 19th of *October* 1810, agreed with the plaintiff as follows: "Received, *Middletown*, *October* 19th, 1810, of *Samuel Hawley* 200 dollars in full payment for repairing ten shares in the *Middletown* and *Berlin* turnpike road at the *Stepping Stones*, (so called;) and I do hereby promise and engage, that the said shares in said road shall be done and completed according to the contract made by *T. Woodruff* and *J. Belden*, jun. with the said *Samuel Hawley*, by the 1st of *June* next; and that if any work done by them before the same shall be completed shall fail and want repairs, it shall, in such case, be immediately repaired." After averring the identity of the "ten shares" mentioned in the last contract with that part of the road specified in the first, the declaration proceeded thus: "Now the plaintiff says, that the work done by said *T. Woodruff* and *J. Belden*, jun. failed and wanted repairs on or about the 20th day of *October* 1810, the said work never having been completed, all as the defendant well knew; but the defendant his promise aforesaid not regarding, hath not performed the same, nor any part thereof; and the defendant hath not done and completed the said shares in said road according to the contract made by said *T. Woodruff* and *J. Belden*, jun., nor according to said contract signed by the defendant; nor hath he repaired the work done by said *T. Woodruff* and *J. Belden*, jun. which failed and wanted repairs as aforesaid; nor hath the defendant, or the said *T. Woodruff* and *J. Belden*, jun. put the said road into repair, to the acceptance of the commissioners on the said road, or completed the same pursuant to said contracts; all to the damage of the plaintiff," &c.

The defendant pleaded the general issue; and the cause was tried at *Haddam*, *December* term 1813, before *Mitchell*, Ch. J. and *Trumbull* and *Ingersoll*, Js.

On the trial, the plaintiff, to maintain the issue on his part, offered evidence to prove, that after the 1st day of *June* mentioned in the defendants contract, a part of the road referred to in that contract, consisting of a high causeway, fell down and wholly gave way, through the insufficiency of the materials and defective construction thereof, and not from any external cause. To the admission of this evidence the defendant objected; but the court admitted it.

In the further progress of the trial, the plaintiff, to make out his case more fully, and to shew what damages arose from the non-performance of the contracts, offered to prove what he had done on the road towards completing it, and the amount of the expense thereof, and that the road had not yet been made equal to the requirements of the defendant's contract. The defendant objected also to the admission of this evidence; but the court admitted it.

On the part of the defendant, the following certificate of *Seth Overton* and *Shubael Griswold*, Esqrs. commissioners on the road, was offered in evidence, to prove an acceptance of the road by them: "The subscribers, commissioners appointed to inspect the *Middletown* and *Berlin* turnpike road, having this day examined the same, do find that said road is so far completed and repaired as in our opinion to authorize the proprietors of said road to collect toll thereon. Permission is therefore hereby given to the proprietors of said road to erect the gates on said road, and to collect toll thereon, agreeably to the act of their incorporation; reserving to the commissioners on said road the right of directing such repairs hereafter as they may judge necessary to complete said road agreeably to contracts and former instructions of commissioners. Dated at *Middletown*, this 8th day of *October*, 1810." [Signed.] The defendant also offered to prove, that on said 8th of *October*, the commissioners ordered repairs on that part of the road mentioned in the contracts in this form: "The road west of the bridge to be raised 12 inches, and levelled each way." And the defendant further offered to prove, that *Shubael Griswold*, Esq. one of the commissioners, with *John Caldwell*, Esq. who was supposed to be the other, but was not in fact, went to *Middletown*, where the mistake being discovered, said *Caldwell* went no further; and that said *Griswold* went on the road on the 1st of *July* 1811, and having inspected the whole pursuant to law, made no order for repairing the same, or any part thereof. To the admission of the evidence thus offered by the defendant, the plaintiff objected; and the court rejected it.

The jury found a verdict for the plaintiff; the defendant moved for a new trial; and the questions arising on such motion were reserved for the advice of all the Judges.

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C. Whittelsey in support of the motion. 1. The evidence adduced by the plaintiff and excepted to on the trial, was relevant, if relevant for any purpose, only to prove that the road was built in a defective manner, or of bad materials. The question then is, whether under this declaration the plaintiff may prove that the road was made in a defective manner? Where a contract is made to do a particular piece of work, if the work is done, although it may be done badly, yet an action does not lie on the ground of mere non-performance, but the plaintiff must state that it was done fraudulently. The decisions bearing on this point are somewhat contradictory, but no case can be found where an action has been sustained on the contract on the ground that the work was done in a defective manner. *Broom* v. *Davis*, 7 *East* 480. *in notis*. *Templer* v. *M'Lacklan*, 2 *New Rep.* 136. The rule now is, that if there has been no beneficial service, there shall be no pay; but if there has been some benefit, the plaintiff shall recover his whole demand, and the defendant have his cross action. 2 *New Rep.* 141. n. (1). [*Day's edit.*] The principal case may be tested by the application of two well known rules; 1st, That the defendant must have notice of the plaintiff's claim on the face of the declaration so as to prepare his defence; 2dly, That the judgment must be a bar to every action for the same cause. Now, would this verdict bar an action for making the road in a deceitful manner? If the preceding principles are correct, the evidence would not be admissible even against *Woodruff* and *Belden; a fortiori* not against the defendant.

Further, the operation of the evidence in question is to make the defendant warrant the work done by *Woodruff* and *Belden* indefinitely; whereas by his contract he warranted it only to the 1st of *June*.

2. The evidence to prove the amount of the repairs on the road in 1812 was irrelevant. The question is, what was the damage on the 1st of *June* 1811? To ascertain that, the state of the road on that day should be proved, and the expense necessary to make it equal to the requirements of the contract. The evidence exhibited went to shew the expense of repairing the road a year afterwards.

3. The certificate of commissioners offered in evidence shewed an acceptance of the road by them, according to the

understanding of the parties. The objection is, that the commissioners reserved the right of directing further repairs. But in answer to this, it may be observed, in the first place, that such reservation was not inconsistent with an acceptance within the meaning of the contract; and secondly, that after an order for repairs had been given, the commissioner went upon the road and found it in such a state that he was satisfied with it, as appears from his making no further order thereon. Under the statute (*a*) one commissioner is authorized to perform all the duties required of both: and if the commissioner who went upon the road had not found it repaired to his satisfaction, it clearly would have been his duty to order further repairs. The certificate and evidence offered in connexion with it ought, therefore, to have been received.

Hosmer, contra, insisted, 1. That the fact of the causeway's falling *after* the 1st of *June* 1811, through insufficient materials and defective construction, and not from any external cause, was evidence which at least conduced to shew, that *on* the 1st of *June* the causeway was not in a state of complete repair according to the contract. He referred to *Gibson* v. *Hunter*, 2 *H. Bla.* 288. as a much stronger case than the present, where collateral circumstances were received to afford an inference of the principal fact; and to a class of cases in the law of insurance, where it has been held, that unseaworthiness *at the time of sailing* may be inferred from the condition of the vessel *afterwards*. 2 *Marsh.* 373. *Selw. N. P.* 1016. *Talcott* v. *The Marine Insurance Company of New-York*, 2 *Johns.* 130.

2. That the evidence offered to ascertain the damages was properly admitted. This position he illustrated by referring to the rule for estimating sea damage, *viz.* the amount of repairs, deducting one third new for old.

3. That the evidence offered by the defendant was both incompetent and irrelevant. It was incompetent, because the acts of the commissioners were anterior to the defendant's contract. The certificate and order for repairs were given on the 8th of *October* 1810; the contract was entered into on the 19th. The evidence was irrelevant, because it did

(*a*) *Tit.* 166. *c.* 1. *s.* 9.

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not shew an acceptance of the road as completed according to the contract.

REEVE, Ch. J. This is an action brought to recover damages for not fulfilling a contract to make part of a turnpike road. Previous to entering into the contract by the defendant, the plaintiff had made a contract with a son of the defendant to make a section of the turnpike which had been set out to the plaintiff, to the acceptance of commissioners, by the 1st of *October* 1810. The son not having fulfilled his contract, his father, on the 19th of *October* 1810, entered into the contract on which this suit is brought; in which he covenanted that the work should be finished according to the former contract of the son by the 1st of *June* 1811, and if any work done under the former contract should fail before that day, he should repair it. The plaintiff states, that a part of this work (describing it) failed on the 20th of *October* 1810, and that the defendant had not repaired it. On the trial of the cause, to shew that the work was badly done, the plaintiff offered to prove that the work where there was a causeway, fell down about the 20th of *November* 1811. To the admission of this testimony the defendant objected; and the court admitted it. The admission of this testimony was correct; for if the causeway fell down on the 20th of *November* 1811, not quite six months after the road was by the contract to have been completed, it would show that the workmanship was defective at the time it was built, or it would not without violence have fallen so soon afterwards.

Testimony was offered by the plaintiff to prove that he had been put to great expense in repairing the road after the 1st of *June*, because the road was not then completed. This was objected to; and admitted by the court. The admission was correct; for it was proper for the purpose of assessing damages.

The defendant offered in evidence the certificate of the commissioners, dated the 8th of *October* 1810, that the gates might be erected, which certificate contained a reservation of the right to give further directions. On the objection of the plaintiff the court rejected this evidence; and also rejected the testimony of Gen. *Griswold*, who was a commissioner, that he viewed the road, and gave no order. It was contended by the defendant, that the testimony ought to have

been admitted; for from this he might infer that the road was completed to the acceptance of the commissioners. So far as respects the certificate given, it can afford no ground for such inference; for the acceptance so far as to set up gates contains in it a reservation of a right to give further direction: so it rather proves that the road was not completed. The "acceptance of the commissioners" mentioned in the contract means a full, absolute and entire acceptance; whereas this is only a partial acceptance. And as to the commissioner not having given any order, it is no evidence of acceptance; for none is shewn but the before-mentioned partial acceptance; and the right to give further directions to repair the highway remained, although he gave none at the time he viewed the road.

It would have been improper to admit the certificate on another ground; for it was dated the 8th of *October* 1810, and the contract on which this suit is brought was dated eleven days afterwards, at which time the contract being made to repair the road by the 1st of *June* to the acceptance of the commissioners demonstrates, that at the time of giving the certificate the road was not so completed.

In this opinion the other Judges severally concured.

New trial not to be granted.

PALMER *against* ALLEN.

In a cause brought before the superior court, the pleadings terminated in a demurrer to the defendant's plea in bar, which was adjudged to be insufficient; on a writ of error, that judgment was affirmed by the supreme court of errors; the cause being removed to the supreme court of the *United States* judgment was given in favour of the original defendant, whereby the judgment of the supreme court of errors was reversed, and a mandate was issued to the judges, directing them to enter judgment for the appellant [the original defendant] on the demurrer. Held that the proper course was to enter a judgment here reversing the former judgment of the superior court, and to remand the cause to that court to be proceeded in conformably to the decision of the supreme court of the *United States*.

AN action of trespass for assault and battery and false imprisonment was brought by *Allen* against *Palmer* before the superior court in *New-Haven* county, *January* term 1811. The defendant pleaded in bar, That he was a deputy of the marshal of the *United States* for the district of *Connecticut*, and in that capacity had in his hands to serve a writ of at-

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tachment, issued under the authority of the *United States*, returnable to the district court of the *United States* for said district; in virtue of which he attached the body of the plaintiff, read the writ in his hearing, and for want of bail, committed him to the keeper of the gaol in *New-Haven*, with whom he left a true and attested copy of said writ and process; averring this to be the imprisonment and pretended trespass complained of. To this plea the plaintiff demurred; and the superior court adjudged the same to be insufficient. *Palmer* thereupon brought a writ of error; and the Supreme Court of Errors, at the *November* term 1811, affirmed the judgment of the superior court. *Palmer* then removed the cause to the Supreme Court of the *United States*, where he obtained a decision in his favour.

H. Huntington now presented the following mandate to this Court:

"*United States of America*, ss. The President of the *United States*, to the Honourable the Judges of the Supreme Court of Errors of the state of *Connecticut*, *Greeting*.

"Whereas lately in the Supreme Court of Errors of the state of *Connecticut*, in a cause wherein *Robert Allen* was plaintiff and *Jonathan Palmer* was defendant, judgment was rendered by the said Supreme Court of Errors for the said *Robert Allen*, as by the transcript of the record of the said Supreme Court of Errors, which was brought into the Supreme Court of the *United States*, by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears; and whereas in the present term of *February*, in the year of our Lord one thousand eight hundred and thirteen, the said cause came on to be heard before said Supreme Court on the said transcript of the record; on consideration whereof, this Court is of opinion that the Supreme Court of Errors of the state of *Connecticut* erred in supposing that the officers of the *United States* are obliged to conform their conduct to the provisions of the laws of that state requiring the *mittimus* in civil cases. It is, therefore, adjudged and ordered, that the judgment of the said Supreme Court of Errors of the state of *Connecticut* be reversed and annulled, and that the cause be remanded to the said Supreme Court of Errors with directions to enter judgment for the said appellant *Palmer* on the demurrer.

You are, therefore, hereby commanded, that such proceedings be had in said cause as according to right and justice, and the laws of the *United States*, and agreeably to said opinion, judgment and order of said Supreme Court, ought to be had, the said writ of error notwithstanding.

"Witness the Honorable *John Marshall*, Chief Justice of said Supreme Court, this first *Monday* in *February*, in the year of our Lord one thousand eight hundred and thirteen.

E. B. Caldwell, Clk. Sup. Ct. U. S."

He therefore moved this Court to enter judgment in *Palmer's* favour pursuant to the mandate, and to award execution for his damages and costs.

Per Curiam. From the constitution of this Court, and the established course of proceeding in analogous cases, a literal compliance with the terms of the mandate is impracticable; but there will be no difficulty in carrying its object into effect. Let a judgment be entered here reversing the former judgment of the superior court, and the cause be remanded to that court, to be proceeded in conformably to the decision of the Supreme Court of the *United States*.

REGULA GENERALIS.

AFTER the first week of the present term, the consent of parties, or their counsel, will not excuse a compliance with the rule passed *June* 1808, (*a*) requiring all motions and other matters reserved for argument before this Court, to be entered in the docket before the second opening.

(*a*) Vide 3 *Day's Ca.* 278. *R.* 2.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT,

IN NOVEMBER TERM, 1814.

PECK *against* SMITH.

A high way having been laid out and established, pursuant to the statute through the land of *A*, he conveyed the same land to *B.* with the usual covenants of warranty and seisin, "saving and excepting the said highway:" Held that the right of soil in the highway vested in *B.*, subject to the right of passage in the public, and that *B.* could maintain trespass *quare clausum fregit*, against a stranger for the continuance of a shop, &c. erected by him on a part of the highway not used for traveling before the conveyance from *A.* to *B.*

THIS was an action of trespass, alleging that the plaintiff being seised and possessed of a certain close or piece of land in *Waterford*, (describing it,) the defendant, contrary to the mind and will of the plaintiff, and without law or right, and with force and arms, entered into and upon the plaintiff's said land; and with the like force and arms, erected upon said land one certain dram or grog-shop; and with the like force and arms, dug up, broke and destroyed the plaintiff's herbage, sod, turf and grass then and there standing and growing thereon, sunk and deposited therein and thereon large stone; together with various other enormities; to the plaintiff's damage, &c.

The cause was tried on the issue of *Not Guilty*, at *New-*

London, *September* term, 1812, before *Mitchell*, Ch. J., and *Brainard* and *Baldwin*, Js.

On the trial, the plaintiff exhibited, as evidence of his title, a deed from *Benjaman Williams*, Esq., with the usual covenants of seisin and warranty, conveying to the plaintiff a certain piece of land therein described, with a reservation annexed in these words: "Saving and excepting the road or highway, laid out, used and improved, running from the old highway to the bridge over the premises." It was admitted by the defendant, that the plaintiff was well seised of the premises as described in the deed, except the road or highway therein excepted. And it was admitted, that the only trespass, if any, committed by the defendant, was, that he dug and stoned up a small cellar, and set a small shop thereon, in "the road or highway, laid out, used and improved, running from the old highway to the bridge over the premises," as saved and excepted in the deed; and that the road or highway in question had been, according to the statute law of this state laid out, accepted and used, as and for a public highway, and the defendent dug and stoned the cellar, and erected the shop thereon, and took possession thereof, long before the plaintiff's purchase. It was also admitted, that the plaintiff was well seised of the land on both sides of the highway; and that said acts of the defendant were done within the limits of the highway, but not on that part used for travelling. Upon this state of facts the court directed the jury, that if they found that the acts complained of were done within the limits of the highway, the plaintiff could not maintain this action; and that they must, in such case, find a verdict for the defendant. A verdict being found accordingly for the defendant, the plaintiff moved for a new trial; and the questions arising on such motion were reserved for the advice of all the Judges. The case was argued at *November* Term 1813, by *Daggett* and *Goddard* for the plaintiff, and *Gurley* for the defendant.

For the plaintiff it was contended, that he was proprietor of the land over which the highway in question was laid out, and was entitled to recover against the defendant in this action. *Lade* v. *Shepherd*, 2 *Stra.* 1004. *Goodtitle* d. *Chester* v. *Alker & al.* 1 *Burr.* 133. *Harrison* v. *Parker*, 6 *East*

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154. *The Commonwealth* v. *Peters*, 2 *Mass. Rep.* 127. per *Sedgwick*, J. *Pearley* v. *Chandler*, 6 *Mass. Rep.* 454. *Cortelyou* v. *Van Brundt*, 2 *Johns. Rep.* 357. *Northampton* v. *Ward*, 2 *Stra.* 1238. S. C. 1 *Wils.* 107. were cited.

For the defendant it was insisted, 1. That whatever the theory of the *English* law may be, yet in this state an action of *quare clausum fregit* will not lie for a trespass or nuisance upon the highway; the whole title to which passes from the original proprietor, and becomes vested in the public, at the time the highway is laid out and established.

2. That admitting the general doctrine contended for by the plaintiff, still from the terms of the deed under which he claimed, he had never acquired a title to the *locus in quo*. The right of action, if any, was in *Williams*, his grantor.

The Court took the case into consideration; and at this term the Judges delivered their opinions *seriatim*.

REEVE, Ch. J. The law of highways, if I may so express it, exhibits some singular traits of character, which are not to be found in any other subject. I flatter myself the following view of the subject, so far as it respects the law of *England*, will be found correct.

I apprehend that I can better convey my ideas on this subject by putting cases than in any other way.

In the first place, I will suppose that the lord of a manor (and the kingdom was once parcelled out into manors) should sell a highway through his manor, or, as doubtless was often the case, should give one, or one should be laid through his land in the manner the law then prescribed, no deed to any person of the land covered by the highway being executed; the enquiry is, what would pass to the public by the sale, or gift, or laying out? Nothing but a right of passage for the king and his subjects; and all the rest would remain the property of the lord of the manor as long as the highway continued to be a highway; that is, he would be proprietor of the soil, the trees growing thereon would belong to him, and all mines and quarries under ground would be his. If the easement should be injured by his enjoyment of the appurtenances, he must cease from the enjoyment; but whatever could be done to or with them, compatible with the full enjoyment of the

easement by the king and his subjects, might be done by the lord of the manor. It is here to be remarked, that the public acquired a right to this easement, although a kind of incorporeal interest, without deed.

In the second place, I will suppose the lord of the manor should sell his land lying on the east side of the highway to A., bounding him on the highway west, and should sell the land lying on the west side of the highway to B., bounding him on the highway east. Has the lord of the manor any interest in the highway after this sale? I answer none; for he is no longer proprietor of the land adjoining to the highway. It is the proprietor of the land adjoining to the highway that is then entitled to the highway; if he were not, the benefit of his manor might be lost by the intrusive intermeddling of others over whom he had no control; and as every subject would have an equal right to occupy, it would be a source of much disorder arising from conflicting claims of prior occupancy. Sound policy, therefore, dictated the rule, that the highway should be the freehold of the lord of the manor, as long as he held the land adjoining the highway. But in the present case, the land is sold to others, and the reason why the lord should have any ownership has entirely ceased. The next enquiry is, will the purchasers on each side of the highway have a property in the highway? I answer, yes; and for the same reason that the lord of the manor had, in the first case; and they own each to the center of the road. By this it is not intended to assent to the proposition that the proprietors of land adjoining to a highway have an interest in the highway to the center of the road as they have in their other land subject to the easement: For suppose,

In the third place, that the highway had been laid out wholly on the land of *B.* There are cases where *B.*, the proprietor, may by a writ *ad quod damnum* remove the easement, and the land will wholly belong to *B.* in fee, free from incumbrance, as it was formerly, and *A.* would be entitled to nothing in such land. But as long as that land continued a highway, *A.* would have an interest therein to the center of the road, as well as *B.* And in this there is no injustice done to *B.*; for he had been paid for the land, or had freely dedicated it to the public; and it was not a reason founded in any equity that either *A.* or *B.* should have an interest therein, but one founded wholly in policy.

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If, indeed, it was so, that when a road was disused, and ceased to be a road, it vested in *A.* or *B.*, unless where *B.* had freed it from the easement by a writ *ad quod damnum*, in which case he re-paid the purchase money, manifest injustice would be done. But the truth is this; when the road ceases to be a road, the land reverts to the public,—that is to say, to those who are under an obligation to maintain the road, with power to sell it, and apply the avails to the purchase of new roads. Whilst it is a road *A.* and *B.* have the interest in the highway contended for as laid down in 1 *Roll. Abr.* 392.; but when it ceases to be one, it is at the disposal of the public, as before stated; for if this were not so, then whenever an old highway is disused, and stopped up, as it is provided by law it may be when a new highway is made leading to the same places as the old one, over more convenient ground, or for the purpose of shortening the road, the land would belong to *A.* and *B.*, or at least, to that one from whose land the old highway was taken. But this is not so. The law expressly provides, that the surveyor of highways shall sell the old highway to its full value to some adjoining proprietor, who is vested with the fee of the land free from all incumbrances; and if such proprietor does not buy it, he has power to sell it to any person who will buy it; and the avails of the sale are to be applied to the purchase of other highways, without paying any thing to the adjoining proprietors for their supposed interest; for they had none only whilst it remained a highway. Now, this could not possibly be done by any legislature, if there was any title in the adjoining proprietors other than has been admitted. It is true, the legislative power is such that they can take from proprietors their lands, and convert them into highways; but in that case, the proprietors must be indemnified for the injury sustained. But no legislature ever claimed that they could take from a proprietor his land, and sell it, and apply the avails to such use as they pleased, without making the least compensation for it. And it is remarkable that the *English* statute, which provides for laying out highways through lands, provides that twelve jurymen shall assess the damages as they think reasonable not exceeding forty years purchase for the clear yearly value of the ground, which is the full value of any land, and also damages for the making of new ditches and fences. The act then provides, that upon

the damages so assessed being tendered to the owner of the land, he shall be divested of his interest therein forever, saving to the owner, however, all mines, minerals and fossils, and the timber thereon growing. It then proceeds to provide, that if the highway should be disused and stopped, because not wanted, it is to be sold, and no compensation to be made to the owner for any right that he has therein, and the avails are to be applied for the purchase of the new highway. It also provides, that if the old highway remains open because there are houses to which it leads which are not accessible by the new highway, then all minerals, &c. continue to be the property of the adjoining proprietors.

From this view of the subject, the proprietors of lands adjoining a highway will be found to own the freehold of the highway subject to the easement of passing over it as long as it continues such, and no longer; for when it ceases to be a highway legally, those who are obliged to maintain highways may sell it, and apply the avails to purchase new highways therewith, without any further compensation therefor; so that all the highways in the kingdom are a fund, if disused, to procure therewith new highways. In other words, the doctrine of the *English* law, as supported by all the authorities, appears to be this; that the proprietors of lands on each side of the highway have a freehold estate in the highway subject to the easement before mentioned, which freehold estate is of uncertain duration, no time being limited when it shall end, and yet is liable to end, and will cease in the event of the highway ceasing to be an highway. It is then an estate for life; for such is every estate which may last during natural life, and is liable to be determined on some uncertain event; and such an estate is a freehold estate.

The enquiry then is, where is the fee? In the view of common sense, it is not necessary that it should be any where; and that would be satisfied with a power vested in that community which is put to the expense of maintaining highways, to sell the highway, and apply the avails to the purchase of new highways; but as the law has a singular abhorrence of the idea that a fee should not be in any person, in compliance with the maxims of law we may consider the ultimate fee of the land to be in that community, and the surveyor of highways, who is vested with power to sell such highway, and apply the avails as before stated, as a trustee

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to this community to account with them for the avails, and to shew that he has applied them in conformity to the trust reposed in him.

I believe a thorough investigation of the authorities in the books will satisfy the enquirer, that the common law of *England* is as has been stated; and I see no reason from any thing that I can discover, to conclude that our own law is not in all the important principles here mentioned the same. We have a statute (*a*) on this subject which informs us, that when a highway is disused, as it may be by a judgment of the county court, it shall belong to him who owns the fee of the land. But this throws no light on the subject until we are informed who does own the fee. It cannot mean, I think, that the person from whose land the highway was taken *of course* owns the fee. This would throw us into the utmost confusion. Very many of our highways were dedicated to the public by the original proprietors more than a century ago. Will the heirs of these proprietors, if such highway is disused, own the highway in fee? Such a narrow strip would be to the proprietor a very inconvenient inheritance, and very destructive to the adjoining proprietors. Such a dedication has always been understood to be an abandonment to the public of the highway with no remaining claim. This I am warranted to say; for no proprietor has ever claimed the fee of the highway; and, on the contrary, the public have always claimed a right to a highway that is no longer used as such. This seems to be an universally received opinion, if we can judge from the conduct of the towns in selling such highways. They evidently view them as theirs, and treat them accordingly. And this applies equally well to highways that have been laid out according to the usage in *Connecticut*. But what is decisive of the question is, that the legislature themselves have regulated this matter by vesting the public with a right to sell such highways, and take the avails. This is what they could not do, if on the highway being disused it belonged in fee to its original owner. This proves demonstrably to my mind, that the original proprietor is not of course again proprietor when the highway is disused; for the contrary opinion has been, and now is universally practised upon. Every town in the state where highways have been laid out that now have

(*a*) *Tit.* 86. *c.* 2. *s.* 2.

become useless as highways, look to these as a fund to defray the expense of laying out new highways; and the conduct of the legislature, as before alluded to, demonstrates that they view the community which must by law be at the expense of maintaining highways as vested with the right to them.

From this view of the subject it will follow, that if the common law is our law, and I see no reason to conclude that it is not, then the adjoining proprietors of a highway have a defeasible freehold estate in the highway subject to the easement of passage; and the ultimate fee of the land is in that community which must maintain highways, and, when the highway is disused, have power to sell it.

This opinion is in perfect accordance with the case of *Stiles* v. *Curtiss*, determined in this Court. In the present case, the plaintiff was proprietor of the adjoining land on both sides of the highway; and had there been nothing else in the case, I could not have hesitated but that there ought to be a new trial; for I believe that the proprietor of land adjoining a highway has a freehold estate in the highway, according to the doctrine before laid down.

But in this case, there is an exception of the highway, in which the grantor, before he conveyed to the plaintiff, had a freehold estate. Does this make any difference? It would in my mind, if the estate holden by the proprietor in the highway was of such a nature as that he could have excepted it to himself. But this was impossible; for the moment he parted with the land adjoining the highway, he lost his estate in the highway; for this could not be holden by any person but by the owner of the land adjoining to the highway. The exception, therefore, was, for such purpose, nugatory; and there is no necessity of supposing that the owner of the land adjoining had any such intention as to except the highway for himself. The only design doubtless was to avoid all liability on his covenants in the deed.

My opinion therefore is, that the Court ought to advise a new trial.

INGERSOLL, J. It is contended in this case, that the plaintiff is the owner of the soil, where the trespass is said to have been committed, subject to the easement of the highway: That this being the case, the action of trespass

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brought against the defendant, is well founded. It is agreed, that in *Great-Britain* land made use of as a highway, does not belong to the king, but belongs to the original proprietor, whose it was when taken for a highway, or to those who claimed under him: That the king has a right of passage only for his subjects. This principle, it is said, ought to be adopted in this state, as being a common law principle. The question is, whether our circumstances are not such as to require a different rule? Or rather, whether ever since the first settlement of this state (then a colony,) it has not been universally understood, when lands have been reserved or laid out for highways, that the fee belonged to the public? And whether the practice has not been, uniformly, to treat such lands as public property, in all the laws enacted with respect to them; and also, in the course pursued in all cases, where new highways are laid out and in the management of them, after they *have been* laid out? When new townships have been taken up, I believe, it has been the general, if not the universal practice, to reserve lands for highways. The reserving or making of highways has been coeval with the division of lands among the proprietors. This reservation, I think, must of course have been to the public; at any rate, it could not have been a mere right of passage over the land of an individual, inasmuch as no individual ever separately owned the land so reserved. As to all the ancient highways, then, it seems to me, there can be no pretence that they are mere rights of passage over the lands of an individual.

But it may be said, and in fact is said, that this is a modern highway, laid out over this farm, and that of course, it is a mere right of passage. It appears, to be sure, by the case, that this highway has been laid out, according to the statute law of this state, as and for a public highway. Taking it then, as a highway laid out over the land of an individual, or rather laid out according to the provisions of this statute, I am of opinion, that the land itself is taken for the public. The statute provides, that the damages sustained by the person whose land is taken for a highway shall be estimated by the committee appointed to lay it out, and also makes provision for the payment of those damages. The statute, indeed, does not say, that an estimate shall be made of the full value of the land taken, and that payment shall be made accordingly. I believe, I may venture to say, however, that

the uniform practice has been, to allow the full value to the proprietor, if the highway be considered as not beneficial to him. Cases indeed occur, where no damages are given to him, on the ground that he suffers nothing, inasmuch as the highway is considered as very beneficial to him; more so, than the value of the land taken from him. This mode of assessing damages is a practical construction of the statute, and ought to have great weight, if the statute itself be not very explicit on the subject.

In the year 1699, it appears by the statute book, jurisdiction relative to laying out and altering highways, was first given to the county court. Previous to this time, I presume, it was seldom or never practised to lay out a highway through the lands of an individual proprietor, as there was a sufficiency of common lands not taken up for all highways thought to be necessary. Whether there was any statute on the subject, I know not.

It must be supposed, when the legislature first took up the business of laying out highways through the land of an individual, the practice of reserving lands for highways, in the first settlement of towns, was taken into consideration; and if those ancient highways were not mere rights of passage, but the soil of them belonged to the public, it was intended, that those laid out by virtue of this statute, should stand precisely on the same ground.

The practice, also, as has been observed, has corresponded with this idea. Never, I believe, has it been taken into the account in estimating damages, that a right of passage only was taken from the proprietor, and that the full use of the land might come to him again. Indeed, it would be next to impossible, to make an appraisement on this principle.—Whether the proprietor would again have the full enjoyment of his land in one year, or never, would be a matter of utter uncertainty. Of course, no rule could be given, by which to make the appraisement.

Again, if the highway should in a few years be discontinued, the proprietor would have his land, and payment for it, into the bargain.

Further, it has been an established practice for a long time, probably ever since highways have been laid out, to exchange highways for highways, when an old highway has been discontinued, and a new one taken up. This procedure

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must have been on the ground, that the town was entitled to the fee of the land taken up for highways.

To make the matter clear, that my construction of the law is correct, may be adduced that clause in all the city charters, "that the mayor, aldermen and common council are empowered to lay out new highways, streets and public walks, or to alter those already laid out, and to exchange highways for highways, or to sell highways for the purpose of purchasing other highways, taking the same measures in all respects, as are directed by the laws of this state, to be taken in case of highways laid out by the selectmen for the use of towns," &c. Here they are to take the same measures to lay out highways, as selectmen take, in the case of towns, and no other. Damages are to be estimated and paid in the same manner, and authority is given to exchange highways for highways. There is no clause vesting the fee in the mayor, aldermen and common council, or in the city, or in any public body, any more than in the case of the selectmen, when highways are laid out by them; and yet having precisely the same authority, they (the mayor, aldermen and common council) are authorized by law expressly, "to exchange highways for highways, and to sell old highways and purchase new ones," in the same manner, as had been practiced by selectmen.

These acts of the legislature, as it appears to me, proceed on the ground, that when a highway is laid out, it belongs the whole of it, land and all, to the public. They show what the construction of the statute relative to this subject has been, which of itself will, without any aid from the legislature, form a rule of common law for us.

The conclusion of the whole is, that in this state, however different it may be in *Great-Britain*, when land is laid out for a highway, the land itself becomes public property, and no individual has any right or title to it; and on this ground, there ought to be no new trial of the cause.

But, secondly, supposing the fee in the present case remained in the original proprietor, when his land was thrown open, and laid out for a highway, still it is not clear to my mind, that this action is maintainable.

I am sensible, in thus questioning this right of action, I am setting up my opinion against the opinion of much greater men, and much more able lawyers, than I am; and am

also questioning the propriety of some decisions in *Great-Britain*, as well as in our neighbouring states, on this subject. I am well aware, the modern decisions in *Great-Britain* have been, that both trespass and ejectment will lie for land contained in a highway. Indeed, I know not, but it may be now considered as a settled principle in that country, that these actions are maintainable in cases of this kind. But the question is, whether there are not certain established principles of law, that operate against these actions to the extent to which they have been carried? Whether also these principles must not be given up, or the actions given up? And if so, whether these adjudged cases ought to be considered as precedents for us?

In the first place, to take up the action of ejectment. I presume, it will be agreed, that the action of ejectment is brought to recover possession of lands unlawfully withheld from the plaintiff. It is an action which gives specific relief. So say all the elementary writers; so say the judges, when giving an opinion, as to the nature of this action. So says Lord *Mansfield*, particularly, in the first volume of *Burrow's* reports, page 119. I mention what he says, because he gave an opinion afterwards in a case reported in the same volume, that the action *would* lie, in which, as it appears to me, possession *could not* be given. His words are in the above quoted page "An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter." And again, "Every plaintiff in ejectment must show a right of possession, as well as of property." Indeed, on a recovery by the plaintiff, the form of the execution is to give possession, as well as damages.

Clear it is, then, if you are not entitled to the possession of the property sought to be recovered, you are not entitled to your action. It makes no difference, whether the fee be in you, or not. If another person has a right to the present possession, you cannot have it, however it may, in a course or time, come to you. This principle so forcibly struck Lord *Hardwicke* in a case before him at *nisi prius* in the year 1735, that he decided, "That no possession could be delivered of the soil of the highway; and therefore no ejectment would lie for it: And if it was a nuisance, the defendant might be indicted." This decision is cited in a case reported in the first volume of *Burrow's* reports, from page

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133 to 146 inclusive. In page 140, reference is made to this decision of Lord *Hardwicke*. In this case in *Burrow*, however, wherein the above mentioned reference is made, it was expressly decided by the court, to wit, Lord *Mansfield* and Justices *Denison* and *Foster*, that an ejectment *would* lie for a highway, and that the land might be recovered subject to the right of passage, or, as it is expressed by some of the judges, subject to the easement. They said further, that there was but a loose recollection of the case before Lord *Hardwicke;* little regard was therefore paid to it. This case seems to have settled the question in *Great-Britain*.

But, let us examine the principles,—those principles, which Lord *Mansfield* in page 119 of *Burrow* above mentioned, lays down as essential to the maintenance of the action of ejectment. A leading principle is, that the plaintiff is entitled to the possession of real estate, wrongfully withheld from him by the defendant. He brings his action to recover this possession; and if the action be well founded, he recovers, and is put into possession. I would now ask the question, whether in this case determined by Lord *Mansfield* and his brethren, as above mentioned, the plaintiff could have been put into possession of this highway? Whether he had any right to it, in exclusion of all others? Or whether he had a right to hold it with others? That he could not exclude the public or the king is very clear: And that he could not be upon the land *holding* or *possessing* it in any other manner, than any other subject might hold or possess it, is to me, *as* clear. He could neither build upon it, plow it, nor sow it; because in so doing, he would interfere with the rights of the public. In short, he was, by its being a highway, entirely excluded from having any foothold on the soil, though the freehold or fee was in him.

"The land," it is said "may be recovered, subject to the right of passage, or subject to the easement." What is the meaning of these expressions? Is it meant, that possession can be given, subject to the right of passage? The meaning, I think, must be this, if any thing. The object of the action, as has been observed, is to get possession. It is to get possession, as well as to ascertain a right; not to ascertain a right merely. But, how can this possession be enjoyed subject to the easement? The easement is the

right of passage, and an individual possession interferes with this right. One, then, interfering with the other, they cannot exist together. It is not like holding land subject to the better title of another. It is like holding it in opposition to such title. If then, possession cannot, on legal principles, be given of a highway, the action of ejectment will not lie.

On the ground that the plaintiff in ejectment must be entitled to the possession of the property demanded, it is, that an heir to an estate cannot recover against a disseisor, as long as there is a tenant in dower or by the curtesy in being, who has a right to the present enjoyment. This was determined a few years ago in the case of *Bush & al.* against *Bradley*, reported in the 4th volume of *Day's* Cases from page 298 to 310. Indeed, this I believe, is a settled principle, that a reversioner cannot recover in ejectment, while there is a particular tenant for life or for years under him, who has a right to the possession.

At the time when this decision in *Burrow* establishing the doctrine that ejectment would lie for a highway, took place, it was the practice in *Westminster-Hall*, to permit a plaintiff to recover in ejectment when he had not the clear legal title in himself. That is to say, if a *cestuy que trust* should bring the action, the judges would not permit a defendant to set up a legal title in the trustee, as a bar to the recovery of the plaintiff. Nay, they went further, by permitting a plaintiff to recover in ejectment, when at the time of bringing the action, there was an outstanding, unsatisfied term of the premises, whether the termor were the plaintiff's own trustee, or not. So also, if ejectment were brought by a second mortgagee, they would not permit a defendant to set up a legal title in the first mortgagee. A recovery, however, was not permitted, except where the plaintiff avowedly meant to recover subject to the better title of the termor, trustee or first mortgagee, and where those having the legal estate did not interfere. When this was done, he was permitted to recover, and to go into possession, and to hold the premises subject to the term, trust or mortgage, which ever it was.

This was the doctrine of Lord *Mansfield*, Mr. Justice *Buller*, and some others. But I take it, this doctrine is now exploded, and a plaintiff cannot now recover in ejectment in the courts in *Great-Britain*, unless he have the clear

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legal title to the estate, and unless, also, he have a right to the possession of it.

An exception perhaps may be made to the rule, where there is only an outstanding satisfied term; or where a mortgagee attempts to defeat the title of his own mortgagor, by setting up title in a stranger; or where perhaps the legal estate is in the plaintiff's own trustee. In the second volume of the reports of *Durnford* and *East*, from page 684 to 701, is reported the case of *Doe* on the demise of *Hodsden* against *Staple*, in which it was determined by Lord *Kenyon*, Chief Justice, *Ashhurst* and *Grose*, Justices, against the opinion of *Buller*, Justice, that the plaintiff must have the legal title, and a clear right to the possession of the premises, or he could not recover in ejectment. The idea of recovering with a view not to disturb the right of another to the possession of the premises, who did not interfere in the suit, was done away. The case was thus circumstanced. The plaintiff was vested with the fee of the land demanded, but a term had been created for the benefit of an annuitant who was then alive, and the plaintiff gave notice, that he meant to recover subject to the payment of the annuity. The court laid it down as an unbending rule, that the plaintiff in ejectment must have the legal title, and a right to the enjoyment of the premises demanded, or he could not recover. The only exceptions to the rule, as made by the court, were, the case of an outstanding satisfied term, the case of a plaintiff's own trustee, and that of a mortgagor disputing the title of his own mortgagee.

This, I believe, to be the law now in *Great-Britain*. If then, in ejectment for a highway, it were now a new question there, I see not why the judges would not permit the defendant to say to the plaintiff "The *public* have a right to the sole *possession* of this ground, though *you* may have the fee." "You have no more right to the exclusive possession of it, than I have." "If you get possession of it you will be a tort-feasor, and the public will immediately turn you out of it."

It was, to be sure, pretty easy to say, the plaintiff might recover subject to the easement, after it had been determined, that he might recover without having the better title. But even then, it appears to me, that the two cases are different. In the one case, a recovery is had against a defendant who

has no title; and he who has title, is neither in possession, nor claims to be in. In the other, a recovery is had, where those who have title *do* claim the possession; and an occupation of the property in dispute by the plaintiff equally interferes with their possession, and their rights, as does the like occupation by the defendant.

Thus, as it strikes me, an action of ejectment for a highway, or part of a highway, could not be maintained consistently with plain acknowledged principles of law, if it were a new case now to be decided; and of course, that it is not maintainable in this state.

But the case under consideration is an action of trespass, and it may be said, though ejectment *will not lie*, yet trespass *will*. I am of opinion, however, that as strong objections may be made against the action of trespass, in a case circumstanced as this is, as against the action of ejectment.

Here also I must concede, as I did, in making my observations relative to the action of ejectment, that it is pretty well settled in *Great-Britain*, that trespass will lie by the owner of the soil for an injury done to it in a highway, and, I know not any exception to the rule. When I concede this, it must be understood, that for an injury of this kind, it was formerly held in that country, that trespass would *not* lie. In the case of *Durand* against *Child*, reported in 1 *Bulstrode* 157. it was held, that trespass would not lie. The reason given was "For that when land is dedicated to the service of the public, it ceases to be private property." In the eighth year of the reign of *George* the second, however, in the case of Sir *John Lade* against *Shepherd*, reported 2 *Strange*, 1004. it was determined, that trespass *would lie*. The case was, Sir *John Lade* formerly owned the property, where the trespass was supposed to have been committed, and built a street upon it, which after that, had ever been considered as a highway. The court determined, that it was "a dedication of it to the public, so far as the public had occasion for it, which is only a right of passage. But it never was understood to be a transfer of the absolute property of the soil." It was also held in a later case determined in the 13th of *George* the second, by eight judges out of eleven, that "if this action is brought by the owner of the soil for a trespass in a highway, it cannot, on *not guilty*, be given in evidence, that the place in which the trespass is charged to

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have been committed, was a highway." I know not any other cases, where the point has *been made*, and a direct decision had on it. No doubt there have been many decisions of the like kind, considering the point as being settled.

As to the case of Sir *John Lade*, however, perhaps it ought to be observed, that as he himself voluntarily opened a passage over his own land, he might do it, on such terms, as pleased him. It was competent for him to make it a mere right of passage, and to reserve every other right of the soil to himself.

As to the other case, it was a divided opinion, to make the most of it, if it went to decide the question directly, that the action of trespass would lie by the original owner of the soil, for an injury done to a highway. But it will be observed, that the only question decided was, as it appears in *Bacon's Abridgment*, 5th volume, page 161, that on *not guilty*, it could not be given in evidence, that the *locus in quo* was a highway. Possibly the court meant to decide only, that as the fee of the land, or, at any rate, the freehold was in the plaintiff, it was not competent for the defendant, under the plea of *not guilty*, to avail himself of any circumstances to show that the land was in such a situation, as that the plaintiff could not recover. That under the plea of *not guilty*, nothing should be given in evidence, but a clear want of title in the plaintiff.

But be the principles of these decisions as they may, as I have before observed, it is *now* considered in *Great-Britain* as a settled point, that the action of trespass may be brought for an injury done to a highway. But, I think notwithstanding, in this state, we ought not to take it for law, that the action is sustainable, without examining the principles on which an action of trespass is founded. If those principles will warrant the action, it ought to be sustained; if otherwise, it ought not to be sustained.

It is an essential ingredient in an action of trespass, that the plaintiff be in possession of the property at the time of its being taken or trespassed upon; or, at any rate, that he have a right to the possession. If the property be personal, the possession may be actual or constructive; if real, an actual possession is requisite for the maintenance of the action. On this ground it is, or at least this is one ground, why a reversioner cannot bring this action against any one,

who enters upon his estate, plows it up, treads down the grass, or does any other injury to it. Every injury of this kind is done to the particular tenant, the lessee, the man in possession. It concerns not the reversioner, who plows his land, who takes the fruit growing on it, or who does any other trespass on it. He has his rent, and the tenant being entitled to the use and possession of the land, can alone bring the action for all trespasses on it. True it is, if any thing be done, which comes under the denomination of *waste*, this goes to the destruction of the reversioner's estate, and this being an injury to him, he can have redress; but it must be by an action of waste, *not* trespass. This action must also be brought against the tenant, whether the waste be done by him, or a stranger. If it be done by a stranger, the tenant has his remedy over against him.

These then, as I conceive, being the acknowledged principles attached to the action of trespass, let us see how they will apply to the case under consideration. It will be proper now to attend more particularly to the case under consideration, and to see, for what acts, if any, the defendant is liable. By the case stated, the defendant has barely kept possession of the shop and cellar, since the plaintiff owned the land. For the building of the shop, digging and stoning of the cellar, I presume, it will not be urged, that he is liable to the plaintiff. These acts were done before the commencement of the plaintiff's title, and clearly were no injury *to him.*

But indeed, if this using and keeping possession of the shop and cellar, had been on the plaintiff's land unincumbered with any easement or highway, the same would have been an injury to him, and for which damages might have been recovered by an action of trespass. But the land being thrown open, and used as a highway, what injury is it to *him*, that this shop and cellar are there? Or rather, what more injury to him, than to any other individual of the community? Is *he* deprived of any right? Could *he* have set up the same shop, and dug the same cellar? Suppose the shop had been set up, and the cellar dug in the travelled path; could the plaintiff, as owner of the soil, have recovered damages for these acts? The answer, as it seems to me, is obvious, that in the case put, he could not recover damages. I ask then, whether the use of every part of the

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highway is not as much given up to the public, as *that* of the travelled path. Every encroachment, in every part of the highway, may be removed. This very building may be abated or removed, as a nuisance, and the defendant may as much be indicted for keeping it there, as if it were in the middle of the path.

Where then, I ask again, are the plaintiff's separate rights? In the 6th volume of *Massachusetts* Term Reports, page 456, Chief Justice *Parsons*, speaking of the rights which the owner of land taken for a highway, has in or to such land, says, "Every use to which the land may be applied and all the profits which may be derived from it, *consistently* with the continuance of the easement, the owner can lawfully claim." And though he agrees to the principle, that the owner may maintain both trespass and ejectment for injuries to his land encumbered with a highway, yet I think, an inference may be drawn from what he says, as above stated, that trespass would not lie, in the case under consideration. "Every use to which the land may be applied, &c. *consistently* with the continuance of the easement, the owner can lawfully claim." The inference is, as it appears to me, that "every use to which the land may be applied *inconsistently* with the continuance of the easement, the owner *cannot* lawfully claim." That the keeping up of this shop, and having this cellar dug in the manner as the case states, are acts inconsistent with the continuance of the easement or highway, I think, is undeniable.

I have put the case of a reversioner not being able to recover for a trespass on his estate, supposing it to be apposite to the point in question. I think it is so, in a good degree. The reversioner cannot recover, because he is out of possession, and because the present beneficial use of the land is in another. The plaintiff, in like manner, is out of possession, entirely so, for the purpose of building on the land, or digging a cellar on it. The public is *in* possession for occupancy, and for every useful purpose. The ground of an action of trespass is, to recover damages for an injury done to the plaintiff, and always implies, that by the trespass, he suffers a wrong, or is deprived of a right. Take the case of a reversioner; whatever trespass is committed on his land, if it do not amount to waste, it injures not him. All the profits of the land, for the time being, belong to the particu-

lar tenant. *He* alone has a right to use the land as pleases him, or in such manner, as it has been used by the trespasser. In short, as it strikes me, a just criterion to determine, whether or not the action is maintainable, is to determine whether the plaintiff can do the acts, which have been done by the defendant. When I now speak of the action of trespass, I mean of trespass on land. This rule, I think, will hold in every case short of waste. If a man plows or feeds my land, in my use and possession, or treads down my grass, he does that, which I alone have a right to do. If I have no right to do these acts, I cannot complain, that he has deprived me of a right: Consequently, I cannot complain, that he has done me a wrong. Apply these principles to the present case. Has the plaintiff a right to occupy this house and cellar in the manner in which they have been occupied by the defendant? The answer at once is, *no*. By so occupying them, he would infringe on the rights of the public. For so doing, he would be indictable, as for an offence, not to say, that an action of ejectment would lie in favour of the public to turn him off; indeed, there is no need of the action in favour of the public, as the shop may be taken down or removed off, and the cellar be filled up, on the ground of their being nuisances.

When the land of any person is uninclosed, it may be fed by cattle not his own. It may be travelled over by other people, and it is not in his mouth to say, why is this done, or why do ye so? In like manner, if it be taken for a highway, it may be thus fed and thus travelled on. Why may these things be done? For this plain reason, inasmuch as the public has taken it, his separate rights of feeding it, and of travelling across it, are gone, they cannot be enjoyed. So also, by its being thus taken, his separate rights of keeping a shop and cellar on it, are in like manner gone.

How it might be as to mines under ground, with which the public has no concern, I do not pretend to say. Though indeed I might say, if the highway be but a mere right of passage, the mines would belong to the owner of the soil, as his separate property, and for violating this property, trespass would lie, as in all other cases of the violation of property.

Neither do I pretend to say, but the proprietor may have an action of trespass for cutting down trees on it, and car-

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rying them away, provided they are not needed by the public. These cases stand on a different ground from the case under consideration. It will be enough, however, to determine them, when they shall come up. Sufficient is it for the present, to determine the case we now have.

One word further; if this action be sustainable, it may be sustained for every load of wood, every log, every cart, plough or other instrument of husbandry laid upon the highway, which would be highly prejudicial to individuals, as well as totally overturn what always has been considered as the law on this subject.

These are my reasons against granting a new trial, going on the ground, that the highway is but a mere right of passage. These reasons are to me conclusive; not so perhaps to any one else. There are opinions of great men against me, at least as to some things I have advanced. But as it is a new question with us, I thought proper to take up the case on principles, and, on principes, not having any precedents binding on us, on the subject, it is my opinion, the action of trespass will not lie, and therefore would not advise a new trial.

BALDWIN, J. I concur generally in the opinion expressed by Judge *Ingersoll*. But I would observe further, that it appears to me the plaintiff cannot maintain this action for want of title or interest in the premises. Admitting that in some cases, from the peculiar manner of laying out an highway, the adjoining owners of land will own the fee, or a freehold estate in the highway, which I cannot admit as a principle always applicable to the highways in this country; yet I cannot agree that such an estate, where it does exist, is an appurtenant inseparable from the adjoining land. The highway may have a mine or a quarry under it, more valuable than the land to which it is claimed to be appurtenant. This may be separated by sale or reservation, leaving the highway free for all the purposes, for which the public or the adjoining proprietors have right to use it.

In the case before us, the plaintiff is the grantee of *Williams*, who in his deed including the highway within its boundaries, made an express reservation and exception of that from the grant. More apt words could not be used to express the intention of the grantor to retain the fee of the highway in himself, or to prevent the grant from extending to land which he knew was in the possession of the defendant.

But the plaintiff is not without remedy. He may have his action on the case for any actual injury done to him in particular, by the erection of such a nuisance on the highway in front of his land or buildings.

BRAINARD, J. observed, that he should give no opinion upon what seemed to be considered the principal point in the case, *viz.* In whom does the fee of a highway vest? as he thought the case did not require a decision of that question. Whatever may be the correct principle with regard to highways generally, the fee, in this instance, was not in *Peck* the plaintiff; because the deed from *Williams* to him contained not only an exception of the easement, but an exclusion of all interest whatever in the land. Consequently, *Peck* could maintain neither ejectment nor trespass. For any special injury he might sustain, he could have his action on the case commensurate with it. On this ground the charge of the court to the jury was correct.

EDMOND, J. The plaintiff in support of his action relied on a deed from *Williams*, describing a piece of land by certain metes and boundaries, and conveying the whole to the plaintiff with an exception in the deed of the highway running through the same. The court directed the jury, if they found the trespass complained of, was committed on the highway referred to in the exception, to find for the defendant. On this direction the motion by the plaintiff for a new trial is grounded. It is admitted, that the highway was laid out by the select-men of the town, on the land of *Williams*, before his conveyance to the plaintiff. From these facts I think it necessarily follows, that the fee of the highway was in *Williams;* that by *Williams's* deed to the plaintiff the fee passed to him, as the boundaries of the land include the highway; unless the exception in the deed is a reservation to *Williams* of the fee of the land, on which the highway was laid; or unless the laying out of the highway divested *Williams* of the fee, and amounted to an absolute transfer from him of his whole title and property in the soil.

In respect to the exception of the deed, I cannot consider it as a reservation to the grantor of the fee of any lands within the boundaries given, but inserted by way of caution, merely to give notice of the public right of passage, and to

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secure himself against any possible liability on his covenant that the premises were free from all incumbrances whatsoever. The word "*highway*" does not *necessarily* import any thing more than an easement or right of passage. I lay the exception in the deed, therefore, out of the case, and consider the plaintiff as having all the right and title to the highway and land on which it was laid, that *Williams* had *subsequent* to the laying out of the road by the select-men.

The next enquiry is, what effect had the laying out of the road by the select-men on *Williams's* property? Did it divest him of the *fee?* The whole power of select-men and county courts, in relation to highways, is given by statute: We search there in vain for an authority to pass the *fee.* A statute giving such power would be oppressive and unjust. In lands holden in fee simple the owner has an absolute property. They are not to be wrested from him by the sovereign power of the state, except in cases of *justifiable necessity;* and where such cases occur, nothing more is to be taken from the individual than the public exigency necessarily requires, and then only upon a fair *equivalent.*— Where a new highway becomes necessary, an easement or right of passage is all the public have a right in justice to demand. So much the owner of the soil is bound to yield. When that is obtained, the public exigency is satisfied.— There is no necessity that the *fee* of the land should accompany the easement. Nothing to my mind is clearer than that the accommodation of public travel, and not the purchase of land, was the object contemplated in clothing select-men and county courts with such power as they possess by statute in relation to roads. The convenience and necessity of the road is to be the subject of their enquiry. When that is found to exist, the mode of laying out is prescribed; when that is performed, so long as the necessity of the road remains "such ways shall be and remain *for the use* for which they were laid out;" and when they become "unnecessary for *public use*," they may be discontinued and "be at the disposal and for the benefit of the corporation or person to whom the fee of the land belongs upon which the road was laid." From all this I find nothing, even by
[*126] *implication, to warrant the idea, that select-men or a county court have authority to deprive the owner of the *fee.*

The discontinuance of a highway conveys nothing back

to the owner of the fee. It amounts only to a judicial decision that the exigency which authorized the appropriation is at an end, and that the owner of the soil is at liberty to resume the occupation of his lands, or dispose of them, discharged from the servitude to which they had been subjected. In this view of the case, I am satisfied that the *fee* of the highway was in *Williams;* that it passed by his deed to the plaintiff; that the right of way or passage only belonged to the public; and that the plaintiff for the injury complained of, although committed on the highway in question, might be well entitled to recover in trespass, and that the jury ought to have been so directed. I think a new trial ought, therefore, to be granted.

Whether the fee of highways laid out by select-men and county courts belongs to the owner of the adjoining ground is a question that has not appeared to me absolutely necessary to discuss in order to decide the case under consideration: It may not, however, be altogether amiss to make a few observations in respect to it. If I have been correct in the remarks already made, it is clear the laying out of a road by select-men or a county court does not, and cannot deprive the owner of the land of the fee. If so, the fee must of necessity remain with the owner; and if not alienated, devised or conveyed by him, descend to his heirs, or escheat in failure of heirs to the state. And regularly, it would seem, the person claiming the fee, ought to shew a title in himself by descent, deed or devise. But this notwithstanding, length of time without interference or claim on the part of the heirs, the disposal by the ancestor of all his adjoining land, and other circumstances, may furnish a presumption in favour of the adjoining proprietor sufficient to warrant courts of justice in adopting as a general rule of law the principle that the fee is in the adjoining proprietor or proprietors: and proof that the party claiming the fee is the adjoining proprietor may be considered as evidence of title, so far forth, as to cast the burthen of proof on the party contesting it. But to any one general rule that can be adopted in relation to highways of *this description*, it appears * to me, there must be exceptions:—*e. g. A.* owns a piece of [127] land; a highway is laid across the middle of it; the fee remains in *A.*—Again, *A.* and *B.* own lands adjoining; a highway is laid wholly on *A.*'s land, but bounding on the land of *B.* Here it is clear the *fee* of the way remains in

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A., as much as in the first case; for laying a servitude on the land of *A.* cannot transfer any part of the fee to *B.*, although by the laying out of the road *B.* has become an adjoining proprietor. Take one case more: *A.* owns land; *B.* owns land adjoining on each side of it; the whole of the land of *A.* is laid out for a road. Will it be said, in such a case, that the *fee* is transferred from *A.* to *B.*? That in case of a discontinuance of the way, he shall hold it against *A.*, because he owns the land adjoining? I think it cannot be said with reason, because proof of such a set of facts, in respect to the laying out of the road, and the circumstances of ownership continuing the same as at the time of the laying out, rebuts and oversets entirely the presumption that the road was originally laid on *B.*'s land, or the land of those under whom he claims. The same proof equally excludes the supposition that when *B.* purchased his land, the fee in the way accompanied and made part of his purchase, because the fee was then in *A.* exclusively; no right of way existed. The common law rule, that the fee of a highway is in the owner of the adjoining land could not *then* apply, and the laying out *afterwards* by the select-men, &c. could not transfer a *fee*.

With respect to highways laid out by the original proprietors of townships, they are generally ancient, and were laid out at a period, when it can scarcely be imagined, and we are not now to presume, that those interested in the laying out were ignorant of the legal import of the word *highway*, or *king's highway*, formerly so called. They undoubtedly understood, that it implied a *way*, or passage common to all the king's people; that, by the rule of the common law, the freehold of the soil was in the lord of the manor, or in the owner of the land on each side. It must have been equally well known, that when lands were voluntarily located by the owner or owners, and appropriated as common *highways* to public use, whatever might have been the consideration, or motive for such an act, or the manner of doing it, being done and accepted, all the laws in relation to the repairs of
[*128] * highways, building bridges, removing nuisances, &c. would immediately attach, and the grant (without the consent of the public) become irrevocable. With a full knowledge of all this, it seems to have been the general practice of the owners of a township, or *propriety* (so called), being owners

in fee simple of the land, to accommodate public travel, to advance their common interest, and with an eye to the division of their common property, to set apart and appropriate certain portions of their land, over which they granted a highway, or common passage. This, while it cast the burthen of providing roads equally on their common property, did not affect the freehold of the soil; it remained in the proprietors. They were then, *in fact*, the *owners of the adjoining land on each side;* they *in fact*, furnished the ground for the highways; the very situation presumed and assigned as the reason for the rule of the common law, that "the fee of highways or freehold of the soil is in the lord of the manor or the owner of the land on each side." It follows, that the laying out of their highways did not divest them of the fee. It remained in connexion with other parts of the propriety as a common interest. Each and every of the proprietors, and such as had purchased shares under them, might be said to be not only owners, but adjoining owners. But when the proprietors proceeded by their joint act to make a division of the whole or a part of their township or propriety, to be held in severalty; so far as the division extended, the common interest terminated. Individuals became the adjoining owners; each received his allotment by the mutual consent and agreement of the concerned, without reservation, in satisfaction of his claim in the propriety, accompanied with every right, title and privilege in relation to it, which was, before the division, held, by the proprietors in common; or which they might have claimed and been justly entitled to, by the known and established rules and principles of the common law; among which, no one rule perhaps was better known and established than the one already mentioned, "that the freehold of the soil of a highway is in the owner of the land adjoining." The same act of the proprietors that constituted the individual the owner in fee, in severalty, of the portion allotted him, vested him with the fee in those highways, where by the location of his allotment, he became the adjoining owner, on both sides; and when adjoining on one side only, with the fee in a moiety, not as *incident*, *appendant* or *appurtenant*, but as a *component* part of his share or allotment in the division of the propriety. [*129]

As in the original division by the proprietors the fee of

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the highways does not appear to have been particularly noticed, but left to be governed by the common law rule in relation to it: So in the transmission of the lands from the individuals to whom they were first allotted, the same silence as to the fee of the adjoining ways has prevailed, and the same common law rule been left to operate. So also in the settlement of estates, no instance, I presume, can be found, where the fee of a highway, *as distinct from the adjoining land*, ever found its way into an inventory, or has been the subject of distribution.

From these considerations, and from a firm persuasion of the innumerable mischiefs that would result from a different decision, in respect to the fee of highways of *this description*, I am prepared for a uniform application of the common law rule to such ways; and to consider ownership of the adjoining land on each side, as furnishing conclusive evidence that such owner is the owner of the fee in the adjoining way.

TRUMBULL, J. Two questions arise in this case. First, Is the property of the soil in the plaintiff, subject to the right of an highway over it, as an easement only?

A way, whether public or private, is merely a right of passage over lands. A highway, *ex vi termini*, is but an easement; a right of way over land from its nature presupposes the fee of the soil to be in another; it could not otherwise exist as a separate right, for it would be absurd gravely to lay it down, as a principle of law, that a man has a right of passing over his own land. So are all the *English* authorities. 2 *Coke's Institutes*, 705. "The freehold of highways is in him, that hath the freehold of the soil; either the lord of the manor, as part of his waste, or the land owners on both sides of the way. It is called the *king's* highway, not that he hath any property in the soil, but because of the privilege he hath of a free passage for all his people. The freehold of a high street is in the lord of the manor, and the people have nothing there, but a liberty of passage. The freehold and profits of a way, that leadeth to the fields are in him that hath land next adjoining." [*180] * So 1 *Roll. Abr.* 392. Trees in a highway generally belong to the proprietors of the land *ex utraque parte;* also the lord or owner of the soil shall have an action of trespass for digging the ground there. *Com. Dig. tit.* Chimin A 2. *Bac. Abr. tit.* Highways B. *Wood's Instit.* 99. A way is

only an easement, and no interest in the land. *Yelv. Rep.* 159. *Croke Jac.* 190. It cannot be granted to an use, *quia ipso consumitur usu.* 2 *Black. Comm.* 330. 1 *Jones* 127.

Coke indeed gives as the reason, why the freehold of highways is in the lord of the manor, or the land owners on both sides of the way, that "the law presumes the way was at first taken out of the lands of the party, that hath other lands adjoining it;" and it is said, that this reason cannot apply in this state; that our mode of laying out or establishing highways is different, and gives to the public the right of soil.

But these rules apply universally in *England*, not only to ancient highways, but to those more recently altered and enlarged according to the mode there prescribed by statute, or laid out and assigned by the king's licence; and neither our method of establishing highways by reservation, nor of laying them out according to our statute, gives to the public a freehold in the soil. Like theirs, it gives to the owners of the lands, a compensation in damages only, in those cases where the soil over which the way passes is private property.

By the statute 8 *William* 3. the justices at their quarter sessions have power to enlarge highways to a certain width, and to impannel a jury on oath to assess such recompense to the owners of the ground as they shall think reasonable, not exceeding five and twenty years purchase, and also recompense for making a new ditch and fence to that side of the highway that shall be so enlarged, &c.

This clause is copied into the general act relative to highways, passed in the 7th year of *George* 3., with the following alterations; that two justices may order narrow roads to be widened to a sufficient breadth; that the surveyor, with their approbation, is to make agreement with the owners of the soil for the recompense and for making new ditches and fences; and if he cannot agree, the damage is to be assessed by a jury.

By the statutes of this state, *tit.* Highways, *chap.* 1. *(*Day's* edit,) the damages done to the owners of the land are [*131] to be estimated and paid; and *chap.* 2. When any highway shall be discontinued as unnecessary, the same shall be at the disposal and for the benefit of the corporation or person, to whom the fee of the land belongs, on which the road was laid out.

Turnpike roads, and roads conveyed to the public by deed from the proprietors of the soil, granting the land for a high-

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way, rest wholly as to the rights of those proprietors, [turnpike companies and the public, on the grants or charters of incorporation, by which they are established: Though I am of opinion, that the owners of lands adjoining such roads are entitled, as appurtenant to their land, to all privileges, uses and profits, not inconsistent with the rights therein granted or reserved. So also in respect to highways, standing merely upon use and prescription, or sequestered and reserved by the original proprietors of the soil. But this point does not arise in the case before us.

The lands over which this highway passes were the property of *Benjamin Williams*. During his ownership, the highway was laid out, according to the statute, and for sundry years used and occupied for public travel. The defendant, without right or license, dug and stoned up a cellar in said highway, erected a shop thereon, and hath ever since continued in the possession and use of the shop and cellar. After this shop was built, *Williams* by deed conveyed to the plaintiff in fee, all the land (which extends on each side of the highway) with all appurtenances "saving and excepting this road or highway." This is an exception of the easement only. The freehold of the soil over which the way is laid, was in *Williams*, and well passed by the deed to the plaintiff.

The only remaining question is, Whether the plaintiff can maintain this action of trespass?

It is contended, that the action ought to be brought on the case, for placing a nuisance in the highway to the special damage of the plaintiff. But according to the principles already stated, it is clear that the digging in the soil, erecting the shop, taking exclusive possession of the land on which it was built, were not merely placing nuisances in the highway, but were direct and immediate trespasses against *Williams*, who was then owner and possessor of the soil.

[*132] *See the distinction between *trespass* and *action on the case* in *Reynolds* v. *Clarke*, 1 *Stra.* 635. *Harker & al.* v. *Birbeck & al.* 3 *Burr.* 1563. *Scott* v. *Shepherd*, 3 *Wils.* 412., *&c.*

but the present plaintiff can only maintain this action for some trespass against his possession since he became the owner; and no trespass by digging, breaking the soil, or erecting any new building is claimed in that time.

The continuance of exclusive possession of the shop and

cellar is a disseisin of the plaintiff's freehold, for which he may maintain trespass against the defendant. *Co. Litt. s.* 430. 2 *Roll.* 550. *& seq.* Every entry by the defendant claiming such exclusive possession is a new trespass.

It is true, that by the *English* rules the owner must enter and have actual possession before he can maintain trespass for an injury done to the land, &c. while he was ousted. But by our law, he who has the right of possession by deed on record may bring his action against a disseisor or a trespasser, without the formality of actual entry or regress.

For these reasons I am of opinion that the charge to the jury was incorrect, and that a new trial ought to be granted.

SMITH, J. was of the same opinion, on the same grounds.

SWIFT, J. The question is, whether the plaintiff, in virtue of owning the adjoining land, owns the freehold and soil over which the highway is located?

An idea has been entertained by some, that the public have the fee in highways, and are the owners of the soil, over which they are laid. This erroneous opinion originated in a misconception of the nature of a highway. A highway is nothing but an easement, comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil nor give the public the legal possession of it. Such is the description of a highway by all the common law writers; and this being the nature of it the consequence clearly follows, that the right of freehold is not touched by establishing a highway, but the freehold continues in the original owner of the land in the same manner it was before the highway was established, subject to the easement. To say, then, that the public in virtue of having *a highway established over land become the owners of the freehold, is a palpable contradiction in terms. It is saying, that a mere right of passing and repassing, without any interest in the soil, is an estate in fee simple. It might as well be said, that an estate at will is an estate in fee-simple. If the public are the owners of the soil, the privilege of passing over it cannot be called an easement. Every man has a right to pass over his own land, yet nobody calls this an easement.

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It is said, that in the first settlement of this country, and

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in the original laying out of towns, lands have been reserved for highways; and that this reservation has ever been to the public, and could not have been a right of passage over the lands of an individual, as no individual ever separately owned the land so reserved.

It makes no difference who owned the land when the highways were reserved or granted. Whoever owned the land retained the fee in the place where the highway was reserved, and whenever he sold or granted the adjoining land, the freehold in the soil of the highway passed as an appurtenant to the land subject to the easement. It is also said, that in laying out a highway pursuant to the statute, the freehold of the land is taken by the public. But the least reflection will shew this opinion to be erroneous. The statute does not direct that the owner shall be paid for the value of the land, but merely the damages, which may be more or less than the value of the land, according as the highway is beneficial to him. It also declares, that after certain steps have been pursued, *said highway shall be, and remain a public highway.* If instead of this, the statute had declared, that the public should thereby become vested with the freehold of the soil, over which the highway was located, there would be some reason for saying that the public acquired a fee; but the expressions used not only exclude such idea, but shew that the intention of the legislature was to take only the right of passage; for such is the appropriate meaning of the word *highway* used in the statute.

Again, it is said, that it has been long practised to exchange highways, and that this must have been on the ground that the town was entitled to the fee of the land taken up for highways. Admitting such to have been the
[*134] * practice, no argument can be drawn from it; for it is clear that towns have no power to exchange highways, and cannot at any rate have the fee of lands taken up for highways. If it is not in the adjoining proprietors, it must be in the public. Such proceedings in towns must of course be illegal; and can have no weight in settling a question of law.

It is further said, the legislature have authorised cities to exchange and sell highways; but this does not prove, that the legislature own the land. It might as well be said, if a tenant at will aliens in fee, that therefore he had an estate in fee. The truth is, the legislature do not proceed on the ground that they

own the freehold; but in virtue of their legislative power. Whether they have such constitutional power or not can make no difference with regard to the right of soil.

There is nothing then in the custom or usage of this state, which oppugns the common law idea, that a highway is merely an easement.

But it is further contended, admitting the freehold of an highway to be in the adjoining proprietor, yet that in this case the grantor of the plaintiff made a reservation of the highway from the grant, and that more apt words could not be used to express his intention to retain the fee of the highway in himself. Here is repeated the same mistaken idea respecting the meaning of the word *highway;* for it is supposed to comprehend the freehold: but when we advert to the true meaning of the term, it is evident that the grantor could not have made use of more apt terms to express his intention not to reserve the fee of the land, but to except the easement, belonging to the public, so as not to make himself liable on his covenant against incumbrances. Suppose in the deed the expression had been reserving to the public the right of every citizen to pass over the land where the highway is laid; all will agree, that this would not have reserved the freehold. The expression "reserving the highway," is precisely of the same import.

But a new ground is taken in this case. It is said, admitting the adjoining proprietor has the freehold of the soil in a highway, yet he cannot maintain ejectment or trespass; and that the opinion of Lord *Mansfield*, Chief Justice *Parsons*, Chief Justice *Kent*, and other distinguished jurists, is opposed to the principles of the common law.

*In regard to an action of disseisin, one objection stated is, [*135]
that the plaintiff is not entitled to the possession of the property demanded. But this objection is founded on an entire misapprehension of the nature of an easement. If the public have only the right of passing, and the adjoining proprietor has the freehold, the consequence is, that he is, in legal consideration, in possession of the land. The laying out of the highway, and the passing on it by the public, do not disseise, or dispossess the owner. He continues the same possession subject to the easement. He is entitled to every right he was before, except that the public have the right of passage; and it will not be pretended, that the mere transient passing over a man's land will amount to a disseisin. Suppose a man should pass a hundred times in

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a day over my land; this does not oust me of my possession. He must do something amounting to a permanent occupation, such as keeping me out of possession, driving off my cattle, or cultivating the land.

It is asked, how can this possession be enjoyed subject to the easement? The easement is a right of passage, and an individual possession interferes with that right. One then interfering with the other, they cannot exist together. But this is saying that an easement in one, and an estate in fee in another, with actual possession, cannot co-exist in the same land. This is a misapprehension of the nature of an easement. An easement is a privilege, service or convenience in the estate of another, by grant or prescription, put comprises no interest in the thing itself. It supposes that different rights in the use of the same thing may co-exist in different persons; and nothing is more common than for one to have an easement in the land of another, who has an estate in fee, and is in actual possession. Suppose a grant to one to draw water at the well of another. Here the grantee may pass a thousand times a day to the well; but he does not dispossess the grantor. The rights of each are perfectly compatible. But to put a case which in all respects compares with the present: Suppose I grant to a man a right of way, or the privilege of passing over my land within certain limits, and a stranger disseises me; cannot I maintain ejectment against him? Is it in his mouth to say, that another has the right of passing over the land, and therefore I have no right to the possession? Suppose
[*136] the grantee himself should disseise me, and I bring * ejectment; can he say he has the right of passage, and therefore, my action shall not be sustained? The answer would be obvious. I have granted you nothing but the right of passage. The freehold of the soil remains in me. I have a right to every thing consistent with your passing over it. I may depasture and mow it; take the trees, and any thing growing on it; and of course, am entitled to the possession for these purposes. And there is no inconsistency, no interference of right, for me to take possession of the land subject to the right of passing. So in the present case, the plaintiff owns the soil of the highway, subject to the right of the public to pass over it; and there is no more inconsistency in his recovering possession subject to the public right of way, than there is for the owner in the supposed case to recover possession subject to the private right of way.

Again it is said, the defendant may say to the plaintiff, you

have no more right to the exclusive possession of it, than I have. If you get possession of it, you will be a tort-feasor, and the public will immediately turn you out. But it is not necessary that the plaintiff should have the exclusive right of possession to maintain ejectment. If a tenant in common be disseised by his co-tenant, he can maintain ejectment against him, and be put into possession with him. He recovers subject to the right of the co-tenant. It is sufficient, if he has the right of possession for any purpose; and then if he is ousted of that right, he may always recover possession so as to be enabled to enjoy it, but not so as to destroy any co-existent right in another.

But what right has the defendant to say to the plaintiff, if he recovers he will be a tort-feasor, and the public will immediately turn him out? What justification is that for him to do an act in violation of another's right? If the plaintiff is the owner of the land, the defendant can have no right but in common with the public to pass over it. He may not arrogate to himself the exclusive possession by building a house thereon. This is a violation of a right not taken from the plaintiff by establishing the highway. He has a right to the possession for certain purposes, which this act defeats; he must, of course, have a remedy to recover it. How can the defendant say, that it is not the object of the plaintiff to recover possession to abate the nuisance? It *might lead to great disturbance to pull down a house over the heads of the family of a man who had erected it in the highway. [*137]
The adjoining proprietor, instead of resorting to this violent measure, may wish to recover possession for the purpose of abating the nuisance in a peaceable manner; and it can never lie in the mouth of the wrong-doer to say such is not his object.

If the plaintiff recovers, he obtains possession subject to the easement, subject to the right of the public to remove the nuisance whenever they please. But it may be the case, that the public may not find it necessary to pull down the building in order to enjoy the easement: And shall the defendant say, because the public have the right, and may possibly abate the nuisance, therefore the plaintiff shall not recover a right which may possibly be of great use to him? It is well known, there are many buildings erected by adjoining proprietors in highways, which, as they do not injure the public, have been long permitted to remain. But admitting the doctrine contended for to be correct, then if a stranger should get possession of them, the owner could have no legal remedy to regain it, and could only redress

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the injury by turning the trespasser out of the house with force and strong hand, or by pulling it down about his ears.

I apprehend, then, if the adjoining proprietor be the owner of the soil of the highway subject to the easement, it follows as an undeniable consequence that he is entitled to every use consistent with the easement; and if ousted of his right, must have his proper remedy to regain it.

To show that an action of trespass cannot be maintained, it has been said, that the land being thrown open and used as a highway, it is no injury to the plaintiff that this shop and cellar are there; or rather, it is no more injury to him than to any other individual of the community. He is not deprived of any right. He could not have set up the same shop and cellar in the same place.

This is not the view in which the subject is to be considered. Admitting the adjoining proprietor owns the soil, and the public have an easement, then, on principles of common law, (and we are now examining the question on that ground) he has every right to the land covered by the highway, excepting the passage, which he has to any other land; he may
[*138] apply it to every use, and take every profit, consistent *with the easement; and of course, may maintain an action of trespass for every act done to the land not necessary to the enjoyment of the easement, which would be a trespass to land not incumbered by a highway. The question then is, not whether the plaintiff has sustained more injury by the act complained of, than any other person, or whether he has a right to erect the shop, and dig the cellar; but whether the defendant has not done an act not necessary to the enjoyment of the easement, which would have been an actionable trespass if committed on land of the plaintiff not covered by a highway? That the acts done are such acts, admits of no question. Here then is clearly an infraction of right.

Again, it is said, that the owner cannot claim a use of the land inconsistent with the easement; that digging the cellar and building the shop are inconsistent with it; and therefore, the plaintiff had no right to have done the acts; that no man can maintain an action of trespass for acts done on land, unless he had a lawful right to do the same acts himself, excepting in case of waste; and as the plaintiff had no right to erect his nuisance, he cannot maintain an action against another for doing it.

This is the first time this doctrine was ever heard of, and

it is not supported by principle or precedent. Who ever before enquired, in an action of trespass, whether the plaintiff had a right to do the act himself? The question is, whether the defendant had a right to do it. An exception is made in the case of waste. I will mention other cases to shew that no such rule can exist. Suppose I grant to a man a private right of way over my land, and he should dig a ditch across the place where the right of way is granted; I can maintain trespass against him for the injury done to the land, though I have no right to dig the same ditch, because it would obstruct his way. Suppose I let to a man a meadow to cut and carry away the grass; if he should plow it up, I can maintain trespass against him; yet I have no right to plow up the meadow myself, for that would destroy the grass to which he has a right. Indeed, in all cases where easements exist, or where different persons have different rights to occupy the same land, there will be certain acts which violate co-existing rights, which neither party may do, and for which each has a remedy. So that to say that no man can maintain trespass for an act which * he has no right to do himself, is a position as unfounded as it is novel. [*139]

It is also said, that when the land of any person is uninclosed, it may be fed by cattle not his own, and may be travelled over by other people, and he has no right to complain; in like manner, if it be taken for a highway, it may be thus fed and thus travelled on. This is stated as a doctrine of the common law; but there is no such common law. By that law trespass *quare clausum fregit* will lie, whether the land be inclosed or not. The word "close" imports an absolute interest in the soil, and not land inclosed by a fence. By the common law an action of trespass will lie against the owner of cattle for feeding the land of another not fenced, as well as for making an unlawful entry upon it. In *England*, as the owners of cattle are bound to restrain them, and the owners of land are not bound to fence against them, trespass is constantly brought for the injury done by cattle to lands uninclosed. But in this state, by force of statute, every man is bound to inclose his land by a fence of a certain description before he can maintain trespass against the owner of cattle for entering upon and feeding it. This is a regulation different from the common law; it only extends to the case of injury done by cattle; but in all other cases

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of injuries done to land, the owner has the same right of action, whether it be inclosed or not. It then is a position not warranted by law, that land not inclosed may be travelled on by other people, and the owner is without remedy.

As to the right of feeding a highway by cattle not belonging to the adjoining proprietor, it is clear at common law trespass will lie against the owner of the cattle in favour of the adjoining proprietor. This follows as a necessary consequence of the doctrine, that the adjoining proprietor owns the soil subject to the easement. Such is the opinion now entertained by the courts of *Westminister-Hall*. The case of *Stevens* v. *Whistler*, 11 *East* 51. was trespass, and the declaration contained two counts, one for entering the plaintiff's close called *Shepherd's lane*, and the other for breaking and entering another close in the same parish. After a general verdict for the plaintiff, a motion was made to set it aside, and enter a verdict on the latter count only, because *Shepherd's lane* was proved at the trial to be an open parish highway, and there was no proof of the plaintiff's exclusive possession
[*140] * of that, but only that he had lands on one side of the lane, which at most would only prove that he was entitled to the soil and freehold of half the lane opposite to his own inclosures, and would not justify his declaring for a trespass in the lane generally, as if he claimed an exclusive right to the whole, which might be set up on other occasions. The trespasses proved were, that the defendant had depastured his cattle all along the lane, as well in the parts opposite to the plaintiff's closes, as in other parts, and they had also broken into an inclosure of the plaintiff's. But the court said, that the plaintiff had an exclusive right to part of *Shepherd's lane*, and if the defendant meant to drive him to confine the trespass complained of to that part of the lane which was his, he should have pleaded soil and freehold in another, which would have obliged the plaintiff to new assign. This case proves all the common law principles I have contended for in relation to highways. It shows, that the adjoining proprietor may have the exclusive right of depasturing an open parish highway, notwithstanding the public right of passing it; and of course, that the public have not the exclusive possession of it. It also proves, that trespass *quare clausum fregit* will lie for depasturing an open highway; and *a fortiori*, uninclosed land; so that the position is incorrect, that when the land of any person is uninclosed it may be fed by cattle not his own, or that the land taken for a highway may be thus fed. It is true, the common law has been

changed in this state by a statute requiring lands to be fenced, or the owner cannot maintain trespass for an injury done by cattle. Were it not for this statute, such action could be maintained here. The exclusive right of depasturing the highway in front of a man's land is not taken from the adjoining proprietor by laying out the highway; for it is not necessary to the enjoyment of the easement; but the right of action for a violation of such right is taken away by an indirect consequence of the statute respecting fences. But suppose no cattle should be turned into the highway, and the grass should grow in front of one's land so as to be fit to mow, he could maintain trespass against a stranger for cutting and carrying away the grass; for this is a right which is not affected by the statute. So on the same principles he can for cutting trees, digging the soil, or destroying mines. It is then conclusively evident, that the public right of passing a highway * does not exclude the owner of the soil from deriving many important advantages from the rights remaining in him; and it is the duty of courts to furnish the same protection and security to these as to all other rights.

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It is also said, if this action be sustainable, it may be sustained for every load of wood, every log, every cart or other implement of husbandry laid upon the highway, which would be highly prejudicial to individuals, as well as totally overturn what has always been considered to be the law on the subject. If this action cannot be sustained, then any person may put wood, logs, carts, every implement of husbandry, and every thing else in front of our houses and lands in such manner and quantity as he pleases, and we have no remedy but to complain to a grand juror; and if he turns a deaf ear to our complaints, we have nothing to do but remove them as often as he pleases to put them there, or patiently submit to the insult and injury. Nor is this all. Any person on the same principle may cut down and destroy ornamental trees in front of our houses and lands, may build yards, dig up the ground, and destroy the mines. It often happens there are convenient places in the streets in front of lands to collect manure, or turn it on the land; but any person may cart it away, stop the ditches, or turn it from the land. In these cases, there is no sort of remedy, not even a complaint to a grand juror. If you bring an action, the answer is ready. "You have no possession of the highway; you have no right of possession, any more than the de-

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fendant has; for by its being taken for a highway, you are entirely excluded from having any foothold in the soil, though the freehold or fee was in you." Such language as this would give but little consolation to a man whose neighbour had placed his woodpile in front of his house, or land, cut down his trees set out for ornament and shade, and dug up and carried away the turf of a flourishing green to make a handsome plat for himself. But on the principles contended for, he would be without legal remedy; he must either submit with patience and resignation, or become the avenger of his own wrongs. He might indeed retaliate the injury; but this would lead to such dreadful consequences that every mind will shudder at a doctrine that directly or indirectly gives a sanction to them.

[*142] But how would it be prejudicial to individuals to be liable * to an action for laying wood, or implements of husbandry in front of their neighbour's house, or land? Can they not as well place them in front of, or upon, their own land? I can see no prejudice that can be sustained, unless it be one for a man to be deprived of the power of injuring a neighbour by piling wood and placing implements of husbandry in front of his house and land. But it was hardly to be expected, that this would be urged as an objection to the operation of a principle of the common law, as old as the common law itself.

No prejudice, however, can arise from making individuals responsible in such cases. It would restrain every one from doing any act injurious to the front of another; it would secure the private rights retained in highways; and prevent the conflicts and confusion which might occur in the struggle for the possession of property, that has no definite owner.

It is also said, that on the ground the plaintiff has no property in the soil of the highway in question, he is not without remedy; he may have his action on the case for any actual injury done to him in particular by the erection of such a nuisance in front of his lands or buildings. There is an ambiguity in this proposition which is all that renders it difficult to answer it. What is here meant by actual injury? If it means such special injury to the person or personal property occasioned by a nuisance in the highway as will give a right of action to an individual, then this position will be conceded to be law; and the plaintiff can maintain his action for such injury, whether the nuisance be in front of his land or not; but this will give him no remedy

in this case, because he has sustained no injury of this description. But if it means, that the sole act of digging a cellar, and erecting a shop in the front of another's land, but who is not the owner of the highway, is such actual injury as will give an action on the case (which is precisely the plaintiff's case, admitting he does not own the highway), then the answer is, that such position is not law. At common law, trespass can be maintained for an injury done to a man's land though covered by a highway. So case can be maintained for any particular injury to one's person, or personal property, occasioned by a common nuisance in the highway; but case cannot be maintained for any injury done to land in the highway in front of another's land, * which would give him an action of trespass if he was the [*143] owner, and which would be no ground of action as a common nuisance. For no action can ever be sustained for any thing done in the highway for the sole reason that it was done in front of one's land. Trespass can be maintained for an injury to the land because he is the owner, not because it injures the front of the land. Case can be maintained for consequential damage arising from a nuisance, not because it is in front of one's land; for the right of action would be the same, though the nuisance stood in front of another's land. Suppose then an action of the case should be brought in which the plaintiff should declare, that the defendant dug a cellar, and erected a shop in front of his land, but not on land that belonged to him, and say nothing more (which is all there is in the plaintiff's case, if he does not own the land,) will it be said, that here is an injury stated for which an action will lie? Here is no violation of any right of property; for the plaintiff does not own the land. There is no such act as will warrant an action on the case for a common nuisance; for there is no injury to his person, or personal property.

Again it is said, that the doctrine of the common law, as supported by all the authorities, is, that the adjoining proprietors have a freehold estate in a highway so long as it continues to be a highway subject to the easement, and that the ultimate fee of the land is in that community which must maintain highways, who can sell them when disused.

There is not a single *dictum* or authority to warrant this opinion. It is said by one of the oldest writers on the com-

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mon law, and sanctioned by one of the ablest judges that ever adorned a court, "That the king has nothing but the passage for himself and his people; but the freehold, and all the profits, belong to the owner of the soil: So do all the trees upon it, and mines under it, which may be very valuable. The owners may carry water in pipes under it. The owner may get his soil discharged of this servitude, or easement of a way over it, by a writ of *ad quod damnum*." 1 *Burr.* 143. It would seem impossible that one can read this authority, and then entertain an opinion that the public have the ultimate fee, and the adjoining proprietor a freehold continuing only so long as the highway continues; for the public have only the easement or right of passing, which [*144] * excludes the idea that they have the fee; and it is expressly declared, that the freehold belongs to the owner of the soil, by which is plainly meant an absolute, and not a conditional one dependant on the continuance of the highway. And it seems a strange sort of logic to say, that when a man's freehold is discharged of an easement, he loses it.

In the argument in support of this doctrine, it is conceded, that when the lord of a manor grants a highway through it, he retains the freehold; and that if he conveys to different persons on each side, each owns to the centre of the highway; and that a proprietor may by a writ of *ad quod damnum* remove the easement, and hold the land as formerly. This is a clear concession that the freehold must be in the adjoining proprietors, and that it never passes to the public; for if the proprietor on removing the easement holds the land in fee, it must be because he never parted with it; for by this process there is no re-conveyance to him, it merely discharges the incumbrance.

But in the same argument it is further said, that when the road ceases to be a road the land reverts to the public, or to those who are bound to maintain it; for if it did not, it would belong to the owner of the land from whom it was taken; but that the law expressly provides, that the surveyors of highways may sell it without making any compensation to the adjoining proprietors, and therefore they have no title to it. Here it must be noted, that by the common law no power is given to any public body or officer to sell highways, and that the authority in *England* is created by statute. It may be asked, how the land, when the road

ceases, can revert to the public, unless they owned it before the highway was laid out? But what is the amount of this argument? It is this; because the legislature have authorized surveyors to sell highways when discontinued, therefore the fee of the land is in the community bound to maintain highways. If by the common law, the public have only an easement in the land covered by a highway, it is difficult to see how a statute authorizing a sale of it, could vest them with the fee. The legislature in this state have frequently authorized guardians to sell the lands of their wards; but nobody ever supposed, because they possessed this power, that the fee of the land was in the legislature, or in the guardians.

*This doctrine is further attempted to be supported by the argument that this could not possibly be done by any legislature, if there was any title in the adjoining proprietor, excepting a freehold during the continuance of the highway. But this is arguing in a circle; it is saying, as the legislature have no right to sell highways unless they own the freehold; therefore, the act authorizing the sale proves they own the freehold. To give this argument any effect, the position must be assumed, that a legislature never attempts to do any act unless it be right: A position which no one will seriously attempt to maintain. [*145]

It is admitted in the course of the argument, that the legislature can authorize lands to be taken for highways on making compensation to the proprietors. This is not done in virtue of their having the ultimate fee of the land; and certainly they may as well sell highways when discontinued without owning the fee, as they can take land for a highway without owning it, though they make compensation for it; for in both cases, they act by virtue of their legislative power without the consent of the proprietors of the land.

But why is it pretended, that the public, in virtue of the statute authorizing the sale of highways when disused, become vested with the ultimate fee? This obviates no difficulty. It is just as arbitrary to say this, as to say they have a right to dispose of them without being the owners of the fee.

The authority, however, in *Great-Britain* to sell highways is created by statute. We have no such statute here. Our statute is very different, and provides when highways are discontinued they shall belong to them who own the fee of the land. This clearly proves that the legislature did not

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consider that they owned the land, or had a right to sell it; for if such had been their understanding, they would unquestionably have directed a sale. It also shows, that they considered it as belonging to individuals, and that they intended to leave their rights to be decided at law.

It is then wholly unnecessary for us to determine whether the *British* parliament had a right to pass such an act, or whether it vested the ultimate fee in the soil of highways in the public, or not. That statute can have no force here; and this case must be decided upon the principles of the com-

[*146] mon *law in the same manner as if it had never been enacted.

By the common law, the only mode of altering a highway is by writ *ad quod damnum* by the owner of the land; in which case, if the jury found it would be no damage to the public to make the proposed alteration, then by license of the king the altered road is established, and the old one discontinued, whereby it becomes discharged of the easement, and the owner holds it disincumbered; but no such thing was known as the sale of the land when the highway was discontinued. Of course, by the common law, there would never be any claim to the land but by the adjoining proprietors.

The result of the enquiry is, that the public have only an easement, a right of passage in a highway; that the adjoining proprietors have the freehold, and own the soil; have a right to every use and profit which can be derived from it consistent with the easement; may take trees growing thereon, occupy mines, or sink water courses under it, and by the common law may depasture it; that when disseised, they can maintain ejectment, and recover the possession subject to the easement; and can maintain trespass for any act done to the land not necessary for the enjoyment of the easement, which would be an actionable injury if the land was not covered by a highway; that the soil of a highway descends to heirs and passes to grantees as an appurtenant to the adjoining land; and whenever the highway is discontinued, the adjoining proprietors hold the land discharged of the easement. (*a*)

Whether the legislature on discontinuing a highway have the right to dispose of the soil is a matter not necessary to be decided; for the easement gives them the power of enforcing adjoining proprietors to make a reasonable compensation for it, as a condition of the discontinuance.

(*a*) The law is now well settled in this state in conformity to the views here expressed. See *Chatham* v. *Brainerd* & al. 11 *C. R.* 60. *Watrous* v. *Southworth*, 5 *C. R.* 305. *Champlin* v. *Pendleton*, 13 *C. R.* 23.

When different persons own each side of the highway, each owns to the centre; but as the title is grounded on the presumption that the land originally belonged to each, then if a case should ever happen that in laying out a highway between adjoining proprietors, the whole should be laid on the land of one, it would seem to follow as a necessary consequence of the general principle, that he should retain the fee of the land in the whole, while the other should have no * mode of protecting his front but that furnished by the law [*147] respecting nuisances. It is, however, unnecessary to anticipate the decision of a question which there is little probability will ever occur. I am of opinion, that a new trial ought to be granted.

MITCHELL, late Ch. J., who presided in the Court when the case was argued, expressed an opinion, at the time recognizing the general doctrine that the right of soil in highways is in the adjoining proprietors; but he thought that in this case the reservation in the deed from *Williams* to *Peck* extended to the right of soil, so that it did not pass; and of course, *Peck* could not sustain this action.

SKILLENGER *against* BOLT.

A witness interested in the event of the suit on the ground of his being liable over to the defendant, having been released by the defendant, was asked if he did not expect to pay the judgment and all expenses, provided a recovery should be had against the defendant, to which he replied "I certainly do:" Held that such witness was incompetent to testify for the defendant.

THIS was an action of trover for a horse and carriage. The cause was tried at *Danbury*, *September* term 1814, before *Reeve*, Ch. J. and *Edmond*, J. On the trial on the issue of not guilty, it appeared that the defendant, as a sheriff's deputy, attached the property described in the declaration, by direction of *Thaddeus Betts*, in a suit brought by him against one *Wallace* on a promissory note. The defendant relied on the attachment for his defence, and offered *Betts* as a witness to prove his part of the issue. The plaintiff's counsel objected to the competency of *Betts* on the ground that he was directly interested in the event of the suit. The defendant's counsel then produced a discharge from the defendant to *Betts*; upon which *Betts* was asked, if he did not expect to pay the judgment and all expenses

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provided a recovery should be had against the defendant? To which he replied, "I certainly do." The plaintiff's counsel urged this as an objection to his being admitted to testify; and the court thereupon excluded him. The jury having found a verdict for the plaintiff, the defendant moved for a new trial on the ground that the court mistook the law in thus excluding the witness; and the question was reserved for the advice of all the judges.

[*148] * *R. M. Sherman* and *Bissell*, in support of the motion, stated the question to be, whether a mere honourary obligation, independent of any legal liability, shall go to the competency of a witness. They then gave a history of the course of decisions to show that since the time of Lord *Mansfield* objections on the score of interest have, as far as possible, been confined to the credit of the witness, and have not been permitted to affect his competency. It is now settled, with universal approbation, that the only interest which will exclude a witness must be a pecuniary interest in the event of the suit. *Bent* v. *Baker & al.* 3 *Term. Rep.* 27. *Phelps* v. *Winchell*, 1 *Day's Ca.* 269. *Swift's Ev.* 54. It must be a real, and not a merely imaginary interest; it must be a strictly legal interest, for a court of law can recognize no other. It is also settled, that a release of the witness' interest, whatever it may be, restores his competency. 3 *Term Rep.* 29. 33. 35. *Peake's Ev.* 158. *Esp. Dig.* 716. 1 *Campb.* 37. 8 *Johns. Rep.* 377. This rule is clear, precise, and of universal application. That which makes the question whether the witness considers himself under an honourary obligation the criterion, is necessarily uncertain, and depends wholly on the sense which the witness entertains of such an obligation. This absurd consequence will result, that a witness who has a nice sense of honour will be excluded, while another in the same situation, who disregards the obligations of honour, will be admitted. It is now settled in *England*, that a mere obligation in honour is not an objection to the competency of a witness. *Pederson* v. *Stoffles*, 1 *Campb.* 144. and a case cited *ibid.* by *Best*, Serjt. before Sir *James Mansfield*, where his lordship said, "that the same honour by which the witness considered himself bound to pay a sum of money for which he was not liable, would lead him to speak the truth between the parties." The same doctrine has been recognized in *New-York*. *Gilpin* v. *Vincent*, 9 *Johns. Rep.* 219.

It is clear, that if *Betts* had taken his release, and said noth-

ing, he would have been a competent witness, and the defendant would have had a right to his testimony. But he said, he *expected* to pay. This expectation was a mere volition of his mind. Can a man thus disqualify himself as a witness? The release has operation, whatever may be his private intentions.

[*149] * *N. Smith* and *Hamlin*, contra. The rule in the *English* courts formerly was, that if the witness conceived himself in honour bound to assume upon himself the consequences of the action, he was incompetent. *Fotheringham* v. *Greenwood*, 1 *Stra.* 129. S. C. cited with approbation by *Gould*, J. 1 *H. Bla.* 307. *Peake's Ev.* 157. *Esp. Dig.* 707. The same doctrine has been recognized in this state by the practice of our courts. *Swift's Ev.* 55. The old rule is certainly the most reasonable; for if the witness has made up his mind that he shall indemnify the party, the *bias* on his mind will be the same, whether the law compels him to do so or not. For a contrary rule there is no other authority than one or two decisions of a single judge at *nisi prius*. Sir *James Mansfield's* reasoning may be applied to a witness who has a legal interest in the event. The same sentiment of probity and honour which induces him to say that he is interested, when the question is put to him on the *voir dire*, will induce him to tell the truth when examined in chief.

Further, it appears from the case, that the witness was under a *legal* obligation to indemnify the defendant. Notwithstanding a release had been executed, he *still expected to pay*. The fair inference is, either that he had incurred an obligation since the execution of the release, or at any rate, that he was not to avail himself of it.

Again, it does not appear, that any injustice has been done; or that the evidence offered was of any importance, so that if admitted, it would have varied the result. On this ground, therefore, a new trial ought not to be granted.

INGERSOLL, J. It is my opinion that the court did right in excluding the witness. It seems, the discharge was given to the witness in order to qualify him to testify in a cause, in which he was directly interested, and in which he was bound by every honest principle to indemnify the defendant. In such a case, though a discharge be given to the witness, it comes in a very questionable shape, even if nothing more appears than the discharge itself. But if immediately after it be given, and at the very time when it is produced before

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the court, the witness says he considers it as nothing, the inference must be, that it was a sham business, made up for the occasion; and that it never was intended by the parties to the discharge, that it should exonerate the witness from *liability to indemnify the defendant for taking the property as stated in the motion. (*a*)

In this opinion the other judges severally concurred.

New trial not to be granted.

RICHARDS *against* COMSTOCK:

IN ERROR.

To an action of *indebitatus assumpsit* for money had and received, the defendant pleaded, that the plaintiff, without complaint or process, voluntarily came to the defendant, who was a justice of the peace, and confessed that he had played at cards *contra formam statuti*; the defendant found the plaintiff guilty of the fact confessed, and gave judgment that he should pay a fine to the town treasury; the plaintiff thereupon paid the fine to the defendant, being the money specified in the declaration, which the defendant received and paid over to the town treasurer before action brought. On a demurrer to the plea it was held, that the facts disclosed were sufficient to support the promise laid in the declaration, and that the plaintiff was entitled to recover.

The damages to be assessed in favour of a plaintiff in error on reversal of the judgment below are restricted to what was recovered from him by force of that judgment, and cannot be extended to costs which he would have been entitled to recover, if such judgment had been originally correct.

THE original action was *indebitatus assumpsit* for money had and received, brought by *Comstock* against *Richards* before *Eliphalet St. John*, Esq. in *December* 1812, to recover the sum of three dollars thirty four cents.

The defendant pleaded in bar, That at the time he received the money mentioned in the declaration, *viz.* on the 29th of *April* 1811, he was a justice of the peace for *Fairfield* county; and that the plaintiff then voluntarily, and without any antecedent process or complaint, appeared before the defendant in person, and voluntarily confessed to the defendant, in his capacity of justice of the peace, that he the plaintiff had played at cards within the year next preceding with one *William Beal*, against the form and effect of a certain statute law of this state

(*a*) This decision obviously proceeds on the *assumption*, that it was never *intended* by the parties that the release should take effect. Where the legal interest is effectually discharged, a mere honorary obligation will not render the witness incompetent. *Smith* v. *Downs*, 6 *C. R.* 365.

entitled "An act against gaming;" whereupon the defendant adjudged the plaintiff guilty of the fact by him confessed, and that he pay to the treasury of the town the sum of three dollars thirty four cents, which the plaintiff accordingly paid in satisfaction of said judgment, and the defendant paid the same over to the town treasurer, long before the commencement of this action. The plea then averred the identity of the money demanded in the declaration with that thus paid to the defendant, and by him paid over.

To this plea there was a demurrer.

*Justice *St. John* adjudged the plea sufficient, and gave judgment for the defendant to recover thirty-one cents costs. [*151]

Comstock then brought a writ of error to the superior court, assigning the general error, as well as some defects in the form of the judgment which it is unnecessary to specify. The superior court reversed the judgment of justice *St. John*, and allowed *Comstock* six dollars twenty-three cents damages. *Richards* then brought the present writ of error.

R. M. Sherman and *Bissell*, for the plaintiff in error, contended, that the judgment disclosed in the plea in bar was validated by the late statute, *October Session* 1813. *chap.* 6. *s.* 1.(*a*) But aside from that statute, the merits of a court of competent jurisdiction cannot be enquired into collaterally for the purpose of pronouncing it erroneous. Nor, a *fortiori*, for the purpose of pronouncing it void. So long as this judgment remained unreversed, Justice *St. John* could not treat it as a void judgment. If the money was paid in satisfaction of a subsisting judgment, it clearly could not be recovered back.

But lay the judgment out of the case; still it appears that the money was paid *voluntarily* with full knowledge of the facts. On this ground it cannot be recovered back. 2 *Com. Contr.* 41. *Knibbs* v. *Hall*, 1 *Esp. Rep.* 84. *Cartwright* v. *Rowley*, 2 *Esp. Rep.* 723.

(*a*) The preamble of that statute is as follows: "Whereas it is represented to this Assembly, that justices of the peace in many instances have taken confessions of persons of offences, and have proceeded to render judgment thereon; and whereas doubts exist as to the legality of such proceedings." It is then enacted, "That all judgments heretofore rendered by an assistant or justice of the peace on the confession of any person, without complaint and warrant, of offences, the jurisdiction of which appertained to such assistant or justice, shall be deemed valid in the same manner as if previous complaint and warrant had been made."

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Further, *Comstock* paid the money to *Richards*, *eo nomine* as a penalty belonging to the town treasury; and *Richards* paid it over to the town treasurer as *Comstock* virtually directed him to do. It would be going very far to say, that a man is bound *ex bono et æquo* to refund money, which he has received and paid over according to his instructions.

[*152] * *I. Mills* and *N. Smith*, for the defendant in error, insisted that the pretended judgment was a nullity, as there had been no writ, complaint, or process. Nor does it appear from the plea in bar, that there is any record. The judgment being void, *Richards* had no right to take the money. His paying it over would not protect him. The town treasurer had no right to receive it.

This is not averred to be a voluntary payment. The plea states that *Comstock* voluntarily appeared and confessed; but *non constat* that he voluntarily paid the money. He paid it in compliance with a judgment, which, at the time, he thought himself bound by. Where money is exacted and paid under a mistaken apprehension of both parties, it may be recovered back.

On this record it is unnecessary to discuss the question whether the facts stated in the plea are sufficient to imply a promise to refund the money; for an express promise is alleged in the declaration, and admitted by the demurrer. The facts disclosed in the case constitute a sufficient consideration to support such promise.

As to the statute of *October* 1813, it is to be observed, that *Comstock* brought his action, and his right of recovery existed, before it was passed. That statute cannot be so construed as to take away his right. *Bac. Abr. tit.* Statute (C). *vol.* 6. *p.* 370. *Dash* v. *Van Kleeck*, 7 *Johns. Rep.* 477.

In reply, it was said, that an express promise is not binding without consideration; and as *Comstock* paid the money voluntarily, as a penalty for a breach of law, with intent that it should be paid over to the town treasurer, and it was so paid over, there was no obligation in *Richards* to refund, and of course no consideration for a promise to refund.

BALDWIN, J. This record presents a variety of points which claim the attention of the court. The facts stated in the defendant's plea and admitted by the demurrer do not form a sufficient basis for an implied promise to refund the

money thus received. It was obviously the intention of the plaintiff, when from a misapprehension of the law, he placed the money in the hands of the defendant, that he should pay it into the town treasury.(1) But the defendant on being informed of the mistake of the plaintiff, might have undertaken *to regain and refund the money by an express promise and undertaking. To support such promise, the facts stated are sufficient. The declaration states such promise, and the plea does not deny, or answer it. On that ground the judgment of the justice ought to have been reversed, as it was, by the superior court. [*153]

But in assessing the damages consequent on that reversal, the superior court evidently erred, and mistook the law. By statute, (*a*) the plaintiff in error, on reversal of an erroneous judgment, shall recover all that he hath been damnified thereby, "that is," (in the language of the old statute passed in 1738) "the whole that was recovered against him in said erroneous judgment, on which execution hath been done;" but no cost shall be taxed for either party. The judgment being thus set aside, and the money collected by force of it, restored, the parties remain as though no judgment had been rendered, and the plaintiff, in the original action may, by force of the statute, enter his action for trial in the superior court; and his right to recover the object of his suit, with costs of that court and the court below, will depend on the issue of such trial. By this rule, the damages assessed by the superior court could not exceed 31

(1) In *Clarke* v. *Dutcher*, 9 *Cowen R.* 674, SUTHERLAND, J. reviews the cases, and states as his conclusion, that "Although there are a few *dicta* of eminent Judges to the contrary, I consider the current and weight of authorities as clearly establishing the position, that when money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of law; and it shall be considered a voluntary payment." In *Mowatt et al.* v. *Wright*, 1 *Wend. R.* 355. SAVAGE, Ch. J. came to the same conclusion. But the converse of the rule holds, where the mistake is one of *fact*. In the case last cited, SAVAGE, Ch. J. said, that "the cases founded on mistake, seem to rest on this principle; that if parties, believing that a certain state of things exists, come to an agreement with such belief for its basis, on discovering their mutual error, they are remitted to their original rights." And see *Tinslar* v. *May*, 8 *Wend. R.* 561; *Burr* v. *Veeder*, 3 *Wend. R.* 412; *White* v. *Leggett*, 8 *Cowen R.* 195; and *Durkinchal* v. *Cranston et al.* 7 *John. R.* 442.

(*a*) *Tit.* 88.

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cents, that being the amount of costs, taxed by the justice, against the defendant. But the superior court, without entry, or trial of the action, allowed a further sum for the damages and costs, which the plaintiff might and probably ought to have recovered before the justice, amounting, in the whole, to 6 dollars 23 cents. For this cause, the judgment of the superior court ought to be reversed.

In this opinion the other Judges severally concurred.

Judgment reversed.

[*154] *HART and others *against* GRANGER:

IN ERROR.

To a petition in chancery brought by *A.* and *B.*, inhabitants, of this state, against *C.*, an inhabitant of the district of *Columbia*, praying the court to order and decree that *C.* should deliver up to be cancelled a certain contract entered into between *A.* and *B.* on the one part, and *C.* on the other, for the purchase of *Western Reserve* lands in the state of *Ohio*, the terms of which contract *C.* had failed to comply with, or that he should now pay the purchase money and interest, and receive a conveyance of the same quantity of *Western Reserve* lands; *C.* pleaded in abatement, that he had previously brought his bill in chancery in the state of *Ohio* against *A.* and *B.* stating the same contract and subject of controversy, and praying the court there to order and decree that *A.* and *B.* should pay to *C.* the just value of the lands specified in the contract, after deducting the purchase money, interest and taxes, or to grant other equitable relief; whereupon process of subpœna issued, and was duly served on *A.* and *B.*, who appeared and filed their motion for the removal of the cause to the circuit court of the *United States;* this motion being over-ruled, the cause was continued to the next term, when *A.* and *B.* again appeared and demurred to the bill, assigning as one cause of demurrer that the court had not jurisdiction; which bill is now pending, and within the jurisdiction of the court. Plea in abatement held to be sufficient.

It is not a sufficient ground of abatement of a petition in chancery that the respondent was an inhabitant of another state, and was here on a transient visit only, at the time a copy of the petition and citation was left in service with him.

THIS was a petition in chancery, brought by *William Hart* and the heirs of *Samuel Mather*, jun. late of *Lyme* deceased, against *Gideon Granger*, Esq. before the superior court in *Middlesex* county, stating generally, That in the month of *August* in the year 1795, the state of *Connecticut* sold to said *Hart* and *Mather*, and divers other persons, their associates, at the price of 1,200,000 dollars, a certain tract of land, called the *Western Reserve;* and it was agreed by the purchasers, that the proprietors should hold said land as tenants in common: That said pur-

chasers, on or before the 5th of *September* in the same year, associated themselves together by the name of the *Connecticut Land Company:* That in said month of *September*, it was agreed by said company, that their purchase should be formed into 400 shares of 3000 dollars each, amounting to the sum of 1,200,000; and that each purchaser should convey his share to *John Caldwell*, *John Morgan*, and *Jonathan Brace*, Esqrs. as trustees for said company: That, in pursuance thereof, on said 5th of *September*, each of said purchasers conveyed his portion accordingly; and said trustees issued out to each purchaser their certificates, called *Scrip*, for his part of the trust and benefit: That *Hart* and *Mather* afterwards, in said month of *September*, received certificates to the amount of 36,923 parts of said 1,200,000 parts, the latter being the whole of said trust and benefit: That on the 11th of *September* aforesaid, *Hart* and *Mather* contracted with one *George W. Kirkland* to sell him the whole of their purchase, * in consideration of a bill of exchange drawn by him in favour [*155] of *Hart* and *Mather* on one *Henry Newman* of *Boston*, for the sum of 2719 dollars and 20 1-2 cents, payable in 60 days from its date, and also of another bill of exchange drawn as aforesaid for the same sum, and payable in 120 days from the date, and also in consideration of *Kirkland's* promissory note then executed and delivered to *Hart* and *Mather* for the sum of 5438 dollars, and 45 cents payable in one year from its date with interest; and as a further consideration for said purchase, *Kirkland* then entered into a covenant with *Hart* and *Mather*, that on the 2nd of *September* 1797, he would secure to them by good and sufficient personal security to their satisfaction in *New-York* or *Boston*, 36,923 dollars, to be paid at *Hartford* in the state of *Connecticut* on the 2nd of *September* in the year 1800, to *Hart* and *Mather*, with interest annually after the date of such security: That *Hart* and *Mather*, in consideration of the premises, agreed that on receipt of said security for 26,923 dollars, they would assign to *Kirkland*, in the form prescribed by the *Connecticut Land Company*, certificates of the shares of land sold by the state of *Connecticut* called the *Connecticut Western Reserve*, amounting to 36,923 twelve hundred thousanths: That it was further agreed by the parties, that in case *Kirkland* should fail to procure and make the security for said 36,923 dollars at the time and in the manner specified by the agreement, *Hart* and *Mather* should be altogether

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released from their contract to assign said certificates, but that notwithstanding they should be entitled to the money specified in the bills of exchange and promissory note.

The petition further stated, that *Kirkland*, on the 25th of *April* 1796, sold, assigned and delivered said contract to *Oliver Phelps*, lately deceased, and to *Gideon Granger* then of *Suffield* in the state of *Connecticut*, but when said petition was brought was called *Gideon Granger* of the city of *Washington* in the district of *Columbia;* and that on the 8th of *August* 1797, said *Phelps* sold, assigned and delivered all his right and title to said contract to said *Granger:* That after the last mentioned assignment, and previous to the 2nd of *September* 1797, it was agreed by and between *Hart* and *Mather* and *Granger*, that the dwelling house of Mrs. *Gray* in *Boston* should be the place where the parties to said contract should fulfil their respective engagements to each other
[*156] * in virtue of that contract to be performed on said 2nd day of *September:* That *Hart* and *Mather* on said 2nd day of *September*, and at the uttermost convenient time of the day, were ready at the dwelling house of Mrs. *Gray* to perform their part of said coutract which was to be performed on said day, on receiving from *Kirkland*, or from *Granger* his assignee, the security before mentioned, and on so receiving it then and there offered and tendered so to perform their part of said contract; but that neither *Kirkland*, nor *Granger*, nor any one in their behalf, appeared at said time and place to make said security, nor was any one there to offer and tender the same, nor was the same offered or tendered.

The petition further stated, that said lands since said 2nd day of *September* 1797, have by said *Land Company*, of which *Granger* was one, been aparted and set out to each proprietor in severalty; and that *Hart* and the other petitioners, the heirs and representatives of *Mather*, hold their respective shares in the same in severalty, and own a far greater quantity than was contracted to be conveyed as aforesaid.

Under these circumstances, the petitioners complain, that though *Kirkland* and *Granger* his assignee, entirely neglected to perform their part of said contract as above set forth, yet *Granger*, since the decease of *Mather*, which took place in the month of *March* 1809, threatens to harass and vex the petitioners with suits at law and in equity on said contract, and most unjustly refuses to deliver up the same to the petitioners; that it is of the utmost importance that the

estate of *Mather* should be settled; and that the petitioners are in hazard of being deprived of testimony by the death of witnesses. For these reasons the petitioners pray the court to take their case into consideration, and to order and decree, that *Granger* deliver up to them said contract; or that he pay the petitioners said 36,923 dollars, together with the interest thereon, as well as the sum of 5000 dollars, the same being the amount of taxes and expenses on said land paid by the petitioners and the interest thereon, and in consideration thereof that he be compelled to receive from the petitioners said quantity of land so to be conveyed as aforesaid from the said several lands aparted to the petitioners as aforesaid; or that relief may be granted in some other way.

An attested copy of the petition and citation was left in *service by a proper officer with the respondent at *Suffield* [*157] in this state more than twelve days before the session of said superior court.

To the petition above stated, the respondent (now defendant in error) pleaded, in the first place, that said petition ought to abate and be dismissed, because long before, and at the date and service thereof, he was, and now is, an inhabitant of the city of *Washington* in the district of *Columbia*, and not an inhabitant of the state of *Connecticut;* and that at the time when said petition was served, he was in the state of *Connecticut* on a transient visit with an intent to return to said city of *Washington* his residence, to which place he long since has returned, and where he has ever since resided; and therefore, that the court had no jurisdiction of the cause.

Secondly, that the petition was insufficient to entitle the petitioners to the relief prayed for.

And thirdly, that it ought to abate inasmuch as long before the date and service of the petition, the respondent filed his bill in chancery against the petitioners before the court of common pleas holden at *Warren* in the county of *Trumbull* and state of *Ohio*, on the fourth *Monday* in *June* 1811, embracing the same contract and subject of controversy as mentioned in the petition, on which process of *subpœna* issued and was duly served on the petitioners, who appeared in said cause, and answered to said bill, and the same is now pending before said court, and within the jurisdiction of the same. The plea then sets out the bill, and the proceedings thereon.

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The bill sets out the contract made by *Hart* and *Mather* with *Kirkland*, and the assignment of the same by *Kirkland* to *Oliver Phelps* and *Granger*, as stated in the petition here, as well as the consideration paid and contracted to be paid to *Hart* and *Mather;* but states further, that on the 2nd of *September* 1797, *Granger* tendered to *Hart* and *Mather* security for said sum of 36,923 dollars, payable on the 1st of *September* 1800, in every particular such as *Kirkland* by his contract with *Hart* and *Mather* engaged to deliver them, except that the sums of money therein specified were through ignorance and mistake made payable to *Hart* and *Mather* personally, whereas they ought to have been payable at *Hartford*. *Hart* and *Mather* refused on this ground to accept the security offered; and informed *Granger* that

[*158] * they were released from a performance of their part of said contract, and refused to perform the same; though they had received payment of the bills of exchange and the promissory note before mentioned, the latter having been paid by *Granger*.

The bill further states, that *Granger*, since said 2nd day of *September*, had offered to deliver *Hart* and *Mather* precisely such security payable at *Hartford* as by said contract was to have been given, but that they utterly refused to accept the same. Various other matters contained in the bill it is unnecessary to detail. It may, however, be proper to state, that the bill applies to *Hart* to disclose on oath many negotiations and transactions relative to the bills of exchange, &c., and prays for an injunction against committing waste on the land the subject matter of the contract. It ought to be stated also, that the bill as set forth in the plea, states the purchase of the *Western Reserve*, the holding of the lands as tenants in common, and the subsequent partition of the same, as appears by the petition brought here. It then states, that by means of such partition said contract cannot be specifically performed; and prays generally, that the court, as said lands are within their jurisdiction, would order and decree that the respondents in the bill, the petitioners here, should pay to the complainant, the present defendant in error, the just value of 92,307⅛ acres (the same being the whole tract purchased by *Hart* and *Mather*,) after deducting said sum of 36,923 dollars, and the taxes paid on said land, together with the interest

of the same from the 2nd of *September* 1799; or that the court would grant such other relief as by the rules of equity the complainant is entitled to.

It appears further, that a subpœna was issued by said court of common pleas to summon in the respondents, the present plaintiffs in error, to appear before the next court of common pleas to be held at *Warren* in the county of *Trumbull*, on the 4th *Monday* of *November* 1811; and the respondents having been summoned, appeared before said court, and by consent the cause was continued to the term of the same court held on the 4th *Monday* of *March* 1812; at which court the respondents appeared, and filed their written motion, stating to said court that they all dwelt and resided out of the state of *Ohio*, where said court was held, and * where said land lay; and prayed that said cause might be removed to the circuit court of the *United States* within and for that district. This motion was not granted; and the cause was ordered to be continued to the next term; but previous to the continuance the respondents demurred to the petition, and assigned for causes of demurrer, that said court had not jurisdiction of the cause, inasmuch as it appeared by the bill and in fact was the case, that none of the parties to the bill were inhabitants, citizens, or dwellers in the state of *Ohio*, and there was no prayer for any specific performance of a contract for land in that state, nor was there any thing alleged in the bill to give said court jurisdiction of the cause; besides this, the contract which was the foundation of the suit was made out of the state of *Ohio*.

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To the plea in abatement above stated the petitioners demurred. There was then a joinder in demurrer.

The superior court adjudged said plea in abatement to be sufficient, and gave judgment in favour of the respondent. To reverse this judgment the present writ of error is brought.

The case was elaborately argued by *N. Smith* and *Gould* for the plaintiffs in error, and by *Hosmer* and *Granger* for the defendant in error.

For the plaintiffs in error it was insisted,

1. That if the party be within the local jurisdiction of the court, and has personal notice, he is bound to obey the order of the court. It is of no moment where his domicil is. Nor does it make any difference whether the suit be a petition in chancery or an action at law; nor whether the process be by summons or at-

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tachment. *Anon.* 1 *Atk.* 19. *Penn* v. Lord *Baltimore*, 1 *Ves.* 454. 1 *Fonb. Eq.* 31. 2 *Pow. Cont.* 8, 9. 2 *Swift's Syst.* 189. In *Buchanan* v. *Rucker*, 9 *East* 192. and *Kilburn* v. *Woodworth*, 5 *Johns. Rep.* 37. it was admitted, that if the party had been personally served with process, he would have been bound by the judgment.

2. That the petition is sufficient. But if it were not, advantage could not be taken of the insufficiency under this plea. You cannot plead to the jurisdiction by a demurrer to the bill; for a demurrer is always in bar, and goes to the merits of the
[*160] case. *Roberdeau* v. *Rous & ux.*, 1 *Atk.* 544. * It is manifestly absurd to call upon the court to decide upon the merits of the application while you deny their jurisdiction.

3. That this petition ought not to abate by reason of the pendency of the suit in *Ohio*. In order that the pendency of one suit may be a ground of abating another, it must be a suit between the same parties standing in the same relation, regarding the same subject matter, and before a court that has jurisdiction.

First, the parties are not the same in the same relation, the plaintiffs here being respondents in *Ohio*, and the respondent here being plaintiff in *Ohio*. Secondly, the subject matters of the two suits respectively and the objects sought by them are different. As our petition embraces several matters which are contained in the bill in *Ohio*, the former may perhaps be considered as a cross-bill; but this is no ground of abatement. Thirdly, the court in *Ohio* has no jurisdiction. All the parties are without its local jurisdiction. It is the *res* only that is claimed to give jurisdiction. But the plaintiff in that bill does not pray for *the land*. His bill is not for a specific performance. This court certainly cannot judicially know that the court in *Ohio* has jurisdiction. The record does not shew that essential fact. Further, the suit pleaded in abatement is pending in a *foreign* court; and the pendency of a suit in a foreign court, though by the same plaintiff against the same defendant, and for the same cause of action, is no stay to a new suit brought here. *Maule* v. *Murray*, 7 *Term Rep.* 470. *Bowne & al.* v. *Joy*, 9 *Johns. Rep.* 221.

For the defendant in error it was contended,

1. That the petition was properly dismissed, because the superior court had not jurisdiction. They had not jurisdiction of the lands, for they lie in *Ohio;* nor of the contract, for though made in *Connecticut*, it was to be performed in

Massachusetts; (*a*) nor over the person of the defendant, for he belonged to a different sovereignty; he was not even a *resident* here, but *transiently* in this state. A resident is something less than a citizen, and something more than a traveller, or a person transiently in a sovereignty. The latter * is amenable to the laws of that sovereignty for crimes only. *Ld. Kaimes* 543.

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2. The petition brought in this state is insufficient. The petitioners aver, that security was not offered; that they are without relief at law; and pray that the respondent may be compelled to give up the contract. If they had relief at law, their bill was rightfully dismissed; and by their own shewing it is clear that they had. First, because *Granger* held as assignee, and they could non-suit him, or prevail against him on demurrer; as law does not recognize the assignment, nor allow him to sue. Secondly, because they were not to convey until the taxes were paid, and the security given, as a *condition precedent;* and these not being done, as they aver, they were not bound to convey. No suit at law can be sustained against them. At law, therefore, they are in no danger.

But they say, that the respondent threatens to vex them with suits *in equity*. The amount of this averment is, that the petitioners fear the respondent will seek redress before a court of equity; they therefore pray a court of equity to take his papers from him, and lay him under penalties so that he cannot make his grievances known.

Another ground relied upon by the petitioners for sustaining their bill, is, that they fear by lapse of time they may be deprived of the testimony of material witnesses. The principal facts set forth in the petition are matters of record, or under signature and seal, and require not the testimony of witnesses. The only fact averred which requires proof that may be destroyed by time, is the petitioners' *readiness to perform*. Now this readiness could be nothing more than *willingness;* a mere operation of the mind, to which neither angels nor men can safely testify. The furtherest they could go would be to prove facts indicative of this disposition of mind.

But the petitioners' readiness, if it existed, was immaterial; since, as they aver, the security was not offered; for surely, with-

(*a*) To shew that the *lex loci* is that where the contract is to be *performed*, the following authorities were referred to: *Thorne* v. *Watkins*, 2 *Ves.* 35. *Robinson* v. *Bland*, 2 *Burr.* 1077. *Nichols* v. *Cosset*, 1 *Root* 294.

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out offer of security, neither *Kirkland* nor *Granger* could claim of them the lands or damages.

In chancery this readiness is as unimportant as at law. If chancery decrees the forfeiture of the 24,000 dollars paid, the basis of her decree will be the *neglect* of the respondent, not the readiness of the petitioners. If chancery applies [*162] her known maxims and rules to the case, then readiness on the day is no reason why the contract, on a *subsequent* day, should not be carried into effect; nor why the plaintiff in *Ohio* should not now have relief.

Though a case might exist in which a dispute arose from an attempt or offer to perform, in which they might want witnesses; yet that is not the case before the court. This case is one where the petitioners charge a perfect and entire failure. It is one of *absolute neglect;* not one of contested sufficiency, or insufficiency, in an attempt to perform.

But if the petitioners really had material testimony which may be lost by time, still the superior court were not authorized to give the relief prayed for, or to perpetuate the facts. First, because the petitioners do not specifically state the facts which their witnesses will testify, that the court may judge of their relevancy or importance. Secondly, because they do not name these witnesses, that the court may judge of their competency. Thirdly, because they do not state the ages and infirmities of their witnesses, that the court may judge of the hazard of losing their testimony. Fourthly, because the statute and the rules of chancery, allow them to take the testimony *in perpetuam rei memoriam*. Fifthly, because by the rules of chancery, the danger, if real, of losing testimony, does not authorize a party to come into court, and claim relief; it only empowers the party to perpetuate the knowledge of facts.

The petitioners aver, that they have more acres of *Western Reserve* land than by the contract they were to convey to *Kirkland;* and they offer, if the court think it right, on the receipt of the 36,923 dollars, and compound interest from the 2nd of *September* 1797, and 5000 dollars for taxes, to convey this land. To this we answer, first, they do not state, that they have the lands drawn for the 36,923 twelve hundred thousandths. Nor secondly, that they have lands from soil and situation equal in value to the lands drawn for these 36,923 twelve hundred thousandths, or equal to the average of lands in the purchase. Nor thirdly, do they offer to convey the same lands; or lands of equal

value; or lands in value equal to the general purchase. They offer only as many acres; but they may not be of one half the value of the lands drawn, or of average lands. Their petition does not describe a single tract. Of the 92,307¼ acres mentioned, *not one acre is pointed out. No foundation is laid for a decree.

There is one further consideration, which in chancery must be conclusive against the petitioners. It is this. It is a maxim in equity, that "he who asks equity must do equity." If they want their contract annulled, they must offer to restore to the respondent what he has advanced on the contract: to place him in as good a situation as though the contract never had existed. From the record it is apparent that they have received nearly 24,000 dollars. They now apply for what they call equity; and to sustain themselves in the enjoyment of this sum, they violate every maxim of equity, and rely on arguments unknown to equity, which can only be addressed to a court of law. They ask to be relieved from an evil; and at the same time ask the court to inflict as a forfeiture a dead loss of 24,000 dollars on the respondent. This is not equity. She hates forfeitures and penalties. Instead of sanctioning them, she invariably vacates and destroys them.

3. The plea of the pendency of the bill in *Ohio* was a full answer to the petitioner's bill, and the superior court were bound to dismiss their bill. At any rate, they had a *discretion*, and that discretion was exercised in a way which evinces their wisdom and regard for justice. They were bound to respect the proceedings of the court of *Ohio*. *Burroughs* v. *Jamineau*, *Mos.* 1. 2 *Eq. Ca. Abr.* 476. *Beak* v. *Tyrrell*, *Carth.* 31.

The constitution of the *United States* ordains, that full faith and credit shall be given to the judicial proceedings of other states; and the law explains this by declaring it shall be the same credit that is given to the records of other courts in the same state. Now, a court of chancery sitting at *Litchfield* would never command a party in *Connecticut* before a court of chancery at *New-London* to desist from asking relief, and to give up the evidence of his claim.

We contend that the pendency of the bill in *Ohio* was a sufficient answer, because it was between the same parties, and for the same subject matter. *Mitf.* 133. 182. 183. 1 *Harr.* 345. *Foster* v. *Vassal*, 3 *Atk.* 587. *Morgan* v. ——, 1 *Atk.* 408. 1 *Eq. Ca. Abr.* 38. 39. *pl.* 12. 14. It is a good plea to a bill in *Ireland* that the same controversy is pend-

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ing before the chancery in *England*. *Arguendo*, *Arglasse* v. * *Muschamp*, 1 *Vern.* 76. So it is a good plea that another court has jurisdiction; and if this appears on the record, the defendant may demur. Besides, chancery will not hold plea in a cause arising under a different jurisdiction. *Jennet* v. *Bishopp*, 1 *Vern.* 184. It has no power over the lands at *St. Christophers*, or any where out of her jurisdiction. *Roberdeau* v. *Rous*, 1 *Atk.* 544.

The objection to our plea that the court in *Ohio* had not jurisdiction, is without foundation. The jurisdiction of courts is founded, first, upon their authority and control over the *property* within the sovereignty under which they act; secondly, upon their authority over the *persons of the defendants* belonging to or resident within that sovereignty. As the court of King's Bench claims a general correcting power over persons and law proceedings throughout the realm; so chancery claims to possess a power of equal extent over the property and consciences of men. *Earl of Kildare* v. *Eustace & al.* 1 *Vern.* 419. Though neither of the parties are residents in *Ohio*, yet the property, which is the subject of controversy, is there; the question ought to be settled by her laws; and her courts are the only constitutional expositors of her laws. In an anonymous case, 1 *Atk.* 19. the chancellor decreed to a lady at *Dantzick* against her husband in *Prussia*, an allowance out of stock in *England* belonging to her, for her and her children's maintenance. The Grand Session of *Wales* sequestered the lands lying in their jurisdiction of a person residing at *London*, because he did not answer to a bill before them. 6 *Com. Dig.* 508. So the chancellor of *Virginia* held plea of a bill brought by *Swann* of *France* against *Wolcott* of *Connecticut*. So the chancellor of *New-York* held plea of the bill *Tallmadge* and others of *Connecticut* against *Odgen* of *New-Jersey;* and of *Morriss* of *Pennsylvania* against *Phelps* and *Gorham* of *New-England*. See also *Manwaring* v. *Harris*, 2 *Root* 456.

Finally, there is no solidity in the objection, that the plaintiff in *Ohio* does not ask for a specific performance; for he asks an injunction which no other court can effectually grant and secure, and the moment a decree comes it is a lien on the land. Besides, it is a novel doctrine that the form

of the prayer gives the jurisdiction. A general prayer is always good.

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* INGERSOLL, J. [after stating the principal facts.] As to the first matter alleged in the plea in abatement, to wit, that the service of the petition was void, inasmuch as the respondent, now defendant in error, was not an inhabitant of this state, and was but transiently in it, when the copy was left with him, I am clearly of opinion that it is unavailable. There is no difference as to the validity of such service, between suits at law and in chancery. As to suits at law, one mode of service is to leave a copy of the writ at the defendant's usual place of abode, which by statute is good in every case where the defendant, at the time of service, belongs to this state. Another mode of service is to read the writ in the hearing of the defendant; and this, if done by a proper officer, or by one properly authorized, is good service in all cases, as well where the defendant does not belong to this state as in those where he does belong to it. This is called personal service, and by the statute is good notice of the suit.

Originally, the General Assembly exercised all chancery jurisdiction; and it was enacted, that all petitions returnable to that forum should be served by leaving a copy of the petition with the respondent, or at his usual place of abode. When chancery jurisdiction was given to the superior and county courts, the same powers were given to these courts in all equity cases coming under their cognizance as had been exercised by the General Assembly in cases of the like kind. Petitions have uniformly been served in the same manner as those were which were returnable to the General Assembly. And never has there been a distinction as to service on the person of the defendant, whether he did or did not belong to the state. In an action at law, the writ must be read in the hearing of the defendant: In a petition in chancery, a copy must be left with him. In *all* cases this kind of service is good. When I speak of actions at law, I mean those in which the defendant is summoned only to answer to the suit.

I am of opinion also, that there is enough stated in the petition to warrant the interposition of the court. At any rate, I am not prepared to say, that a court of chancery can give no relief in such a case as is presented in the petition.

As to the third matter alleged by way of abatement, to

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wit, the bill in chancery, filed by the defendant in error * against the plaintiffs, in the court of common pleas in the state of *Ohio*, and the proceedings thereon, and the operation of the same on the petition, there may be more of a question. On the one side, it has been argued, that this bill in chancery before the court in *Ohio*, would have no operation on the petition at all: In the first place, because it appeared that neither the plaintiff nor the defendants were inhabitants of the state of *Ohio*, at the date of the bill and the service of the *subpœnas*, and at the time of plea pleaded; that though the lands, the subject of the controversy, lay within the jurisdiction of the courts of *Ohio*, yet there was no prayer in the bill for a specific performance of the contract set forth in it, nor for any part of the lands, but for a recompense in money; that of course, the whole of the proceedings before the court were *coram non judice:* But secondly, supposing for argument's sake, that these proceedings were not *coram non judice*, but were before a court of competent jurisdiction, yet that no advantage could be taken of this statement of the case by a plea in abatement; that in contracts containing mutual covenants there may be claims on each side, and consequently, that mutual suits may be sustained for enforcing such claims; that one suit is never pleadable in abatement of another except where a plaintiff harasses a defendant with two suits for the same cause, matter and thing; that it is pleadable only by a defendant where two suits for the same thing are brought against him, not where he has first brought a suit on a contract, and the plaintiff afterwards brings a suit on the same contract.

On the other side it was said, that the proceedings were not *coram non judice*, inasmuch as there was in the bill a general prayer for relief, and under this general prayer a decree might be made vesting these lands, or a part of them, in the defendant in error; and whether the court could give relief in the precise mode specifically prayed for, was totally out of the question. Further, it was said, that though in some instances actions on a contract might be pending in favour of both parties, each against the other, at the same time, yet that this was not an universal rule: That in all cases where one action or suit will settle the rights of the parties, two are not sustainable; and that the case under consideration is of this latter kind; and if so, a former suit

or bill is pleadable in abatement of a second on the ground of its being brought for the same matter, cause and thing.

Upon the best consideration I have been able to give to the question, I am of opinion that the proceedings before the court in *Ohio* are not *coram non judice*. It appears by the record, that that court has jurisdiction in chancery suits; consequently, if there are proper parties before it, or rather if the plaintiff in that suit has a right to call the defendants before the court to answer his claim, and they are *properly* called, all the proceedings are as regular as if they had been before a court of chancery in this state. It matters not, I apprehend, as to the point of jurisdiction, whether or not a court of chancery can, *beyond all question*, give relief in the case stated in the bill. It is sufficient if application be made to such court for relief; or, at any rate, if plausible grounds for relief are so stated. The present case no doubt is a proper one to be brought before a court of chancery; and unless relief can be obtained in such court, it can be obtained no where. If there had been in the bill a prayer for a specific execution of the contract, by conveyance of the land, or any part of the land, this of itself would have given jurisdiction to the court, whether the parties lived out of the state of *Ohio*, or in it. This is a fixed principle in chancery, and has been fully adopted in this state. Indeed, by a statute law of this state (*a*) all actions to try the title of land, or wherein the title of land is concerned, must be brought to a court in the county where the land lies. Nor is it necessary in cases of this kind that a court of chancery should have had authority to send any process of notification to the place or places where the defendant or defendants dwell. It will suffice to give them reasonable notice of the suit; such notice as the court shall direct. True it is, the courts of chancery in this state are authorized by statute (*b*) to give such notice to defendants being out of the state as they shall think proper. But I imagine this statute was passed *ex abundanti cautela*, and went upon the ground that the court had jurisdiction of the cause by means of the subject matter of the controversy (the land for instance) being within the limits of this state. This appeared to be an agreed principle in the argument of the cause, as the only objection made to the jurisdiction of the court was, that there was in the bill no specific prayer respecting the land, but that it was merely for a sum of

(*a*) *Tit.* 6. *c.* 1. *s.* 6. (*b*) *Tit.* 42. *c.* 30.

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money, which of itself would not give jurisdiction, circumstanced as the parties were. But this objection will vanish, if it be an established principle, that under the general prayer to give such relief as is proper a specific execution of the contract as to the land can be decreed. And that this is an established principle, is a matter so plain, and occurs, and is acknowledged, so often, in daily practice, that I shall adduce no arguments to prove it.

But supposing for argument's sake, that this principle is not so well established, yet, as has been observed, the case presented by the bill is properly a chancery case, apart from the circumstance of there being no specific relief prayed as to the land. The plaintiff in the bill says, he tendered to *Hart* and *Mather* performance of his part of a contract made by *Kirkland* his assignor, on the very day, and in the very place, designated by the contract for the performance of it; and that what he did was a literal performance of his part of the contract, except that the securities tendered were not made payable in *Hartford;* and that they were not so made payable was owing to his ignorance of the obligation he was under so to make them payable. He says further, that *Hart* and *Mather* availing themselves of this circumstance, refused, after the day, to receive securities from him, all made perfectly right, and to make an assignment of the *scrip* according to the terms of the contract, but chose rather to pocket the money they had received from him and his assignor as part of the consideration. Under these circumstances, he prays for relief. This, I say, is a proper case for the exercise of chancery jurisdiction, and whether or not a decree can be made respecting the land, yet if the court can adjudicate between the parties, the bill cannot be thrown out on the ground of being *coram non judice.* This, I think, is clear. The question then is, even supposing it necessary to give the defendants legal notice of the suit, whether the parties are so before the court, and the cause is of such a kind, as that this particular court can take cognizance of it.—There can be no difficulty about the *cause*, even going on the most narrow ground, inasmuch as the contract has reference to property within the jurisdiction of the court. It follows then of course, if the court can get hold of the defendants (if I may use the expression); that is to say, if the

defendants are so within the jurisdiction of the court as that they can be *commanded* in the subpœna to appear and answer to the bill, and if they are so commanded; that the proceedings are not *coram non judice*. These principles being correct, if the subpœnas had been served on the defendants in the state of *Ohio*, the parties would have been properly before the court; or, at any rate, every thing requisite would have been done to give the court jurisdiction.

But it may be said, that the subpœnas in the present case were served on the defendants out of the jurisdiction of the court, and were inoperative as to giving it jurisdiction, inasmuch as the defendants could not be commanded to appear and answer to the bill; that in fact they have never been legally notified of the suit. How the case would have been, (going on the ground that legal service of the subpœnas was necessary) if the defendants had taken no notice of the subpœnas, and had never gone before the court, it is unimportant to say, provided it appears by the record, as I think it does, that they have actually appeared, and have thereby given the court jurisdiction, as far as it was competent for them to do it.

I agree most fully, where the court has not on any ground jurisdiction of the cause, that no consent of parties will validate the proceedings. As for instance, no consent of parties can give a justice of the peace jurisdiction to try the title of land in an action of ejectment brought before him. No action to try the title of land lying in *Hartford* can by consent of parties be brought before a court in the county of *New-Haven*. But when the want of jurisdiction arises from want of notice to the defendant, by not serving the writ a sufficient number of days before the court, or from any other defect of service, this defect may be cured, and jurisdiction given, by the defendant's waiving every objection to the service of the writ, and voluntarily appearing before the court, and answering to the suit.

Before I apply these principles more particularly to the case under consideration it may be expedient to observe, in order to enforce the position that personal service of the subpœnas in the state of *Ohio* would have given the court jurisdiction, that the practice in this state is exactly conformable to this idea. It is the universal practice in this state, and may be said to be the common law of the state,

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to sustain jurisdiction of a cause where both parties belong out of the state, provided the defendant can be caught and service can be made on him here.

A few words more now with respect to the appearance of the defendants. The record shews, that they went before the court, and filed their motion for the removal of the cause to the circuit court, not at all objecting to the jurisdiction on the ground of a want of legal notice. This step of the defendants would alone, in my opinion, validate all the proceedings. But further, the record shows, that on this motion being over-ruled, there was a continuance of the cause. At the next court a demurrer is taken to the bill; and, to be sure, one cause of demurrer assigned is, that the court had not jurisdiction. It will be observed, however, that no exception is taken to the jurisdiction for want of legal notice.

This exception to the jurisdiction, if the proper ground had been assigned, I think comes too late; and besides, is improperly pleaded. A plea to the jurisdiction must be the first plea, and must be mixed with nothing else. Clear I am, therefore, that the proceedings in the court in *Ohio* are not *coram non judice*.

As to the operation of the proceedings, going on the ground that they are regular, and that the court in *Ohio* has jurisdiction of the cause, I had some doubt before the argument was closed. I was doubtful whether any other advantage could be taken of those proceedings than by moving for a continuance of the petition on which this writ of error is brought till a trial could be had of the bill in chancery in the state of *Ohio*. But on the whole, I have come to this conclusion, and with little or no doubt now remaining, that the plea in abatement grounded on the aforesaid proceedings, was well put in, and that the judgment of the court below on the same was right. I will not say, if the bill had been filed by the defendant in error before the court in *Middlesex* county, that the plea would have been available. Perhaps the petition in such case might have been considered as a cross-bill, and both petition and bill have been tried together. Whenever both processes are before the same court, there is no danger of injustice being done, or of hardship taking place, by trying the last process in point of time, first. Cases there may be indeed, where processes in favour of both parties may and ought to subsist at the same time. All cases of

mutual covenants, where one covenant is the consideration of the other, are of this sort. So also are actions of book-debt where a balance is claimed by both parties. A defendant in an action of book-debt may not only claim a balance to be due to him, but may want to secure it by attachment. For this purpose, it is competent for him to bring an action pending the plaintiff's suit. In short, whenever the determination of the plaintiff's suit will not put an end to the controversy, the defendant may bring an action on the same contract. But, as a general principle, if the determination of the suit first commenced will determine the whole controversy, the first is pleadable in abatement of the last; at any rate, it is so, if the suits be not in the same court. I know not, indeed, that it would make any difference at law, if they were both in the same court. It rather strikes me, that in chancery, as the court could easily try them both together, and settle at once all the controversies between the parties, the suits would stand on the ground of bill and cross-bill. But if the suits be before different courts, one court would have no control over the proceedings of the other, and unless a plea in abatement were allowed, as above stated, manifest injustice might be done, by trying the last suit brought, first. This would be inequitable, inasmuch as the plaintiff who first brings a suit gains, and ought to gain, a priority thereby; and when the rights of the parties can be settled in this suit, he ought not to be harassed with a suit before another court in favour of the defendant.

Again, to test the principle that in such a case the first bill ought to abate the second, let us see what operation a *judgment* on the first suit would have on the second. If a judgment on the first bill would settle all the rights of the parties, it could unquestionably be pleaded in bar of the second, and would be available to bar all proceedings on it. This proposition certainly is very clear, and needs no argument to prove the truth of it. It seems to me, then, to follow conclusively, that a first process undetermined would abate a second.

It remains but now to consider whether a determination of the suit before the court in the state *Ohio*, let it be either way, would not be conclusive as to every thing contained in the petition of the plaintiffs in error. The general ground stated for bringing the petition is, that the defendant in error will not bring a suit against them to try the question whether

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they are liable to him on the contract; and notwithstanding this that he will not give it up to be cancelled. But the fact is, he had, at the very time, brought his suit to enforce the contract; and therefore, on this ground there could be no need of bringing the petition. They go on further to pray the court to order the defendant in error to deliver up to them the contract to be cancelled without any thing being done on their part, or if it should be supposed that in equity they are still holden on it, to give such relief as the case should require, and on such terms as the court should think proper. The drift of the petition, therefore, is, for the court to determine whether it is in any sense binding on them; and if so, in what manner, and on what terms, it shall be performed. This is the ground stated in the petition for the court to proceed upon; and it is as clear to me as any proposition that can be stated, that a decision on the bill of the defendant in error will take away this and every other ground on which the petition can stand. If the court in *Ohio* should grant relief to the defendant in error on his bill, this would be conclusive as to any redress the plaintiffs in error could have on the contract. They could not have it delivered up to them to be cancelled, nor could the court below give any relief, or prescribe any terms for giving relief to either of the parties. Such a decision on the bill would end the controversy. If, however, the determination should be against the defendant in error; in such case, the plaintiffs would obtain exactly what they wish. This judgment would protect them from all future suits on the contract, and there would be no need of its being delivered up.

In every point of view, the case must be with the defendant in error; and I think the judgment ought to be affirmed.

In this opinion SWIFT, TRUMBULL, BRAINARD and BALDWIN, Js. severally concurred.

REEVE, Ch. J. and SMITH, J. dissented.

EDMOND, J. also dissented, and assigned his reasons in substance as follows.

On the sufficiency of the petition it appears to me there can be but one opinion.

The plea in abatement to the jurisdiction of the court rests

on the ground, that the respondent was a citizen of *Washington*, and only passing through this state at the time he was summoned.

If the person is within the local jurisdiction of the court at the time of the summons, and personally served, it is sufficient to give jurisdiction to the court. Strangers while here are under the protection of our laws, and owe a local obedience. When summoned, and the process returned to the court, and entered in the docket, the jurisdiction of the court attaches in the same manner it would attach by a like personal service in the case of a citizen of this state.

It was contended, that a court of chancery will not hold jurisdiction and pass a decree where it must *of necessity* be nugatory and unavailing; that should the respondent go out of the state before a decree is passed, the decree would be defeated.

To this it may be answered, in every instance where the process is by summons, the defendant or respondent, before judgment rendered or decree passed, may withdraw his person and effects, so as to render a judgment or decree inoperative; but because this is possible, the bare possibility that the judgment or decree cannot be carried into effect is not a sufficient reason for dismissing the action or petition from the court.

Should a foreigner contract a debt in *Connecticut;* for example, purchase a horse to carry him on his journey, and refuse to pay, the creditor at his election may summon or attach; should he adopt the former mode, it would be a singular plea on the part of the defendant, to say, the action ought to abate and be dismissed, because he has it in his power to render nugatory any judgment that may be rendered.

The possibility or probability of the applicant failing to derive benefit from his process, is not the criterion by which the court are to be governed. If indeed it can be shewn to the court, that by any event anterior to the plea of abatement pleaded, any judgment or decree of the court that could be rendered or passed, must of *necessity in all events* be nugatory, the court will dismiss the application; but that is not the case here. The objection only amounts to this: I can by leaving the state forever escape the effect of your decree.

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The pendency of another petition in *Ohio* is also urged as a ground for abating the present petition.

Where the petitioners are the same, the respondents the same, and standing in the same relation, and the prayer of the petition is for the same thing, before a court of competent jurisdiction, it is but reasonable that the prior should abate the latter; because in such case the latter is vexatious. But that is not precisely this case. The prayer of the petition in *Ohio* is general, "that what pertains to justice may be done." If by this prayer we are to understand that the remedy sought is against the person, there is a manifest want of jurisdiction in that court. The respondents in that petition, or either of them, never were in *Ohio* to be served with the petition, and in that way give jurisdiction. If then the court in *Ohio* have jurisdiction at all in the case, it is on the ground that specific relief is sought, and that the proceeding is to act *in rem*. It was stated in the argument, and so appears from the record, that the respondents in that petition, before plea or answer, prayed a removal into the circuit court of the *United States*, which was denied; and that a demurrer was then taken to the jurisdiction. If so, the question whether the petition in *Ohio* is such as to give to that court competent jurisdiction remains yet to be decided there; and the opinion of this court on that point cannot vary their decision. If then we abate the petition before us, on the ground of the petition pending in *Ohio*, and the court there should dismiss that petition, or it should be withdrawn, the petitioners in this court will be turned off without remedy, and driven probably to seek redress in some other state. Under these circumstances, as this court is not furnished with evidence (for a recital of the petition in the plea is not proof) that a petition is pending before a court of competent jurisdiction in *Ohio* between the same parties, and the matters offered in the plea in bar appear to me insufficient, and it can produce no conflict of jurisdictions, or argue any want of comity to that court, I think it would be correct to sustain the present petition, until the fate of the petition in *Ohio* is decided by that court. Should the petition there be sustained, and a decree passed embracing all the objects properly sought by the present petition, on proper proof of those facts, it will be time enough to say, that any decree passed by this court would be nugatory.

On the whole, I am satisfied, that the petition here is sufficient; that the superior court had jurisdiction; and that the petition in *Ohio*, with the proceedings there had, furnished no sufficient ground for abatement or bar; and that the judgment of the superior court was erroneous.

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Judgment affirmed.

TOUSEY *against* PRESTON.

A. and *B.* having entered into a written contract, by which, after reciting that there were two suits pending in favour of *C.* and *D.* against *E.* and *F.*, *B.* promised "to account with *A.* for one third part of all the moneys and other property that should be recovered of *E.* and *F.* by judgment of court and collected, in such property as should be collected;" *B.* settled such suits before judgment, and received of one of the defendants therein a certain sum in goods and cash: Held that *A.* might waive his remedy on the contract, and recover of *B.* one third of the sum so received by him, after deducting his reasonable expenses, in an action for money had and received to the plaintiff's use.

Though in such action the contract be specially stated, and though it be a *sine qua non* of recovery; yet as it is inducement only, and not the gist of the action, it is not of course necessary to shew the happening of a condition which it would be indispensable to show in an action on the contract.

That account will lie is no objection to bringing *assumpsit*, if the defendant is not thereby deprived of any right, or subjected to any inconvenience.

THIS was an action of *assumpsit*. The declaration stated, That two suits had been brought before the county court in *Fairfield* county, in one of which *Shadrach Osborn*, *Garwood H. Cunningham* and the present defendant were plaintiffs, and *David Baldwin*, *Samuel Beers* and others were defendants, and in the other *David Tallman* was plaintiff, and *Solomon Glover*, *Daniel Ferry* and others were defendants; alleging a combination in the defendants in those suits to defraud the plaintiffs in the pretended sale of certain lands lying on the waters of *Tenessee* river, by means of which combination, and the deceitful practices of the defendants, they obtained large sums of money from the plaintiffs without any equivalent; demanding, in one suit, the sum of 3000 dollars, and in the other, the sum of 12,000 dollars, damages: That the plaintiff and the defendant were the joint proprietors, by lawful assignment, for valuable considerations, of each of the rights and claims in the declarations respectively alleged, and had good right in said actions, in the names of the plaintiffs therein, to have and recover of the defendants therein, the sum of 1000 dollars with interest in the action first mentioned, and the sum of 8000 dollars

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with interest, in the other action; the plaintiff's proportion of interest in such claims being one third part, and the defendant's, two third parts: And that while said actions were pending, one in the superior court, the other in the county court, *viz.* on the 3rd of *January* 1812, the defendant received of the demands in said declarations respectively set forth the sum of 2,500 dollars of *Solomon Glover*, and the sum of 700 dollars of *Samuel Beers;* and also received, at the same time, of the defendants in said first action the sum of 1800 dollars in full of the demands in that action, and also received of the defendants in said second action the further sum of 10,000 dollars in full of all the demands in that action, and discharged both actions and all claims therein stated. The declaration then averred, that one third part of the sums so received by the defendant on account of the demands in said declarations set forth, were received by him to and for the plaintiff's use, and thereby the defendant became indebted, &c. and assumed and promised, &c.

The defendant pleaded *non assumpsit.* The cause was tried at *Danbury*, *September* term, 1814, before *Reeve*, Ch. J. and *Edmond*, J.

On the trial the plaintiff offered in evidence a writing of the following tenor: "*Newtown*, *January* 1st, 1811. For a valuable consideration, I hereby agree, that whereas there is a suit depending before *Fairfield* superior court, *Shadrach Osborn*, Esq. and others, plaintiffs, and *David Baldwin* and others, defendants, I promise to account unto *Oliver Tousey*, for one third part of all the moneys and other property, that shall be recovered of the defendants by judgment of court and collected, to be accounted for in such property as shall be collected. And whereas there is a suit in contemplation in favour of *David Tallman* against *David Baldwin* and others, on a contract made with *Daniel Ferry* in the year 1795 or 1796, I hereby agree to account with said *Oliver* for one third part of the sum which shall be recovered against said *Baldwin* and others by judgment of court and collected; to be accounted for in such property as shall be collected.—(Signed) *Nathan Preston.*" To the admission of this writing the defendant objected on the ground that it did not conduce to prove any of the facts stated in the declaration. The court over-ruled the objection, and admitted the writing in evidence. It was agreed by the parties, that the suits

mentioned in the declaration were settled by *Preston*, and never went into judgment; and that he received *Solomon Glover's* promissory notes for the sum of 2,500 dollars, payable in three annual instalments; but that no part of said sum had been paid by *Glover* at the commencement of this suit. The plaintiff claimed on the trial, that the defendant had received on the settlement of said suits, and before the commencement of this suit, 700 dollars of *Samuel Beers*. The defendant denied that he had received that sum, but admitted that he had received 200 dollars in goods and cash, and claimed that he had expended large sums of money in the prosecution of said suits, and exhibited an account thereof. All the evidence exhibited on the trial consisted of this account, the writing above recited, and the evidence relative to the amount received on the settlement. The defendant contended that the proof did not support the declaration; that by law said suits could not be assigned to the plaintiff; that if any action could be sustained, it must be either an action of account, or an action founded upon the contract; and that the condition upon which the defendant was, by the contract, to account with the plaintiff, had never happened, as nothing had been *recovered by judgment of court*. The defendant, therefore, claimed that the court ought to instruct the jury, that this action could not be sustained. But the court did not give any opinion to the jury upon these points; but decided and instructed the jury, that no money could be recovered in this action on account of the notes against *Glover*, because no part thereof had been collected at the commencement of this suit; but if the defendant had received of *Beers* more than sufficient to pay the money the defendant had expended in said suits, they might find for the plaintiff to the amount of one third of the sum that remained after deducting the expenses. The jury thereupon returned a verdict for the plaintiff for 56 dollars 22 cents, and costs. The defendant moved for a new trial on the ground that the court erred in admitting the writing in evidence, and in not charging the jury pursuant to the claim made by him. The questions arising on this motion were reserved for the advice of all the Judges.

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N. Smith, in support of the motion, enforced the positions which had been contended for by the defendant on the

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trial. He cited *Weston* v. *Downes*, *Doug.* 23. *Towers* v. *Barrett*, 1 *Term Rep.* 133. *Hulle* v. *Heightman*, 2 *East* 145. S. C. at * *Nisi Prius*, 4 *Esp.* 77. *Hunt* v. *Silk*, 5 *East* 449. *Mussen* v. *Price*, 4 *East* 147.

R. M. Sherman, contra.

BRAINARD, J. The action is a special *assumpsit* for money had and received by the defendant for the plaintiff's use.

The first objection stated in the motion is, that the court admitted in evidence a certain writing therein recited. The objection to the admission of this writing is, that it does not conduce to prove the facts stated in the declaration. It is further objected, that if admitted, it proves, as it respects this action, too much; that if it proves any thing it proves that this action cannot be sustained; that if any action will lie, it must be account, or an action founded on this particular and precise contract; and that thus the court ought to have instructed the jury. And the real question is, whether, that writing notwithstanding, this action can be sustained?

One question made on the argument was, whether the writing was the origin or creation of the plaintiff's right, or the acknowledgment of a pre-existing right? On the part of the plaintiff it was contended, that one third of the moneys claimed by the suit was originally the plaintiff's, and that the writing was evidence of that fact; that it was properly introduced to shew that such was the case; that the expression "I promise to account" does *ex vi termini* necessarily import the acknowledgment of a pre-existing right.

For myself I do not very well see that this distinction is of much importance. But in point of construction I am inclined to think that the writing is the origin or creation of the plaintiff's right, and not a mere acknowledgment of an antecedent right; that previous to its execution, the plaintiff had no interest in the subject; for the writing does not seem to contemplate any thing antecedent. It seems to speak altogether in the present time.

I know that it is objected that the suits contemplated in the writing could not be assigned. But a man may covenant, for a valuable consideration, to pay over a certain proportion of money which he may recover on a suit of his own. This would be no assignment of the suit or right of action. It would be a mere covenant to pay money upon a contingency.

But, be this as it may; if the plaintiff had rights anterior to the contract, which are only recognized and regulated by it; or if they were created by it; still when once created, they must be governed by the same rules.

We must, therefore, substantially found ourselves upon the contract; and the question still recurs, what are the plaintiff's rights and remedies under it?

There are instances where a man may have an election of remedies. He may either have his action in damages upon his written contract for the breach of it, or he may waive his contract, and claim a sum of money which the defendant holds, the very reception of which might constitute the breach. Here the action would not be founded on the contract; but the contract would be stated and relied on as inducement. For instance, *A.* receives of *B.* a cargo, and promises by a written contract to transport it to the *West-Indies*, and there vest the avails in a cargo of sugars, and on return to deliver it to *A.* at some port in *Connecticut*. *B.* accordingly proceeds to the *West-Indies*, procures a cargo of sugars, returns to *New-York*, there disposes of it for money, and puts it in his pocket. In such case, I see not but that *A.* may have his remedy on his contract; or he may waive that, and sue for the money.

Analogous to this is the present case. If *Preston* was guilty of a breach of contract, as it is contended he was, *Tousey* might have sued him in damages; but if *Preston* recovered money, to which, in virtue of that contract, *Tousey* had a right or a claim, he might waive his remedy on the contract, and sue for his proportion of the money.(*a*)

The money recovered by *Preston* of *Samuel Beers*, and respecting which the court directed the jury, proceeded out of the rights contemplated by the contract, and in which the plaintiff was interested, on the execution of the contract, if not before.

In this case, the plaintiff goes for the money; and under the contract, not as the gist of the action, but as the inducement, and indeed *sine qua non* of recovery, is entitled to receive his proportion of what the defendant may have realized. The court are careful to discriminate, and give a rule by which to determine what ought to be.

As to the action of account; a plaintiff cannot arbitrarily waive that, and adopt another, to the essential prejudice of a

(*a*) See *Pettibone* v. *Pettibone*, 4 *Day*, 175. *Hinsdale* v. *Edes*, 3 *C. R.* 377. *Lyon* v. *Annable*, 4 *C. R.* 350. *Hawley* v. *Sage*, 15 *C. R.* 52.

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defendant. But in this case, it does not appear that by waiving the action of account, (for I believe it would have lain) and bringing *assumpsit*, the defendant is deprived of any right, or subjected to any inconvenience.(1) The action is special, and well calculated to guard against any surprise upon the defendant. The court direct the jury to look to the money which *Preston* had actually received, to see how much he was entitled to retain before a dividend be made; and if they found a surplus, to give *Tousey* his proportion according to the contract; which, I think, is not only equitable, but legal.

I would not advise a new trial.

In this opinion the other Judges severally concurred.

New trial not to be granted.

HOLLY *against* LOCKWOOD and others.

A resolve of the General Assembly, on the petition of *A. B.* and *C.* describing themselves as *select-men of the town of S.* authorized *the said select-men* to sell and convey the real estate of *R.* a person *non compos mentis*, and to use the avails for her support, "the said select-men, in case of the decease of said *R.* being subject to account with her *legal representatives* for so much of her estate as should remain unexpended at the time of her decease;" in pursuance of which, *A. B.* and *C.* sold said real estate, and received the avails: Held, that after the decease of *R.* they as individuals, and not the town of *S.* were liable to account for the money so received, and that the administrator of *R.* was entitled to bring the action.

THIS was an action of account, brought by *Holly*, as administrator of the estate of *Ruama Holly*, late of *Stamford*, deceased, charging the defendants with having received of said *Ruama* many sums of money amounting in the whole to 1500 dollars, to put at interest, and to render their account thereof on demand. The declaration stated, that said *Ruama* being naturally wanting in understanding, and incapa-

(1) The common law action of account is not favored in New York, where it has become nearly obsolete. In *McMurray* v. *Rawson*, 3 *Hill R.* 60, BRONSON, J., said, that "All the Books agree that this is one of the most difficult, dilatory and expensive actions that ever existed, and it has long since given place to other remedies. In this State, it does not appear that more than one action of account was ever brought before, (*Jacobs* v. *Fountain*, 19 *Wend. R.* 121,) and the present experiment will probably be the last. In England the action seems not to have been brought more than a dozen times within the last two centuries, and in most of the cases the difficulty has been about the form of the remedy, rather than the rights of the parties. One of the last cases which I have noticed in the English Books was brought in 1768, and ended in 1770 (*Godfred* v. *Saunders*, 3 *Wils.* 73.)" And see the learned opinion of COWEN, J. in the same case.

ble of taking care of herself, the defendants brought their petition to the General Assembly in *October* 1793, praying for liberty and authority to sell the real estate of said *Ruama* consisting of about twenty-four acres of land in *Stamford*. This petition was granted, and a resolve passed authorizing the defendants to sell and convey said land, and to use the money arising therefrom for the support of said *Ruama* as should from time to time be necessary, the defendants being made subject, in case of her decease, to account with her legal representatives for so much of her estate as should then remain unexpended. The defendants accordingly sold the *land for the sum of 500 dollars, which sum they received [*181] for the purposes mentioned in the resolve, but never expended any part of the principal or interest for the support of said *Ruama*, who died in *January* 1813.

The defendants pleaded, that they were not bailiffs and receivers as the plaintiffs had alleged; on which issue was joined. The cause was tried at *Danbury*, *September* term 1814, before *Reeve*, Ch. J. and *Edmond*, J.

On the trial, the plaintiff offered in evidence an exemplification of a resolve of the General Assembly passed in *October* 1793, in the following words: "Upon the petition of *Isaac Lockwood*, *Sylvanus Knapp*, *Nathaniel Webb* and *Charles Smith*, select-men of the town of *Stamford*, shewing to this Assembly, that *Ruama Holly*, daughter of *Francis Holly*, late of said *Stamford*, deceased, is naturally wanting in understanding, and incapable of taking care of herself; that she is, and must continue to be, chargeable to said town; and that she is the owner of about twenty-four acres of land in said *Stamford*, which is unfenced and unprofitable, but would now sell to advantage; and that the avails thereof, if now sold and put on interest, would provide for her support a much longer time than if disposed of in any way authorized by law; that said *Ruama* is less than thirty years of age, and will in all probability live to expend the whole of her own estate, and be an expense to said town; praying authority to sell the real estate of said *Ruama* &c. as per petition on file: *Resolved by this Assembly*, that said select-men be, and they are hereby authorized and empowered to sell and convey the real estate of said *Ruama* lying in said *Stamford*, and use and improve the money arising therefrom for the support of said *Ruama*, as may be necessary from time to

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time, the said select-men, in case of the decease of said *Ruama*, being subject to account with the legal representatives of said *Ruama* for what of her estate shall remain unexpended at the time of her decease." The plaintiff offered this resolve in connexion with evidence that the defendants had sold and conveyed the land, and had received the avails. But the defendants contended, that the resolve was inadmissible on the ground that the defendants were not liable in their individual capacity for the money received by them. On this objection the court rejected the evidence offered; and the defendants obtained a verdict. The plaintiff moved

[*182] for a new trial; and the questions arising on such motion were reserved for the consideration of all the Judges.

N. Smith argued in support of the motion.

Bissell, contra.

SMITH, J. There appears from the argument of counsel before this Court to be two principal objections to the admission of the resolve in question. 1st, That the defendants acted only as select-men in behalf of the town of *Stamford*, and are not liable to account as individuals with any person whatever. 2ndly, But if they are liable to account, it must be with the heirs of *Ruama*, and not with her administrator.

The first of these objections is settled at once by recurring to the resolve itself, which is recited at length in the motion for a new trial. We there find the resolve to be on the petition of *Isaac Lockwood* and others. It is added, indeed, that they are "select-men of the town of *Stamford;*" but this appears to be inserted merely as description of the men, and it is no where even intimated that they petition for and in behalf of the town. When we come to the resolve itself, we find it authorizes *the said select-men* to sell the land; which is nothing more than to enable the same *individual persons* before mentioned, and who had been already described as being select-men, to sell; but they are not directed to sell as select-men, nor to sell for the use and benefit of the town; nor is there any intimation that the town in any event is to account for the money, although there is an express provision that *the said select-men* shall be accountable for the avails of the land on the death of *Ruama*. This resolve, then, does not purport to authorize the town to sell the land

by these individual select-men as their agents; nor does it vest such power in the select-men of the town generally; but it is *the said selectmen* who are petitioners, that are invested with the power in their own right, and on their own account. It ought also to be noticed as appearing from the motion for a new trial, that the plaintiff offered evidence in connexion with this resolve, that the defendants actually sold the land, and received the avails of it. In my judgment, therefore, there is nothing appearing on the face of this resolve, which renders the town liable to account for the avails of the land, * and much less the successors of the defendants in office; who [*183] do not appear to have had any of the money come into their hands. And it is equally obvious that the defendants who have sold the land, and received the avails, must be accountable.

The second objection is principally founded on a part of the resolve which is in the following words: "The said select-men, in case of the decease of the said *Ruama*, being subject to account with the legal representatives of said *Ruama* for what of her estate shall remain unexpended at the time of her decease." This, it is said, renders the select-men liable to account with the *legal representatives* of the deceased, who in point of law must be the heirs; and besides, as the money in question is due for the sale of land, it must be considered as land.

To answer this objection it becomes unnecessary to determine the precise meaning of the term *legal representatives* as used in this resolve; though I very much doubt whether any technical meaning can with propriety be affixed to it. Whatever may be said about this clause, it cannot take away any common law right to call the defendants to account. Even *Ruama* in her life-time might have had an action; for although she was naturally wanting in understanding, she might nevertheless receive injuries, and prosecute her action by her attorney and her friend. If the defendants refused or neglected to apply the avails of the land to her support, they would be liable to be called to account during her life; or she might contract debts for necessaries, which would remain debts against her at her decease, as fully as though she had been *compos mentis;* and an administrator to such a person has the same powers to collect and pay debts as the administrator to any other. Nor is there any exception to this, unless in cases where a conservator has been appointed by a county court, in which case a particular mode is pointed out by law for settling the accounts. But whoever may have the ultimate claim to the money, the ad-

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ministrator has a right to collect it; for all personal estate is liable to go through a course of administration; and whatever a court of chancery may do in certain cases, a court of law will consider a chose in action as personal estate.

I am, therefore, of opinion that the court were incorrect in [*184] * rejecting the evidence in this case, and would advise a new trial.

In this opinion the other Judges severally concurred, BALDWIN, J. having at first entertained doubts.

New trial to be granted.

KING *against* THE MIDDLETOWN INSURANCE COMPANY.

A ship was insured from *New-London* to *Wilmington* in *North Carolina*, thence to one or two ports in *Ireland* or *England*, with liberty to go to *Lisbon*, and to touch and trade at *St. Ubes*, and back to her port of discharge in the *United States*. The ship having performed her outward voyage, took in a cargo of salt at *St. Ubes*, cleared out therefrom for *New-York*, arrived off *Montaug* point, sailed thence for *New-York*, and arrived there on the 21st of *June* in the evening. The supercargo wrote, the same evening, to the owner in *Hartford*, advising him of the arrival of the ship, and received an answer on the 25th, directing him to proceed immediately with the ship and cargo to *Middletown;* the letter of the supercargo having been sent, and the answer returned, as soon as by the course of the mails was possible. On the 26th, the master, with the advice of the supercargo, took out of the ship about 3,000 bushels of salt, and put it into lighters for the purpose of lightening the ship so that she could get into *Connecticut* river. The ship and cargo were entered at the custom-house in *New-York*, and the duty paid on three boxes of lemons, being the only part of the cargo liable to pay duty; but no part of the cargo was taken out except the salt which was put into lighters. The ship sailed from *New-York* with the first fair wind, which was on the 30th, for *Middletown;* and in attempting to go through *Hurl-gate* on the first of *July*, she was thrown upon the rocks, her rudder and a great part of her keel were knocked off, one of her sides was beaten in so that the whole of the salt on board was washed out, and she was in extreme danger of being utterly lost. While she thus lay on the rocks, *viz.* on the 4th of *July*, the owner abandoned. The insurers refused to aid in getting her off, or in repairing her. She was got off on the 8th, and taken to *New-York*, where she was afterwards sold at vendue. Held, 1. that the going from *Montaug* point to *New-York* was not a deviation; 2. that the clearing out for *New-York*, arrival there, payment of duty on the lemons there, waiting there for orders from the owner, and lightening the ship there, did not constitute *New-York* the port of discharge; 3. that though the unlading of a part of the cargo in *New-York* would make that port the port of discharge, yet the lightening of the ship there was not an unlading; 4. that the intention of the master to make *New-York* the port of discharge was immaterial; 5. that the direction of the owner to the master to come from *New-York* to *Middletown* to discharge was reasonable; 6. that at the time of abandonment there was a total loss; and 7. that a subsequent purchase of the ship by the original owner, at an open and fair vendue, would be no waiver of the abandonment.

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THIS was an action on a policy of insurance in the usual form on the ship *Governour Griswold*, upon a voyage from *New-London* to *Wilmington* in *North Carolina*, thence to one or two ports in *Ireland* or *England*, with liberty to go to *Lisbon*, and to touch and trade at *St. Ubes*, and back to her port of discharge in the *United States*. The plaintiff sought to recover as for a total loss.

The cause was tried at *Hartford*, *February* term 1814, before *Reeve*, Ch. J. and *Trumbull* and *Ingersoll*, Js.; when a verdict was found for the plaintiff, as for a total loss.

The case as it appeared on the trial was as follows. The ship *Governour Griswold* sailed on her voyage from *New-London* to *Wilmington*, thence to *Ireland*, and thence to *St.* [*185] *Ubes*, where she took in a cargo of salt, and cleared out therefrom for *New-York*. She arrived off *Montaug* point, and sailed thence for *New-York*, where she arrived on the 21st of *June*, 1812, in the evening. The supercargo wrote to the owner in *Hartford*, advising him of his arrival in *New-York*, and put his letter into the post-office the same evening, which was carried to *Hartford* in the mail that left *New-York* the next day, and arrived at *Hartford* on the 23rd. He received an answer on the 25th, directing him to proceed immediately with the ship and cargo to *Middletown* on *Connecticut* river. This letter of the supercargo was sent, and the answer thereto returned, as soon as by the course of the mails was possible. The supercargo and captain then conferred together upon the expediency of lightening the ship in *New-York*, and determined to do it, considering it to be safer and better for all concerned to have her lightened at *New-York* than off the mouth of the river; it being agreed that she could not go into the river and up to *Middletown* without lightening. In consequence of this determination, they immediately engaged lighters; and the next day, the 26th, a little less than 3,000 bushels of salt was taken out of the ship, and put on board the lighters. The ship sailed with the first fair wind, which was on the 30th, for *Middletown*, having first taken a pilot on board. In attempting to go through *Hurl-gate* on the 1st of *July*, she was thrown upon the rocks, her rudder and a great part of her keel knocked off, and one of her sides beaten in so that by means thereof the whole of the salt on board of her was washed out and lost. The captain immediately wrote to the owner, and informed him of her condition; who thereupon immediately, *viz.* on the

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4th of *July*, while she thus lay on the rocks, abandoned her to the defendants, so far as they were concerned by virtue of their insurance. The defendants neglected and refused to furnish any assistance for getting the ship off the rocks, or to defray the expenses of doing it; and they declared to the plaintiff that they would do nothing, as they considered their insurance upon the ship to have ended at *New-York*.

The ship was got off the rocks on the 8th, and taken down to *New-York*. She was afterwards sold there at vendue; and was [*186] purchased by *John King*, the plaintiff's brother. * The plaintiff afterwards agreed to take the purchase off his hands, and took the ship into his possession, and caused repairs to be made upon her; and she has ever since remained in his possession. But the plaintiff denied that *John King* had any authority to purchase the ship on his, the plaintiff's account; and contended that he purchased her altogether on his own account.

The usual entry was made at the custom-house in *New-York* of the ship and her cargo as at her port of discharge, after she arrived there, and before she sailed for *Middletown;* and the duty was then and there paid on three boxes of lemons, being the only part of the cargo liable to pay duty. But no part of the cargo was landed at *New-York;* nor was any part thereof taken out of the ship, except the salt which was put into lighters.

The voyage to *Middletown* by way of *New-York*, was more circuitous and hazardous than by *Montaug* point.

Upon these facts the defendants contended, that the court ought to instruct the jury, that the risk terminated at *New-York*. But the court decided otherwise, and gave the following charge to the jury. "This is an action brought on a policy of insurance to recover damages on account of an injury done to the ship at *Hurl-gate*, by the perils insured against in the policy. It is agreed, that the ship having sailed from *New-London*, was insured on her voyage to *Wilmington* in *North Carolina*, and thence to one or two ports in *Ireland* or *England*, and thence to *St. Ubes*, and thence back to her port of discharge in the *United States*. It is also agreed, that she went this voyage to *Europe*, and cleared out for *New-York*, arrived there, and there made an entry. Immediately on the arrival, the supercargo wrote to the plaintiff notifying him of the arrival of the ship in *New-York*. This letter was written on the 21st of *June*, 1812, and reached the plaintiff on the 23rd; to which an answer was returned, which was received on the 25th, directing the ship to be brought

into *Connecticut* river. The captain immediately lightened the ship in *New-York*, taking out nearly 3,000 bushels of salt, and proceeded on the 30th for *Connecticut* river; and in attempting to pass through *Hurl-gate*, was cast away on the rocks, by which means the damages complained of ensued.

"On this state of facts the defendants contend, that they [*187] are not liable for any damages; because the voyage, and of course, the risk, terminated at *New-York*, that being the port of discharge mentioned in the declaration. Whether it is so or not depends on the construction of the words of the policy, that is, what is meant by the term *port of discharge*. The court are of opinion that there is nothing in the facts stated that can constitute the port of *New-York* the port of discharge, and that the captain had a right to come to *New-York*, and there learn of the owner at what port the ship should discharge her lading, to which port he would have a right to go, unless the owner in his directions should act unreasonably.

"It is agreed that *Middletown* was the port at which the owner directed the ship to discharge. Whether this was reasonable or not is a question of law. The court are of opinion that this direction was reasonable.

"It has been urged that the delay at *New-York* was unreasonable, and by means thereof the risk was ended at *New-York*. If the facts before stated as to delay are not controverted, whether this was an unreasonable delay or not is a question of law. The court are of opinion that it was reasonable.

"It has also been contended, that it is in proof that it was the intention of the captain that *New-York* should be his port of discharge; and that such intention makes it so. This is a fact which it would be proper for you to find, if it was in point of law a material fact; but as it is wholly immaterial, you need not make any enquiry respecting it.

"It is further contended by the defendants, that the captain discharged a part of his cargo in *New-York*, and there landed it. This is a fact for you to determine. If he did, this would constitute *New-York* his port of discharge; there the voyage and risk terminated; and, of course, the defendants are discharged. But if you find no other discharge of the cargo than taking out the salt for the purpose of lightening the ship, and putting it into lighters, and the payment of

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the duty on the lemons; this is not in point of law such an unlading as will discharge the defendants. Of course, there must be a verdict for the plaintiff.

"In this case, the plaintiff contends that the loss is a total loss. The defendants contend, that the loss, if any that can be recovered, is only a partial loss. Where there is an utter destruction of the thing insured, the loss is total, and the insured can recover, whether he has abandoned or not. There are other cases where the loss is total, but by subsequent events it may be only partial; as in the case of capture. There is, during the restraint by capture, a total loss; but the ship may be recaptured or ransomed, and proceed upon the voyage. Thus a loss which was total becomes a partial loss. But if the assured abandon while the loss remains total, he has a right to recover as for a total loss. If he waits until subsequent events have rendered the loss partial, he cannot abandon, and can recover for a partial loss only. In the present case, the abandonment was made, as is agreed, while the ship lay on the rocks. The question then is, was it a total loss while she lay on the rocks? If it was, then the plaintiff has a right to recover for a total loss, unless the defendants had defeated the effect of the abandonment by repairing the ship, or agreeing so to do. But this is not claimed; but it is admitted, on the contrary, that they refused to do any thing on the ground that the risk terminated at *New-York*.

"It is contended in this case, that the plaintiff bid off the ship at vendue, and is now possessed of her, and that he has thereby waived his claim for a total loss. It is admitted, that the vendue was open and fair for all persons to bid. The plaintiff admits, that he is in possession of the ship, but denies that he bid her off, or authorized any person so to do. Whether he did or not is a question of fact, concerning which it would be proper for you to enquire, if it was material; but you need not enquire; for however that fact may be, the court are of opinion that the purchase is no waiver of the abandonment.

"If the injury is such as only to delay the voyage, and there is no extreme hazard of the loss of the ship, even though she is stranded, but under such circumstances that she may be got off without danger of sinking, or going to pieces, there is not a total loss at any time; but if her situa-

tion is extremely hazardous, if she is in danger of being utterly destroyed, this is a total loss, and the insured having abandoned before she was got off, has a right to recover as for a total loss, unless the insurers will consent to be at the expense. Whether the situation of this ship was thus hazardous or not, is a fact for you, gentlemen, to determine. *If you find it was, your verdict will be for a total loss; if not, it will be for a partial loss." [*189]

To this direction the defendants excepted, and moved for a new trial; which motion was reserved for the advice of all the Judges.

The case was argued at the last term, by *T. S. Williams* and *C. Whittelsey*, and at this term, by *Dwight* and *T. S. Williams*, in support of this motion; and by *Terry* and *J. Trumbull*, contra, in both instances.

In support of the motion it was contended,

1. That if *Middletown* was to be considered as the port of discharge, there was a deviation from the voyage insured. This ship made *Montaug* point on the 18th of *June*, reached *New-York* on the 21st, sailed for *Middletown* on the 30th, and was lost on the 1st of *July*. Here a period of twelve days elapsed; whereas twelve hours would have carried her from *Montaug* point to *New-London:* or into the mouth of *Connecticut* river, in a direct course. *New-York* was neither in the direct, nor in the usual course to *Middletown*. The law of insurance requires that the ship shall proceed to her port of destination by the shortest and safest course. 1 *Marsh. Ins.* 183, 4 (*Condy's* edit.) *Reade* v. *The Commercial Insurance Company*, 3 *Johns. Rep.* 352. *Brazier* v. *Clapp*, 5 *Mass. Rep.* 1. If she calls at any port not specified, the policy is ended; *Millar* 393. even if it be done with a view to land a cargo, *or for orders*. Per *Washington*, J. in *The Marine Insurance Company of Alexandria* v. *Tucker*, 3 *Cranch* 391. If there be several ports of discharge, the ship must not invert the order of them. 1 *Marsh. Ins.* 189. *Beatson* v. *Haworth*, 6 *Term. Rep.* 531. If the order be not particularly specified, they must be taken in their *geographical* order. 1 *Marsh. Ins.* 190. *Brown* v. *Vigne*, 12 *East* 283.

2. That *New-York* was the port of discharge, and there the risk ended. The term *port of discharge* is synonymous with *port of delivery* or *port of destination*. *Camden.* v. *Cowley*, *Millar* 399. *n.* S. C. 1 *Bla. Rep.* 417. *Brown* v. *Vigne*,

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12 *East* 283. *Leigh* v. *Mather*, 1 *Esp.* 412. The port of discharge is the place where the goods are *intended* to be delivered. *Clason* v. *Simmonds*, cited 6 *Term Rep.* 533. In *Brown* v. *Vigne*, 12 *East* 288. *Le Blanc*, J. lays much stress upon the fact that the master never contemplated going to any other port. In *Jarman* v. *Coape*, 2 *Campb.* 614. Lord *Ellenborough* held, that if it was the intention of the master to unlade the ship's cargo where the loss happened, she was to be considered as within the limits of her port of discharge. Suppose the plaintiff in this case had ordered the ship to discharge in *New-York*, and she had been lost after her arrival there, but before discharge begun; would the defendants be liable? That the master elected *New-York* as the port of discharge is evidenced by his having cleared out for that port, by his making entry there, and paying duty there. *Laws U. S. vol.* 4. *p.* 326. 331, 2, 3, 4. *sect.* 29. 32. 33. 34.

3. That the plaintiff had no right to abandon. That right exists only where there is an utter destruction of the property insured, or where the voyage is defeated. The stranding of a ship merely will not justify an abandonment. 2 *Marsh.* 582. *a.* *Wood* v. *The Lincoln and Kennebeck Insurance Company*, 6 *Mass. Rep.* 483, 4. A ship was driven by a field of ice on the rocks on the 19th of *November;* she could not be examined until *April* following, when she was found to be bilged, and much injured, but it was thought not irreparably so; in repairing her, difficulties arose from want of materials, and she was sold. Lord *Mansfield* decided this to be an average loss only. *Furneaux* v. *Bradley*, 2 *Marsh* 584. Can it be said that the voyage was lost? The ship had reached the port in the *United States* for which she cleared; entry had been made; and a considerable part of the cargo had been taken out. In *Manning* v. *Newnham*, 2 *Marsh.* 586. the cargo could not be got home in the ship insured, or in any other. In *Alexander* v. *The Baltimore Insurance Company*, 4 *Cranch*, 370. it was held, that the loss of the voyage as to the *cargo*, is not a loss of the voyage as to the *ship*. It will not be claimed, that there was a total loss in this case, on the ground that the damage exceeds half the value of the ship. But the court in their charge, say, "if the situation of the vessel is extremely hazardous, and she is in danger of being utterly lost," the insured may abandon. Was not the situation of the vessel in the case of *Furneaux* v *Bradley*

extremely hazardous? Was she not in danger of being utterly lost? Hazard alone, however extreme, can never constitute a loss. Hazard implies, *ex vi termini*, that the thing exposed is not lost. The ablest judges in *England* have * regretted that owners should ever be allowed to abandon where the property insured still exists. 1 *Term. Rep.* 515, 516. 10 *East* 343.

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4. That the purchase of the ship by the plaintiff was a waiver of the abandonment. *Saidler & Craig* v. *Church*, stated in 2 *Caines* 290. *Abbott* v. *Sebor*, 3 *Johns. Ca.* 39. *Ogden* v. *The New-York Fire Insurance Company*, 10 *John's Rep.* 177. In *Abbott* v. *Broome*, 1 *Caines* 292. 303. the principle of *Saidler & Church* v. *Craig*, was recognized, and the ground on which the cases were distinguished was, that in *Abbott* v. *Broome* the assured had done no act to affirm the purchase. In *Oliver* v. *The Newburyport Marine Insurance Company*, 3 *Mass. Rep.* 54. *Sewall*, J. said he would regard the substantial condition of the property for which an indemnity is claimed, rather than any formal changes of title. From the language generally used to describe the nature and effect of an abandonment, it is evident that in certain cases it *may be* waived. 10 *East* 341. 1 *Johns. Ca.* 152. 6 *Mass. Rep.* 482. 4 *Cranch* 45.

On the other side, it was argued,

1. As to there being a deviation. The ship left *St. Ubes* for *New-York*, and the first land made in the *United States* was *Montaug* point. There could, therefore, be no deviation in pursuing her voyage to her port of destination. To say that the ship deviated in going to *New-York*, assumes that *Middletown* had at that time been elected as the port of discharge; which is not claimed. The plaintiff insists, that he had a right to elect the port of discharge after the arrival of the ship in *New-York*; if so, it was no deviation to come to *New-York*.

2. Did the risk terminate at *New-York?* It is agreed that no part of the cargo was actually discharged at that place. If there had been an intention to discharge there, would it make any difference? The terms, "unlade," "deliver," "land," and "discharge" are used in the books as synonymous. *Laws U. S. vol.* 4. *p.* 321. 324. 6 *East* 204. And it cannot be pretended, that an intention to perform the act designated by either of those terms can be equivalent to the performance itself. If therefore the ship was not discharged of any part of her lading,

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this port was not necessarily her port of discharge. *Coolidge* v. *Gray*, 8 *Mass. Rep.* 527.

*It is contended by the defendants, that *New-York* became the port of discharge because the ship was there entered, and because the duty on the lemons was there paid. But it will be found by examining the statutes of the *United States*, *vol.* 4. *p.* 326. 327. 380. that these acts were unavoidable; and therefore do not even prove an intention to discharge, much less are they a discharge itself.

Did the lightening of the ship in *New-York* constitute that her port of discharge? A ship is *lightened* that she may pursue her voyage. She is *discharged* when the voyage is ended. A breaking of bulk, when done for the purpose of discharging, is a beginning to discharge; but this frequently is done for different purposes, and is not then a beginning to discharge. *Kane* v. *The Columbian Insurance Company*, 2 *Johns. Rep.* 264. 272. The salt was not taken out of the ship to land, or that the ship might be discharged; but was put into boats or lighters, and these boats are, in legal construction, a part of the ship. *Sparrow* v. *Caruthers*, 2 *Stra.* 1236. *Hurry* v. *The Royal Exchange Assurance Company*, 2 *Bos. & Pull.* 430. *Parsons* v. *The Massachusetts Fire and Marine Insurance Company*, 6 *Mass. Rep.* 197. 208. In this case, lightening the ship was necessary; and the only question was as to the expediency of doing it at *New-York*, or at the mouth of *Connecticut* river. The captain in his discretion took out the salt at *New-York;* and this was a question proper for him to determine. 1 *Burr.* 348. *Doug.* 234. 5 *Mass. Rep.* 9. As the salt was taken out of the ship that it might be landed at *Middletown*, and as the boats are contemplated as part of the ship; the ship was not in reality discharged until it was landed at *Middletown*.

3. If the ship was protected by the policy at the time of the loss, the next enquiry is, whether the insured had a right to abandon? Upon the state of facts which then existed he had this right for two reasons; first, because the voyage was broken up; secondly, because the insurers refused to do any thing, or be at any expense, to get the ship off. *Millar* 284. 2 *Marsh.* 585, 6. 2 *Campb.* 624. *n.* *Abbott* v. *Broome*, 1 *Caines* 302. *Goold* v. *Shaw*, 1 *Johns. Ca.* 293. *Waldens* v. *The Phœnix Insurance Company*, 5 *Johns. Rep.* 310. 326. *Wood* v. *The Lincoln and Kennebeck Insurance Company*, 6 *Mass .Rep.* 479. 482.

4. Has the plaintiff by purchasing in the ship waived his

abandonment? The effect of an abandonment is to transfer the property to the insurers. *The United Insurance Company* v. *Robinson*, 2 *Caines* 280. 284. *Waldens* v. *The Phœnix Insurance Company*, 5 *Johns. Rep.* 324. The law gives the insured, under certain circumstances, a right to abandon; and when he exercises this right, the insurer cannot say that he will not accept. The transfer is complete without such acceptance. The ship having become the property of the insurers, it could not be revested in the insured without the agreement of both parties. Neither party by himself could vacate or waive the abandonment. In the *English* books there are many cases in which the insured had for a time the right to abandon, but not exercising it in season, he could afterwards recover only for a partial loss. *McMasters* v. *Shoolbred*, 1 *Esp.* 237. is a case of this description. But no *English* case can be found where an abandonment rightfully made is said to have been waived. In the cases decided in the state of *New-York*, two principal reasons are given why the original owner cannot purchase; first, because he is agent and trustee of the insurer; secondly, on account of the danger of fraud. The owner is never trustee unless he is also master; for the master becomes immediately after abandonment the agent of the insurer. That principle, therefore, does not apply to the present case. And if the insurer can elect to take the vessel or not, as would seem from the same cases, it is difficult to perceive how he can be defrauded. It is admitted that the sale in this case was open and fair; and no reason can be assigned why the original owner of the ship might not purchase her at vendue, if he was willing to give more than any other person.

In reply, it was said that the case of *Coolidge* v. *Gray*, which was principally relied on to shew that the risk did not terminate at *New-York*, was distinguishable from the present in several important particulars. 1. That vessel was *outward* bound; this was *homeward*. The cargo of the outward bound vessel is to be disposed of abroad, and the avails brought back to the owner. A homeward bound vessel comes, of course, to the owner, unless otherwise particularly directed. In this case, the port of arrival was left to the discretion of the supercargo, and he fixed on *New-York*. Having exercised his discretion, the owner must be concluded by it, and his powers were exhausted. 2. That vessel was bound *to a market;* this was

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bound *home*. *Rotterdam* was the object of the former. Could she have gone there, and had actually gone there, it would have been her port of discharge, as appears from the reasoning of the court. This vessel actually did reach her port of destination, *viz. New-York*. 3. That vessel was turned away from *Rotterdam by necessity*. Necessity alone justified her going elsewhere. Her right of departure for *Gottenburgh* rests altogether on this necessity. Is that the fact with this vessel? So far from it, she left *New-York* merely for the convenience of the owner, and by his voluntary orders. 4. That vessel left *Rotterdam* and went to *Gottenburgh* in pursuit of a market, where the cargo was to be sold for the owner. This vessel came home to the owner, her cargo was to be sold by him, or at his will. The supercargo did not go to *New-York* for a market, but for further orders. He could not sell there under any circumstances. All the powers he had over the voyage were exhausted on his arrival at *New-York*. In order to enable the ship to proceed further, new orders were necessary. The owner gave new orders; and in the execution of them, the loss happened.

It was also insisted, that no other case ever went the length of *Coolidge* v. *Gray;* and if the decision be law, it is only in that case, and others that are in substance like it. The principles of that decision cannot safely be extended.

REEVE, Ch. J. In this case it was contended by the defendants, that *New-York*, to which port the ship was cleared out, and to which she arrived, was her port of discharge; and, of course, the risks insured against there terminated. The plaintiff contended, that he had a right to clear out for one port in the *United States*, and when he had arrived there, to enquire where he could find the best market for his cargo, and to go thither; and when he had elected any port to which to go, that became his port of discharge.

English authorities as to this point were searched for in vain; but there is in the 8th volume of *Massachusetts* Reports(*a*) a case that cannot in point of principle be distinguished from the case before the court. In that case, a cargo was insured from *Boston* to her port of discharge in *Europe*. In this case, the insurance was to certain ports

(*a*) *Coolidge* & al. v. *Gray*, 8 *Mass. Rep.* 527.

in *Europe*, and back again to her port of discharge in the *United States*. If in this case the port of arrival in the *United States* was her port of discharge, and there the risk terminated; then in the case referred to the port of arrival in *Europe* must have been the port of discharge of the ship so insured. In that case, the intention was to have gone to some port in *Holland*. The vessel arrived in the *Maese*, and would have gone to *Rotterdam;* but hearing that she would be in danger of confiscation, if she went there, she left *Holland* and went to *Gottenburgh;* and thence she sailed up the *Baltic* for some port for a market, and was captured by a *Danish* privateer, and condemned. It was urged in that case, as in this, that as she had arrived to a port in *Europe*, *viz. Gottenburgh*, this port was her port of discharge; and, of course, the risk terminated there. But the court held that the insurer was liable; and that her port of arrival was not her port of discharge. The court went upon the ground that it was reasonable that when a ship had arrived at one port, the owner should enquire into the state of the market in other places, and if they found a port at which their cargo would sell, they might go thither. This is, then, an authority in point, that the port of arrival is not of course the port of discharge; for if it was, *Gottenburgh* must have been the port of discharge; and if it was, the risk there terminated.

In what does this policy differ from that? It was said, that was to a port of discharge in a foreign land, while this is to a port of discharge in the *United States*. Can it be contended, that this makes a difference in point of principle? Why did the court judge it to be reasonable that the risk in that case should continue after sailing from the port of arrival? It was, as they tell us, that the owners, or their agents, might have a reasonable time to enquire into the state of the markets in the country to which they went, and not be driven to sell their cargo at a market which might be already glutted with the articles of which the cargo consisted. Does not the same reason exist when a vessel is sent from this country to *Europe* to bring thence a cargo to this? How are the agents of the owners of the cargo to know the state of the market at the various ports here until they arrive in this country? The constant fluctuation of the market in commercial countries is such that it is not impossi-

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ble but that the part which afforded the best market for such articles as constitute the cargo when they left the country, may afford the worst on their return.

Since then, there is a decision in point in a sister state, by an enlightened court, and not *scintilla juris* to be found in any book of any country to the contrary, why was it not proper that the court should be governed by such decision? If it was, in the view of the court, an unreasonable decision, or opposed in its principle to analogous cases, the court would have decided otherwise.

Let us then enquire, is not such a construction of the policy most reasonable? It is undoubtedly the interest of every commercial country to afford to commerce the most prompt protection, and every reasonable facility. Would it not often prove detrimental to commerce, to compel the insured, when insured to a port of discharge, to elect that port in a foreign land, when they clear out for their homeward voyage, without understanding what the market is in the various ports of that country to which they are bound; so that when they arrive at the port for which they cleared out, they must discharge the cargo there, or run the risk of part of the voyage until they come to a good market? It will often happen, that when they arrive, the market is glutted; but in one day's sail the market is good. Why should the insured be obliged to run the risk of loss, if they go thither, when it is manifest it was the intention of the parties, that the policy should cover the risks insured against until the vessel should arrive at the port of actual discharge? If the port of arrival is in point of law the port of discharge, it is *technically* so; and it cannot be supposed that the parties so intended. If the parties had intended that the risk should cease on the arrival of the vessel in any port of the *United States*, they would have so declared in the policy, or the insurance would have been on her until she arrived in some port. If the port of arrival is of course the port of discharge, being one and the same thing, the argument is with the defendants; and in that case, the agents of the owners will be obliged to select their port of discharge, when in a foreign country, without any means of knowing the state of the market to which they are going. This appears to me unreasonable. But if the port of discharge may mean a different port from the port of arrival, then to such different port is the vessel insured; and the risk does not terminate upon her arrival at any port.

And this appears most reasonable, that the agents of the insured may be able to learn upon their arrival in the *United States* at what port they can sell their cargo to the greatest advantage, and thus sail to their port of discharge protected by the policy. If by port of discharge we may conclude that the parties meant where the vessel should unlade, on what principle could the court be justified in saying that they meant where the vessel should first arrive? This the court could never say, unless port of arrival and port of discharge are synonymous terms. They certainly are not so used in common parlance; and in no book can we find that in a legal sense they mean one and the same thing. We are, therefore, bound to understand them in a policy of insurance as the terms naturally import.

It was further contended by the defendants, that on the hypothesis of the owners, or their agents, having a power after their arrival at *New-York* to elect another port as a port of discharge, they should have done it sooner. It is inconceivable how there could have been greater expedition; for immediately on the arrival of the vessel, the supercargo wrote to the owner to learn to what port he should go. The owner, on the receipt of his letter, wrote to the supercargo to come to *Middletown*. The time from the arrival to the receipt of the letter from the owner directing him to come to *Middletown*, was but five days, including the day of arrival, and also the day on which the owner's letter to the supercargo was received; which was as soon as it could be done according to the course of the mail. Whether there had been any unreasonable delay being a question of law, the court was of opinion that there was none.

It was further urged, that the vessel delayed sailing from *New-York* an unreasonable time. The facts stated in the motion, and which were agreed to, are, that the vessel, on the receipt of the directions of the owner to come to *Middletown*, was immediately lightened of 3000 bushels of salt, which was put into lighters that the vessel might go into *Connecticut* river more safely, it being agreed that she could not get into the river unless she was lightened; and that she sailed the first fair wind for *Middletown*, which was, as appears from the statement agreed to, the fifth day after the directions to come to *Middletown*. It was agreed, that she took a pilot on board. This being also a question of law, the court was of opinion that there was no unnecessary delay.

It was also contended by the defendants, that this case in

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point of fact differed from that reported in the 8th of *Massachusetts* reports in this, that this vessel broke bulk in *New-York*, but the vessel at *Gottenburgh* did not. This was a fact left to the jury by the court's directing them, if they found that bulk had been broken at *New-York*, to find for the defendants; for this would have made the port of *New-York* her port of discharge; charging them, however, if they found no other breaking of bulk than putting the salt into lighters, that this was not in point of law breaking of bulk. This fact the jury found against the defendants. It was never claimed that the salt was landed in *New-York*. It was admitted that the vessel must be lightened somewhere; and that it might be done with more safety in *New-York* than in the sound off *Connecticut* river. I can perceive no ground on which this transaction can be called a breaking of bulk in *New-York*. (1)

It was also urged, that the vessel made the common entry in *New-York*, and paid the duty on three boxes of lemons; but there was no pretence that any of the cargo or lemons were there landed. This she must have done as a matter of course when she arrived at *New-York*, whatever port might have been her port of discharge. Surely, no man will contend, that the port at which a vessel may happen to arrive where the owners are bound to make entry and pay duties, is of course the port of discharge of the vessel, unless the owners do some voluntary act making it a port of discharge.

It was also urged, that it was the intention of the captain to make *New-York* his port of discharge. The court charged the jury that it was immaterial whether the captain intended to make it a port of discharge or not. (2) It is taking very rank ground to say, that if a captain should once intend that a certain port should be his port of discharge, he never can, be his information what it may, change that intention. He might have thought that *New-York* was the best market when he cleared out, and have intended to go there, and there discharge his cargo; but learning that *Middletown* was a better market, might he not have gone there directly?

(1) If a vessel is obliged by a necessity to put into a port, and a part of her cargo is necessarily taken out, in order to repair the vessel, and being found damaged, is sold, without occasioning a delay to the vessel it will not avoid the policy; *Kane* v. *Columbian Ins. Co.* 2 *John. R.* 264.

(2) An unexecuted *intention* to deviate does not avoid the policy; *Silva* v. *Low*, 1 *Johns. Cas.* 184; *Henshaw. Marine Ins. Co.* 2 *Caines R.* 274; and *New-York Fireman Ins. Co.* v. *Lawrence in Error*, 14 *Johns. R.* 46.

The answer can be no other than that he might have so done. Would the port of *New-York* be his port of discharge in such case? It cannot be pretended. No intention in the captain to make a certain port a port of discharge can preclude him from changing his opinion, and making some other port his port of discharge. If any thing makes *New-York* in this case the port of discharge, it is because the vessel arrived there, and that a port of arrival and a port of discharge are one and the same thing; which is directly opposed to the case cited from the *Massachusetts* Reports, not supported by any law of any country. The adoption of such a construction would be detrimental to the interests of a commercial country, and imposing an unreasonable hardship on the owners of vessels, compelling them to make their election of their ports of discharge without knowing the state of the market, or when they had learned, compelling them to go to market, there to discharge their cargoes at their own risk, when it is most apparent from the policy that the parties intended that the risk should rest upon the insurers until the vessel arrived at the port where she was to discharge her cargo.

It was also contended, that if *Middletown* was the port of discharge, there has been a deviation, which discharges the insurers; for the vessel arrived off *Montaug* point, and thence ilsaed to *New-York*, which was a very indirect course for *Middletown*. It must be apparent to every person, that this must wholly depend on the question that has been already considered; for if she had a right to go to *New-York*, the port to which she had cleared out, and there elect her port of discharge, there can be no deviation. For when she arrived at *Montaug* point, *Middletown* was not her port of discharge, but became so after her arrival at *New-York*. She was cleared out for *New-York*, and when on her voyage, without intending it, fell to the eastward of that port.(1) It was then proper that she should go to *New-York*, which she did; and it is not pretended but that she went in the most direct course. If she had been insured to *Middletown*, and had arrived at *Montaug* point, and thence had gone to *New-York*, and had then sailed for *Middletown*, and had been lost, it would have been a deviation. But to make it a deviation

(1) If a policy limit the vessel to a given geographical tract, and in navigating a river on her general course, she negligently and unskillfully depart from the channel, it seems, this will not be a deviation, in a legal sense. The true objection to a deviation is, that the assured has voluntarily substituted another voyage for that covered by the policy; *Keeler* v. *The Firemans Ins. Co. of the City of Albany*, 8 *Hill. R.* 250.

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in this case, *Middletown* must have been her port of discharge at the time she arrived off *Montaug* point. But this could not be, if there could be an election in *New-York* to * make her port of discharge; for it was not her port of discharge, until such election was made. The case is brought back to the doctrine held in the 8th of *Massachusetts* Reports, *viz.* that where there is an insurance to a port of discharge in *Europe*, the vessel may go to one port in *Europe*, and there make her election of her port of discharge; and that the port first arrived at is not her port of discharge, unless she makes it so by breaking bulk; and if she sails from such port in quest of a market, and is captured, the insurer is liable. This is an insurance of a vessel to her port in the *United States*, and, according to the doctrine of that case, can go to any port in the *United States*, and there make her election of her port of discharge, and if on her voyage to such port she is lost, the insurer continues liable.

It is admitted, that there has been a loss. It follows of course, if the doctrine I contend for be well founded, that there must be a verdict for the plaintiff. But the defendants contended, that admitting there was a loss, still it was only a partial loss; whilst the plaintiff contended that it was a total loss.

Where there is an utter destruction of the thing insured, the plaintiff can recover for a total loss, whether he abandons or not. But there are cases where the law views the loss as a total one, when in fact there is not an entire destruction of the thing insured; and in these cases the insured may abandon to the insurers what is not lost, and then recover as for a total loss. The idea of abandoning implies in it that there is something to abandon. In the present case, if the plaintiff is entitled to recover as for a total loss, it is this technical total loss; for it is admitted that he did abandon the vessel to the insurers. What is such total loss the books abundantly teach us; and we find a variety of cases in which the loss would be considered as total, if the insured had abandoned, whilst the loss was thus technically total; but not having abandoned until it became a partial loss, the recovery must be for a partial loss only. Where a vessel is captured, if this comes to the knowledge of the insured, he may abandon; and although the vessel escapes, or is recaptured, yet the insured can recover as for a total loss. But if the insured had waited until the vessel had escaped, or had

been recaptured, before he abandoned, he could not have turned this partial into a total loss.

It being admitted, as before stated, that the plaintiff did *abandon, the enquiry will be, was there a total technical loss at the time of abandonment? It is admitted that the abandonment was made at the time the vessel lay upon the rocks. It is agreed that her rudder, and a great part of her keel were knocked off, and her sides beaten in, so that the whole of the salt on board was washed out and lost. And it was agreed that the defendants refused to be at any expense in getting her off, or in repairing her, claiming that the risk was at an end. Under these circumstances, the court charged the jury, that if the injury was such as only to delay the voyage, and there was no extreme hazard of her loss, even if she was stranded, but under such circumstances that she might be got off without danger of sinking, or going to pieces, this would not be a total loss at any time. But if her situation was extremely hazardous, and she was in danger of being utterly lost, this would be a total loss; and the insured having abandoned before she was got off, had a right to recover as for a total loss, unless the insurers would have consented to bear the expense of getting her off and of repairing her. With these facts the case was left to the jury under a direction, that if they found the vessel thus hazardously situated, the verdict must be for a total loss; if not so situated, the verdict must be for a partial loss only.

The charge on this ground, I apprehend, is perfectly correct. In the case of *Milles* v. *Fletcher*, *Doug.* 233. the rule is laid down by Lord *Mansfield*, that in every case where the voyage is lost, or not worth pursuing; or where the thing insured is so damaged as to be of little value to the owner, and where what is saved is worth less than the freight; and also, which particularly applies to the present case, where further expense is necessary, and the insurer will not undertake at all events to pay that expense; the insured may abandon, and recover as for a total loss. In this case, there was an absolute refusal to pay any expense; and the verdict of the jury found the extremely hazardous situation of the vessel at the time of the abandonment.

The doctrine here laid down is abundantly established in the case of *Goss* v. *Withers*, 2 *Burr.* 683. It is laid down in 2 *Marsh. on Insur.* 488. 583. (*Condy's* edit.) that where stranding is followed by shipwreck, so as to render the ship incapable

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of prosecuting her voyage, the insured may abandon. The same doctrine is taught by *Emerigon*, tom. 2. p. 180.

In this case, the vessel could not prosecute her voyage. It was completely defeated, and the cargo washed into the sea. And wherever the voyage is lost, let the cause be what it will, it is a total loss of ship and freight, if the abandonment be made whilst the loss remains total. *Park.* 119.

In this case, the abandonment was made whilst the vessel was ship-wrecked on the rocks, before she was got off.

The abandonment must also be made as soon as the insured has learned that there is a total loss; and he must give the insured notice of his intention to abandon in a reasonable time after the intelligence arrives; which was done in the case before the court. This doctrine is established in the case of *Mitchill* v. *Edie*, 1 *Term Rep.* 608. *Park* 172.

It is admitted in this case, that the plaintiff is in possession of the vessel; that after she was got off the rocks, she was taken down to *New-York*, and there sold at public auction. It is not pretended that any unfairness was practised in the sale. She was purchased by a brother of the plaintiff, and by him transferred to the plaintiff. The defendants contended, that this purchase so made by the plaintiff's brother, was for and on the account of the plaintiff; and that this transaction was a waiver of the abandonment before made. The plaintiff denied that his brother purchased the vessel on his account. The court charged the jury, that they need not enquire whether the purchase was on the plaintiff's account or not, for it was immaterial; for if she was so purchased on the plaintiff's account, it was no waiver of the abandonment.

When we attend to the nature of an abandonment, this will shew that the purchase in *New-York*, if it had been made by the plaintiff himself, could not have made the purchase a waiver of the abandonment; for the effect of an abandonment, is a transfer of the property abandoned to the insurers; and the insured cannot by his own act revest himself with the property abandoned. No bill of sale could more completely transfer the property to the insured than is done by abandonment. If the insured wishes to waive his abandonment there must be the mutual consent of insurer and insured. If the plaintiff, whilst the vessel was on the rocks, had conveyed her by bill of sale to the defendants, and they had accepted the conveyance, and given their note

of hand for the purchase money, and having got her off the rocks, had brought her to *New-York*, and there sold her at auction, and the plaintiff had there purchased her; it might have been said in this case, that this transaction had annulled the purchase, and that the defendants were discharged from paying their note, with as much propriety as it can be said in the case before the court, that the purchase of the vessel by the plaintiff had annulled the abandonment. Nothing can be more absurd than to suppose that the plaintiff, after having transferred the property of the ship to the defendants, could, without their consent, set aside the transfer. This would place in the hands of the insured an advantage that would be most unreasonable. And the law is such as will shew us that such an idea is wholly inadmissible: as where there was an abandonment by reason of capture by the *Spaniards*, which capture rendered it a total loss, and the abandonment vested the property in the insurers. This loss was afterwards made up by government. The insured would have waived the abandonment; but they could not; for the right to the bounty of government was vested in the insurers. So when after abandonment, through a succession of unexpected events, a profitable voyage is made, the insurer reaps the whole of the profit; and it cannot be otherwise, for the property abandoned became the insurer's. *Randal* v. *Cockran*, 1 *Ves.* 98.

To suppose (as has been urged) that to give effect to an abandonment, it must be accepted by the insurer, or in other words, that there can be no abandonment except where there is a contract between the insured and insurer that there shall be one, is to defeat the thing itself. This idea is wholly opposed to every case of abandonment. If it were admitted, in all the litigated cases whether there was an abandonment or not, or whether there was a right to abandon, the insurer would have had nothing to do but to show that he never agreed to it. But this is never done in any case. The language of the books is utterly inconsistent with such an idea. It would be absurd to speak of the right of the insured to abandon, if there was no right but what depended on contract.

But it is said, that such language is to be found in the elementary writers. It is true, *Pothier* and *Valens* have both adopted the language of giving effect to an abandonment, if accepted by the insurer. However learned these authors

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may be, and however useful to the jurist, they are not books of authority in the *English* courts, or in our courts; nor can there be found, as I apprehend, such an idea in any of our reporters. And this doctrine is denied to have any foundation in truth by *Emerigon*, tom. 2. p. 197.; and it is there stated, that an abandonment made on sufficient ground is irrevocable.

It follows, then, that this vessel was the property of the insurers from the time of the abandonment; and when sold in *New-York*, was sold by their agents, and for their benefit; for by law, as soon as the abandonment was fairly made, the captain and crew were no longer agents for, or in the employ of, the insured, but became the agents of the insurers. The vessel was sold at a fair sale, and for as full a price as she would fetch in market; and the plaintiff, if he bought her, must pay the purchase money. And there is no more reason in saying, that the plaintiff by the purchase having got her into his possession, he shall not recover the full value in an action on the policy, than there would be to say, if *A.* sells to *B.* an article of property for 100 dollars, and *B.* gives to *A.* his note of hand therefor, and then sells it again at auction or private sale, and *A.* is the purchaser for 50 dollars, that since *A.* has got the article sold into his possession, *B.* ought not to pay the full value expressed in his note.

If it could be said, that after the abandonment by the plaintiff, he had continued the captain and crew at his expense to get her off the rocks, and had succeeded, and had proceeded to *New-York* with her, and had there repaired her, and no objection was made to this by the insurer; it might be urged with some appearance of plausibility, that by consent of both insurer and insured, the abandonment was waived and given up; for although it is not true, that it is in the power of either party to prevent the effect which an abandonment has of vesting the property in the insurer, yet both parties may agree to waive it. But no such inference can be drawn in the present case; for immediately on the abandonment, the captain and crew became agents of the insurer, and whatever they did, in the view of the law, was done for the insurers, unless the contrary appears, *viz.* that they were continued by the insured in their employment.

It often happens, that the captain and crew know not for whom they are agents. The law has made it their duty to

do all in their power to save the property; and whatever is done is for those who at the time are owners. It may become necessary that the ship and cargo should be sold. This the captain has an implied power to do by the mercantile law; and by that law he is agent for the owner, whoever he may be, whether insurer or insured. In the present case, whoever carried this vessel to *New-York*, and sold her there, were agents of the insurers, unless the contrary appears. But there is no pretence that any thing was done by the directions of the plaintiff. It was, of course, done for the benefit of the insurers, and by those who in point of law are their agents. The law implies this, whether the insurers had, or had not, given any directions as to what was done.

When we consider the nature of an abandonment, and the effect it has upon the property abandoned, and the law merchant as it respects those who are on board of a vessel which is abandoned, that is to say, whose agents they are, it seems to me that the conclusion is irresistible, that the purchase of the vessel by the plaintiff has not turned that which was a total into a partial loss.

It is contended by the defendants, that there is a case (*a*) in the 10th volume of *Johnson's* Reports in point against the plaintiff. If this case should be found to be opposed to the plaintiff's claim, as is contended by the defendants, I should consider a decision in that commercial state, by a court so highly respectable, and respecting a subject to which their attention is so often called, of very high authority. But by a careful attention to that case as reported, and the principles there avowed, we shall find that it is in nothing opposed to the opinion of the court in this case, but on the contrary corroborates it. This was a case of *assumpsit* on two policies, one on the ship, and the other on the freight. The vessel was detained under an embargo of the *United States*, and by the plaintiff abandoned for a total loss; which the plaintiff could do; for at the time of the abandonment the loss was total. The abandonment was made on the 20th of *April* 1812. The defendants took no steps with respect to her. The plaintiffs, on the 2nd of *July* 1812, gave notice to the defendants, that unless they paid the plaintiffs as for a total loss, they should cause the cargo to be discharged, and the

(*a*) *Ogden & al.* v. *The New-York Fire Insurance Company*, 10 *Johns. Rep.* 177.

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vessel to be sold for the benefit of whom it might concern. The plaintiffs having received no communication from the defendants, did sell her on the 23rd of *July*, the time which they mentioned in their notice for the sale. All this by the law merchant the plaintiffs might do; and doing it, they were agents and trustees for the defendants. She was purchased by one *Stynets* for the plaintiffs, by their authority and direction, for 6,300 dollars. But this they could not do; for a trustee cannot be both buyer and seller. The plaintiffs having thus got the vessel into their hands, immediately chartered her to one *Bulkley* for a voyage from *Charlestown* to *Cadiz*. By the charter-party the freight was made payable to the plaintiffs. The ship's papers were not changed, but remained as they were at the time that the insurance was effected. In this case, the court held that the plaintiffs could not recover as for a total loss.

It is said, this is the case before the court. But there is a marked and essential difference in the cases. In the case before the court, the plaintiff had nothing to do with the sale of the vessel. The was brought to *New-York*, and sold by those who are the defendant's agents, without any interference by him, and by those to whom he had no relation, it having ceased by the abandonment. The defendants themselves, in the view of the law, brought their own vessel into market, and sold her for their own benefit.

It is true, the plaintiff might have given notice to the defendants, that he would sell her, if they would do nothing in the business, as was done in the case of *Ogden* v. *The Fire Insurance Company*. The law merchant permits this to be done; and he might proceed to sell her; but all that he does is as trustee to the insurers; and if he sells to himself, he cannot avail himself of this sale as a *bona fide* purchase, on the principle before mentioned that a trustee can never be both seller and buyer. If the plaintiff in the case before the court had thus done, being both seller and buyer, it would have been the same case as the case cited from *Johnson*, except that the plaintiff has never employed the vessel as the plaintiffs in that case did.

The court in the case in *Johnson* say, if the original owner of a vessel is reduced to the necessity of selling her, if he perseveres in his claim for a total loss, he must surrender to the insurers the benefit of the sale. Nothing can be more

reasonable; for in that case, the owner is by law a trustee for the insurer, and sells for him. If he purchases for himself, he cannot hold the property against the will of the insurer; for the law has not vested him with power to sell to himself, but to others. But if he does sell to himself, as in the case referred to in *Johnson*, and the insurer does nothing to annul the sale, it is a waiver of the effect of the abandonment by both parties. It is an implied contract by both, that it shall be given up.

In the case of *Ogden* v. *The Fire Insurance Company*, and several others decided in the state of *New-York*, particularly that of *Saidler & Craig* v. *Church*, (*a*) there was not only a purchase by the original owner, the plaintiff, but an employment by him, which furnished complete evidence that it was a purchase for himself when acting in character of trustee for the defendant. None of these circumstances exist in the case before the court.

It is not sufficient to bring a case within the principle of *Ogden* v. *The Fire Insurance Company*, that the original owner was the purchaser. He must also be the seller; and if a seller, he never can, in character of trustee, be the buyer. If then he sells and buys on his own account, and, in consequence thereof, takes possession, he waives the abandonment; and if the insurer does nothing to prevent him from the enjoyment of the vessel, he also waives his title which accrued to him by the abandonment; and the case is the same as if the original owner had, without any sale or purchase, taken possession of the vessel as his own, and employed her as his own, to which the insured had interposed no objection. This would have been a giving up of the effect of an abandonment by both parties. A sale and purchase by a trustee gives no different operation to the transaction than if there had been none; and by taking possession, he assumes his original character of owner. The law allows him to sell, if the insurer does nothing; and if he surrender the benefit of the sale to the insurer, he has a right to recover for a total loss. He may also buy, if the insurer sell, without waiving his abandonment.

It cannot be that the buying by the original owner shall have the effect to turn a total into a partial loss. This point is most manifest. If *A.* the insurer sells, and *B.* the insured,

(*a*) 1 *Caines* 297. n. 2 *Caines* 286.

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who has abandoned, buys the article abandoned, there is no room for fraudulent speculation upon a loss at the expense of the insurer. But if the original owner who has abandoned may sell and buy for himself, it opens a door for fraud. The article will be sold for much less than it is worth; as appears to have been the case in *Ogden* v. *The Fire Insurance Company*. In the first case, where the insurer sells, he is interested to sell for as large a price as he can procure in market. In the other case, where the insured sells, if he is allowed to sell to himself, he is interested to sell at as low a price as possible; and thus it becomes a fraudulent speculation upon the insurer.

The rule that a trustee who sells cannot be the buyer is founded on a principle of sound policy. And in the case in *Johnson*, the Supreme Court of *New-York* recognized this as the ground on which the various decisions in that court went; for in the cases in which the vessel was not thus sold and bought by a trustee, the insured on abandonment was allowed to recover for a total loss. In the case of *Abbott* v. *Broome*,(*a*) where there was an abandonment for a justifiable cause, the vessel was purchased abroad, not as in the case of *Saidler & Craig* v. *Church* for the benefit of the original owners, but for whom it might concern, and brought to *New-York*, and there sold. This was held to be a total loss.

It is true, in this case, the vessel was not purchased by the original owner. But this cannot make the smallest difference when sold by the insurer, as in the case before the court. If *A.* sells his ship to *B.*, and then *B.* sets it up at auction for sale, it must be the same thing whether *A.* or *C.* purchases her. There is no principle violated. But if *B.* should convey his vessel to *A.* to sell for his benefit, and *A.* should set it up at auction, and employ *C.* to bid it off for him, a sound principle would be violated if such a sale should be sanctioned by law.

Perhaps it will be urged, that this doctrine is at war with that branch of my argument where I contended that an abandonment was irrevocable. I still contend that it is, without consent. In the case in *Johnson*, it was not in the power of the plaintiffs to have retained the vessel so purchased without the consent of the defendants; and if they had insisted upon it, they would have been entitled to all the benefits of the pur-

(*a*) 1 *Caines* 292.

chase, as the plaintiffs could hold them to pay as for a total loss, if they had surrendered the benefit of the purchase to them. The whole efficacy of the puchase by the plaintiffs for themselves to turn a total into a partial loss depends upon the implied consent of the insurers. The plaintiffs have conducted as willing to surrender their claim for a total loss by selling the vessel, purchasing her, and employing her as if they were owners; for as trustees the sale and purchase must have been for the defendants' benefit. The defendants by making no objection to this proceeding, impliedly agreed that it should be so. When the plaintiffs sold the vessel, they might have sold it to whom they pleased, and allowed to the defendants the purchase money, and have recovered as for a total loss; or the defendants could have insisted that the sale was for their benefit, as the property was theirs, and the plaintiffs their trustees. But they did not; and the plaintiffs having resorted to this method, instead of suing in the first instance for a total loss, to which they were entitled; and instead of surrendering the benefits of the sale to the defendants, claiming them themselves; it surely does not lie in the mouth of the plaintiffs in such case, to say that a loss, which they have treated as partial, shall be turned into a total loss. How entirely different is the case before the court! The insurer, not the agent of the insured as in the case of *Ogden* v. *The Fire Insurance Company*, brings his own property into market; and the plaintiff, who once owned it, purchases it, at a fair sale, in open market. It is utterly impossible to turn such a possession of the vessel thus obtained to the defendants' advantage, unless the law is so that no man can purchase with safety property which he has once owned and transferred.

I am, therefore, of opinion that there ought not to be a new trial.

In this opinion SWIFT, TRUMBULL, EDMOND, BRAINARD and BALDWIN, Js. concurred.

INGERSOLL, J. I am so unfortunate as to differ in opinion from a majority of the court, on the case now brought before us to decide. It seems to me, that a new trial ought to be granted, on the three following grounds.

In the first place, as it strikes me, the entry at the custom-

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house in *New-York*, and taking out a part of the cargo, and putting it on board of (what are called) lighters, in order to be transported to *Middletown*, to all intents and purposes, makes *New-York* the port of discharge.

Secondly, if *Middletown*, and not *New-York*, were the port of discharge, still the clearing out and sailing from *St. Ubes* directly to the latter place, would be a deviation from the voyage insured, and of course would discharge the underwriters.

Thirdly, however these propositions may be, yet the insured had no right to abandon and claim as for a total loss, in the case stated by the court in the charge to the jury, as a ground for such abandonment.

Some observations as to the first point. I am aware, that the counsel in favour of the motion for a new trial gave up this point before this Court, though it was urged before the court below. At any rate, if it was not given up, it was not insisted on; but whether insisted on or not, I think the proposition is a sound one, that the above circumstances made *New-York* the port of discharge. It is an agreed principle, that if any part of the cargo had been actually landed, instead of being put on board of a lighter, it would have put an end to the question as to the port of discharge. *New-York* would, beyond all doubt, have been such port. I hold that it is not a *sine qua non*, that any part of the cargo should be actually landed, in order to make the port, where it is so landed, a port of discharge. The case of landing some part of the cargo is generally put, as being decisive that the voyage is at an end, or at least, that the port where it is so landed is the port of discharge. But the great point in every case must be, whether the vessel has broken bulk? Whether any part of the cargo has been delivered to the owners or freighters, or whether it has been sold to third persons? If, for instance, after the entry of vessel and cargo, the cargo, or any part of it, be taken out, sold and put on board of another vessel, and not landed at all, this will make the port of entry a port of discharge. *Marshall*, in his treatise on *Insurance*, vol. 1, p. 257, 8. (*Condy's* edit.) speaking of the risks on goods, when by the terms of the policy, they are insured till they are safely landed, says, "Yet, where a factor, after a ship's arrival at her port of discharge, sells the cargo on board, without unloading, and the buyer of the goods contracts for the freight of them to some other port;

but before the ship breaks ground, she meets with an accident and is lost: In this case, the insurers are discharged, for the property being changed, and freight contracted for *de novo*, it is the same as if the goods had been landed." For this opinion he cites a book called *General Treatise of Trade*, page 78. True it is, in the case put by *Marshall*, the ship has in fact arrived at her port of discharge, but so far from having landed the goods, she has not even broken bulk; yet the above circumstances taking place, he says, "it is the same as if the goods had been landed." This proves, that a sale of the cargo in the present case in the port of *New-York*, without ever having landed it, would have been the same as landing it, and would, of course, have made *New-York* the port of discharge.

Still it will be objected, "that there has been in the case under consideration, no sale of any part of the cargo in the port of *New-York*. The whole cargo, both what was taken out and what remained on board of the ship, belonged to the original owner." Be it so; but as has been observed, the case I have been considering, proves that it was not absolutely requisite, to land a part of the cargo, in order to make *New-York* the port of discharge.

I am now to show, that such circumstances have taken place in the present case, as in point of law, amount to such landing, and as amounts to making *New-York* the port of discharge. I would ask the question, if the ship had been met at sea by the owner or his agent, and a part of the cargo had been taken out and put on board of another vessel, whether she would not have been discharged of such part?

The answer, as it seems to me, will at once be in the affirmative. The cargo so taken out would not have been under the care and management of the master of the ship; he would not have been liable for any damage sustained by it, either through neglect or otherwise; in short, he would have been, as well as his ship, to all intents and purposes, completely discharged from it. If then, there be the same taking out and putting on board of vessels in the port of entry, will not the same consequences follow? Will not the master be discharged from his duty respecting this part of the cargo, and will not the ship be also discharged from so much of the cargo? If so, is not the port of entry where such discharge takes place, a port of discharge. The answer must be, yes.

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At least, so it clearly appears to me. By taking out the cargo at sea as above stated, the ship would have been merely discharged of such cargo, and it would have had no operation on the insurance, inasmuch as by the terms of the policy, the insurance company (the defendants in the present case) were holden till she should arrive at her port of discharge. But when it is so taken out in her port of entry, the very port to which she was destined, she is discharged of it in *a port*, which *ex vi termini* is, and must be, her *port of discharge*.

In the court below, stress was laid on this, that the cargo taken out at *New-York* was barely put on board of lighters, to be carried to *Middletown*, the port of discharge, and therefore *New-York* was not that port. To prove the point, the law respecting losses on board of lighters being the same as if they had been on board of the ship, was brought up. Let us now see how the law stands on this particular point, and how much it will bear on the present question. All the decisions on this point have been in cases of insurance of cargo or goods, till *safely landed* at the port of delivery. Goods have been damaged or lost when on board of the lighter in going from the ship to the shore, and the question has been whether the underwriter should not be holden in all cases, till the goods were actually on shore, or in other words, till actually landed. It was decided in the case of *Sparrow* v. *Caruthers*, reported in 2 *Strange*, page 1236, where the insurance was on goods to *London*, and until they should be *safely landed there*, that the insurer was not liable to a damage sustained by the goods on board of the owner's own lighter. The case was this, "on the arrival of the ship, the owner of the goods sent *his own lighter*, and received them out of the ship; but before they reached the shore, an accident happened, by which they were damaged." Lord Chief Justice *Lee* held, "that the insurer was discharged." He said "it would have been otherwise, if the goods had been sent by the ship's boat, which is considered as part of the ship, and its passage part of the voyage. The jury (of merchants) thought it turned on that distinction, and found a verdict for the defendant accordingly." It is true, this was a *Nisi Prius* decision, but it was made by Lord Chief Justice *Lee*, a very great common lawyer, and by a very respectable jury, peculiarly conversant with the law of insurance. I know not that this decision has ever been contradicted,

though I am sensible, the propriety of it has been (and as I think injudiciously) questioned by some judges, in more modern times. It had indeed been previously determined by the same judge, in the case of *Tierney* against *Etherington* cited in 1 *Burrow* 348., "that if it were the usage of the trade, that all goods in that particular trade should be landed by the owners of such goods in their own lighters, the risk would continue in those lighters." This, as I apprehend, would depend on the usage, and on the knowledge of the same, on the part of the insurer. It is now, however, well established, that if goods are damaged on board of a public lighter, the loss will fall on the insurer. In the case of *Rucker* v. *London Assurance Company*, tried before Mr. Justice *Buller* at *Nisi Prius*, *June* 8th, 1784, as appears by *Marshall on Insurance*, pages 253, 4. (*Condy's* edit.) the judge thus addresses the jury: "The decision of this cause depends on the usage; but the fact of usage being once established, the question whether the underwriter is liable or not, is matter of law. But it belongs to the jury to say, whether that which has been done here, be or be not within the usual course of trade. The distinction is between public lighters and those which are the property of the merchant, and work only for him. Public lighters have a stamp of authority. They are entered at *Waterman's Hall*. The case of *Sparrow* v. *Caruthers* does not affect this case. If a merchant will not send public lighters, it shall be a delivery to him, when the goods are put on board his own lighters. But lightermen, appointed by the waterman's company, are *public officers*, and have a public credit." But though it has been determined, that the insurer is liable for damage done the goods on board of a public lighter, yet it is expressly laid down by Mr. Justice *Heath*, as appears by *Marshall*, page 255. (*Condy's* edit.) speaking of the case then under consideration,(*a*) that the master and the owners of the ship were discharged when the goods were put into the lighter; but the freight and insurance are not commensurate; the latter is far more extensive than the former. It will be noticed, that the case abovementioned was not a case of insurance on a ship till her *arrival at her port of discharge;* but on goods *until they are safely landed.*

(*a*) *Hurry & al.* v. *Royal Exchange Assurance Company*, 2 *Bos. & Pull.* 430. S. C. at *Nisi Prius*, 3 *Esp. Rep.* 289.

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These decisions respecting losses sustained on board of lighters do not, however, directly apply to the present case. These cases were not exactly like this case. If an insurance had been on the cargo, and a loss had happened to that part of it taken out and shipped to *Middletown*, on a question whether in such case the insurer would be liable, these cases would more directly apply. But even if this were the question, what a mighty difference there is between those lighters spoken of in the cases above referred to, and these vessels called lighters, in the case under consideration? The former were water craft made use of to land the cargo at the several places within the port of *London*, where it was most convenient for the owners to have it landed; and made use of either because the ship was too deeply laden to go to the several landing places, or because it would be very inconvenient for her so to do after the entry. The latter were vessels on board of which the cargo was put, to be transported from *New-York*, one port of entry, the distance of more than one hundred miles, to *Middletown*, another port of entry. In no sense, as I think, can these vessels (called lighters) be considered as public lighters, or as any such kind of lighters, as have obtained that name, to land cargoes from ships in the port of *London*, or any other port in *Great-Britain*. If so, the voyage was at an end so far as respected the part of the cargo taken out of the ship. That part of the cargo was delivered from the ship in the port of *New-York*.

If the point be not perfectly clear, that *New-York* was in fact the port of delivery or discharge, I will put a case which perhaps may throw light on the subject. Suppose a ship is insured from one of the *West-India* islands to her port of discharge in the *United States*, and being cleared out for *New-Haven*, she arrives there, and after having entered her cargo, the whole is taken out and put on board of packets, and sent to *New York*, without ever having been landed; will not *New-Haven* be her port of delivery? There can be no question about it. *New-Haven* must be considered as her port of delivery. Is there any difference between the case put, and the case under consideration? I think not. In both cases, I take it, there must be a clearing out of the cargo re-shipped. But in the cases decided in *Great-Britain*, the landing is all in the port of entry. There is no new voyage, no new clearing out. But let it be remembered, that accord-

ing to the above cited opinion of Mr. Justice *Heath*, as respects the master's being discharged of the cargo, it makes no difference, whether or not an insurer on goods would be liable for a damage sustained on board of a lighter. In every case, according to his opinion, when bulk is broken, and the goods or cargo are put into a lighter, from that moment the master is discharged from any care or oversight of them; and of course, the ship must be discharged of them also. I have now done with this point.

Secondly, I am now to show, that if *Middletown*, and not *New-York*, was in fact the port of discharge, yet the clearing out and sailing from *St. Ubes* directly to the latter place, was a deviation from the voyage insured, and of course discharged the underwriters.

It is a fixed principle of the law of insurance, that a ship insured from one port to another particularly designated, must go the direct, usual course from the former to the latter. It then follows, if in the present case, the insurance had been from the ship's last port in *Europe* to *Middletown her port of discharge*, her going to *New-York* but from necessity would have been a deviation, and the insurance company would have been discharged from the loss that happened.

As to the principle of law thus laid down, and as to its application to the supposed case of insurance, as above stated, there has been no controversy in the argument of this case. Taking this principle of law to be a correct one, it appears to me to be a proposition nearly self-evident, if the particular port of discharge be not named in the policy, but the insurance be to her port of discharge generally, in the *United States*, wherever *that* shall be, that this port must be selected in time so as to enable the ship to sail in the usual course from her last port to it. If the insurance be from one port to another, the voyage, it is agreed, must be direct, in the usual track; if it be to any port within a certain district, I say, the voyage must be equally direct. The only difference in the two cases is, that in the latter, the insured may, after the insurance has been effected, designate the port of destination, but when it is once designated, and the voyage is entered upon, it must be direct, in the usual track, to such port.

But a decision of the Supreme Court in *Massachusetts* is cited, as being contrary to this doctrine. This decision, if

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it be in point, certainly carries great weight with it. But though made by the ablest judges, if it be opposed to the general principles of insurance law, and moreover, if it be a solitary decision, I should not implicitly give credence to it as an authority, about which there could be neither disputation nor doubt. I know not any decision in *Great-Britain* directly on the particular point now under discussion; nor indeed do I know any in this country on it, unless the one above alluded to be so.

But let us see what this case in the Supreme Court of *Massachusetts* was; and whether, in all points, it will compare with the case under consideration. It is reported in the eighth volume of *Massachusetts* Reports, from page 527 to 531, inclusive. The report states the case to be "an insurance on property on board of the schooner *Cremer*, at and from *Boston* to her port of discharge in *Europe;* including blockaded ports, and until there safely landed, and in quiet possession of the consignee thirty days. It was also contained in the policy, that it was understood that all risks of every name and nature (bad debts and illicit trade excepted) were included in the policy; that the vessel, though cleared for *Tonningen*, was intended for some port in *Holland*, or wherever else the master should deem proper, *in case he could not get into Holland;* that by illicit trade in the policy was understood an infraction of the municipal laws; but the assured was to take the risk of *French* and *Dutch* decrees against *American* commerce; at a premium of 25 per cent, to return 10 per cent, if from any cause the vessel should not discharge in *Holland*, or any blockaded port, and there should be no loss on the policy. The case goes on to state, that the schooner with her said cargo sailed from *Boston*, on the 28th of *March* 1810, and proceeded on her said voyage; and having escaped the *British* blockade of *Holland*, went so far up the *Mease* that she might have gone to *Rotterdam*, to which she was then proceeding, secure from capture by any *British* cruiser, or any blockading force. But the master being there informed by his owner's correspondent in *Rotterdam*, that if he entered that port with his vessel, he would not be permitted to enter or land his cargo there, or in any port in *Holland;* and that his vessel and cargo would be seized and confiscated, if they were discovered by the *French* guards, or custom-house officers; and there being imminent danger

thereof, he immediately proceeded with said schooner and cargo for *Gottenburgh*, to ascertain whether his cargo could be sold there to advantage, and if not, to what market in the north of *Europe* it would be best to carry it. He arrived at *Gottenburgh* on the 13th of *June*, and remained there until the 21st of the same month; when he left *Gottenburgh*, with the schooner and cargo to proceed for a market in the *Baltic*. On the day following, he was captured by a *Danish* privateer and carried into *Copenhagen*, where he arrived on the 26th, and where the vessel and cargo were libelled as prize, and after an acquittal at the lower court, were condemned on an appeal." The arguments of counsel I shall omit, and proceed to state the opinion of the court, which is as follows: "Two objections are made on behalf of the defendants to the right of the plaintiff to recover in this action. First, it is said that after the vessel had eluded the blockade, and gotten safely into *Holland*, she had no right to leave *Holland* and go elsewhere at the risk of the underwriter. But our opinion is, that by getting into *Holland*, as it is used in this policy, must be understood getting in for some beneficial purpose, as the sale and delivery of the cargo, which was known to be the sole object of the voyage. The master had a right, and it was his duty, after receiving the information which he had from the correspondent of the plaintiff at *Rotterdam*, to depart from the *Maese*, and seek some other port to discharge his cargo as it would have been his duty to do, in case he had been boarded and warned to depart by a blockading squadron or ship, on his approaching the river. It would have been as wicked as imprudent for him, under the circumstances, to have pursued his route to *Rotterdam*. This objection, therefore, cannot prevail. The second objection is, that even if the master had a right to leave *Holland* under the existing circumstances, yet that the policy having limited the voyage to one port only, the vessel must have discharged at *Gottenburgh*, and that the voyage contemplated by the policy must cease there. The determination of this objection depends on the construction to be given to the words *port of discharge*. As it appears that the policy was made some time after the vessel had sailed, it is presumable that no particular port of destination had been fixed upon previously to her sailing, and that it was left to the discretion of the master or supercargo to what port he should go.

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If he had broken bulk, or begun to unlade, at *Gottenburgh*, that must have been considered the port of discharge, and the voyage would have ended there within the policy. But we think, and in this opinion we are confirmed by that of several eminent underwriters of whom we have enquired, that when property is insured to a port of discharge, the *assured has a right to obtain advice at his port of arrival*, respecting the markets, and having informed himself, has a right to proceed to such port as promises the best sales, and still is protected by the policy; not being obliged to discharge his cargo at the first port he makes."

We have now before us this case determined in the Supreme Court in *Massachusetts*, and the opinion of the court on the same; and it will be seen, that it differs in some points from the case under consideration, and as I think, in some material points. It will be noticed, that it was expressly stipulated in the policy, that though the schooner was cleared for *Tonningen*, yet that the voyage was intended to some port in *Holland*, "*or whereever else the master should deem proper in case he could not get into Holland.*" The whole coast of *Holland* being blockaded at the time, the master must get into such port as was, under all circumstances, most convenient for him. If possible, he must avoid the blockading ships. To do this, no plan could have been devised previously to his sailing, even if the insurance had been effected before the schooner left *Boston*. From the nature of the voyage, therefore, and from the situation of the ports in *Holland*, as respected the blockade, it was impracticable to go in a direct usual course from the port of *Boston* to the port of discharge. It was impossible to forsee, in which, or whether in any, of the ports in *Holland*, the cargo could be discharged. It must have depended on the discretion of the master, to steer one course or another, in order to avoid the blockade, and to get into port. But if he should not be able to get into any port in *Holland*, he might steer for any other port in *Europe*. In this situation, it must be a matter of judgment with him to what place to direct his course. He could not, if turned off from the coast of *Holland*, have any means in his power to determine where he could find the best market for his cargo. To ascertain this, it would seem not only expedient but necessary, to steer for some port, to make enquiry as to the state of the markets. This would

be prudent and proper, and would be the usual course of acting and proceeding, when under such circumstances. If an insurance then be made on the vessel, or the cargo on board of the vessel, bound on a voyage of this description, all these things above related will be taken into consideration, and the underwriter insures against a loss happening in the voyage conducted in a prudent manner, and as such voyages are usually conducted. If after having been turned off by a blockading squadron, it would be the usual course, to go to a port, to enquire into the state of the markets, the underwriter would be holden for a loss happening after leaving such port of enquiry.

These principles governed the court in *Massachusetts*. They went upon the ground, that the insurance was made some time after the vessel had sailed, and that it was left to the discretion of the master at what port he should discharge his cargo: That it being impossible to sell the cargo in *Holland*, made it necessary to leave that country, and to go for a market somewhere else: That it was competent for the master to go to *Gottenburgh* merely to enquire with respect to the state of the markets: And that "when property is insured to a port of discharge, the assured has a right to *obtain advice at his port of arrival* respecting the markets, and having informed himself, has a right to proceed to such port as promises the best sales, and still is protected by the policy; not being obliged to discharge his cargo at the first port he makes."

I think this decision may well stand, and yet the defendants in the present case be liable to no damages for the loss, that has happened. Let the decision in *Massachusetts* be a precedent for all cases circumstanced as that was. It certainly can be for none other.

That insurance was an insurance on a foreign voyage, until the vessel arrived in a foreign country, at her port of discharge, and thirty days after. It was an insurance in which much discretion was left with the master, as to what course to steer, as well as at what port to discharge. It was a voyage in which it was necessary that sales should be immediately made, and also should be made to the best advantage. It was a voyage in which it was impossible to know where the best market was, except at some port of arrival; and of course, the port of discharge must be sought for

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after the arrival on the *European* coast. In a voyage of this kind, perhaps the principle as laid down by the court, was correct, that "where property is insured to a port of discharge, *the assured has a right to obtain advice at the port of arrival* respecting the markets, and having informed himself has a right to proceed to such port, as promises the best sales, and still is protected by the policy; not being obliged to discharge his cargo at the first port he makes." This opinion, I say, may be correct, especially if fortified by that of eminent underwriters. But be it remembered, that the opinion of underwriters, as to the general principles of insurance law, can be of little avail; but has weight only, as to the usage of trade: that is to say, as applicable to the case before the Supreme Court, such opinion of underwriters may and ought to have weight, stating what had been the practice in looking out for a foreign market in voyages of this kind, and what in such cases had been the construction of policies, where an insurance had been made to a *port of discharge* generally.

Taking this decision as a precedent, yet as has been observed, it can be only so, in a case circumstanced as *that* was, which was there decided. The case before us, as it strikes me, is a different one from the case in *Massachusetts*. It is an insurance on a voyage from the *United States* to certain ports in *Europe*, and from thence to *the port of discharge* in *America*. There was nothing to interrupt the pursuance of a direct course from *St. Ubes*, the last port of clearance in *Europe*, to *New-York* the port of destination. There was no blockading force to turn the ship off from *New-York*, and to oblige the master of the ship (the owner's agent) to cast about him, and deliberate, at what port he could best sell his cargo. It was not competent for him to go into any port and enquire into the state of the markets, and to act accordingly. He had nothing to do with selling the cargo. The voyage from *St. Ubes* to *America*, was a voyage *home*, to the place and country where the owner resided. A correspondence between the owner and master could be constantly kept up, while the latter was in *Europe*, in which he might be informed what was the state of the markets here, and be directed whether to clear out for and come to *Middletown*, or some other port. And that instructions were in fact given him, to make *New-York* his port of arrival on the voyage

home, there can be very little doubt. In truth, if he had not been otherwise directed, he must and ought to have shaped his course, so as to have made *Middletown* his port of arrival.

Such then being the case, can it be said, that the owner being at home, may direct the master to bring his ship to the port of *New-York* as a port of enquiry, and after her arrival, to order her to *Middletown*, and the underwriters be holden for this loss ? In the case decided in *Massachusetts*, inasmuch as no sales could be made in *Holland*, the place of destination, it seemed to be a matter of necessity, for the master to carry his vessel to some port merely to enquire with respect to the markets. The policy expressly authorizes his leaving his place of destination, and seeking a market in some other place or country, in the happening of certain events. The present policy gives no latitude to range from one port to another. In the present case, there was no absolute necessity of selling the cargo immediately, and for that purpose, immediately to look out for a market. There can, therefore, be no usage as to going to a port to look for a market, as in a foreign voyage, and particularly, as in such a one as was under the consideration of the court in *Massachusetts*. Indeed, it was asserted in that case by the counsel for the insurer, and not contradicted either by the opposite counsel, or by the court, that in an insurance to the port of discharge in the *United States*, " it never had been understood that the vessel had a right to range from port to port to find a convenient market for her cargo." I say, this position was not contradicted by the court, unless the decision in that case contradicted it, which, I think, it did not.

If after the arrival of the ship at *New-York*, the owner (the plaintiff in the present case) had a right to order her from thence to *Middletown*, he had the same right to order her from *New-York* to *New-Orleans*, a voyage, I presume, of more hazard than from *St. Ubes* to *New-York*. If this be law, the premium is not at all proportioned to the risk. Indeed, going on this ground, there is no knowing what premium to take. I am, therefore, clearly of opinion, that on this point the case is with the defendants.

But thirdly, whether the case be with the defendants or not, on the two grounds I have been considering, yet as it appears to me, the right of abandoning and of claiming as for total

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loss, would not accrue on the happening of any of the events stated in the charge as such ground: Or, to be more explicit, that it was incorrect for the court to charge the jury, that if they should find the vessel to have been in a situation extremely hazardous, when on the rocks, and farther, if they should find, that the insurers refused to bear the expense of attempting to get her off, these circumstances would justify an abandonment and claim as for a total loss.

In the first place, I will attempt to shew, that the ship being on the rocks, and in a situation extremely hazardous, apart from the circumstance of the insurers refusing to bear the expense of attempting to get her off, will form no ground for an abandonment. Secondly, I will then endeavor to show, that the refusal to bear the aforesaid expense, will be no additional ground for an abandonment.

A few observations as to the first proposition. It is a clear principle of law, that a contract of insurance is a contract for an indemnity merely: It is a contract for a satisfaction to the insured for damage which may be sustained, on the happening of an event or events, which satisfaction is to be proportionate to the damage sustained. As to damages to be recovered, it stands on the same ground with every other contract, to wit, that so much shall be recovered, and so much only, as will repair the injury sustained. If the property insured be totally lost, the whole sum put at hazard for the safety of that property, shall be paid by the insurer. If however, it be but partially damaged, such sum shall be paid, as bears the same proportion to the whole money put at hazard, as the property in a damaged state does to its value in a sound state. Where the property is totally lost, beyond all recovery; as for instance, if it be destroyed by fire, sunk in the middle of the ocean, or captured by an enemy at open war and duly condemned; in all these cases, there is no need of an abandonment, in order to recover as for a total loss. But where a loss is total for a time, and by the happening of after events, becomes partial; as by the capture and recapture of a ship, it is absolutely necessary to abandon to the underwriter while the loss is *total*, in order to recover more than for an average loss.

There may be also what may be called a *technical total loss*, and in such case, if recovery is to be had as for a total loss, an abandonment *must* take place. A technical total loss is

where the property insured is in existence, but in such a damaged state, as to be of little or no value to the owner: as if a ship and cargo be so damaged, as that the voyage be totally lost, or not worth pursuing; if salvage be high; if in case of insurance on a ship, she is so much damaged as to be not worth repairing; if in case of goods, salvage perhaps be not worth the freights; in all these cases, the insured may abandon the property the subject of insurance to the insurer, for him to make what he can of it, and recover as for a total loss.

But this I take to be a fixed principle, that the insured cannot by abandonment turn what is in its very nature but a partial loss into a total one. When I say partial loss, I do not mean any of the above cases, where in fact the loss is but partial, but the property saved is hardly worth having. Every abandonment is made on the ground, that the property is either totally, (as in the case of a capture,) or technically, lost.

Now comes the question whether a ship's being on the rocks, and in an extremely hazardous situation, will justify the owner and insured, to abandon her to the insurer: In other words, whether her being in that situation, is a technical total loss of her.

I am of opinion, that it is never a ground for abandoning a ship to the insurers, that she is in a hazardous, nay very hazardous situation, and in great danger of being lost. Though in such a situation for a time, yet if she gets out of it, but by sustaining a partial loss, notwithstanding the abandonment, damages can be recovered but for the actual injury or loss sustained, which, in fact and in truth, is partial only. No speculation can be made by the insured from the happening of this event to make money out of the insurer. If extreme danger of being lost be a ground of abandonment, there is no knowing where to stop. A ship though not aground, nor on the rocks, may be in extreme danger of going ashore in a gale of wind; she may be at sea, and in a tremendous gale be in extreme danger of foundering; and if being in a situation extremely hazardous be the criterion to determine whether an abandonment may be made, in each of these instances the insured may abandon, and though little or no damage be sustained in the gale, he may turn what really was little or no loss, into a total one; and if the property be insured well up, may make a handsome speculation

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for himself. No; this is not the principle. No extreme hazard will justify an abandonment, provided that, in the event, though the danger was great, yet the damage was but partial. Though the vessel was in the utmost hazard, yet she escaped every danger, and is safe.

Marshall says, "Shipwreck is generally a total loss. What may be saved of the ship or goods is so uncertain, and depends so much on accident, that the law cannot distinguish this from the absolute destruction of the whole. The wreck of the ship may remain and may be saved, but the ship is lost. A thing is said to be destroyed when it is so broken, disjointed, or otherwise injured, that it no longer exists in its original nature and essence."(*a*) And again, "But the mere stranding of the ship is not of itself deemed a total loss, so as to entitle the insured *immediately* to abandon. If by some fortunate accident, by the exertions of the crew, or by any borrowed assistance, the ship be got off and rendered capable of continuing her voyage, it is not a total loss, and the insurers are only liable for the expenses occasioned by the stranding. It is only where the stranding is followed by shipwreck, or in any other way renders the ship incapable of prosecuting her voyage, that the insured is entitled to abandon." "It is a rule that, to entitle the insured to abandon, there must have been, at some period of the voyage insured, or during the continuance of the risk, a total loss."(*b*)

To prove the above propositions, he cites a number of cases determined in *Westminster Hall*, and among them, the case of *Cazalet* v. *St. Barbe*, reported in 1 *Term Reports*, page 187. It was an insurance on the ship *Friendship* from *Wyburgh* to *Lynn*. In an action on the policy, the defendant pleaded a tender of forty eight pounds. The plaintiff claimed as for a total loss, and upon the trial of the cause, it appeared that the ship had suffered so much in her voyage, that when she arrived at *Lynn*, she was not worth repairing. The damage, however, sustained by the ship did not exceed 48 *per cent*, the sum which the defendant had paid into court upon his plea of tender. Upon this case the defendant insisted that this was a *partial* and not a total loss, and that therefore the plaintiff had no right to abandon. The court were clearly of opinion, that the owner cannot abandon but in the case of a total loss, and that they could not determine,

(*a*) 2 *Marsh. Insur.* 582. *c.* (*Condy's* edit.) (*b*) *Ibid.* and *p.* 583.

that there had been a total loss, when the jury found, that there was only a loss of 48 *per cent.* Mr. Justice *Buller* in giving his opinion in this case says, "Nothing can be better established than that the owner of a ship can only abandon in the case of a total loss happening *at some period or other of the voyage;* which cannot have happened in this case, as the jury have expressly found, that the loss amounted to 48 *per cent.*" He says further, "The true way of considering the case is, that it was an insurance *on the ship for the voyage;* and if either the ship or voyage be lost, it will be a total loss; but here neither was lost. The case of *Hamilton* v. *Mendes* is decisive."

This case of *Hamilton* v. *Mendes* is reported in 2 *Burr.* 1198. and 1 *Black.* 276. A statement of the case and the opinion of the court appears in *Marshall on Insurance* from page 572 to page 578, inclusive. In page 574 he quotes the opinion of Lord *Mansfield* in the following words: "The plaintiff's demand is for an indemnity. His action then, must be founded on the nature of his damnification, *as it really was*, at the time of the action brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has determined that the damnification is, in truth, an average loss. Whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to say, that an action will lie for an indemnity, when upon the whole event no damage has been sustained."

It seems to me, that it is now proved from the reason of the thing as well as from authorities, that the charge as above stated was incorrect, inasmuch as a situation *of extreme hazard* is a very different thing from the total loss of the ship.

Secondly, I will now attempt to show, that if to the circumstance of an extremely hazardous situation be added a request to and refusal by the defendants to bear the expense of attempting to get the ship off the rocks, all these things will not make them liable for a total loss. I am well aware that Chief Justice *Parsons*, in giving the opinion of the Supreme Court in *Massachusetts* in *Wood* v. *The Lincoln and Kennebeck Insurance Company*, 6 *Mass. Rep.* 483. says, "If the ship be stranded in a place where assistance, materials and workmen may be easily procured, but it may be doubtful whether the attempt to get her off will succeed, while the

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expense is certain, if the insurer on having notice, will not engage to pay the expenses of the attempt, and also to *repair the vessel if the attempt should succeed*, the assured may abandon. For in this case, as he cannot recover more than a total loss, he shall not be holden to labour for the recovery of the ship, which he must do at his own expense, if he should be unsuccessful." It seems to me it was not necessary in deciding the case then under consideration, to have recourse to the above principles thus laid down by the Chief Justice. It was a case, in his opinion, of a mere stranding, not of a shipwreck. In discussing it, he fully agrees with what I have quoted from *Marshall*, "that if the ship be stranded only, it is no ground for an abandonment, and claim as for a total loss." He says in so many words, in that same page 483. "When a ship is stranded, the assured cannot for that cause merely, immediately abandon." The plaintiff (the insured) abandoned immediately after she had got upon some rocks, and was stranded, but did not request the defendants to be at any expense in getting her off. These being the facts, the Chief Justice upon his own principles must have decided against the claim of the plaintiff, as for a total loss, inasmuch as when the abandonment was made, there *was* no total loss, either real or constructive. True it is, a few days after the vessel got upon the rocks, she overset and sunk, and the defendants, unrequested, weighed her up, and restored her to the plaintiff's wharf fully repaired. The court determined the loss not to be total.

The above stated opinion of the Chief Justice, however, has great weight, even if it be an *obiter* opinion, as he certainly was one of the most able judges that ever sat on the bench in this or any other country. Yet it cannot be considered as an authority, unless it was necessary to give it, in deciding that case.

I have seen no case, that has been decided on the ground taken by him. There was an opinion expressed by Lord *Mansfield* in the case of *Hamilton* v. *Mendes*, 2 *Burr.* 1198. which at first view appears to be somewhat similar to this opinion of Chief Justice *Parsons*, but by comparing the two opinions with each other, the similarity is not very striking. This opinion was also, as I think, given unnecessarily, because the case he was considering did not require it. It was a case of insurance on a ship and goods from *Virginia* to *Lon-*

don. In the course of the voyage, the ship was captured, re-captured and carried into *Plymouth.* While there, the insured abandoned to the insurer. The latter refused to take the ship, but was ready to pay the salvage, and all other losses and charges sustained by the capture. The court determined, that though the loss was total, while the ship remained in the hands of the enemy, yet it was not so, after the re-capture and her arrival at *Plymouth.* That the abandonment having been made while the loss was but partial, from this very circumstance, it was improperly made, and was inoperative. The plaintiff claimed as for a total loss, and failed. It ought to have been further stated, that the ship was brought from *Plymouth* to the port of *London*, by the order of the owners of the cargo and the re-captors, and that the ship sustained no damage from the capture. In delivering the resolution of the court, Lord *Mansfield* said, "It does not necessarily follow, that because there is a re-capture, therefore the loss ceases to be total. *If* the voyage be absolutely lost, or not worth pursuing; *if* the salvage be very high; *if* further expense be necessary; *if* the insurer will not engage, at all events, to bear that expense, *though it should exceed the value, or fail of success;* under these and many other like circumstances, the insured may abandon, notwithstanding there was a re-capture." That is to say, as I understand it; if by means of a capture and re-capture, such be the state of things, that the voyage is so far broken up, as not to be worth pursuing, and even if pursued, expense will be necessary for repairs and for refitting, the insured may, under those circumstances, abandon to the insurer, and claim as for a total loss, unless the latter will come forward and engage to pay this expense, be the amount ever so great. He meant to be understood to say, that an abandonment might take place in the extreme cases put by him, even though the property insured was not absolutely all lost and destroyed, unless the insured would engage to bear the expense above stated. That he meant to say no more than what I have just stated, I think, is clear, not only from the manner of expression in giving the opinion, but also from his citing the case of *Goss* v. *Withers*, previously determined by the court of King's Bench, as a case in which it was decided that an abandonment might be made, inasmuch as the voyage was completely broken up, and "the insurer

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did not engage to be at any expense." This reference to the case of *Goss* v. *Withers* is in page 1212 of the same volume of *Burrow*, and is a part of the report of the case of *Hamilton* v. *Mendes*.

This opinion of Lord *Mansfield*, I agree is founded in good sense, though it should be considered as an *obiter* opinion, as respected the case he was then deciding. Whenever a constructive total loss has taken place, by a voyage being ruined in the manner above stated, it would be very unreasonable to oblige the insured to pursue it at his own expense, insomuch as the losses, repairs and expenses on the winding up of the business very probably might not only exceed the sum subscribed by the insurer, but also, might eat up (if I may use the expression) vessel and cargo. Unless therefore, the insurer will engage to pay all the expense, though it may exceed the sum he agreed to hazard, the insured may abandon to the insurer, and let him make the best of the business.

The opinion of Chief Justice *Parsons* in the case before him was that if a vessel be merely stranded, for which alone, *he* agreed, an abandonment could not be made, yet even in this case, if the insurer "will not, on notice, engage to pay the expense of getting her off, and also, *to repair the vessel if the attempt to get her off should succeed*, he (the insured) may abandon." Though I can subscribe very fully to the above mentioned opinion of Lord *Mansfield*, yet I cannot so fully to that of Chief Justice *Parsons*. There are strong reasons, why to prevent an abandonment, the insurer should explicitly engage to pay all the expense, in the case put by Lord *Mansfield*, because without such engagement, as events might be, he would not be liable to pay it at all, or at least, but a part of it. In the case put by Chief Justice *Parsons*, the abandonment may be made, while the loss is partial only, unless the insurer will engage to pay all the expense of getting off and repairing, let the loss be total or partial; for there is no exception made of a partial loss. Indeed, the probability is if the vessel be got off and repaired, that it will eventually be but a partial loss. If so, that is, if it turn out to be a partial loss, the insurer, of course, without any engagement on his part will be holden to pay his part of it. His putting his name to the policy secures this payment. If the ship be insured to the full value, he must pay the loss, whatever it is, not surmounting the value; or, at any rate, not coming up

to the value. If she be insured to a sum short of the value, say for instance, to one half the value, he must pay one half of the loss, and the owner or insured, must pay the other half; or rather, (which amounts to a payment,) must sustain the loss of the other half, without any indemnification. Hence may be seen the impropriety of calling on the insurer to bear the expense accruing from the damage sustained, as long as this damage is merely partial. As the case may be, the insured himself, for the reasons just given, must be at a part of such expense.

Further, to call on the insurer to engage to pay for the *repairs* of the ship after she shall have been extricated from her difficulty, seems to go on the ground that the loss *will* be partial, but that notwithstanding this, the insurer must engage to pay for these repairs, or the ship will be turned on his hands. This appears to me to be unreasonable and not to be warranted by any authority, that I have seen.

The true reason of calling on the insurer to make any engagement about expenses is, that inasmuch as by the policy he will not be obliged to pay such expenses, he therefore must either engage to pay the expenses, or take the ship. Such a state of things can only be, when in point of law, a total loss has happened.

If then it cannot be considered as settled law, in consequence of decisions on the very point, that the charge to the jury in the present case was correct, I think, on fair, legal principles, it was incorrect. It being a principle of law, that there can be no abandonment of the ship to the insurer, unless in point of law a total loss has intervened; and it being also a principle of law, that such loss has not intervened, by a ship's being in a situation extremely hazardous; it is difficult for me to conceive, how a refusal of the insurer to be at the expense of getting her out of danger, can alter the state of things, in other words, can turn a partial loss into a total one.

But it is said, to be very possible, that by the utmost exertions, the ship or the property insured, be it what it may, never can be extricated from this hazardous situation, but must eventually be lost. In such case, that is, if there be a total loss, the insured can recover no more than the sum put down in the policy, as being hazarded, whether the same be a complete indemnification or not. Be it so, that he can re-

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cover nothing but the sum insured, (as I believe he cannot) when he goes for a total loss on the policy. In case of a stranding, however, it is hardly presumable, that the whole loss, including all expenses of every kind, will overgo the sum named in the policy, if the insurance be to the full value.

But further, is it not the duty of the insured as well as that of his agents, the master and mariners, to do all they can to save the property insured, whenever it is in jeopardy? Can he or they be by, and say "we know not, whether we shall get payment, and therefore we will do nothing to secure the property insured?" Certainly not.

But again, must not the insured wait until the saving of the ship (if the insurance be on a ship) is hopeless, entirely so, before he can abandon? If the situation be extremely hazardous, but not hopeless, the insured cannot divest himself of the ship, or the property insured. In such a case, there is no total loss, in any sense of the words; and the insurer, when called upon to bear the expense, may say to the insured, "the property is yours, not mine, and you must take care of it."

As has been observed, there must have been in the course of the voyage a total loss, either absolute, or in point of law so, in order to justify an abandonment. But in the case under consideration, how can it be said, there has been a total loss, when soon after the abandonment, the ship was got off the rocks by some person or other (no matter by whom) with sustaining a trifling damage? Suppose she had floated off without the exertions of any one, at the time she was made to float by the exertion of individuals, and with receiving no more damage, than she actually *did* receive; would the loss *then* have been total? It seems to me, it cannot be so said. I beg to know, where is the difference between the two cases? If the refusal to bear the expenses be the criterion to determine, whether the loss be total or partial, her floating off of her own accord (if I may use the expression) would have made no difference in the case.

But the fact is, there has been no total loss, either *actual* or *constructive*. The event has proved, that no abandonment could have taken place.

If after the abandonment, the ship had gone to pieces on the rocks, and had become a perfect wreck, a different case from the one we have been considering, would have been

presented to the court. In such a case it might have been strongly argued, that the event had proved the abandonment to have been properly made. The *fact* of a total loss would have actually existed, and that the ship was in a desperate and hopeless situation, when she had been abandoned, might have been very naturally inferred. Let me repeat it, the true ground of abandoning, as I apprehend it, is, that there must be a constructive total loss, at the time when it is made; and nothing will prevent its going into effect, but an engagement on the part of the insurer to pay all expenses of refitting, repairing, or of whatever nature they may be, or to whatever amount they may be. He can then make his calculations, whether it will be best for him to take the ship, and pay the sum subscribed by him, or to let her remain with the insured, and pay the above expenses. But that he should be obliged to engage to pay expenses, at a time when in fact there is not, and when it is a matter of total uncertainty whether there ever will be, a total loss at all, appears to me to be an unsound position, one that will work great injustice. If for want of this engagement, an abandonment may be made, the insured may make money by the loss. Because clear it is, if it does not turn out to be a total loss, the insurer never will insist on the abandonment, unless he has overvalued, or unless he can, in some way or other, make a good speculation, by the events that have happened. But as has been observed, the object of an insurance is an indemnity merely, not for the insured to make a good speculation out of the insurer.

I am, therefore, of opinion, that on the three before-mentioned grounds, there ought to be a new trial. I fear I have been tedious; but I have great names opposed to my opinion; and from this circumstance, it seemed necessary to examine more minutely all the points, that I thought would bear on the question, than, under other circumstances might have been thought necessary.

SMITH, J. I agree fully in the opinion expressed by the Chief Justice so far as it respects taking out a part of the salt and putting it into lighters for the purposes mentioned in the motion.

But on other points in this case I have formed a different opinion from the one given by him. It appears to me, that the voyage terminated at *New-York*, and that the policy was

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at an end before the accident happened. In this policy, the ship was insured from *St. Ubes* to her port of discharge in the *United States*. The port of discharge not being named in the policy, gave a right to the insured of electing one; and this is the whole extent of his privilege. It gave him no right to elect two; but when he had once exercised the power given him, he must be bound by it. This election was actually made by clearing out for *New-York*, and further evinced by actually arriving in port. But if there was still any doubt on this subject, the fact of entering the vessel and cargo at the custom-house, and paying the duties, ought to be conclusive; but if a doubt still existed, it would render the *intent* with which all this was done material. And the intent should have been left to the jury.

I admit, that no port is literally a port of discharge without unlading the vessel in it, or beginning to unlade by breaking bulk; but I proceed upon the ground that the insured, having proceeded thus far, is bound to make *New-York* the port of discharge; and whether he does or not, that the policy is at an end, the same as it would have been if *New-York* had been named in the policy as the port of discharge. If however we admit, that the insured might elect another port of discharge; and as the ship was on her passage to *Middletown* with a view to discharge her cargo when the accident happened, that this is to be considered the port of discharge, still we meet with insuperable difficulties in our way; for in this view, there has been such a deviation in going into *New-York* as to discharge the insurers. The port of discharge under this policy is the port of destination, to which the insured was bound to proceed by the shortest and safest course; and it is admitted in this case, that the ship had entirely changed its course before the accident happened. Had *Middletown* been named in this policy, it would be admitted, that the deviation in going into *New-York* would discharge the underwriters; and why not the same when that omission is supplied by the insured? But it has been said, that the captain might go into *New-York*, and wait for orders from the owners, who might then direct at what port he should discharge the cargo; and this is the ground assumed by the court below in charging the jury. But for this position there is no foundation in point of fact. The defendant expressly denied this, and claimed that the

captain went there, not *to wait for orders*, but with *intent to discharge the cargo*. And the court, after deciding this fact to be immaterial, could not assume it as true, or otherwise.

But if the fact had been admitted, or it had been found by the jury, that the captain went into *New-York* to wait for orders from his owners, and not with intent to unlade his ship; yet I should doubt the right to do that under this policy. If such a right existed, it must be found either in some usage of trade, or in a rational construction of the instrument itself. For the former of these there is no pretence; and for the latter, I see no foundation. If such a right existed, I see no reason for restricting it to *New-York* only; but after the ship had arrived at *Middletown*, the owners might have given new orders to return to *Philadelphia*, and from thence could direct her to return to *Boston;* and on the same principles, the insured may keep the ship ranging from port to port indefinitely, in search of the best market, as their own convenience may dictate, and still hold the underwriters responsible for any loss which may happen.

There is but one of two constructions which can be put on this policy. One is, that the insured has the mere power of electing a port of discharge to which he is bound to proceed in the shortest and safest course. The other is, to hold the insurers responsible until the vessel is actually discharged of her cargo, or has begun to discharge, provided the insured acts reasonably for his own interest, and not wantonly or fraudulently. The latter of these would in my opinion increase the risk far beyond what could have been contemplated by the parties at the time of entering into the policy. If such a privilege is intended to be given to the insured, there should be an express clause to that effect, or it ought to appear, from the nature of the voyage, and the situation of the parties, taken in connexion with other parts of the policy, that such was their intention. But in the present case, the construction I oppose derives no aid from any of these sources.

Had this been the case of an outward bound voyage, with a cargo from the nature of it evidently seeking an uncertain market, in an unknown country, there would be some room to doubt whether it was not their intention to authorize the insured to range from port to port in search of a market; but the present was a homeward bound voyage, with the owner in this country, who must of course have been well

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acquainted with the state of the markets before the ship sailed; and besides, the cargo was of a kind which, of all others, is perhaps the least subject to any great fluctuation in the markets, in this country.

But it is said, that if the construction which I put upon this policy be correct, there is no difference between a port of *arrival* and port of *discharge*, whereas a difference must have been intended. I am far from being certain, however, that any difference was intended. I find the terms port of *discharge*, port of *delivery*, port of *destination*, and port of *arrival*, all used in the books indiscriminately to express the same idea. But it is not necessary for me to insist that these terms are synonymous, because I do not say, that under a policy of the kind in question, it is necessary for the ship to discharge her cargo in every case at her port of arrival. The port of arrival may be in the direct course to the port which is intended as the port of discharge. In that case, she might proceed to her port of discharge without deviation, and of course without discharging the policy.

It has been said, however, to be reasonable, that the insured should be allowed to go into one port, and there enquire as to the state of the markets, or to enable the master to communicate with his owners, before an election is made at what port to unlade the ship. In answer to this argument, I will only say, that when about to put a construction on a written instrument, I cannot permit myself to speculate on what would or would not have been reasonable and useful provisions to have been introduced into it; my only business is with what I find in it; and by the best attention which I have been able to bestow on this subject, I have not discovered any intention to give such a privilege, which would indeed be of great importance to the insured, but would increase the risk of the underwriters in a degree equally important and interesting to them.

In the argument of this case, much stress has been laid on the case of *Coolidge & al* v. *Gray*, reported in 8 *Mass. Rep.* 527. The case appears to me to differ from the present in several particulars of considerable importance; but whether it can be distinguished from the present in point of principle, I do not deem it necessary to enquire, because it is agreed not to be of any binding authority in this court. And though I admit, that it has been decided by a court of high respecta-

bility, yet I feel myself constrained to say, if it must be admitted to be similar in principle to the present, that it is not supported by any usage of trade, or by a single decision either in the *English* courts, or any of the courts of our sister states, and stands opposed to the general principles of law as applicable to the construction of written instruments.

It appears to me, also, that the court below were incorrect in deciding, that because the ship was stranded, and in imminent danger of being lost, the insured had a right to abandon her to the insurers. There is no right to abandon, unless there is a total loss; but to constitute a total loss in point of law, it is not necessary that the ship should be entirely destroyed. If a ship becomes a wreck, it is in point of law a total loss; and it becomes a wreck when by means of damage at sea the repairs will cost more than one half her value. So a loss of the voyage is a total loss, although the ship may have received but a slight injury. But the mere stranding of a ship has never been held to be a total loss, though it may afterwards become a wreck by means of another storm, or otherwise; and if so, it then becomes a total loss; or it may remain stranded so long that the voyage is thereby lost; and if so, then it becomes a total loss by that means. In the case under consideration, the ship was stranded on the rocks, and in imminent danger of being lost when the abandonment was made. Does this constitute a total loss so as to give the right to abandon? The mere stranding, we have seen, does not. Does the danger she was in of being lost alter the case? I do not see any difference in this respect between the danger a ship is in of being lost by stranding, and danger by a storm, or by an enemy, provided it is equal in degree; but these, however extreme, have never been holden to constitute a total loss. They are mere perils; and however imminent the danger, a total loss may never happen. The stranded ship may drift off without becoming a wreck; the storm may abate; and the enemy may not succeed. At any rate, the insured should wait till the loss happens, unless by waiting the voyage is lost. Suppose a ship in a storm drifts on rocks near the shore, and for the moment is in imminent danger of being lost; the insured standing on the shore instantly abandons her to the insurers; and the next gust of wind, in five minutes afterwards, drifts her off, and she proceeds on her voyage, not having received any essential

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injury; would there be a total loss at the time of the abandonment? It appears to me that this would not be contended for; and I see no difference in point of principle between the cases where she drifts off soon enough to proceed on her voyage, provided the damage is not so great but that she can be easily repaired. In the present case, the vessel was got off the rocks by the master in a few days after the abandonment, in a situation to be easily repaired with an expense of but a small part of her value. For the expense of getting her off the rocks and repairs the insurers ought to be liable; but it is too much to subject them to pay for the ship.

But it appears in the present case, that the insurers, on being notified of the abandonment, refused to advance money to get her off from the rocks, on the ground that they considered the voyage to have terminated in *New-York*. And it is said in argument, that where a ship is stranded, and in extreme hazard of being lost, the insured is not bound to expend his own money in attempting to get her off; because if he fails, and the ship is lost, he can recover for no more than a total loss on the policy; and of course, must lose the expense. If, therefore, the insurers in such case, will not advance money to defray the expense on being notified, the insured may immediately abandon. If then the insurers had advanced money to defray the expense of getting the ship off the rocks, it would not have been a total loss, and *a fortiori* it is not a total loss where she gets off without expense; or where the master gets her off with a small expense, and she is in a condition to proceed on her voyage.

The law has been rightly stated, that the insured is not obliged to expend his own money in getting off a ship which is stranded, and in extreme hazard of being lost. But it does not follow, that because the insurers refuse to advance money, the insured may immediately abandon. The right to abandon must still depend on the question whether there is a *total loss*; which may never be the case, though both parties refuse to advance money.

In a case of this kind the insured is in no difficulty; he is not bound to expend his own money; and if the insurers will not advance it, on being notified, the insured may abandon whenever the ship becomes a wreck, or whenever it remains stranded so long that the voyage is lost; because in either of these cases, there will be a total loss. But where

the ship immediately drifts off without expense, and in good condition to proceed on her voyage; or is in a condition to be easily repaired, and the voyage is not lost; the refusal to advance money will not turn it into a total loss. The case of *Wood* v. *The Lincoln and Kennebeck Insurance Company*, decided by the Supreme Court in *Massachusetts*, and reported in the sixth volume of *Massachusetts* Reports, page 479, was decided on the same principles which govern this case. In that case, it appeared that the vessel was stranded, and in as much hazard of being lost when the abandonment was made as the ship in this case was at the time of abandonment. In that case as well as this, the event proved it not to be a total loss, however great the danger might be at the time of abandonment. And both that case and this must turn upon the question whether there was in point of law a total loss, at the time of abandonment; because if so, it was a vested right, and changed the property. The court, however, in that case, did not subject the insurers for a total loss.

Further, in that case, after the abandonment the insurers got off the ship at their own expense; in the present case, the master got her off, and he being agent to the insurers after the abandonment, it is the same thing in point of law as though they had done it themselves.

Chief Justice *Parsons* indeed says, that where it may be doubtful whether the attempt to get off the ship will succeed, while the expense is certain, if the insurer on having notice will not engage to pay the expense of the attempt, and also repair the vessel if the attempt should succeed, the assured may abandon; but he proceeds on the ground that the getting off the ship by the insurers is tantamount to their engagement to get her off, and equally efficacious to prevent the stranding from being a total loss, though done after the abandonment. In the present case, then, if the principle advanced by him be correct, the master's getting off the ship in behalf of the underwriters will have the same effect as though she had been got off by them, and the legal effect of the abandonment being in this way destroyed, the master becomes, again, the agent of the insured.

But I cannot conceive that these are the real principles which governed that case; because it contradicts the whole current of authorities to permit any subsequent transactions

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to remove the legal effect of an abandonment rightly made at the time, except an agreement of the parties either express or implied. I must conclude, therefore, that the real principles which governed that case were, that the subsequent transactions showed that there was not a total loss, at the time of abandonment. Nor can I admit, that the principle is a correct one, that a refusal of the insurer to advance money, or undertake to defray the expense, will in any case turn a partial loss into a total loss. I find no adjudged case to support such a position. In the case of *Hamilton* v. *Mendes*, 2 *Burr.* 1198 there had been a clear total loss by a capture of the ship, and the ship having been re-captured before any abandonment or action brought, and the insurers having undertaken to defray all the expense, the question was whether the insured could then avail himself of such total loss. It had been argued, that he could, because the re-captor had a right to demand a sale for the salvage, and thus prevent any farther prosecution of the voyage. But this Lord *Mansfield* said was not so; but on paying the salvage, the owner was entitled to restitution. And as the insurer had undertaken to pay this, the owner was placed in the same situation as though the loss had not happened; and although there had been a damnification by a total loss, yet the insurance was a contract of indemnity, and all damages had been removed before action brought. But Lord *Mansfield* remarks, that "It does not necessarily follow, that because there is a re-capture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expense is necessary; if the insurer will not in all events engage to pay that expense, though it should exceed the value, or fail of success; under these, and like circumstances, the insured may disentangle himself and abandon, notwithstanding there has been a re-capture."

Now these principles appear to me perfectly correct, and are supported by many analogous cases; but they are very different from those assumed by Chief Justice *Parsons*, and by the court below in the present case. In the one case, there had been confessedly a total loss, and the question was how the effect of that could be removed; and in the other, there is no total loss, and the question is how a partial loss can be turned into a total one. The former of these can be done in many cases; but the latter can be done in no case.

There has not, then, been a total loss of this ship at the time of abandonment, or at any other time; and if the object of the insured is a fair indemnity for the damage sustained, he has a full and perfect remedy by considering this a partial loss. If his object is not an indemnity, but the sale of his ship at a high price, it is unjust.

There have been in argument before this court some remarks on the subject of the *voyage* being lost, by means of this stranding. But as the court below did not decide this to be a total loss on that ground, but expressly on the ground of the stranding of the ship, her being in great danger of being lost, and the refusal of the insurers to advance money, I need make no remarks on that ground; though it seems that a considerable portion of the cargo was taken out of the vessel by the insured and put into lighters for the purpose of performing the remainder of the voyage before the accident happened. (*a*)

New trial not to be granted.

E Sage and E. W. Sage *against* The Middletown Insurance Company.

Where a vessel, being insured from a port in *Europe* to the port of discharge in the *United States*, arrived at *New-York*, waited there a reasonable time for orders from the owner, and then proceeded for *Middletown*, with a view to make that her port of discharge; it was held, that the insurers were liable for a loss happening between *New-York* and *Middletown*.

Though as a general rule, if a vessel under such a policy arrives in port, and there voluntarily, and without cause of necessity, breaks bulk, and discharges any part of her cargo, she thereby makes such port her port of discharge; yet if such vessel, while waiting for orders at her port of arrival, has goods on board in a perishing condition, the landing of such goods at that port will not make it the port of discharge.

The insurer is in no case liable for any commission on disbursements made by the owner for repairs.

Nor is the insurer liable for any compensation paid to the master and mariners for their services in making repairs.

Nor is the insurer liable for any injury to the vessel insured by *straining* beyond the amount of the bill of repairs.

THIS was an action on a policy of insurance on the brig *Ganges* and her cargo, at and from *Gibraltar* to the port of discharge in the *United States*, with liberty to go to *St. Ubes* or the *Cape de Verde* islands. The cause was tried at *Middletown*, *July* term 1814, before *Swift*, *Brainard* and *Baldwin*, Js.

(*a*) *See King* v. *The Hartford Insurance Company*, *post* 333. 422.

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The *Ganges* sailed from *St. Ubes*, with a cargo of salt and other articles, and arrived at *New-York*, her first port in the *United States*, on the 10th of *September* 1811. *E. W. Sage*, one of the owners who was on board as supercargo, immediately wrote to *E. Sage*, the other owner, at *Middletown*, for advice and direction. On the 12th and 14th of *September*, the vessel and cargo were regularly entered at the custom-house in *New-York*. At the same time, 150 boxes of lemons, part of the cargo, which the plaintiffs claimed to be in a perishing condition, were landed at *New-York* and sold. On the 15th, the vessel cleared out from *New-York* for *Middletown;* arrived off *Saybrook* bar and anchored, on the 16th; and on the 17th, by the perils of the sea was driven from her anchorage, and stranded on *Saybrook* bar. The court charged the jury, that under the policy the vessel had a right to go to *New-York*, and there wait a reasonable time for information from the absent owner, and then proceed for *Middletown;* and that if the lemons were actually perishing, the plaintiffs had a right to land them; but that it was not necessary for the jury to enquire into that fact. The court also directed the jury, if they found for the plaintiffs, to allow as part of the expense of repairs the sum of 241 dollars 97 cents paid to the master and mariners for their services while the vessel was under repair, it being shewn that they were actually employed as labourers in making repairs; and a further sum of 50 dollars 83 cents being 2 1-2 *per cent.* commission on the plaintiff's bill of disbursements for the repairs. The plaintiffs offered evidence to shew that the vessel had received further injury by *straining* while stranded, which was not included in the bill of repairs; to which the defendants objected, contending that the claim was illegal; but the court over-ruled the objection, and admitted the evidence. The jury having found a verdict for the plaintiffs, the defendants moved for a new trial, on the ground of misdirection, and for the admission of improper evidence.

N. Smith and *C. Whittelsey*, in support of the motion.

Hosmer, contra.

BALDWIN, J. [After stating the case.] The first question presented is, whether the assured could thus touch, tarry and make entry at *New-York*, without constituting that the port of discharge. On this point I am satisfied with the opinion of the court; but it is not necessary that I should

give my reasons at large in support of this opinion, because they are given in the case of *King* v. *The Middletown Insurance Company*, in which this point was expressly decided, and because I am of opinion that on other grounds a new trial must be granted in this case.

Admitting, then, that the plaintiffs, might, under this policy, touch at *New-York*, and there wait for information and orders from the owner at *Middletown*, a question was raised whether during such stay, they might break bulk and land any part of the cargo, provided it occasioned no additional delay or hazard; and if not, whether they might thus land articles which were in a perishing condition. With a view to present both questions to our consideration rather than to express the decided opinion of the court which tried the cause, they charged the jury, that it was not necessary for them to enquire into the perishing condition of the lemons. If the plaintiffs, during the vessel's continuance in the port of *New-York*, had the right to break bulk and land goods generally, then the enquiry would indeed be useless; and if they had no right to land even perishing articles, then the enquiry would also be useless. But if the right to land depended on the perishing quality of the article landed, and extended no further, then the enquiry was important, and the charge incorrect.

Authorities have been read as applicable to the first question which seem to be contradictory. The case of *Stitt* v. *Wardell*, 2 *Esp. Ca.* 610. and that of *Sheriff* v. *Potts*, 5 *Esp. Ca.* 95. consider the breaking of bulk and landing in the first case, and receiving goods on board in the other, at an intermediate port, as destroying the policy; but the authority of these cases is overthrown in *Raine* v. *Bell*, 9 *East* 201. in which it is expressly decided, that if the unlading of part of the cargo, during the necessary or lawful stay of a ship in port, does not alter the risk, and is not expressly prohibited, it shall not avoid the policy. The principle of this decision is recognized and supported in *Cormack* v. *Gladstone*, 11 *East* 347. *and Laroche & al.* v. *Oswin*, 12 *East* 131.; and it seems now settled, that taking goods on board, or even trading during a voyage, if done without delay or increasing the risk, will not destroy the insurance.

These principles would apply, if *Middletown* had been named as the port of discharge; but the case under conside-

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ration stands on different ground. The insurance is not to *Middletown* by name as the place of destination, nor is it to her *ports* of discharge, nor is the policy limited to the port of arrival. It is confined to one port of discharge, and that at the election of the plaintiffs. We must then enquire whether the assured, under a policy thus limited, can, at the port of arrival, during a lawful detention, break bulk and land any part of the cargo, without making that the port of discharge. To constitute a port of discharge, it is not necessary that every article of the cargo should be there landed; part may be discharged at one port, and part at another. Each becomes a port of discharge, and the policy terminates at the first. As a general rule, then, if a ship under such policy arrives in port, and there voluntarily, and without cause of necessity, breaks bulk, and discharges any part of her cargo, she has made such port her port of discharge. But if the ship, while delayed at her port of arrival, waiting for orders, has goods on board in a perishing condition, so that they cannot with safety be transported to the intended port of discharge, it is highly reasonable that such goods should be landed without prejudice to the rights of either party. It will benefit the assured, and cannot injure the insurer; his assent will, therefore, be presumed. A contract of insurance ought to receive a liberal and rational construction. The landing of goods under such circumstances will not make a port of discharge. It is a landing from necessity, not choice. Whether the condition of the lemons in the present case was such as to justify the landing on this ground of necessity is then an important fact, and ought to have been submitted to the jury. On this ground, I think a new trial ought to be granted.

I am also of opinion, that the commission charged by the owner on the disbursements made by him for the repairs cannot be recovered against the underwriter. Commissions actually paid to *foreign agents* become part of the expense, which the owner incurs, and are always allowed as such. He is entitled to an indemnity, not a profit. I know of no case in which commissions are allowed on the disbursements made by the owner personally. He might with equal propriety charge a commission in all cases on the gross sum paid by him to his agent, including his commission on the commission paid to such agent.

The allowance of the charge for the services of the master and mariners was also incorrect. Mariners wages are sometimes allowed during detention as a general average; but I find no case in which they have been allowed under circumstances like the present. This, however, is not a case presenting simply a charge for mariner's wages. It is an extra allowance for labour on the repairs, while they remained a part of the crew not discharged. If this were allowed against the underwriters, either the mariners would receive a double compensation for their services, or the owner would receive from the underwriters the price of day labourers, for services paid by him at a less price by the month. In the case of *Dacosta* v. *Newnham*, 2 *Term Rep.* 407. compensation was allowed to the mariners who assisted in the repairs, because the men were discharged, and afterwards employed as labourers; and the court express a decided opinion, that it could not otherwise be allowed. It is the duty of the crew to do what they can to prevent and to repair the mischiefs incident to the voyage, without specific remuneration. When the disaster is beyond their ordinary power, extraordinary assistance may be procured, and the expense falls on the underwiter. This alone seems to be the charge sanctioned by precedent, and is perhaps the only safe rule to be adopted.

There is still another point, of an impression wholly novel. The plaintiffs were permitted to prove, and in consequence of such proof to recover, a large allowance for injury done to their vessel by straining while stranded. I say, it is novel, because on the argument no authority, or *dictum*, was offered in support of it; and upon diligent search, I can find no case in which the principle has been discussed. On the first view of the question, it would seem reasonable that all injuries arising from the perils insured against should be compensated; but the difficulties of adjusting the variety of losses incident to insurance has led to the adoption of known rules, which, as general guides, will do substantial justice, though in particular cases they may be attended with hardship. Thus, it is a rule that when a loss is repaired by a new article, a deduction of one third new for old be always made, even though the article lost were as good as new. So it seems at least to be tacitly understood in the business of insurance, that invisible, uncertain and

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conjectural damages are never the subject of remuneration. The wear and tear of a ship, that weathers a storm in safety, may greatly lessen her value, and yet not be the subject of repair or remuneration by the underwriter. So a ship stranded and got off may be strained, and thereby become less valuable; yet I apprehend the injury is not the subject of adjustment, unless it is of a nature capable of repair, in the ordinary course of such business; and then the loss must be ascertained by the actual expense of such repairs, with such deductions as custom has established. In this case, the injury complained of by straining, is of such a nature that it is not pretended it could be repaired, otherwise than by rebuilding the ship; and because it is irreparable, compensation in damages is claimed. The allowance of such a claim would open a door for infinite fraud, imposition and uncertainty, and end in the destruction of all that is valuable in insurance. I am clearly of opinion, that this item in the damages is unprecedented, improper, and that it ought not to be allowed.

For these reasons I think a new trial ought to be granted.

In this opinion the other Judges severally concurred.

New trial to be granted.

BOOTH *against* STARR and others.

Where there have been several conveyances of land with covenants of warranty, and an eviction of the last covenantee, an intermediate covenantee, who has not been damnified, is not entitled to recover against a prior covenantor.

THIS was a bill in chancery, brought to the superior court in *Fairfield* county. The facts stated in the bill, and found by the court, were these. *John Booth*, in 1795, conveyed a lot of land in *Hudson* to *Stephen Booth*, the plaintiff, with the usual covenants of warranty and seisin. In 1802, the plaintiff conveyed the premises to one *Mc Kinstry; Mc Kinstry* afterwards conveyed to one *Seymour;* he conveyed to *Thomas Williams;* and he conveyed to *Elisha Williams*, Esq.; there being in each of the deeds the same covenants as in the deed first mentioned. At the time *John Booth* conveyed the premises, he was not the owner thereof in fee, but the title was in one *Lucy Starr*, who has since entered and evicted the last grantee; but the plaintiff has not been damnified. The respondents are

the administrators of the estate, and the heir at law, of *John Booth*, now deceased, and have his effects in their hands. Upon these facts the respondents contended, that the plaintiff was not entitled to recover. But the court decided otherwise, and decreed the payment of the sum of 2340 dollars to the plaintiff, as damages sustained by him by reason of the aforesaid breach of covenant.

The respondents moved for a new trial, on the ground that the court mistook the law in making such decree. The question of law arising on the motion was reserved for the consideration of all the Judges.

N. Smith and *Bristol*, in support of the motion, contended, that the covenant of warranty is annexed to the land, and passes with the land to heirs and assignees, vesting in them the whole legal interest, and not a mere equitable title. In the present case, when *Stephen Booth* conveyed to *McKinstry*, the covenant of *John Booth* passed at the same time, and *Stephen Booth* ceased to have any legal interest in the warranty. It follows, of course, that he cannot sue on such warranty until he has been damnified, and thereby reinvested with his original right. 1 *Chitt. Plead.* 3, 11. *Shep. Touch.* 198. *Co. Litt.* 384. *b.* *Spencer's* case, 5 *Co.* 17, 18. *Bull. N. P.* 158, 9. *Com. Dig. tit.* Covenant, (B. 3.) *Beely* v. *Purry*, 3 *Lev.* 154. *Walker's* case, 3 *Co.* 22. *b.* 23. *a. b.* *Com. Dig. tit.* Debt, (D.) *Waldron* v. *McCarty*, 3 *Johns. Rep.* 471. *Kortz* v. *Carpenter*, 5 *Johns. Rep.* 120.

R. M. Sherman, contra, insisted that though a right of action passes with the land to the assignee, yet the *privity of contract* remains with the grantor, and he may bring *warrantia chartæ* immediately after eviction of the tenant, without waiting for an action to be brought against him. *Jacob's Law Dict. tit.* Warrantia Chartæ. *Fitzherb. Nat. Brev.* 298, 9. *Griffith* v. *Harrison*, 1 *Salk.* 196, 7. *Abbots* v. *Johnson*, 3 *Bulstr.* 233. *Broughton's* case, 5 *Co.* 24. 1 *Saund.* 241. *c.* (*Wms.* edit.) *Filly* v. *Brace*, 1 *Root* 507. *Bickford* v. *Page*, 2 *Mass. Rep.* 455, 459.

SWIFT, J. The question is, whether in the case of a covenant of warranty annexed to lands, an intermediate covenantee can maintain an action against a prior covenan-

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tor without having been sued by, or satisfied the damages to, the last covenantee, who has been evicted.

A covenant real is annexed to some estate in land; it runs with the land, and binds not only heirs and executors, but assignees. Every assignee may, for a breach of such covenant, maintain an action against all or any of the prior warrantors, till he has obtained satisfaction. This results from the nature of the covenant; for each covenantor covenants with the covenantee and his assigns; and as the lands are transferable, it was reasonable that covenants annexed to them should be transferred.

As every covenantor in the various conveyances becomes liable for a breach of covenant to his covenaptee and his assignees, it follows of course, that notwithstanding his conveyance of the land, he must, when subjected to pay damages for a breach of the covenant to his covenantee or his assignee, have a right of action for indemnity against his covenantor. This demonstrates that the rights and liabilities of the various parties to a covenant real, continue notwithstanding a conveyance of the land to which it is attached; and that any of them can sustain a proper action when injured by a breach of it.

It has been contended, that a covenant real, like the land, passes by the assignment of the land from the grantor to the grantee, and is thereby extinguished, and the grantor divested of it, so that he can maintain no action for a breach subsequent to the assignment; though it is conceded, that the covenant is revived in favour of the assignor by satisfying the damages for a breach of it. But the grantor does not become totally divested of the covenant by a grant of the land. By the conveyance of the estate, the grantee becomes entitled as assignee to the benefit of the covenants annexed to the land against his grantor, and all prior grantors; but this does not take away the right which his immediate grantor had to look to his grantor, and all prior grantors for indemnity, in case of a breach of the covenant subsequent to the assignment, for which he is liable to pay damages. It cannot be said, that the covenant is extinguished by the assignment of the land, and then revived by being subjected to pay damages for a breach of it. If the covenant be once extinguished, it cannot be revived without the consent of both parties; and the circumstance that the

assignor on being compelled to pay damages for a breach of it to a subsequent assignee may maintain an action against his assignor, proves that the contract continued in force, and did not become extinguished by operation of the assignment.

To prove that the assignor cannot sue for a subsequent breach 1 *Chitty on Pleadings* 10. has been relied on; where it is said, an assignor cannot sue for a subsequent breach of a covenant running with an estate in lands, but the assignee must sue. This doctrine cannot be true to the extent contended for; as it would prove, that the assignor, after having paid the damages to his assignee, could not call on his assignor; though it is conceded in such case he could maintain an action. But to understand the meaning of *Chitty*, we must examine the authority to which he refers, 1 *Saund.* 241. *c.* (*Wms.* edit.) It is there stated, "That the lessor cannot maintain an action of covenant after he has parted with the reversion for any breach of covenant accruing subsequent to the grant of the reversion; for the statute of *Hen.* 8. has transferred the privity of contract, together with the estate in the land, to the assignee of the reversion." Thus, if one should lease land, and the lessee covenant to pay rent, or do particular acts on the land, and the lessor assign his interest in the reversion, then the statute of 32 *Hen.* 8. transfers the privity of contract, and the assignee of the reversion only can maintain an action against the lessee for a breach of his covenant subsequent to the assignment; for he has the privity of contract and estate, and he only can be damnified by the breach of covenant on the part of the lessee. But suppose a lessor makes a lease with covenant of warranty; and the lessee assigns his interest in the estate; after which his assignee is evicted and recovers damages against him for the breach of the covenant of warranty; it will not be pretended that in this case, the lessee, who has now assumed the character of assignor, cannot maintain an action against his lessor on the covenant of warranty, though the breach happened subsequent to the assignment. The case there stated in 1 *Saund.* 241, *c.* must have related to covenants to be performed by the lessee, and must be understood to mean, that the lessor cannot bring an action of covenant *against the lessee* after he has parted with the reversion for any breach of covenant accruing subsequent to the assignment; which is a correct principle.

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It cannot mean that an assignor cannot sue for a subsequent breach; for this in many instances cannot be correct. The authority then relied on has no application to the point in dispute; and I apprehend the position is undeniable, that in all cases where there have been sundry conveyances of land, with covenants real annexed to them, all the covenants between each party continue operative notwithstanding such conveyance, and every one when damnified can maintain an action.

In the present case, the grantee or covenantee of the plaintiff has been evicted; but the plaintiff has never been sued, nor has he paid the damages. The question is, whether under these circumstances, he can maintain this action against the defendant, who is his immediate covenantor.

The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective; though he may be constantly liable to be evicted; though his warrantor may be in doubtful circumstances; yet he can bring no action on the covenant till he is actually evicted; for till then, there has been no breach of the covenant, no damage sustained. By a party of reason, the intermediate covenantees can have no right of action against their covenantors, till something has been done equivalent to an eviction; for till then they have sustained no damage. As the last assignee has his election to sue all or any of the covenantors, as a recovery and satisfaction by an intermediate covenantee against a prior covenantor would not bar a suit by a subsequent assignee, such intermediate assignee ought not to be allowed to sustain his action till he has satisfied the subsequent assignee; for otherwise every intermediate covenantee might sue the first covenantor; one suit would be no bar to another; they might all recover judgment, and obtain satisfaction; so that a man might be liable to sundry suits for the same thing, and be compelled to pay damages to sundry different covenantees for the same breach of covenant. In the present case, the plaintiff cannot know that his covenantee who has been evicted will ever sue him; he may bring his action directly against the defendant; a recovery in this suit, and payment of the damages, would be no bar; the defendant could then have no remedy but by petition for new trial; and if the plaintiff in the mean time should become unable to refund the money, the defendant would, by operation of

law, be compelled to pay the same demand twice, without redress. But if the principle is adopted that the intermediate covenantee can never sue till he has satisfied the damages, no such injustice can ensue.

The subject may be considered in another view. In all these cases it is the duty of the first covenantor to make good the damages for a breach of the covenant, and to indemnify all the subsequent covenantees. Each subsequent covenantor is liable to all the subsequent covenantees, and on paying the damages will have a claim for indemnity against a prior covenantor. The nature then of the engagement of the first covenantor is, to indemnify all the subsequent covenantees from all damages arising from his breach of the covenant.

It may be proper, then, to examine what is necessary to give the surety a right of action against the principal. It would seem to be a clear dictate of reason, that the mere liability to pay money for another, he continuing liable to pay the money himself, can never be a cause of action on the contract of indemnity; for it is uncertain whether the surety will ever be compelled to pay, and the principal may pay himself. Such uncertainty can be no ground of action. It is not necessary that actual payment should be made. If a suit should be brought, judgment rendered, or the person imprisoned, it will be sufficient; but mere liability, without any damage, is not. On this point no doubt could be entertained were it not for the decision in the case of *Filly* v. *Brace*, 1 *Root* 507. where it is distinctly laid down, that mere liability, without any damage, is sufficient cause of action.

In examining this question it may be premised, that there is a difference between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damages by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid. But if it be to discharge or acquit the plaintiff from any damage by reason of such land or particular thing, then it is a condition to indemnify and save harmless. 1 *Saund.* 117. *n.* (1). (*Wms.* edit.) In the case of *Filly* v. *Brace*, much reliance is placed on cases of actions sustained by sheriffs for escapes when they had not paid the debt to the creditor. The ground is assumed, that the liability of the

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sheriff to pay the debt gives the right of action; but this is an erroneous assumption. The wrong done by the escape itself furnishes a cause of action. The sheriff would be entitled to recover, admitting he was not liable to the creditor. Suppose an escape, and before suit brought the debtor escaping pays the debt to the creditor; this would be no bar to an action; for by the wrongful act of the escape, a right of action accrued to the sheriff, which cannot be discharged without his concurrence; and the payment of the debt to the creditor could only go in mitigation of damages.

The case of *Griffith* v. *Harrison*, 1 *Salk.* 197. is also cited. That was a covenant to be discharged and indemnified from all arrears of rent; and the breach alleged was, that rent was in arrear. The court determined the declaration to be bad, because rent remaining in arrear and not paid, is not a damage, unless the plaintiff be sued or charged; and if paid at any time before such damage incurred by the plaintiff, it is sufficient. This is an unanswerable and conclusive authority to disprove the doctrine it is adduced to maintain. Here the liability to pay the rent is acknowledged; and the court say, it is not a damage, unless the plaintiff be sued or charged; and if paid at any time before, it is sufficient. So it may be said in the case of *Filly* v. *Brace*, the debt remaining unpaid is not a damage, unless the plaintiff be sued or charged; if the defendant pays it any time before the plaintiff is sued, he is not liable.

But the court do not seem to rely upon the principal point decided in that case, but on a *dictum* contained in the report. It is there said, that where the counter bond or covenant is given to save harmless from a penal bond before the condition is broken, then if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter bond forfeited. This is the precise principle decided in the case of *Abbots* v. *Johnson*, 3 *Bulstr.* 233. cited in the case of *Filly* v. *Brace*, as proving the doctrine that mere liability is a ground of action. As these two cases contain but one decision which is reported at large in *Bulstrode*, I will examine that authority, and see whether it support the doctrine for which it was cited. That was an action of debt on an obligation, and the case was, the plaintiff was bound in a bond with the defendant for payment of

money on a day to come, and had a counter bond from the defendant for saving him harmless. The defendant paid not the money at the day. Upon this his default, the plaintiff brought his action on the counter bond. To this the defendant pleaded *non damnificatus*. The plaintiff replied, shewing all this matter, and that he requested the defendant to pay this money, which he did not do; on which there was a demurrer. And the question was, whether this non-payment of the money at the day by the defendant be a present forfeiture of the counter bond, without other damage. The court decided, that the failure of payment at the day by the defendant, by which he put the plaintiff in danger of being arrested, was a damnification to him, and a present breach of the condition, and a forfeiture of the counter bond. Here it must be noted, that there was a bond conditioned to pay money at a future day; and the ground of the decision is, not the liability, but the failure of paying the money. When the plaintiff gave the penal bond with the defendant payable at a future time, no liability to be sued, or to pay the penalty, existed. When the counter bond was taken to save him harmless, it was in effect an engagement that he should never be liable to pay the money, or be subjected to the penalty. The failure to pay the money on the bond by the day rendered the plaintiff liable to pay the penalty; and this was a present breach of the condition of the counter bond; for by the non-payment of the money, a liability accrued which did not before exist, and this very liability arising from the failure of paying the money at the day, was the ground of sustaining the action. This is very far from proving, that where there is a contract to save harmless from an existing liability, such liability is a ground of action. Indeed, the fair inference is, that such liability is not to be deemed a ground of action from the circumstance that the court considers the failure of paying the money at the day as the forfeiture of the counter bond. I apprehend no authority can be found, that will support the doctrine laid down in *Filly* v. *Brace;* and the cases cited in favour of it, directly disprove it.

But let us examine this question on principle. What is the nature of the contract to indemnify and save harmless? It is not that the plaintiff shall never be liable. The existence of the liability is the ground of the contract; and the object of it is to make good to the plaintiff any damage he may suffer by reason of it. This liability against the con-

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sequences of which the contract is to indemnify, cannot be a breach of the contract itself. There must be actual damage arising from it to constitute a breach according to the terms of it. If liability without damage be a cause of action, then the contract is broken the moment it is made; and the defendant may be sued. He may be subjected to pay it to his surety; and as this will be no bar to a suit by the creditor, he may be compelled to pay it again, and then seek his remedy against the surety. The law will not countenance such absurdity and injustice. Nor is there any danger from delay to the surety; for if he suspects that the principal is in doubtful circumstances, he may at any time satisfy the demand; and then he has a clear right of action on the contract of indemnity.

This point is equally clear on authority. In all cases where the condition of the bond or contract is to indemnify and save harmless, the proper plea is *non damnificatus*. The defendant may say, that the plaintiff has not been damnified; and then it is necessary for the plaintiff to reply and shew the damage to entitle him to recover. This incontestibly proves that liability is not a ground of action; for the plea admits the existence of the liability, and denies the damage; and the reply setting forth the damage shews it to be necessary to constitute a ground of action. Suppose to the plea of *non damnificatus*, the plaintiff should reply the liability only? Will any lawyer say, that such reply is good? If not, the consequence is, that something more than liability must be shewn; and this must always be actual damage.

In this opinion the other Judges severally concurred.

New trial to be granted.

CUNNINGHAM *against* TRACY.

An heir at law claiming title by virtue of a deed to his ancestor, cannot, without accounting for the non-production of the original, give in evidence an authenticated copy from the town records.

THIS was an action of ejectment for several pieces of land in *Norwich*. The defendant pleaded *No wrong nor disseisin*; on which issue was joined to the court. The cause was tried at *New-London*, *September* term 1814, before *Trumbull*, *Smith*, and *Ingersoll*, Js.

On the trial, the plaintiff claimed title to the demanded

premises as heir at law of *Christopher Kilby*, late of *London*, deceased. And to establish a title in *Kilby*, the plaintiff offered in evidence a copy of a deed from *Ebenezer Backus* to *Kilby*, certified from the records of the town of *Norwich* by the town clerk; to the admission of which the defendant objected, on the ground that the plaintiff was bound to produce the original deed, or account for its non-production. This objection prevailed; and the court found the issue in favour of the defendant, and rendered judgment accordingly. The plaintiff moved for a new trial on the ground that the court mistook the law in rejecting the evidence offered; which motion was reserved for the advice of all the Judges.

Denison, in support of the motion, relied upon a long established practice in the courts of this state in cases where the party claims title by virtue of a series of conveyances anterior to the deed to himself, to admit certified copies of such conveyances from the town records. According to immemorial and universal usage in this state, the anterior title-deeds of an estate are not to be transmitted to the purchaser; and the practice of our courts in admitting authenticated copies has proceeded on the ground that the party is presumed not to be in possession of the originals. Is it not as reasonable a presumption that the heir is not put in possession of the deeds to his ancestor? In the first place, papers of this description more commonly go into the hands of the executor or administrator; and in the next place, no one heir is entitled to the custody of them more than the rest.

Goddard, contra, insisted that the heir at law, in this state as well as in *England*, is bound to produce the original deed to his ancestor from whom he claims title immediately. He cited *Phelps* v. *Yeomans*, 2 *Day's Ca.* 227. *Talcott* v. *Goodwin*, 3 *Day's Ca.* 264. *Swift's Ev.* 4.

SMITH, J. This is the naked question arising from the attempt of an heir to establish a title in an ancestor by producing a certified copy of a deed to the ancestor, which has been regularly recorded in the town clerk's office, agreeably to the laws of this state, without any claim that the original has been lost by time or accident, or in any way out of the power of the plaintiff to produce. (1)

(1) In illustration of the principal case, and especially as to the persons competent to prove, the mode of proving, and the requisite amount of proof of loss; and when loss will be presumed; see *Jackson ex dem. Livingston* v. *Neely*, 10

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It is a general and well known rule of law, that when the plaintiff claims title to lands by a deed, it is necessary for him to produce on trial the original instrument, and prove its execution in the manner required by law. If it becomes necessary for him to prove a title in another under whom he claims, the same rule of evidence applies; and it may be laid down as a rule applicable to all cases, that wherever the plaintiff is bound to prove the execution of a deed in case the defendant denies it, he is of course bound to produce the original deed, or shew some reason for not producing it.

I am aware, that in this state, a long and universal practice has taken place of not passing the title deeds to the purchaser upon the sale of lands; which probably arose at a very early period in consequence of the law requiring all deeds to be recorded. In consequence of this practice, it becomes extremely difficult, if not impossible, in tracing a title through sundry prior conveyances, to produce the original deeds. The court have accordingly, in these cases, admitted certified copies from the town clerk's office; but they have also dispensed with proof of the execution of the original deeds, and considered these copies as *prima facie* evidence of title, so that if they are contested, the burden of proof devolves on the other party.

In this case, the plaintiff steps into the place of the ancestor, and is bound to establish a title in him by producing the original deed, and proving its execution. There is not even a presumption that the plaintiff is not possessed of the original deed. The heir has a right to the title deeds of the ancestor; and the usual course is to receive them.

The case of *Talcott*, assignee of *Sanford* v. *Goodwin*, 3 *Day's Ca.* 264, I consider as in point, and decisive of the present question. In that case, this court decided, that an assignee under a commission of bankruptcy, to support an action of ejectment, was bound to produce the original deed to the bankrupt, and refused to admit a copy from the town clerk's office; and in my judgment, the reason is quite as strong why an heir should produce the original deed to his ancestor. (*a*)

Johns. R. 374; *Williams* v. *Crary*, 5 *Cowen R.* 368; *Jackson ex dem. Livingston* v. *Frier*, 16 *Johns. R.* 193; *Blade* v. *Noland*, 12 *Wend. R.* 173; *Jackson ex dem. Brown* v. *Betts*, 6 *Cowen R.* 200; *Betts* v. *Jackson*, 6 *Wend. R.* 173; *Bond* v. *Root*, 8 *Johns. R.* 60; *Jackson ex dem. Bush* v. *Hasbrouck*, 12 *Johns. R.* 192; *Hammond* v. *Hopping*, 12 *Wend. R.* 509.

(*a*) See the recent case of *Kelsey* & al. v. *Hammer*, 18 *C. R.* 311. where

I am, therefore, of opinion, that the court were correct in rejecting a copy, and should not advise to a new trial.

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In this opinion the other Judges severally concurred.

New trial not to be granted.

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*SCOTT *against* CRANE: [*255]

IN ERROR.

A writ of attachment was served by arresting the body of the debtor, but before any return, the creditor discovering goods belonging to the debtor, released his body, and caused the goods to be attached by the same writ: held that the process was legal.

Where a personal demand is made on an execution of an officer without his official precincts, for goods previously attached by him to respond the judgment, an unqualified refusal to deliver up such goods will subject him to an action at the suit of the creditor.

Though the acts of an agent when acting for the principal are binding on the principal, yet to let in proof of them it is necessary to establish the agency by other evidence than such as may be derived from the acts proposed to be proved.

THIS was an action on the case, against *Scott*, as constable of the town of *Oxford*, for neglecting and refusing to deliver up property to be taken in execution, which he had attached in a suit between *Crane* and one *Smith*. The declaration particularly described the process, and recited the defendant's return on the writ of attachment, and the return on the execution of the officer who held it.

On the trial of the cause in the county court, the plaintiff offered in evidence an authenticated copy of the return on the execution, which was as follows: "*New-Haven* County *ss.* *New-Haven*, *January* 27th, 1814. I made demand of *Elias Scott* of *Oxford*, constable, for the property by him taken on the original attachment against the debtor, whereon to levy this execution, but he neglected and refused to deliver any. I also made search for money, goods or chattels of the debtor within my precincts, whereon to levy and satisfy this execution and my fees, but could find none; neither could I find the debtor's body; I therefore return this execution into the office whence it

the distinction between deeds to the party himself, or to an ancestor whose title he claims, and deeds necessary to trace the title to his grantor or ancestor, is taken, and the law on the subject is clearly stated and fully established. See also *Phelps* v. *Foot*, *post*, 387.

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issued wholly unsatisfied. (Signed.) *Ebenezer Weed*, deputy-sheriff." The defendant objected to the evidence offered, on the ground, that at the time of the demand made upon him for the goods attached, he was an inhabitant and constable of the town of *Oxford*, and that, as it appeared from the return, the demand was made at *New-Haven*, without the defendant's official precincts. To repel this objection, the plaintiff offered to prove by the parol testimony of *Weed*, the deputy-sheriff, that at the time when he made the demand, the defendant declared that he had given up the goods in question to *Zerah Hawley* and *Lewis Hotchkiss*, and taken their receipt for them, which he proposed to deliver over to *Weed*. To the admission of this evidence the defendant also objected; but the court overruled the objection, and admitted the evidence last mentioned, and the copy of the return.

It appeared on the trial, that the plaintiff's writ of attach-
[*256] * ment against *Smith* was legally served on him by arrest in the town of *Derby;* and that soon afterwards, the plaintiff, on the discovery of property belonging to *Smith*, discharged his body from arrest, and sent the writ to the defendant in *Oxford;* where it was served by attaching the goods aforesaid, which, by the order of *Smith*, the defendant delivered up to *Hawley* and *Hotchkiss* before judgment in the suit. The defendant then offered to prove, for the purpose of shewing that he was not liable to the plaintiff, that the writ was sent to him by *Hawley*, and not by the plaintiff; that the defendant served it by direction of *Hawley;* that all the orders he received came from *Hawley;* that he knew no other person in the business; and that he had, by *Smith's* direction, delivered up the goods to *Hawley*. The plaintiff objected to this evidence; and the court decided it to be inadmissible, unless the defendant would shew that *Hawley* was the authorized agent of the plaintiff.

In the charge to the jury, the court instructed them, that notwithstanding the service of the writ upon the body of *Smith* in *Derby*, the service of the same writ by the defendant afterwards was legal, and made him responsible for the goods to the plaintiff.

A verdict being found for the plaintiff, the defendant filed his bill of exceptions to the decisions of the court upon the evidence offered, and to the charge. A writ of error was thereupon brought in the superior court, who affirmed the judgment. The present writ of error was then brought, assigning the general error.

L. E. Wales for the plaintiff in error. 1. The writ under which these goods were attached, when it came into the hands of *Scott*, as constable of *Oxford*, was *functum officio*, a mere dead letter; it having been previously served in *Derby*, by a constable of *Derby*, on the body of *Smith*, the debtor. The precept of the writ was then completely executed; and it was the duty of the officer to return it. Either party might then sue him for not returning it. He was then entitled to his fees for service. If it be said, that it was the right and duty of the plaintiff to take the goods, when he discovered them, in preference to the body; it may be answered, that it was not necessary that he should take them with the same writ. Another writ might have been *served on the goods, and the first action discontinued. In [*257] this way the public revenue would not have been defrauded of the duty. A practice allowing a creditor to arrest the body of his debtor in one part of the county, and then send the writ to another part and attach his goods, would be too vexatious to be endured. When a party has taken the body, he has got the highest security which the law knows of. As therefore, *Scott*, the constable in *Oxford*, was not authorized by virtue of a writ which had been thus served, to attach the goods in question, he is not liable to *Crane* for refusing to deliver them up to him. *Brinley* v. *Allen*, 3 *Mass. Rep.* 561. *Doe.* d. *Pate v. Roe*, 1 *Taun.* 55. *Leavenworth v. Baldwin*, 2 *Day's Ca.* 217. 1 *Back. Sh.* 193. *& seq.*

2. There was no legal demand of *Scott* for the goods attached. He was a constable of *Oxford;* and the demand should have been made of him in *Oxford*, within his official precincts, where alone he was authorized, or bound, to have the goods. The demand might have been as properly made of him in *New-York* as in *New-Haven;* but would he be liable for a refusal there? Parol evidence of what was said in answer to the demand in *New-Haven*, in order to excuse a demand within the plaintiff's official precincts, ought not to have been admitted. The return of the demand on the execution is matter of record, and cannot be varied or explained by parol. 1 *Back. Sh.* 255, 263, 220. *Grant v. Shaw & al.*, 1 *Root* 526. *Eddy v. Knap*, 2 *Mass. Rep.* 154.

3. *Scott* had delivered over the goods to *Hawley* as the agent of *Crane*, and thus discharged himself. *Scott* received the writ from *Hawley*, and attached the goods by his direction, and knew

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no one else in the business. *Crane's* taking judgment and execution on the writ which *Hawley* had thus procured to be served, was sufficient evidence that *Hawley* was his agent in this transaction. At any rate, it should have been permitted to go to the jury for what it was worth.

Staples, for the defendant in error, insisted, 1. That by our law an attaching creditor is bound to take goods, if they are discovered before the writ is returned, in preference to the body. But admitting it to be irregular to serve a writ of attachment upon goods after an arrest of the body under the same writ, yet it is matter that affects none but the defendant in the process; and the proper time for him to make
[*258] *his complaint is at the return of the writ. If he suffers judgment to pass against him, he cannot treat the taking of the goods as a trespass; and if *he* cannot, *a fortiori* the officer who took the goods cannot. Then, if the goods were rightfully taken, or what is the same thing with respect to him, if he cannot be permitted to say that they were taken wrongfully, he must be liable for refusing to deliver them up on the execution.

It does not appear from the return *where* the demand was made. The return, indeed, is *dated* at *New-Haven;* but the demand might have been made in *Oxford.* But suppose the demand to have been made in *New-Haven;* might there not have existed a state of facts which would excuse the officer from going to *Oxford* to make demand? If so, was it necessary that he should detail these facts in his return? This is not like the case where certain things must appear in writing in order to vest a title. If *Scott* waived a demand in *Oxford*, it would justify the officer in making his return in the usual form, without specifying that fact. If it should ever afterwards become material, it might be proved by parol. This evidence is not at variance with the officer's return, but perfectly consistent with it.

3. There was no proof that *Hawley* was the authorized agent of *Crane.* The attempt was to shew what *Hawley* did in relation to this transaction. We objected to their proving *Hawley's* acts without first shewing that he was the authorized agent of *Crane.* It is now argued that the acts of *Hawley* proved his authority. The fallacy of this mode of reasoning is apparent.

SWIFT, J. This was an action against the defendant for

estate, which as constable he had taken on an attachment in favor of the plaintiff against one *Smith*. The defendant (now plaintiff in error) in the court below contended, that the writ was served on the body of *Smith* in *Derby* by a constable there, and then the body released, and the same writ delivered to him in *Oxford*, where he attached the property in question; that the writ having been duly served in *Derby* could not be taken back; and that the service in *Oxford* was void.

In all suits, it is the object of the law in favor of the liberty of the citizen, that the body of a debtor shall never be *taken and imprisoned, where sufficient estate can be found; [*259] and in all cases where estate can be found, the creditor shall have a right to attach it, in preference to the body, for the purpose of more effectually securing his debt. It has, therefore, been the immemorial usage for officers, when they have arrested the body, if before the writ is returned they discover estate, to release the body, and take the estate; and this reasonable practice has been sanctioned by judicial decisions. In the present case, as the estate discovered was not in the precincts of the officer who attached it, it became necessary that the writ should be delivered to a different officer after the body was released; but this can make no distinction in point of principle; for the reason and the object of the law are the same in both cases.

It is further contended, that the demand of the estate should have been made in *Oxford*, within the official precincts of the defendant.

Whenever an officer has attached estate, and holds it to respond the judgment, it is necessary that a demand should be made of him upon the execution. No place is prescribed by law at which such demand must be made. It may be at his place of abode, or wherever he may be. If the demand should be made of him at a place where the property is not, and he offers to deliver it to the officer at the place where it is, it will be the duty of the officer to repair to such place to receive it; but if he refuse to deliver it at any place, this refusal will subject him to an action, whether the estate were at the place where demanded, or not. In this case, if the defendant, on the demand in *New-Haven*, had informed the officer that the estate was in *Oxford*, where he would deliver it, then it would have been the duty of the officer to go there to receive it. So if he had had the estate in *New-*

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Haven, and delivered it on the demand, it would have been good. But as the defendant refused to deliver the estate any where, it was unnecessary to repair to his place of abode. He had a reasonable opportunity to perform his duty; and having neglected and refused to do it, he has rendered himself liable.

As to the question of proving the acts done by *Hawley*, said to be the agent of the plaintiff, it is clear that the doings or concessions of an agent when acting for the principal are binding on the principal; but to let in the proof of them, it [*260] is necessary that the agency should be first proved. The defendant having offered no proof of the agency, it was proper for the court to refuse evidence of the acts done by him.

I am, therefore, of opinion, that there is no error in the judgment complained of.

In this opinion the other Judges severally concurred.

Judgment affirmed.

K. and E. TOWNSEND *against* BUSH.

A party to a negotiable instrument, who is divested of his interest, is a competent witness to prove it usurious in its creation. Where the security given in pursuance of a usurious agreement was a bill drawn upon and accepted by *A.*, payable to and indorsed by *B.*, without notice of the usury; it was held that *B.* who had paid the amount of the bill to an indorsee, could not recover against *A.* either in an action upon the bill, or in a count for money paid to the defendant's use.

THIS was an action of *assumpsit* against *Bush* as acceptor of a bill of exchange drawn by *Ebenezer* and *Atwater Townsend*, and payable to the plaintiffs or order. There was also a count for money paid, laid out and expended for the defendant's use. The cause was tried at *New-Haven*, *August* term 1814, before *Swift*, *Brainard* and *Baldwin*, Js. On the trial, the defendant admitted the drawing and acceptance of the bill, as stated in the declaration. His defence was usury under the following circumstances. *E.* and *A. Townsend* applied to *W. Leffingwell* in *New-York* for the loan of a sum of money. *Leffingwell* agreed to loan them the money at twelve *per cent.* interest, upon their giving him a bill of exchange for the amount, drawn by themselves on the defendant and accepted by him, payable to the plaintiffs *K.*

and *E. Townsend*, and by them indorsed. These terms were complied with; the defendant at the time of accepting the bill, and the plaintiffs at the time of indorsing it, having no notice of the corrupt agreement. *Leffingwell* indorsed the bill to the *Derby Bank*, and there procured it to be discounted. When it became payable, the *Derby Bank* gave due notice to the several parties to the bill; and afterwards commenced a suit against the plaintiffs on their indorsement in the state of *New-York*, and by the judgment of the supreme court of that state recovered the amount of the bill with interest and costs, which the plaintiffs accordingly paid. The defendant accepted the bill for the honor of the drawers, having no effects of the drawers in his hands. To prove these facts, the defendant offered the individuals com- *posing the firm of *E.* and *A. Townsend* as witnesses; offering also at the same time, to shew, that they had no interest in this suit, being discharged from all liability on the bill under an act of insolvency in the state of *New-York*. The plaintiffs objected to the admission of these witnesses, on the ground that having drawn the bill, and thereby given credit to it, they were incompetent to shew that it was invalid on account of usury; and also on the ground that any proof of said corrupt agreement would be irrelevant on this trial. The court excluded the witnesses, and directed the jury to find a verdict for the plaintiffs; which being accordingly done, the defendant moved for a new trial. This motion was reserved for the consideration of all the Judges.

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N. Smith and *R. M. Sherman* in support of the motion. 1. The drawers of this bill, not having any interest in the cause, were competent witnesses. This point is to be considered here as *res integra;* for though some judges may have expressed an opinion upon it, no case has come up which requires a decision upon it. In *England*, its history begins with *Walton* v. *Shelley*, 1 *Term Rep.* 296. in 1786, and ends with *Jordaine* v. *Lashbrooke*, 7 *Term Rep.* 597. in 1798. In the first case, the decision was against the competency of the witness *generally*. The rule was then limited and qualified by various decisions at *nisi prius*, and by extrajudicial opinions *in banco*. *Bent* v. *Baker*, 3 *Term Rep.* 32. 36.* in

* In the same case, p. 34. Lord *Kenyon* is reported to have recognized the rule as limited to *negotiable* paper; but in *Rich* v. *Topping*, 1 *Esp.* 177. he denies having used the words imputed to him.

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1789. *Charrington* v. *Milner*, *Peake's Ca.* 6. in 1790. *Humphrey* v. *Moxon*, *Peake's Ca.* 52. in 1791. In *Adams* v. *Lingard Peake's Ca.* 117. in 1792, Lord *Kenyon* gave an explicit opinion that the indorsor of a bill is a competent witness to invalidate it. He expressed the same opinion in *Rich* v. *Topping*, 1 *Esp.* 176. in 1764. Then came up *Jordaine* v. *Lashbrooke*, before the King's Bench, in which, after full consideration, the doctrine of *Walton* v. *Shelley* was wholly exploded. The question has not been heard of since in the *English* courts. In that country *Jordaine* v. *Lashbrooke* is now as good law as *Bent* v. *Baker*. But if we lay authorities out of the question, and resort to the principles of the common law, it is difficult to perceive why these witnesses [*262] *should not have been admitted. They were not incompetent from want of understanding, or from disbelief in the obligation of an oath; they were not interested; and had not been convicted of any infamous crime. The common law knows of no other disqualification of a witness. The rule of the civil law, by which the decision in *Walton* v. *Shelley* was professedly governed, is applicable only to a *party*. It is every day's practice in public prosecutions to admit a *particeps criminis* as a witness. Further, in the present case, no turpitude is imputable to the witnesses offered. They were the *borrowers*, not the lenders of money at usurious interest. The law considers them as innocent; its object is to protect them; and it rather invites them to make complaint, than stops their mouths.

It has been attempted to support the rule which we oppose on the ground of *policy;* which requires, it is said, that no man, after having given credit to a bill by placing his name upon it, should be permitted to come into a court of justice, and impeach it. But a party who is sued upon a bill which he has given credit to by his signature, may impeach it by a plea of usury. Does not the policy in question bear as hard upon a party as upon a witness? In another point of view the ground of policy may be taken successfully. If the only witnesses to a usurious transaction may be excluded by getting their names upon the security, it will in effect repeal the statute. The policy of the law has hitherto been to suppress usury, not to encourage it.

2. The evidence offered was *relevant*, because it went to establish the defence of usury. The bill in question was given as a security for the payment of money lent whereby

more than lawful interest was reserved. (*a*) If the bill was usurious in its inception, no subsequent transfer of it could make it valid. An indorsee for a valuable consideration, without notice of the usury, can maintain no action upon it. *Lowe* v. *Waller*, *Doug.* 736. Nor does it make any difference that in this case neither of the parties was a party to the usury. The transaction was really a loan of money by *Leffingwell* to *E.* and *A. Townsend*, secured to *Leffingwell* by this bill, drawn by *E.* and *A. Townsend*, accepted by the defendant, and indorsed by the plaintiffs. It was a part of the original corrupt agreement that such a bill, so drawn, *accepted and indorsed, should be procured and delivered to [*263] *Leffingwell* as security for the money lent. The drawers had no effects in the hands of the drawee, and owed nothing to the payees. There was no delivery of the bill, and of course it did not exist as a bill, until it came into the hands of *Leffingwell*. This being the substance of the transaction, the bill is void within the statute as much as though it were a promissory note given by *E.* and *A. Townsend* directly to *Leffingwell*. *Fields* v. *French*, 4 *Day's Ca.* 251. *Wilkie* v. *Roosevelt*, 3 *Johns. Ca.* 66.

This case is very distinguishable from a class of cases where the security was given upon a *new* consideration growing out of a transaction originally usurious; as *Cuthbert* v. *Haley*, 8 *Term Rep.* 390., *Turner* v. *Hulme*, 4 *Esp.* 11., *Bearce* v. *Barstow*, 9 *Mass. Rep.* 45. [Some of the Judges intimated an opinion that *Turner* v. *Hulme* was not law.] It is not, however, necessary to controvert the authority of that case. The present case is within the qualification of Lord *Kenyon's* opinion; as the form of this transaction was a colourable shift to evade the statute, *devised when the money was lent.*

As to the money count, it is only necessary to observe, that the sole ground of claim against the defendant arises from his acceptance of the bill. If *that* was void, he cannot be liable in any way.

Staples and *Denison*, contra. 1. *E.* and *A. Townsend* were inadmissible witnesses to prove usury in this bill. The case of *Walton* v. *Shelley* is the first reported case in which the question was discussed; but the judges do not there consider themselves

(*a*) *Vide Stat. tit.* 170. *s.* 2.

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as establishing a *new* rule. They speak of it as at that time "a settled principle." The court, consisting of Lord *Mansfield* Ch. J. and *Willes*, *Ashhurst* and *Buller*, Js., were unanimous in the decision. The rule was afterwards repeatedly recognized, or admitted, by different judges, at *Nisi Prius*. *Charrington* v. *Milner*, *Humphrey* v. *Moxon*, *Adams* v. *Lingard*, in *Peake's Cases*: *Hart* v. *M'Intosh*, 1 *Esp.* 298. In the case last cited, Justice *Buller* declared explicitly, that he would adhere to the rule; and Justice *Le Blanc*, then at the bar, said, that Chief Justice *Eyre* was of the same opinion. At length, *Jordaine* v. *Lashbrooke* was decided by the opinions of Lord *Kenyon*, Ch. J. and *Grose* and *Lawrence*, Js. against the opinion of *Ashhurst*, J. The question, then, stands thus upon the authority of the judges in *Westminster-Hall:* against the competency of the witness, Lord *Mansfield*, Chief Justice *Eyre*, and *Willes*, *Ashhurst* and *Buller*, Js.; for admitting the witness, the three judges who decided *Jordaine* v. *Lashbrooke*.

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In this country, the decisions have been uniformly against the competency of the witness. The superior court of *Connecticut* have repeatedly decided thus on the circuits. In *Allen* v. *Holkins*, 1 *Day's Ca.* 17. the question was discussed before the supreme court of errors; they recognized the doctrine of *Walton* v. *Shelley*, and decided the case on that ground. [*Smith*, J. I think I recollect Mr. *Ellsworth's* expressing the opinion stated by the reporter.] That the case might have been decided as it was on other grounds does not destroy its authority. In *Webb* v. *Danforth*, 1 *Day's Ca.* 301. before the same court, the doctrine was admitted. In *Massachusetts*, *New-York* and *Pennsylvania*, it is settled law. *Warren* v. *Merry*, 3 *Mass. Rep.* 27. *Parker* v. *Lovejoy*, 3 *Mass. Rep.* 565. *Churchill* v. *Suter*, 4 *Mass. Rep.* 156. *Widgery* v. *Munroe & al.* 6 *Mass. Rep.* 449. *Winton* v. *Saidler*, 3 *Johns. Ca.* 185. *Coleman* v. *Wise*, 2 *Johns. Rep.* 165. *Stille* v. *Lynch*, 2 *Dall.* 194. The great principle of public policy on which the rule is founded, ought to be preserved inviolate in a commercial state.

2. Admitting the competency of the witnesses, still the facts offered to be proved were irrelevant, as they constitute no defence to the action. All persons claiming under *Leffingwell*, however innocent or meritorious, are affected by the usury; but these parties, from the relation in which one stands to the other, are not affected. The contract between the acceptor and the indorsers had no usury in it. A bill accepted in the hands of an

innocent holder, although affected with usury in its creation, is good as between the acceptor and such holder. *Ord on Usury* 109. *Hussey* v. *Jacob*, *Holt* 328. S. C. 1 *Ld. Raym.* 87. S. C. *Com. Rep.* 6.

Further, the plaintiffs have been compelled to pay the amount of the bill by the decision of a competent tribunal upon the very point before the Court. If the plaintiffs were legally liable to the *Derby Bank*, it necessarily follows that the defendant is liable to the plaintiffs. The defendant being the party ultimately liable, the money paid by the plaintiffs [*265] was money paid for his use.

TRUMBULL, J. The principal question in this case is, Whether *Ebenezer* and *Atwater Townsend*, the drawers of the bill in question, are admissiable witnesses in an action by the plaintiffs as payees of the bill against the defendant as acceptor, to prove that it was executed on an usurious contract, and therefore is void in law.

The rule that no person can be permitted to give testimony to invalidate any instrument to which he has made himself a party by affixing his signature, in cases wherein he has no interest in the event of the suit on trial, was first adopted in the case of *Walton* v. *Shelley*, 1 *Durnford & East* 296., by Lord *Mansfield*, and the other judges of the King's Bench. He states that "the rule is founded in public policy; that there is a sound reason for it; because every man, who is a party to an instrument gives a credit to it; that it is of consequence to mankind, that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it; that it is emphatically right in case of notes, because in consequence of different statutes, two very hard cases have arisen; first, with respect to a gaming note, which, though in possession of a *bona fide* purchaser without notice, is void; and in the case of usury, a note given for an usurious consideration, though in the hands of a fair indorsee, is equally void; and therefore, whenever a man signs these instruments, he is always understood to say, that to his knowledge there is no legal objection to them whatever." He then quotes the maxim of the civil law, *nemo suam allegans turpitudinem est audiendus*, and applies it as conclusive on the present point. The other judges concurred, and established this as a general rule of law.

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The *English* courts soon found the principle was laid down on too broad a scale, and narrowed it in its application, to negotiable instruments only. No new or additional reasons were ever adduced in its support. It was adhered to on the grounds stated by Lord *Mansfield*, and the authority of the decision in that case. But at length, the rule was exploded in the King's Bench, and such a witness determined to be [*266] *admissible, unless interested in the event of the suit on trial. See *Jordaine* v. *Lashbrooke*, 7 *Durnf.* & *East* 601.

As the decisions of the highest court and ablest judges at *Westminster-Hall* have been thus directly contradictory, and as their principle (notwithstanding the *dicta* of several of the judges in *Allen* v. *Holkins*, 1 *Day's* Cases in Error, p. 18. adopting the rule as sound law, and the decision in *Webb* v. *Danforth*, p. 301, denying its application as to facts subsequent to the execution of the instrument) has never till now come directly in question before the highest courts in this state, it is our duty to decide it according to the general rules and principles of law respecting admissibility of testimony; and if the grounds and reasons in *Walton* v. *Shelley* are found to be fallacious, we cannot consider the case and its authority conclusive.

The first ground Lord *Mansfield* takes, is, that every person who signs an instrument, thereby gives it a credit, and can never be admitted to dispute its validity. Before we adopt this principle of universal exclusion and estoppel, we must enquire what credit each several party, by putting his signature upon a negotiable instrument, thereby gives to it, and what obligation he thereby incurs; for each signer stands on a different ground.

The drawer of a bill or negotiable note, acknowledges himself indebted to the payee to the amount of the sum it contains, and engages to pay the damages, in case the bill shall be dishonored, or the note uncollected, without the fault of the payee, or of those to whom it may be indorsed.

The indorser of a bill or note acknowledges his receipt of a valuable consideration, and contracts to pay the sum, in case it cannot be obtained of the drawer.

The acceptor acknowledges it to be duly drawn; he is not admitted to deny the hand-writing of the drawer; and he contracts to pay the sum according to its contents to the legal holder.

These are the rules and principles of common law, as adopted and sanctioned by the courts in this state.

The indorsee or holder of a negotiable security has nothing to do with the transaction between the original parties. See *Jordaine* v. *Lashbrooke*. Nor has the drawer or acceptor any thing more to do with the contracts between subsequent indorsers and indorsees. Each party is bound only [*267] so far as his own obligation extends, and cannot be precluded from denying any fact not acknowledged by his signature. All these contracts are separate and independent. No party by his signature warrants the validity of any contract but his own, or gives any farther credit to the security, or is interested in the event of any suit on the several contracts of other parties, whose names may appear on the instrument. He warrants nothing fartther with respect to the validity of the draft, he hangs out no false colours, and is not estopped by his signature from testifying to any facts respecting the instrument, or any legal objections within his knowledge.

The only fundamental principle of the common law, applicable to the present question, is this, that no man can be a witness in his own cause; and this rule hath ever been considered as applicable to every case in which he is a party, or is interested, and to no others. It was formerly holden as well in the *English* courts as our own, that an interest in the question was a sufficient ground for excluding a witness. It is now settled law in both, that an interest in the event of the suit is the only ground on which he can be rejected; and, that a mere interest in the question does not affect his competency, but his credit with the jury only. But this distinction was not fully settled at the time the case of *Walton* v. *Shelley* was tried. Justice *Buller*, though he concurred in the principle that no man can invalidate his own security, relied much in his argument on the fact that the witness was interested in the question, because the question put to him was upon the validity of the notes he had indorsed; although he clearly was not interested in the event of the suit on trial, as it must be uncertain whether he would ever be subjected to a subsequent action on the instrument, was already liable on his signature, and could never give the verdict in evidence in his favour.

The maxim of the civil law, that no man is to be heard who alleges his own turpitude or crime, was never by any court or judge, before Lord *Mansfield*, applied to the inadmissibility of a witness, but only to the rights of the parties in a suit or action. No suitor can support a claim, in which the ground or

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consideration is an unlawful act of his own; nor can any defendant be heard on a defence, grounded on his own unlawful act. But an accomplice in a crime, a fraud, or any illegal transaction, was always an admissible witness, unless immediately interested in the suit. I may further observe, that the term, "turpitude," can with no propriety be applied to an act, not *malum in se*, but only *malum prohibitum*, by force of some statute, making it penal in some particular country, or jurisdiction.

In *Jordaine* v. *Lashbrooke*, Lord *Kenyon* says, "The rule contended for is this, whatever fraud may have been committed if the party to the fraud can get on the instrument the name of the person, who may be the only witness to the transaction, he will stand entrenched within the forms of law, and impose silence on that only witness, though he be a person of unimpeachable character, and not interested in the cause." This he denies to be law. *Grose*, Justice, says, "Let the plaintiff in this case resort to his indorser to recover back the consideration he gave for the bill."

Indeed, if a man sell and indorse a note executed by an infant, or feme covert, and void at common law, or void by statute as being usurious, unstamped or a forgery, I see no legal defence he can set up against an action of *assumpsit* by the indorser, for the money paid on a consideration which has wholly failed. For that is not an action on the bill or note, but rests entirely on the ground that the note is void in law. If such an action can be supported, there is no hardship in the case of an innocent purchaser; he has his remedy. If in any case he is deprived of every legal remedy, no court can have a right, in compassion to the hardship of his situation, to assist him in evading the law by excluding such witnesses, or evidence, as is admissible in all other cases.

The hardship upon the innocent indorsee, which seems so strongly to have influenced the mind of Lord *Mansfield*, is indeed no more than this;—by the statutes to which he refers, all bills or notes, where the consideration is money lent on usury or for gaming, are declared void to all intents and purposes whatever; and consequently, the indorsee, whenever he brings his suit on the note or bill itself, against the drawer, promissor, or acceptor, must fail of a recovery in that action. But he is not without remedy; for, if a fair and *bona fide* purchaser without notice, he may recover of the indorser on his indorsement. *Bowyer* v. *Brampton*, 2 *Stra.* 1155.

In the case of *Lowe* and others against *Waller*, *Doug.* 708. in which all the former cases are well considered, Lord *Mansfield* himself says, "It is better that the law should be as it is with respect to bills and notes, than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover on the bill."

I am therefore of opinion that the witnesses offered are admissible, notwithstanding they have put their signature upon the bill.

But it is farther urged, that their testimony is irrelevant, and was properly rejected on that ground.

This depends entirely on the point, whether an innocent indorsee can recover in an action brought on an usurious bill, against the acceptor. This was the sole point in the case of *Lowe* and others against *Waller;* in which case, after taking time to consider, the court unanimously decided, that a bill of exchange given upon an usurious consideration is void, even in the hands of an indorsee for valuable consideration without notice of the usury. And I hold this decision to be sound law, notwithstanding the extrajudicial opinions cited at the bar from *Holt*, Lord *Raymond* and *Comyns*.

On these grounds, I advise a new trial.

SMITH, J. I concur in the opinion expressed by my brother *Trumbull;* and would add, that the objection made by counsel that the testimony offered was irrelevant rested on the ground that the facts stated, and attempted to be proved, would not, if proved, constitute usury, because the usurious agreement was made between *Leffingwell* and *E.* and *A. Townsend*, who are not parties to this action, and neither the plaintiffs nor defendant had any knowledge of it. The present case, so far as it respects this question, comes within the principle of the case of *Fields* and *French* v. *Gorham*, 4 *Day's Ca.* 251. In that case, the court decided, that the defendant might avail himself of a corrupt agreement, of which he had no knowledge at the time of making it. I then thought it necessary to presume an agency, by which the parties to the corrupt agreement might be supposed to act for the parties on the record. But on attending farther to the expressions of the statute, I find them to apply rather to the *contract* than the *parties;* and the only fact made necessary to

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avoid the contract is, that it be *made for the payment of any principal, or money lent upon or for usury, whereupon or whereby there shall be reserved or taken more than at the rate of six dollars in the hundred. (*a*) In this case, there is no doubt of the fact that the acceptance and indorsement were made to secure payment of money lent on usury; and that more than at the rate of six *per cent.* was taken or reserved by a corrupt agreement.

SWIFT, J. The question whether a party to a negotiable instrument, who is divested of his interest, is a competent witness to shew it void in its creation, now comes for the first time before this Court for decision. We are unshackelled by any precedent, and are at liberty to decide it on principle.

In the case of *Walton* v. *Shelley* the rule was laid down, that no party who had signed an instrument should ever be permitted to give testimony to invalidate it. Though the court and counsel speak of it as a well known rule, yet it can be found in no prior case.

Lord *Mansfield*, who had borrowed many valuable principles from the civil law and incorporated them with the common law, attempts to support his decision by what he says is a maxim of the civil law, *nemo allegans suam turpitudinem est audiendus;* but there is no such rule to be found in the civil law as applicable to witnesses, and it is the daily practice in common law courts to admit witnesses to testify to facts which shew they have been parties to trespasses, frauds and crimes.

The rule, as laid down in the case of *Walton* v. *Shelley*, comprehends instruments not negotiable as well as those which are, and does not require the action to be brought on the instrument; but if the consideration be antecedent notes given up, yet if the witness indorsed such notes, he is incompetent. If this principle should be carried to its full extent, it would furnish an effectual shield for usury, gambling, fraud, and illegal contracts. Let all who are concerned in the transaction, or who have knowledge of it, become parties to the writings made use of, and there will be neither danger nor possibility of detection. So manifest was the mischief of this rule on so broad a basis, that the court of King's Bench, in the case of *Bent* v. *Baker*, in order to avoid it, were obliged to restrict it to negotiable se-

(*a*) *Tit.* 170. *s.* 2.

curities, and in the *case of *Jordaine* v. *Lashbrooke* wholly to explode it. So that the case of *Walton* v. *Shelley* has been overruled, and is not now law in that country.

But as this rule, as far as it relates to negotiable instruments, has been adopted by highly respectable judicial tribunals in our sister states, it may be proper to examine it.

In the case of *Walton v. Shelley*, Lord *Mansfield* says, that whenever a man signs these instruments he is always understood to say that to his knowledge there is no legal objection. In the case of *Coleman* v. *Wise* and others in the state of *New-York*, the same principle is recognized. But there is not a precedent, or *dictum*, to warrant this position. When a man subscribes or indorses an instrument, he contracts certain legal liabilities, and he sets his name to it for no other purpose. He enters into no engagement that he will never testify that the instrument was obtained by fraud or duress; or was given for a gambling or usurious consideration; or that he will never make such plea. Every party to an instrument has a right by his plea to shew it was originally void. How then can it be pretended, that by signing it he is understood to say that to his knowledge there is no legal objection to it? If he contracts such obligation, the true principle would be not to permit him to make a plea or defence repugnant to it. To allow him to plead a fact which shews the instrument void in its creation, and then to refuse him the privilege of proving it, at least by one species of testimony, is a palpable absurdity. The iniquity really consists in the defence itself, and not in the mode of proof; for certainly it would be as unjust for the defendant to make out his defence by a witness not a party to the instrument as by one that is a party.

In the case of *Churchill* v. *Suter*, 4 *Mass. Rep.* 156. Chief Justice *Parsons* says, " If the parties to the usury or the gambling, having received the fruits of their illegal contract, and having given a circulation to the note, can be admitted by their testimony to destroy it, besides the injury to a fair purchaser, the negotiation of paper will be greatly checked, to the no small injury of the public." This supposes that the indorser combines with the maker of the note to have it transferred to an innocent indorsee, and then by his testimony to avoid it for usury. All will acknowledge such conduct to be highly criminal. But suppose there was originally no

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intent to defraud an innocent indorsee, and while the note is held by an indorsee, having knowledge of the usury, for a usurious consideration, the indorser, by an act of bankruptcy, becomes discharged of his interest, it will be agreed then to be perfectly right for him to testify to the usury to avoid the note. Again, suppose a usurer has taken a most unreasonable advantage of the distress and misfortunes of another, and has compelled him to obtain security by the indorsement of a friend whom he cannot indemnify; he then puts the note in suit, and there is an indorser who has become disinterested who is knowing to the oppression and usury; it would clearly be his duty to come forward and testify to the usury for the purpose of destroying the note. Yet by the rule contended for, the indorser in both these cases would not be permitted to testify. Here then, for the purpose of protecting the possible case of the innocent indorsee, ample protection is furnished to the certain case of the usurer and oppressor.

Again, it is said, "that persons may be witnesses against their accomplices, because their testimony tends to prevent fraud and injustice, but in this case it tends to encourage it by enabling parties to enjoy the fruits of it, and throw the consequence on an innocent indorsee." When accomplices are admitted to testify, the enquiry is not made whether it will or will not tend to encourage fraud; for if it should, it was never heard that this would be an objection to their testimony. The object is to punish crimes; and, as in many cases this cannot be done without the testimony of accomplices, the law admits them.

But to illustrate the subject; suppose a combination to defraud an innocent indorsee by a usurious note; the real usurer, to accomplish this plan, does not set his name to the note, and is rendered by releases disinterested; he would then be a competent witness to prove the usury; yet his testimony would tend to encourage fraud and injustice as much as if his name had been set to the note. This clearly shews that no such rule as that above mentioned exists.

It is further said, "No man shall be admitted to allege his own turpitude, when that allegation will tend to encourage fraud, or illegality. Nor shall the defendant in his defence allege his own wrong." This is no more than laying down the well-known maxim that no man shall take advantage of his own wrong; but this has always been applied to the

parties, and is now for the first time attempted to be applied to witnesses. Though this rule be generally true, yet a statute can controul its operation. Suppose a fraudulent combination to cheat an innocent indorsee by a usurious note, and a party to the fraud and the note is sued thereon; he may plead the usury to avoid it. Suppose the plaintiff replies the fraudulent combination, and that an indorsee is the only person who has knowledge of the fact. Unquestionably, the replication would be bad, and the note void. Here, then, the party is permitted to take advantage of all the turpitude, fraud, and wrong, which the above rule intended to exclude. Suppose an issue should be joined on the fraudulent combination; a party to the fraud, if not a party to the note, might, on the principles contended for on the other side, be admitted as a witness; he would then testify to his own fraud and turpitude. The truth is, the real question in all these cases is, whether the note was given for usury; and this the party by force of statute may always plead, however base and shameful the transaction may be; and may prove it by competent witnesses, however deeply they may have been concerned in it. It is in vain to talk about the turpitude of witnesses and the wrong of the defendant. *Ita lex scripta est.*

But public policy is the strong argument against the admission of parties to an instrument to invalidate it by their testimony. It is said, the makers and indorsers of negotiable notes may combine to defraud innocent indorsees, which would check and embarrass their negotiation, and prevent their circulation. It is true, such fraudulent combinations can be made, and the indorser of the note may testify to the usury on a suit against the maker, and the note may be avoided in the hands of an innocent holder. It is also true, that a similar fraud may be practised without the aid of an indorser or party to the note for a witness. Suppose two men wicked enough to contrive such a plan, they may make use of some friend expressly for the purpose of being a witness to the usury; they may indorse the note to some person ignorant of it, and divide the spoils; and on a suit by the indorsee, such friend may be called as a witness, and prove the usury. Here is precisely the same inconvenience and fraud as in the other case, and the same injury to the circulation of negotiable notes; yet it cannot be denied

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that in this case the note must be set aside; for there is no legal objection to the witness, he has no interest, his name is not on the paper. When men are unprincipled enough to practise frauds of this description, I think it is much more probable that it will be done by the intervention of some friend whose name is not on the note than by an indorser. Of course, this rule would furnish very inadequate relief, if such a fraudulent scheme should seriously be adopted.

But if principles of public policy are to govern, they ought to extend to all cases where the injury is the same; and the rule ought to be, that no defendant should ever be admitted to plead usury, or any other fact, to avoid a negotiable instrument in the hands of an innocent holder. This would do complete and equal justice in all cases. But how unequal is this rule? It will protect the innocent holder in one case, but not in another under the same circumstances, and within the same reason; and where it protects the innocent holder, it furnishes the same protection to the usurer; for the rule in *Walton* v. *Shelley* makes no difference whether the holder knew of the usury or not; and in the case decided in *Massachusetts* the plaintiff on the record was the actual usurer. A rule cannot be right which protects the very usurer the law intended to punish in one case, and in another subjects the innocent holder to a loss which it was the object of this rule to prevent.

But to decide on the policy of this law it is necessary to consider the object of the legislature in making it. It is manifest they intended in the most effectual manner to suppress usury. If they had admitted the principle, that usurious notes should be valid in the hands of innocent holders, they would have furnished a mode by which usury could have been practised with safety, and the law rendered nugatory. To shut the door against all such artifices, the law enacts, that usurious securities shall be absolutely void. It must have been well understood, that instances would occur where innocent indorsees might be prejudiced, and that parties to instruments, when not otherwise disqualified, might, by the general rules of evidence, be admitted to invalidate, by their testimony. It is not probable that the legislature contemplated precisely such a fraud as it is suggested may be practised: it must however have been known that notes might be set aside in the hands of innocent holders, which

would operate hardly, if not unjustly, in particular cases; but as a special provision in such cases would have defeated the statute, it must be understood that they intended to declare the notes void in the hands of innocent holders, considering the great object of suppressing usury of more importance than to promote the negotiation and circulation of notes by protecting innocent holders in the few cases where they might be effected. If there is any thing wrong in this business, any thing opposed to public policy, it is in the statute which makes void usurious notes in the hands of innocent holders; but this is a wrong which no court of law can remedy. It would be strange indeed for them to say, that a statute is not founded on principles of public policy, and then, though they cannot declare it void, yet they will refuse legal evidence to carry it into effect. This is an attempt by indirect means to repeal a statute. The legislature have decided on the policy of the measure; and it is the duty of courts to give it due operation.

But it has been said by Justice *Buller:* "It would be attended with consequences the most injurious to society if these securities might be cut down by the persons passing them; it is only for two men to conspire together to cheat all the world." *Peake's Ca.* 118. Chief Justice *Parsons* says: "For any man by contriving with another may take up money of him at usurous interest, and give him a negotiable note for security. The promisee may sell it for a valuable consideration, and when the indorsee attempts to recover the money, the promiser and indorser may (at least by releases) be witnesses for each other, and defeat the purchaser of his remedy, and quietly enjoy the money he has paid for the note." 4 *Mass. Rep.* 162.

It might be inferred from these observations, that innumerable frauds would be practised, if a party to a negotiable instrument could be a witness to impeach it, and that all confidence in negotiable paper would be destroyed; yet the truth is, no innocent holder of a note could ever sustain a loss, unless by the bankruptcy of his indorser, or the person from whom he received it; and he has nothing to do, to guard against a fraud, but to require the same ability in his indorser as prudent men ordinarily require when they give credit. It would also seem from the remarks above quoted, that an opinion was entertained that the parties to a usurious

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note could transfer it without liability to the vendee. Chief Justice *Parsons* says, that they may defeat the party of his remedy, and quietly enjoy the money. It is true, in a suit by the indorsee against the maker of the note, the indorser might be a witness, as he would testify against his interest; but in a suit by the innocent indorsee against the indorser, the testimony of the promiser would be of no avail, unless the indorsement was void on account of the usury contained in the note; and that the indorsement was void must have been the opinion of Chief Justice *Parsons*, otherwise he could not have said that the promiser might be a witness for the indorser, and thereby defeat the remedy of the purchaser. But it is an unquestionable principle, that though the note is void on account of the usury so that no action can be sustained upon it, yet if the promisee indorse it to a *bona fide* purchaser ignorant of the usury, he is liable on his indorsement; for this is a new contract not contaminated with usury, and it is binding on him, though the original note is void. If it should pass into the hands of an innocent purchaser without indorsement, if the seller conceal the usury, an action would lie for the fraud. The consequence then is, that men of property can never combine to practise a fraud of this description; for one or the other would always be responsible in some shape on the sale; and though they might defeat the purchaser of one remedy, they would be liable in some other mode; and consequently, could not enjoy very peaceably the fruits of their fraud, or very successfully cheat all the world. The apprehension, then, of danger from a fraudulent combination of the parties to a negotiable instrument, is founded on a mistaken view of the operation of the law respecting their liabilities.

But what are the frauds that can be practised in such cases? The only successful mode must be by the instrumentality of indorsers without ability to respond. Let us examine what frauds can be practised by the combination of a poor and a rich man. The poor man must always be the indorser. A man of property would never give his note to a bankrupt without consideration, on the risk that he will sell it, divide with him the spoils, and swear him clear of the debt. A poor man would hardly loan money or other property to a rich man on a usurious security, for the privilege

of selling it; under an obligation to discharge the usurer by his testimony, and with a liability of going to gaol himself for another man's debt. A man of property would have little inducement, unless he received the full sum, to execute a note and run the risk that the promisee should swear him clear of it. The promisee could not be compelled to testify, as it would be against his interest; and he might die before the trial. A man of property runs a further risk; if he should practise such a fraud and avoid the note, yet he would be liable to an action in favour of the innocent indorsee whom he had cheated; and it would always be in the power of his coadjutor in the fraud to betray and subject him. So remote is the prospect of deriving any advantage from a fraud of this description, that I very much question whether an attempt ever has been, or ever will be, made to practise it. The calling on an indorser or other party to testify will always be an after calculation, and will probably occur only where there has been some failure or embarrassment.

What can be the injury to the circulation of negotiable paper to admit the parties to invalidate it by their testimony? It might prevent prudent men from taking the indorsements of bankrupts. This would not be very injurious to the commercial world. In the case of failure of the parties to the instrument after the indorsement, it might in some cases throw the loss upon a different party; but this would, in reality, be little more than the common risk of loss by failures, which every man runs in a commercial country where extensive credit is given.

I apprehend, then, there is no solidity in the argument drawn from considerations of public policy.

But let us consider what will be the effect not to admit a party to negotiable paper to invalidate it by his testimony. It will certainly furnish very ample protection to usurers. Conceal the usury from all who are not parties, and there can be no proof in an action founded on the obligation. The only method, then, must be a public or *qui tam* prosecution. The parties affected by the usury will usually be the witnesses, and can get no redress. They can rarely calculate on such advantages from *qui tam* prosecutions as to realize any thing more than a gratification of revenge; and if a usurer has nothing more to restrain him than such prosecutions, the statute against usury will be of little consequence.

In practice, it will be found, that this rule has much of-

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tener protected the usurer than innocent indorsees. In the case of *Walton* v. *Shelley*, *Sutton* by whose assignees the action was brought, must have known the usury. The bond was executed in consideration of notes given up. If he had been ignorant of the usury, the bond would have been good. In the case of *Churchill* v. *Suter*, the usurer was the plaintiff. In both cases, the usurers were protected.

In the case before us, the rule in *Walton* v. *Shelley* would have screened the party charged with the usury, and would have subjected the defendants to pay; but the rule I contend for would have visited the consequences of the usury upon the usurer. In the suit by *Derby Bank* against the plaintiffs in *New-York*, if *E.* and *A. Townsend* had not been excluded from testifying on the ground that they were parties to the bill, then the plaintiffs (admitting the usury existed as conceded by the pleadings) would have made good their defence, and the *Derby Bank* would have had a complete remedy against their indorser, who is stated to be the usurer. But the application of that rule has effectually protected him.

In this case, there would have been no difficulty, had it not been for the failure of *E.* and *A. Townsend.* As the plaintiffs indorsed and the defendants accepted as sureties for them, though their indorsements and acceptance were void as they were made to secure the usury to *Leffingwell;* yet if they had been subjected to pay, they could clearly have recovered of *E.* and *A. Townsend* for money paid by them as sureties; for in the implied promise to indemnify there was no usury, as they were unacquainted with the nature of the transaction between *Leffingwell* and them. But now, by their failure, they have lost their remedy; the application of different rules by the courts in the state of *New-York* and *Connecticut* has subjected the plaintiffs to suffer a loss by the bankruptcy of *E.* and *A. Townsend*, which the defendant must have sustained, if the bill had not been usurious. This loss, however, is owing to the bankruptcy of *E.* and *A. Townsend*, and not to any preconcerted plan to cheat them.

As to the question respecting the usury; it appears from the facts stated, that on a contract between *Leffingwell* and *E.* and *A. Townsend*, they were to draw a bill on *Bush*, in favor of *E.* and *A. Townsend*, to be accepted and indorsed; and on this security the money was to be loaned at twelve

per cent. Here the drawing, accepting and indorsing were to secure the usury to *Leffingwell;* and though the acceptors and indorsers were ignorant of the usury, yet this does not prevent the transaction from being usurious; for it was manifestly a contrivance to evade the statute, and if allowed of, usury might be practised with impunity.

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The other Judges concurred.

New trial to be granted.

The inhabitants of the towns of WINDSOR and SUFFIELD *against* FIELD and others:

IN ERROR.

A petition to the county court for a highway stated, that the old road between certain *termini* was "very circuitous, hilly, and on bad ground," and that a new road might be laid out between the same *termini* "so as to greatly accommodate the public, with little expense to the town, or injury to private property;" it was held to be sufficient, without alleging, that the highway prayed for "is wanting," or that it would be "of common convenience or necessity."

A committee appointed by the county court to lay out a highway stated in their report, that "the agent of the town, [through which the road was laid out,] the petitioners, and the proprietors of the land being legally notified," they met on a certain day, when, "being met by all concerned," they completed the business of their appointment; and it appeared from the record, that before the court "the parties were fully heard as to the acceptance of the report," no exception being taken for want of sufficient notice; it was held that the requirements of the statute with regard to notice were substantially complied with.

A town made a party to a petition for a highway, but not appearing, in which no part of the road prayed for is laid out, is not entitled to notice of the meeting of the committee. At any rate, no advantage can be taken of the want of such notice by another town through which the road runs.

In the report of the committee, the *termini* of the road, and the intermediate courses and distances on each person's land, with the names of the several owners of the soil, and the quantity of land belonging to each subjected to the easement, being precisely stated; it was held that this description fixed the limits of the highway with sufficient certainty.

In an application to the county court for a highway, a finding by the court, on a hearing before themselves, without sending out a committee, that the road prayed for *is of common convenience and necessity*, is regular and sufficient.

The committee, in laying out a highway, reserved to certain individuals the right of altering and repairing their mill dam and flue when necessary, such reservation not appearing to be inconsistent with the public easement; this was held to be correct.

The committee in assessing damages, are not restricted, in all cases, to the *actual owners* of the land on which the road is laid out.

New-Haven, November, 1814.

Windsor v. Field.

The appropriate remedy for persons aggrieved by the doings of the committee, either in laying out the highway, or assessing the damages, is by application to the county court before the report of the committee is accepted.

THIS was a petition to the county court of *Hartford* county, brought by the present defendants in error, praying for the appointment of a committee to view and lay out a public highway between two specified points, one in *Suffield*, [*280] *the other in *Windsor*, to ascertain the place and course of such highway, and to estimate the damage done to any particular persons by laying out the same.

The petition stated, "That the present travelled road leading from the oil-mill bridge in *Suffield* southerly through *Pine-Meadow*, and uniting with the road leading from the town of *Windsor* to *Suffield* near the house of *Phinehas Picket* in *Windsor*, is very circuitous, hilly, and on bad ground; and that a road may be laid out from the road near the house of *John Morron*, jun. in *Suffield*, leaving the present travelled road near said *Morron's* house, and running east of the old road aforesaid, near the margin of *Connecticut* river, and to unite with the old road in *Windsor*, near the house formerly occupied by *Bildad Phelps*, so as greatly to accommodate the public, with little expense to the towns, or injury to private property."

There was a citation to the inhabitants of the towns of *Suffield* and *Windsor*, which was duly served; and the petition was returned to the *December* session 1811. The town of *Suffield* made default of appearance; but the town of *Windsor* appeared by their agent. The court, on a hearing, found the facts stated in the petition to be true; adjudged that the road prayed for was of common convenience and necessity; and appointed a committee of three disinterested freeholders to view and lay out a highway from one of the points specified in the petition to the other, with directions to estimate the damages done to individuals, and to make report of their doings, to some future session.

In *December* 1812, the committee reported as follows: "That pursuant to our appointment, the agent from the town of *Windsor*, the petitioners and the owners of lands being legally notified, on the 1st day of *August* 1812, we met at the house of *Phinehas Picket* in said *Windsor*, at 10 o'clock, A. M., and thence proceeded to view the ground on which to lay the road, but the petitioners not meeting us, we adjourned to

the 31st day of *August*, when two of the committee met, but the ill health of the other preventing his attendance, we adjourned again to the 14th day of *September*, when being met by all concerned, after hearing such observations as they thought proper to make, on the 14th and 15th of *September* we completed viewing, and laid out the highway as follows, attended by Mr. *William Olmsted*, county surveyor for the *county of *Hartford*, and chairmen under oath, *viz.* beginning [*281] on the east side of the old road between the house formerly occupied by *Bildad Phelps* and the house of *Ezra Hayden*, at 110 links north of the north end of said *Hayden's* house, we ran north 13° 40′ east, 249 links, on *Ezra Hayden's* land" &c. [specifying the courses, distances, and owners of the land] " to *Suffield* line, near the centre of the old road in front of the house of *John Morron*, jun. This line is the centre of the road which runs across the mill-dam of *Haskell* and *Dexter*. We then proceeded to assess the damages to individual proprietors of the lands taken for the road, reserving to said *Haskell* and *Dexter* the right of altering and repairing their mill-dam and flue, when necessary." A schedule was annexed to the report, containing the quantity of land taken from, and the damages assessed to, individuals; among whom were the following persons, with the quantities and sums placed against their names respectively, over no part of whose lands did it appear from the report that the road was laid, *viz.*

	Land.			*Damages.*
Edmond Chapman, -	0 *A.*	2 *R.*	23 *R.* - -	$ 21 „
Elizabeth Allyn, jun.,	0	1	7 - - -	9 60
Haskell & Dexter,	0	1	23 - - -	24 „

And the schedule omitted the name of *Edward Chapman*, over whose land the road was laid.

The parties having been fully heard as to the acceptance of the report, the court accepted the same, and established the highway as laid out by the committee. The respondents thereupon brought a writ of error to the superior court, who affirmed the judgment of the county court; and to reverse that judgment the present writ of error was brought, assigning several errors.

Dwight for the plaintiffs in error.

T. S. Williams for the defendant in error.

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EDMOND, J. The first cause of error assigned is, That the petition of the petitioners is insufficient in law to warrant the county court in rendering final judgment in the cause; that the superior court ought to have adjudged the same to be insufficient; and that the proceedings of the county court were erroneous.

[*282] *It was decided by this Court, in the case of *Lockwood* v. *Gregory*, 4 *Day's Ca.* 415. that in an application to the county court for a new highway, a *specific allegation* that the road prayed for would be of *common convenience and necessity*, is not necessary; that if the application states such facts as, if true, would induce the inference that such is the case, it is sufficient. Tested by this rule, there can be little doubt of the sufficiency of this petition. The application here states, that "*the present travelled road leading, &c. is very circuitous, hilly and on bad ground.*" Assume this as a fact, and the inference is fair, that a new highway "*is wanting.*" It further states, that "a road may be laid out leading from, &c. so as greatly to accomodate the public, with little expense to the town or injury to private property." If this be so, that an alteration would be of "common convenience" is with equal justice inferable.

2. It is assigned as cause of error, that by the record, it does not appear that the committee notified one or more of the select-men of the town of *Suffield*, and of the town of *Windsor*, or the owners of the land, and others concerned, of the time, place and occasion of their meeting in the manner which the statute directs.

The statute (*Tit.* 86. *c.* 1. *s.* 11.) directs the committee to give seasonable notice to one or more of the select-men of the town *in which the highway is to be laid out;* and also to set up a notification in writing on the sign-post in such town or towns at least twenty days before they enter on said service, thereby notifying the owners of the land and others concerned, of the time, place and occasion of their meeting. That such notice ought to be given, unless the concerned agree otherwise, will not admit of a doubt. Where notice in the manner prescribed is given, or other notice is accepted by all the parties, the statute requirement is substantially complied with, whether the fact of notice appears by the record or not. The *form of the committee's return* in respect to their having given notice is not pointed out by the law. They are

not bound, nor is it necessary they should be, to state in their report, in the precise words of the statute, that they gave the notice required. Sufficient is it, until the contrary is shewn, if from the tenor of their report the requirements of the statute appear with certainty to a common intent to have been fairly complied with. The committee after counting on *their appointment by the court, in their report say, "pursuant to said appointment, the agent from the town of *Windsor*, the petitioners and the proprietors of the land, being legally notified, on the first day of *August* 1812, we met, &c. but the petitioners not meeting us, we adjourned to the 31st of *August*." From that time it appears another adjournment took place to the 14th of *September*, "when," (say the committee in their report) "*being met by all concerned*, after hearing such observations as they thought proper to make, on the 14th and 15th of *September*, we completed viewing, and laid out the highway as follows," &c.

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It further appears from the record in this case, that before the court "the parties were fully heard as to the acceptance of the report;" and notwithstanding the parties had such a hearing, it does not appear from the record, that any exception was taken to the manner, or for the want of that notice which the law requires. From these facts, I apprehend, it may well be presumed, that all the parties concerned, and whose rights are affected by the judgment, had leg alnotice, or voluntarily waived all exception for insufficiency of the notice given. That one or more of the select-men of *Suffield* was not notified by the committee, was admitted in the argument. This can make no difference in the case. One or more of the select-men of the town or towns (only) in which the highway is to be laid out, is by law to be notified. No part of the road in this case appears to have been laid out on lands in *Suffield*. No judgment has been rendered against them. The interests of the towns of *Windsor* and *Suffield* are distinct and separate; and the want of notice to *Suffield* (had it been necessary) is not a sufficient reason for the reversal of a judgment affecting the rights of *Windsor* alone.

3. It is assigned for error, That by the record it appears that the committee have not fixed any limits to the highway, or determined its breadth.

In the report of the committee, the place where the road shall commence, the courses and distances on each person's

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land, with the names of the several owners of the soil where the road passes, and the quantity of land belonging to each subjected to the easement, are precisely given, together with the place where the road terminates. This description limits the length and breadth of the highway with sufficient certainty.

[*284] *4. It is further assigned for cause of error, That it does not appear by the record that the county court inquired by a disinterested committee into the convenience or necessity of the highway, or that the same was found by the committee or court to be of common convenience and necessity. It is not necessary that the county court should enquire by a disinterested committee into the convenience and necessity of a new highway. The words of the statute are in the alternative, "by a disinterested committee, *or otherwise.*" In the record it is expressly stated, "that the town of *Suffield* made default of appearance, and the town of *Windsor* appeared by their agent; and "the court having enquired into the facts stated in the petition, do find them to be true, and do adjudge the road proposed in said petition to be of common convenience and necessity."(*a*)

5. The plaintiffs in error further complain, that it appears by the record that in laying out the highway the committee have reserved rights and privileges to the owners of the land through which the same is laid.

The only right or privilege reserved by the committee, as appears by record, is to *Haskell* and *Dexter;* and that is only the right of altering and repairing their mill-dam and flue when necessary. The committee were bound by their oath to perform the service assigned them "according to their best skill and judgment, with most convenience to the public, and *least damage to private property.*" If consistent with the public easement or right of way, therefore, and nothing appears to the contrary, the leaving *Haskell* and *Dexter* to enjoy the right of repairing their mill-dam and flue when necessary, without being chargeable in such case with erecting a nuisance, was not only warrantable, but a duty.

6. It is also assigned for error, That by the record if appears

(*a*) *See Lockwood* v. *Gregory*, 4 *Day*, 407. *Bridgeport* v. *Hubbell & al.*, 5 *C. R.* 237. *Plainfield* v. *Packer & al.*, 11 *C. R.* 576. *Winchester & al.* v. *Hinsdale*, 13 *C. R.* 132.

that the committee have assessed damages to *other persons* than the owners of the land through which the highway is laid out, and have neglected to assess damages to the owners of land over which they laid out the highway.

The committee are not restricted to the *actual owners* in the assessment of damages in every case. They are to estimate the damage done to any particular person. Their best skill and judgment are to be exercised. If, however, any person is aggrieved by the doings of the committee, either in laying out the highway, or estimating the damages, the proper [*285] remedy is by application to the county court before the report of the committee is accepted. (§ 12.)

For these reasons, I am of opinion that in the judgment complained of, there is nothing erroneous.

In this opinion the other Judges severally concurred.

Judgment affirmed.

COLEMAN *against* WOLCOTT.

Where an instrument is stated only as inducement, and is not the gist of the action, though a *sine qua non* of recovery; or where the party has no right to the possession of it; he may prove its loss to let in secondary evidence, without averring such loss in his declaration.

In an action by one of two joint covenantees against the covenantor for fraudulently taking and pleading a discharge from the other covenantee, who had parted with his interest by assignment, and was a bankrupt; the covenant being to procure a grant or patent of 200,000 acres of a tract of land in *Virginia* within the *Louisa* forks of the river *Sandy*, or to return the money advanced by the covenantees; the defendant introduced evidence tending to shew that he laid out the money by the plaintiff's direction in the purchase of *Virginia* land, and then offered, for the purpose of shewing that the entries made by the defendant had been vacated, a transcript of the record of a suit in the high court of chancery in *Virginia* between *A.* and *B.*, complainants, and *C. D.*, and the defendant, respondents, whereby the defendant was ordered and decreed to assign to *A.* all his right and title in 300,000 acres, part of a survey made for him of 650,000 acres of land in *Russell* county: Held that such record was irrelevant and inadmissible.

When the effect of an act understandingly done is necessarily injurious to the rights of another, the *quo animo* is not a matter of fact, but an inference of law.

THIS was an action on the case, in several counts, the substance of which may be concisely stated as follows(*a*). In

(*a*) See a more detailed statement of the declaration in a former suit between the same parties, for the same cause of action, in 4 *Day's Ca.* 6 to 9.

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September 1795, the plaintiff and *John Taylor*, on the one part, entered into a covenant with the defendant on the other part, whereby the former covenanted to advance certain sums of money, and the latter covenanted to survey, locate and procure a grant or patent of 200,000 acres of a tract of land in *Virginia* within the *Louisa* forks of the river *Sandy*, or repay the money advanced. In *November* following, *Taylor* assigned all his interest, and the plaintiff two thirds of his interest in this covenant to *Eliel Gilbert*, which assignments were made with the defendant's knowledge, and were entered on the back of the covenant, or a copy thereof. The plaintiff and *Taylor* advanced the stipulated sums to the defendant, and performed all the covenants on their part, except so far as they were prevented by the defendant's acts or negligence; but the defendant failed to procure any title

[*286] *to the land, and then refused to repay the money advanced. In *May* 1801, the defendant, for the purpose of defrauding the plaintiff of his claim for the money advanced by him on that part of the covenant which he yet retained, applied to *Taylor*, whom he knew to be a bankrupt, and procured from him a general release, which the defendant afterwards pleaded in bar of an action brought in the name of the plaintiff and *Taylor* against him on the covenant; in consequence of which the plaintiff suffered a non-suit. In one of the counts, the covenant was averred to be lost by time and accident; but there was no averment of the loss of the assignments to *Gilbert*.

The cause was tried at *Middletown*, *July* term 1814, before *Swift*, *Brainard* and *Baldwin*, Js.

On the trial, the plaintiff did not produce the assignments, but offered to prove that they were lost, and then to prove their contents. The defendant objected to this evidence, insisting that as the assignments were not alleged in the declaration to be lost, or out of the power of the plaintiff, it was indispensable that he should produce them. The court overruled the objection, and permitted the plaintiff to give evidence of the loss of the assignments and of their contents.

In the progress of the cause, the defendant offered to prove, that the plaintiff accompanied the defendant to *Richmond* in *September* 1795, to see to the laying out of the money; that on their arrival there, they discovered that land-warrants had been previously taken out, and entries thereof made of the land in contemplation, by *James Swan* and *Al-*

exander M'Rae; that the defendant was thereupon about to return without laying out the money, but the plaintiff advised and directed him to purchase land-warrants and make entries on the land, which he accordingly did, and thereby expended the money advanced to him for that purpose. To establish these facts, the defendant introduced the testimony of *John Taylor* and the deposition of *Elizur Wolcott. Taylor* testified that the plaintiff told him, at the time of entering into the covenant with the defendant, that he the plaintiff was going to *Virginia* with the defendant; that the witness remonstrated on account of the short credit of sixty days on which they had taken up the money advanced to the defendant; that the witness consented on the representation by the plaintiff of the importance of his seeing the money laid out; *that the plaintiff thereupon went to *Virginia*, and shortly after his return told the witness, that he might thank him that he had any land by the *Wolcott* contract; for when the plaintiff and defendant got to *Richmond*, *Smyth* had gone away, and the defendant was discouraged, and the plaintiff advised the defendant to go on to the westward and see *Smyth. Wolcott* deposed, that in *September* 1795, he went from *Hartford* to *Richmond* in company with the plaintiff and defendant, the defendant's object being to procure *Virginia* land; that the defendant, as the witness understood from him, expected to meet one *Smyth* from the western part of *Virginia*, and to procure the land by his aid; that when they arrived at *Richmond* they learned that *Smyth* had been there and returned, but had left a request to the defendant, as the defendant informed the witness, to come on to the westward, and bring land warrants, with a view to procure or make the location they had talked of; that *Smyth* while at *Richmond*, as the witness understood from the defendant, had made a contract with *Swan* and *M'Rae* to locate a quantity of *Virginia* land; that these circumstances were the subject of frequent consultation between the plaintiff and defendant; that the defendant expressed apprehensions that *Smyth's* bargain with *Swan* and *M'Rae* would interfere with his bargain with the defendant, and appeared disposed to relinquish the object of his journey, but the plaintiff advised him to proceed; that the defendant thereupon took warrants from the land office, and went to the westward, and the plaintiff returned home, having apparently had no other ob-

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ject than to see how the defendant did the business; and that the plaintiff, on his return, expressed an opinion to the witness, that the defendant would not have purchased the land-warrants, had it not been for the plaintiff's advice. The defendant then offered a transcript of the record of a cause in the high court of chancery in *Virginia*, wherein *Swan* and *M'Rae* were complainants and *Smyth* and the present defendant were respondents, to shew that the entries by the defendant had thereby been vacated, and that by means thereof the money was lost. The bill stated, that *M'Rae*, having stipulated to locate certain lands for *Swan*, entered into an agreement with *Smyth* on the 14th of *September* 1795, in pursuance of which *M'Rae* delivered to *Smyth* land-warrants amounting to 300,000 acres; that

[*288] *these were located by *Smyth* in *Russell* county on the lands which *M'Rae* had stipulated to locate; and that after this, *Smyth*, on the application of the present defendant, and in consideration of a considerable sum of money, assigned these warrants with the entries to him, which were included in a large survey of 650,000 acres, and took in exchange a location on lands in the county of *Lee*, of a different description, and less valuable. The court ordered and decreed the respondents to assign to *Swan* all their right and title in and to said 300,000 acres in *Russell* county. To the admission of this transcript the plaintiff objected; and the court ruled it out.

Before the cause was committed to the jury, the defendant contended, that the court ought to instruct them, that they must find, in order to subject the defendant in damages. that the discharge alleged to have been taken by the defendant of *Taylor*, was taken with a fraudulent intent to injure the plaintiff. The court, however, charged the jury, that if they found the plaintiff had proved the execution, loss and contents of the covenant between the plaintiff and *Taylor* on the one part, and the defendant on the other; the execution, loss and contents of the assignments from the plaintiff and *Taylor* to *Gilbert;* and that the facts of *Taylor's* insolvency, and of the assignments, were known to the defendant when he took the discharge; they must find for the plaintiff, with reasonable damages: but that if either of these facts were not proved, they must find for the defendant.

It was admitted, that the defendant pleaded the discharge in bar of the suit brought by the plaintiff and *Taylor* on the covenant, and that the plaintiff suffered a nonsuit.

The jury found a verdict for the plaintiff, with 5978 dollars damages. The defendant thereupon moved for a new trial on the ground of error in the interlocutory decisions of the court before stated, and in their charge to the jury. The questions arising on this motion were reserved for the advice of all the judges.

N. Smith and *Gould* in support of the motion. 1. The right of action accrues in consequence of the assignments to *Gilbert;* for otherwise *Wolcott* might well take a discharge from one of the original covnantees. This was so considered *by the court in their charge to the jury. The right of [*289] action, then, being founded on the deeds of assignment, the plaintiff cannot recover without proving them. As he has not stated in his declaration that they are lost, he has laid no foundation for proving them by secondary evidence. The *probate* must be *secundum allegata*. Not having alleged any loss, he cannot prove one. In a former case between these parties, the court considered the loss of the instrument as a material and traversable fact to be submitted to the jury. *Coleman* v. *Wolcott*, 4 *Day's Ca.* 394.

It does not obviate the difficulty that this is an action on the case for fraud, and not on the original contract. The plaintiff has chosen to set up these deeds in his declaration, and to make them the foundation of his action. Though an action might have been sustained in a different form, without stating these deeds, yet having stated them, the plaintiff is bound to prove his allegations.

2. In this action, the defendant may avail himself of any equitable defence. By the original contract it was his duty either to refund the money, or obtain a patent. The testimony of *Taylor* and *E. Wolcott* proved, that the plaintiff went to *Richmond* with the defendant, and directed him to lay out the money as he did; and that without such direction, the defendant would not have laid out the money. If the defendant now can shew that he failed to obtain a patent, not through any fault of his, but because the title to the land was taken away by a decree in chancery, he justifies himself to this plaintiff. *He* cannot complain. Where performance of a covenant is prevented in consequence of an act of the

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covenantee, it is tantamount to a performance. *Sparrow* v. *Caruthers*, 2 *Stra.* 1236. *Hotham* v. *The East-India Company*, *Doug.* 272. *Hotham* v. *The East-India Company*, 1 *Term Rep.* 638, 645. 2 *New Rep.* 240. c. *in notis.* (*Day's* edit.)

The objection that the record was *res inter alios acta* is inapplicable here. It is sufficient for the defendant to shew *the fact* that such a decree was passed, operating upon the title to this land. Who the parties were is of no moment. In an action by the indorsee of a note against the indorser, the indorsee may give in evidence the record of a judgment against the maker to which the indorser was not a party. So in an action by a surety against his principal, or by a [*290] *sheriff against his deputy, the plaintiff in each case may give in evidence the record of a judgment against himself to which the defendant was not a party. Further, the plaintiff in this case was a *privy* to the decree; for the defendant in relation to the land in question was his *agent.* The decree, therefore, is not only admissible against the plaintiff, but, so long as it remains in force, is *conclusive* upon him.

3. This is an action on the case for *fraud.* The fraud is the very *gist* of the action. Strike out the allegation of *fraudulent intent* in the declaration, and it will clearly be bad. The right of recovery turns upon the *quo animo. Tarleton* v. *Fisher*, *Doug.* 674. *per* Lord *Mansfield. Pasley* v. *Freeman*, 3 *Term Rep.* 56, 63, 65. *Scott & al.* v. *Lara*, *Peake's Ca.* 227. *Tapp & al.* v. *Lea*, 3 *Bos. & Pull.* 370. Then the fraudulent intent ought to have been submitted as a fact to the jury. The court cannot infer such fact from other facts proved. The fraud must be *actual*, and not *constructive* merely. *Crisp* v. *Pratt*, *Cro. Car.* 549. *The Chancellor of Oxford's case*, 10 *Co.* 56. *b.* 57. *a. Rex* v. *Huggins*, 2 *Ld. Raym.* 1581. *Peake's Ev.* 4.

Goddard and *R. M. Sherman*, contra. 1. It is necessary to allege in the declaration the loss of an instrument, in order to entitle the party to give evidence of such loss, in those cases only where a profert must be made of the instrument, if not lost. A profert of the instruments in question is unnecessary for three reasons. First, it does not appear that they are deeds. Secondly, if they are deeds, yet they are not the gist of the action, but are stated only as inducement; and in this respect the present case is distinguishable

from the former one between these parties. (*Coleman* v. *Wolcott*, 4 *Day's Ca.* 388.) Thirdly, if they are deeds and the gist of the action, yet the plaintiff is not the owner or keeper of them. If these assignments were indorsed on the original covenant, *that* is lost, and the assignments with it; if on a copy, the plaintiff still has no right to the possession of it. *Bul. N. P.* 249. 1 *Chitt. Plead.* 249. *Banfill* v. *Leigh & al.* 8 *Term Rep.* 571. 573.

2. The decree in chancery was properly rejected. It is to be observed here, that so far as the testimony of *Taylor* and *E. Wolcott* related to the plantiff's interference in laying out the money, the defendant had the full benefit of it, *with the jury; and thus far he has nothing to complain of. [*291] Then the title of *Swan* and *M'Rae* was irrelevant, because it did not appear that the land on which the defendant's land-warrants were located was the same land as that which was the subject of the decree.

Further, the record was not evidence in this case to prove any fact, because it was not between the same parties, and might have been procured by collusion. It may shew that the title has gone out of the defendant; but a deed from him would shew the same thing.

3. The charge was correct. It is not necessary, in order to vindicate it, to deny that fraud is the gist of this action; that fraud must be found by the jury; and that the court from mere evidence of fraud stated in a special verdict, cannot infer fraud. Here was abundant evidence of fraud to the jury. It was their province, under the direction of the court, to make the proper conclusion from that evidence. If the facts proved, by the rules of law, sufficiently evinced fraud, it was the right and duty of the court to direct the jury to find for the plaintiff. To illustrate this position, take the familiar instance of an action of trover. If a demand and refusal be stated in a special verdict, the court cannot infer a conversion. But if a demand and refusal were proved to the jury, could not the court tell them, that by the rules of law this was sufficient evidence of a conversion, and direct them to find accordingly? In this case, the defendant could not have taken and pleaded the discharge without intending to defeat the plaintiff's right.

BRAINARD, J. As to the first point. No principle of law requires a man to do what is not presumed to be in his

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power, nor to state what he is not presumed to know. These assignments were not under the controul of the plaintiff. They were the property of *Gilbert*, and had been, or were presumed to have been, from delivery, in his possession. *Coleman*, at the time of framing his declaration, could not know the state and situation of these instruments. He had a right to presume that they were in existence in the hands of *Gilbert;* and that upon the trial, through the hands and medium *Gilbert* as a witness, he could have the benefit of them.

[*292] Whenever an action is brought directly upon a written instrument, as upon a bond or other specialty, in *England*, the plaintiff is bound in his declaration to lay a profert of it, and to produce it on oyer, if required, otherwise on trial, unless he states as an excuse in his declaration, and, as an essential and substantive fact, its loss or destruction. This of course is a traversable fact, which the plaintiff must first evince, and then prove the contents. The same principles are applicable in this state, with the exception that the plaintiff here is not bound to lay a profert; but whether he does or does not, he is bound when oyer is prayed, and also on the trial, to produce his writing, his specialty, unless in his declaration, he states, and afterwards proves, its loss or destruction. In other words, the difference is merely this: with us, a profert is not necessarily to be laid in form, but necessarily exists by implication, because whether laid or not, the defendant is entitled to the same benefit of oyer, and the same production on trial.

In every such case the instrument is not only the *sine qua non* of recovery, but is the very gist of the action, and is within the power or knowledge of the plaintiff. He either knows that he has it in his possession and under his controul as his property, or that it is out of his controul or possession by loss or destruction. There are indeed cases where a deed is the gist of the action, and as such necessary to be set forth and pleaded; and yet oyer is not demandable. Such are deeds of conveyances to uses, and other cases, where the claims are by operation of law.

But an instrument in writing belonging to a third person totally disinterested, although it may indeed be a *sine qua non* as to recovery, can never be the gist of the action, can never be the thing on which the action is brought; a profert of it can never be required; of course, no excuse for the

non-production need be made in the declaration. The plaintiff states the instrument in the hands of the party to whom it belongs, and in whose possession it is presumed to be, and for the production of which he depends on the voluntary courtesy of the owner and holder, or on the power and energy of the court.

The court can compel such holder, or owner of a written instrument, if necessary for the furtherance of justice, and if within their jurisdiction, to produce it in court on trial as evidence of a fact. But the loss or destruction of such an *instrument may, without averment, be first proved, and then [*293] its contents given in evidence. (*a*)(1)

These assignments are set forth in the declaration, as Lord *Kenyon* expresses it, by way of inducement, in which case, he says, a profert is never necessary. *Banfill* v. *Leigh & al.* 8 *Term Rep.* 571, 573. And in the case of *Raynall* v. *Long* and others, *Carthew* 315. the court say, the plaintiff shall not be compelled to produce the deed, first, because it does not belong to him; secondly, because he hath no remedy at law to get possession of it; thirdly, because he is in merely by operation of law. This was a case in favour of a *cestui que trust*. To this point, on the argument, 1 *Chitty* 349. was cited, I thought, to good effect.

As to the second point. The testimony of *John Taylor* and the deposition of *Elizur Wolcott* form the basis on which it is contended that the transcript ought to have been admitted. This was intended to shew, that the money advanced by *Coleman* had in fact been laid out according to his direction, by *Wolcott*, in the very lands contemplated in the bill and decree in chancery. But on examination of the materials of that basis, I do not see a connexion between them and the case.

Taylor says, that *Coleman* gave as a reason for his going

(*a*) For cases in which it has been held, that the document must be produced, see *Richards* v. *Stewart*, 2 *Day*, 328. *The United States* v. *Porter*, 2 *Day*, 283. *Buell* v. *Cook*, 5 *C. R.* 206. *Townsend* v. *Atwater*, 5 *Day*, 298. *Talcott* v. *Goodwin*, 3 *Day*, 264. *Cunningham* v. *Tracy*, *ante*, 252. For cases in which the original has been dispensed with, see *Ross* v. *Bruce*, 1 *Day*, 100. *Bank of the United States* v. *Sill*, 5 *C. R.* 106. *Dyer* v. *Smith*, 12 *C. R.* 384. *Kelsey & al.* v. *Hanmer*, 18 *C. R.* 311. The case last cited is particularly valuable to shew what is sufficient proof of loss. That the loss of the instrument is a fact to be decided by the court, preliminary to the admission of secondary evidence of its contents, see *Witter* v. *Latham*, 12 *C. R.* 392.

(1) See cases cited in note 1, ante, p. 253.

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to the southward the importance of his seeing the money laid out; and that on his return, he told him he might thank him that he had any land by the *Wolcott* contract. The inference from this, perhaps, might fairly be, that *Coleman* concluded that some lands had been obtained, but what, or where, is totally uncertain. There is no necessary connexion between any such lands and the lands in dispute between *Swan* and others, and *Smyth* and others.

With respect to the deposition of *Elizur Wolcott*, there is very little in it, except what he received from the defendant himself. He states of his own knowledge, that *Coleman* went to *Virginia* with *Alexander Wolcott* and himself; that *Coleman's* business regarded Virginia lands; that *Coleman* had consultations with *Wolcott*, and advised him to proceed, &c. But the deposition does not identify any lands, nor establish any essential fact. It has no relevancy to the contract between *Coleman* and *Wolcott*. And although on the circuit I was for the admission of the transcript; yet on
[*294] *further consideration, I am convinced that my opinion was then incorrect, and that the record was properly rejected.

As to the third point. The court in the charge direct the jury, that to subject the defendant, they must find the execution, loss and contents of the covenant and of the assignments. These being found, the plaintiff's rights and interests which are liable to be affected, are shewn. They then direct the jury, that they must also find, that at the time of taking the discharge, *Taylor* was insolvent, and that the defendant knew it; and also, that he had knowledge of the assignments. These being found, the rights of the plaintiff are established. They are then brought home to the knowledge of the defendant, when by using the discharge which it is admitted he did, he did an act necessarily and inevitably injurious to the rights of the plaintiff. It could have no other possible effect. There could be no room for further inquiry.

When the effect of an act understandingly done is necessarily injurious to the rights of another, the *quo animo* is not a matter of fact; it is settled, and becomes an inference of law.

I would not, therefore, on either point advise a new trial.

In this opinion the other Judges concurred, INGERSOLL, J. not acting.

New trial not to be granted.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT,

IN JUNE TERM, 1815.

Fox *against* Hills.

A voluntary conveyance to defeat the claim of a third person for damages arising from a tort, though not within our statute against fraudulent conveyances, is void at common law.

The appointment of an appraiser of land taken in execution is not a judicial, but a ministerial act; and if such appraiser be not indifferent, the fact may be shewn to impeach a title under the levy.

An appraiser who is nephew by marrage to one of the parties is not "indifferent" within the meaning of the statute.

THIS was an action of ejectment. The cause was tried at *Hartford*, *September* term, 1814, before *Swift*, *Brainard* and *Baldwin*, Js.

On the trial, the plaintiff claimed title to the land in question by virtue of the levy of two executions issued on judgments recovered by the plaintiff against the defendant, in actions of trespass *vi et armis*. The defendant relied, first, on a deed from himself to *Noble Hills*, his son. It appeared, that this grantee was a minor about sixteen years of age, put out as an apprentice, destitute of property; that no consideration had been paid for the deed; and that the plaintiff's causes of action existed before, but went into judgment after, the conveyance. The plaintiff contended, that the deed was fraudulent and void as to him, it having been made to avoid his claims. The defendant contended, that the deed was good as against those claims, because they

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were not of the nature of a debt or duty, but founded on a tort. Secondly, the defendant contended, that the levy of one of the executions was void, because one of the appraisers was not an indifferent freeholder, being nephew by marriage to the plaintiff. It appeared that the appraiser in question was appointed by a justice of the peace, without the procurement of the plaintiff; and on that ground, the plaintiff insisted, that he must be considered as an indifferent freeholder. The court charged the jury, on the first point, that the deed, though voluntary, and without consideration, was not fraudulent and void as against the plaintiff's claims, because they were founded on a tort; and on the other point, that the appraiser was not an indifferent freeholder as by law is required. They, therefore, directed the jury to find a verdict for the defendant. The jury having found accordingly, the plaintiff moved for a new trial; and the questions arising on such motion were reserved for the consideration and advice of the nine Judges.

Dwight in support of the motion. 1. The defendant's deed to *Noble Hills* was fraudulent and void as against the plaintiff's claims as being within our statute against fraudulent conveyances(*a*), and by the principles of the common law.

First, this conveyance having been made to avoid "a debt or duty" is both within the letter and spirit of the statute. The term "debt" is not here used in a limited and technical sense, but has a comprehensive import, correspondent with the great object of the statute. At any rate, it cannot be denied that the term "duty" is applicable to this case. The plaintiff had a *right* to reparation for the wrong done him; of course, there must have been a correspondent *duty* on the part of the defendant to make reparation.

It may aid us in the construction of this statute to compare it with the stat. 13 *Eliz. c.* 5. from which it was derived. The object if both statutes is undoubtedly the same; and it is evident from inspection that one is a mere *abstract* of the other. In 13 *Vin. Abr. tit.* Fraud (F) *pl.* 3. there is a professed abstract of the *English* statute, which is almost precisely the same as our statute. The irresistible inference is, that our ancestors and that writer drew from a common

(*a*) *Tit.* 76.

source. Besides, it has always been understood by lawyers in this state, that our statute was taken from the 13 *Eliz.* This was the result of the investigations of the committee under whose superintendence the present edition of our statute-book was published. See the note at the end of the statute in question, *p.* 355. Now, there cannot be a doubt whether the provisions of the stat. 13 *Eliz.* extend to this case. By that statute it is declared and enacted, "that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, &c. had or made, to the end, purpose and intent to delay, hinder or defraud creditors *and others* of their just and lawful *actions*, *suits*, debts, accounts, *damages*, penalties, forfeitures, &c. not only to the let or hinderance *of the due course and execution of the law*, but also to the overthrow of all true and plain dealing, &c. shall be deemed and taken (only as against that person, or persons, his or their heirs, &c. whose *actions*, *suits*, debts, accounts, *damages*, penalties, forfeitures, &c. by such guileful, covinous or fraudulent devices and practices as is aforesaid, are, shall or might be disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect." Some of the terms here used are appropriately adapted to the case of a just claim for damages in consequence of a tort. It is, therefore, not to be expected, that since the time of Queen *Elizabeth*, the question now under discussion should often arise in the *English* courts. In one case, however, it has been determined, that a conveyance to trustees in trust for *bona fide* creditors would not protect the surplus beyond the amount due to such creditors, from a claim founded in damages for a tort. *Lewkner* v. *Freeman*, *Prec. Chan.* 105, 6.

Secondly, this conveyance was void at common law. It has been repeatedly said by the ablest judges, that the statute 13 *Eliz.* was declaratory of the common law. In support of this opinion, Lord *Coke* has laid much stress upon the word "declare" in the statute. 3 *Co.* 83. *b.* *Co. Litt.* 76. *a.* 290. *b.* And Lord *Kenyon*, commenting upon a different statute, has observed, that the word "declare" is always inserted in acts of parliament with great caution, and imports an affirmance of the common law. 3 *Term Rep.* 546. Lord *Mansfield*, looking only at the principles of the common law, is of opinion that they are so strong against fraud in every shape that they would have attained every end pro-

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posed by the statutes 13 *Eliz. c.* 5. and 27 *Eliz. c.* 4. 2 *Cowp.* 434. Certain it is, that conveyances made without consideration to defeat the rights of third persons, were held to be void as against such third persons, before the statutes of *Elizabeth*. *Dyer*, 294. *b.* 295. *a.* From the facts which appear in this case, it is apparent that the conveyance was made with *a fraudulent intent*. If this was not a conceded point, it ought to have been submitted to the jury whether a fraudulent intent were not proved.

2. The levy of the execution was good. The appraiser in question was not selected by either of the parties, but was appointed by the justice, who was authorized by the statute(*a*) to act as a judge in relation to such appointment. It is now to be presumed, that the justice conformed to the directions of the statute; and that the appraiser had the qualifications which the statute requires. The marginal abstract in *Tweedy* v. *Picket*, 1 *Day's Ca.* 109. is incorrect; the court of errors having affirmed the judgment of the superior court solely on the second point.

Bristol, contra. 1. The conveyance was valid as against the plaintiff's claim. Our statute relates only to fraudulent and deceitful conveyances made to avoid "a debt or duty;" and from the proviso or saving at the close of the 2nd section, it appears that the debt or duty must be due to "a creditor." The plaintiff's claim was in no sense a debt. Nor was any duty due to him as a creditor. His right was not ascertained; and it was matter of contingency whether it ever would be. It may be admitted, that this case would come within the statute 13 *Elizabeth*. But there is a great difference between the provisions of that statute and ours; and the difference in language imports a difference in the intention of the legislature. Our statute bears more resemblance to some of the earlier *English* statutes against fraudulent conveyances, as 50 *Edw.* 3. *c.* 6. and 3 *Hen.* 7. *c.* 4. But in *Pauncefoot* v. *Blunt*, cited 3 *Co.* 82. *a.* where *Pauncefoot* being indicted for recusancy for not coming to divine service, made a gift of all his goods and leases to defeat the Queen of her forfeiture, then fled beyond the sea, and was afterwards outlawed on the indictment, these early statutes were distinguished from the 13 *Eliz.* and the case was held not to be

(*a*) *Tit.* 63. *c.* 1. *s.* 7.

within the former, though within the latter, as "this act" (says the report, referring to 13 *Eliz. c.* 5.) "doth extend not only to creditors, but to all others who had cause of action, or suit, or any penalty or forfeiture."

Nor was this conveyance void at common law. First, because there was no subsisting debt at the time of the conveyance. *Upton* v. *Basset*, *Cro. Eliz.* 445. 3 *Co.* 83. *a.* 13 *Vin. Abr. tit.* Fraud (E) *pl.* 1. Secondly, because it does not appear that the conveyance was made with a *fraudulent intent.* It was indeed made under circumstances which might furnish evidence of fraud to the jury; and at the trial, the plaintiff *contended* that it was fraudulent as to him, it having been made to avoid his claims, but the *case* states no fraudulent intent. The conveyance certainly *might* have been made under those circumstances with the most perfect good faith. Fraud is not to be intended unless it be expressly found. *Ridler* v. *Punter*, *Cro. Eliz.* 291, 2. Sir *Ralph Bovy's* case, 1 *Vent.* 194. *Doe* v. *Routledge*, *Cowp.* 710. *Stevens* v. *Olive & al.* 2 *Bro. Ch. Ca.* 90.

2. As to the levy of the execution, the case of *Tweedy* v. *Picket*, 1 *Day's Ca.* 109. is in point to shew that it was void. The judges who tried the cause on the circuit considered that case as an authority. But if the question had not been settled, still it ought to be so decided. The statute requires the appraisers to be indifferent freeholders. If they are not, the levy is irregular, and the title is defective. There is no pretence for saying that the selection of an appraiser by a justice is a judicial act which cannot be enquired into.

SWIFT, Ch. J. This is an action of ejectment; and the plaintiff claims title by the levy of two executions against the defendant. The defendant says he had previously conveyed to his son. This conveyance was conceded at the trial to be voluntary, with intent to defeat the plaintiff's claim. His claim was founded on a tort; and the question is, whether the deed is void as it respects such claim.

The statute against fraudulent conveyances makes void all fraudulent conveyances to avoid the debt or duty of others. I am of opinion that this statute does not comprehend claims founded on torts. We must construe statutes according to the common and obvious meaning of the language made use of. In common speech, a debt or duty is never applied to a

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mere legal liability to an action for a tort, in which the party may be subjected to pay damages, to be ascertained by the verdict of a jury. To say this would be to confound the well known distinction between debts and torts. Another part of the statute confines its operation to cases where there was a design to defeat a creditor of his just dues; which clearly shews the intent of the legislature to extend it to debts only, and not torts.

But all deceitful practices in defrauding, or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law. *Co. Litt.* 3. *b.* So by the principles of the common law, if a man have a right and title to a thing, or just debt owing to him, he may avoid any fraudulent conveyance to defeat him of that right. 3 *Co.* 83. Here are principles broad enough to embrace the case under consideration. This was a voluntary conveyance with intent to defeat the plaintiff of a right to recover damages for a tort. And it is not only reasonable, but necessary, that such conveyance should be rendered void as against such claim; for otherwise a man may do to another the greatest injury, and then, by a fraudulent conveyance, defeat his right to obtain satisfaction for the damages out of his estate. I am, therefore, of opinion, that the voluntary deed of the defendant to his son is void at common law, as it regards the claim of the plaintiff.

It appears that on the levy of one of the executions by which the plaintiff claims, one of the appraisers appointed by a justice of the peace was a nephew by marriage to the plaintiff. I am of opinion, that the levy of this execution is void. The statute requires, that lands taken by execution shall be appraised by three indifferent freeholders of the town where the lands lie, one to be chosen by the debtor, and one by the creditor; and if they cannot agree on a third, or either party neglect to choose, then the next assistant or justice of the peace who by law can judge between the parties shall make the appointment. It has been insisted, that the appointment of an appraiser by a justice of the peace is a judicial act, which cannot be inquired into, and is conclusive on the parties. But in such case the justice of the peace acts in a *ministerial* capacity. He is bound to appoint an indifferent freeholder of the town where the lands lie. If he acts otherwise, he transcends

his jurisdiction, and his acts are void. And it is of essential importance to give this construction to the statute; otherwise a justice of the peace might appoint a father, son or brother of the parties, and the grossest partiality and fraud could be practised without redress.

The legislature, in directing that the appraisers should be indifferent, must have intended that there should not be such a relation between them and the parties as could bias their minds, and induce them to act with partiality. As the degree of relationship is not designated, it is reasonable to adopt the rule presented by statute(*a*) as to the cases in which judges are disqualified to judge between parties. As this comprehends the relationship of the appraiser, I think the execution has not been duly levied, and the plaintiff acquired no title by it.(*b*)

In this opinion TRUMBULL, BRAINARD and GODDARD, Js. concurred on all the points.

EDMOND, J. was of opinion that the conveyance was void within our statute, as well as at common law. He thought the levy of the execution good.

SMITH, J. was of opinion that a voluntary conveyance *with intent* to defeat a claim for damages arising from a tort was void, both by our statute, and at common law; but without *a fraudulent intent*, it would not be.

As to the other point, he considered it to have been settled in *Tweedy* v. *Picket* contrary to the marginal abstract of that case. *Tweedy* brought ejectment, claiming under the levy of an execution. On the trial, the validity of the levy was contested. The defendant offered to prove, that one of the appraisers appointed by a justice was uncle to the plaintiff's wife. This evidence the plaintiff objected to; but the court admitted it. The jury found a special verdict, from which it did not appear that any oath was administered to the appraisers. On account of this defect, the superior court gave judgment for the defendant; and the court of errors affirmed that judgment on the same ground; but they were almost unanimously of opinion, that the appointment

(*a*) *Tit.* 95. *c.* 1, *s.* 11.

(*b*) See *Crane & al.* v. *Camp & al.* 12 *C. R.* 464. *Pendleton* v. *Button*, 3 *C. R.* 406.

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by the justice was conclusive. As it was not the practice of the court at that time to give the reasons of their decisions in cases of affirmance, it was natural enough for the reporter, looking only at the record, to suppose that the judgment of the court below was affirmed on both points; but that was not the fact. Had there been no other defect than what related to the appointment of the appraiser, the judgment would have been the other way. And there is some reason for such a decision. The statute, in the first place, declares that whenever an execution shall be levied upon lands, the same shall be appraised by three indifferent freeholders of the town where such lands lie. It then provides for their choice by the parties, if they can agree. If the parties choose two, and cannot agree upon a third; or if either party neglect to choose; the statute empowers the next assistant or justice of the peace, *who by law may judge between the parties* in civil causes, to appoint one or more, as the case may require. The legislature evidently consider the appointment as a judicial act; and require the justice who is to exercise it to be one "who may by law *judge* between the parties." Besides, the act is in its nature judicial. The statute has left the question of indifferency entirely to his judgment. Then, if the appointment is a judicial act, it is conceded that it must be conclusive.

BALDWIN, and INGERSOLL, Js. thought the conveyance void by our statute. On the other points they concurred with the Chief Justice.

HOSMER, J. The voluntary deed given by the defendant to his minor son *Noble Hills, to prevent the plaintiff from obtaining satisfaction for a tort*, is, in my opinion, fraudulent at common law, and of consequence void. It is fraudulent in fact, made under the influence of corrupt motives, and *with intent* to defraud. "The common law doth so abhor fraud and covin, that all acts, judicial as well as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful; *quod alias bonum et justum est*, si per vim vel fraudem petatur, malum et injustum efficitur." *Fermor's* case, 3 *Co.* 78. *a.*

It can hardly be necessary to cite many of the numerous decisions, which illustrate and confirm the principle before stated.

A fine accompanied by all the requisites to give validity to that species of conveyance, *if levied by covin to bar a person of his inheritance*, has been adjudged fraudulent and of no effect. *Fermor's* case, 3 *Co.* 77. *a.*

If land be aliened pending a writ of debt *to avoid the extent thereof for the debt*, the deed is void. 1 *Roll. Abr.* 549.

So a feoffment to the son of a feoffor a few days precedent to the commission of treason *to secure it from forfeiture*, is of no avail. 2 *Roll. Abr.* 34.

Conveyances *to defeat a forfeiture*, the grantor having been indicted for recusancy (3 *Co.* 82. *a.*) *to defraud the lord of his heriot*, (*Dyer* 351. *B.*) *to frustrate a sequestration or execution*, (*Cowp.* 434.) have been adjudged to be void, "*because the purpose is iniquitous.*" A bill of sale of goods and chattels made by the owner of them when in *Newgate* for robbery, was held fraudulent and void, for it could not be intended to any other purpose *than to prevent a forfeiture*, and defraud the King." *Skin.* 357.

In *Sands* and others v. *Codwise* and others, 4 *Johns.* 596. the principle advanced was explicitly recognized; and indeed, it is not susceptible of dispute.

Although I have no doubt that the deed to *Noble Hills* is void at common law, I cannot admit that it is opposed to the statute against fraudulent conveyances. *That* act, in my opinion, is *limited solely to the protection of creditors.* It provides "that all fraudulent and deceitful conveyances of lands, &c. made to avoid *any debt or duty of others*, shall (as against the party or parties only, whose *debt or duty* is so endeavoured to be avoided, their heirs, executors, or assigns) be utterly void, any pretence or feigned consideration notwithstanding.

The standard by which language is to be construed is *usage*; "*usus est jus et norma loquendi.*" "Words" (says Sir *William Blackstone*) "are to be understood in their *usual and most proper signification*; not so much regarding the propriety of grammar, as their general and popular use." 1 *Bl. Comm.* 60.

What then is the usual and proper signification of the words *debt or duty?* I answer, that *debt*, denotes a sum of money arising out of a contract express or implied; never is it confounded with tort or wrong.

The word *duty*, in the common use of language, when

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applied to pecuniary obligations, is synonymous with debt. It has not the signification of trespass, tort or damage. In the statute, it is not contra-distinguished from debt, but merely presents the same idea by another term of equivalent meaning, that it may be the more intelligible. The word "duty" obviously must be construed with some limitation; otherwise it will include the natural, moral and social obligations, for which no one will contend. So usual is it to understand it as commensurate with *debt*, that the pecuniary demands of government for the most part receive that appellation.

The second paragraph, or penal part of the act, must be considered as co-extensive with the first or directory clause on which my observations have hitherto been made. This provides, that if the fraudulent conveyance shall be justified as having been fairly executed, the parties shall be subjected to certain forfeitures, except it appear by two sufficient witnesses, "that the contract or bargain was made *bona fide*, and on good consideration, before any seizure made by *the creditor* or officer of the estate so conveyed, and that it was without any design of fraud to defeat *the creditor* of his just dues.

Penal laws must be construed strictly. The words "*creditor*" in the last branch of the statute, under the protection of this rule, cannot be extended beyond its plain and popular meaning. And yet, it must be admitted, that both paragraphs of the law are co-extensive, and levelled at the same description of persons, unless this absurdity be sanctioned, that the prohibitory part of it is broader than the penal.

It is an undisputed principle, that statutes against fraud when they act upon the offence, should be liberally and beneficially expounded. 1 *Bl. Comm.* 88. In general, this is accomplished, by giving to the expressions used the most comprehensive sense, which the popular signification of the language authorises. But the rule can never justify the ascribing new and unheard of meanings to words; nor a departure from the known signification of unambiguous terms. Such, in my opinion, would be the considering *Fox* a creditor, and the tort by which he was injured a debt, because on the procurement of a judgment at some day posterior to the deed, this state of facts might exist. Notwithstanding this, it is contended, that although *Fox* was not a

creditor *at the date* of the deed, yet, as he might become one, if he should chance *to obtain a judgment against* Hills *before his death*, he is, by a species of figure, to be deemed such, at the sealing and delivery of it.

This figurative construction of plain expressions; this mode of argumentation, which banishes from sight the popular signification of language, and wholly subverts the most established rules of exposition; which considers as in being what clearly is not; which converts a possibility into a certainty, and gives it an anticipated existence; which makes a creditor of a person who has neither debtor nor debt, and transmutes a tort into a contract because it may eventuate in one, I cannot possibly admit. *If* Fox *was a creditor when the deed was executed, he has right to that description, and the benefits of it; but if he was not, he has no claim to either.*

The construction contended for is founded on a future judgment, *which may never be obtained.* The tort-feasor *may die*, and the personal wrong die with the person. What in the mean time is the condition of the deed? Is it valid, or is it void? If valid, it can never be avoided by matter *ex post facto;* if void, it must be on the ground, that the statute operates against the tort-feasor, and in favour of the person trespassed on. This is a principle, in my judgment, wholly inadmissible. In short, if the argument I am opposing were just, it would follow of course, that all persons trespassed on, whether in body or property, are embraced by the word *creditors*, and every species of injury by the term *debt.* This principle, at least, has the merit of novelty, and if applied to statutes and contracts, would make law which the legislature never thought of, and agreements which never entered into the imagination of the parties.

If the words "debt or duty" are considered without reference to a judgment that may be obtained, the construction which makes them equivalent with "tort or wrong," is more palpably indefensible. By this construction, instead of giving to terms their known and popular acceptation, they are expunged from the law, and words of different meaning inserted, on the supposition that the legislative intent requires this transmutation. But the enquiry forcibly occurs, how do you know this to be *the intention* of the legislature? The statute declares no intention, except that which its expressions plainly evince. Is the intent to be attained,

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by annihilating the terms which communicate it, and substituting words of different signification? To understand the *thing signified*, is the *sign* to be effaced? In short, the argument I am opposing, is in subversion of the rule of construction, which requires the statute to be understood according to the popular meaning of its expressions, and by considerations subtle and refined, embraces a meaning figurative, or at least, unusual, to effectuate an intention of the legislature, which cannot be collected from the law.

Some stress has been laid on an expression in 13 *Vin. Abr.* p. 519. that the statute of *Elizabeth* annulled as fraudulent deeds made *to avoid the debt or duty of others*. Now, that statute, it is said, invalidates all fraudulent feoffments, conveyances, &c. executed *with intent*, not merely *to nullify a debt*, but *to frustrate a forfeiture, or damages for a trespass*. Hence, it is inferred, that by the expression "*debt or duty*" that author included *torts;* and thus there is an example furnished for the construction of our statute.

The answer is not difficult. If *Viner*, or any author cited by him, has used *words* so contrary to general usage, as the above argument supposes, he shews himself unacquainted with the force of language, and is not a pattern for imitation, but a beacon to deter. At the same time, I am far from imputing to him the imagined error. Whatever may be the construction of the 13 *Eliz. c.* 5. the elementary authors have generally considered it as levelled at frauds for the avoidance of *debts;* and it is not extraordinary, that under this impression, *Viner* should have expressed himself in the manner above stated.

The argument, however, most insisted on, is, that the statute of *Elizabeth* invalidates fraudulent conveyances, not only in favour of creditors, but of persons whose demands are founded in tort, and that this conclusively establishes the construction of our statute. To render this reasoning of any avail, it must be made to appear, that *the statutes referred to are co-extensive*. The obvious mode of doing this, is to shew, that the laws are expressed in terms identically, or constructively, the same. *Most clearly they are not.* The expressions of our statute have already been given. The act of *Elizabeth*, made "for the avoiding fraudulent feoffments, &c. contrived to hinder and *delay creditors and others*, of their just and lawful actions, debts, accounts, *damages*,

penalties, *forfeitures*, &c., enacts, that all such acts be deemed as against the *person or persons*, &c. injured utterly void." Those for the protection of whom this law was made, were not merely creditors but "*others*" who should be delayed or hindered, not only in their debts, but their "*damages*." *Pauncefoot* v. *Blunt*, 3 *Co.* 82. What stress is put by the expounders of the *English* statute, on words contained in that act, *which are not in ours*, may be seen by recurrence to *Taylor* v. *Jones*, 2 *Atk.* 600. "The word *others*" (says the master of the rolls) "seems *to be inserted to take in all manner of persons*, as well creditors after as before the settlement, whose debts should be defrauded. In the enacting clause the language is still stronger, because the word *creditors* is not mentioned, but general words *person* or *persons*, &c." The difference of phraseology in the two statutes conclusively shews, that they cannot receive the same construction. "For as in a formal instrument the same words must be taken to import the same signification throughout, so in such instruments, a different penning must be taken to import a different meaning or signification." 1 *Pow. on Cont.* vii. This is equally true when affirmed of statutes, whether the words are to be found in one or in several, and "all our conclusions upon the import of words, expressing different ideas, must be established on its basis."

As a legislator I might consider it expedient to enact the matter now endeavoured to be assumed by construction; but I cannot believe, that the judiciary may overleap the authority delegated in terms clear and unambiguous, on reasons which, in my judgment, do not fall within their province.

With respect to the levy of the execution, I am of opinion, that it is not pursuant to law. *The appraiser was nephew to the creditor.*

With reason it may be presumed, that the near connexion of a person will be under the influence of partiality; and hence the wisdom of the law, in requiring the appointment of an "indifferent" appraiser. The meaning of the term "indifferent" cannot be mistaken. Its popular and legal signification are precisely the same. The person of whom "indifference" is predicated, must be impartial, and free from bias. This cannot, in general, be affirmed of the father, the brother, or the nephew of a person, whether by nature or marriage. Neither of these relatives are presumed to be

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indifferent to his interest. For this reason it is, that the common law repels a juror, if he is of kin to either party, either by consanguinity or affinity. "The triers," (says Sir *William Blackstone* in 3 *Comm.* 363.) "in case the first man called be challenged, are two indifferent persons named by the court, and if they try one man and find him *indifferent*, he shall be sworn." But if the person tried is within the ninth degree of kindred, he is *not indifferent*. *Co. Litt.* 158. *a. Trials per Pais* 138.

To obviate the force of this objection to the appraiser, it has been argued, that his appointment by a justice of the peace was a *judicial* act, and absolutely conclusive. I cannot admit that the act was judicial, or if it was, that it had any legal effect.

Whether it was judicial must depend on the nature of the transaction, and the words of the statute concerning the levy of executions.

The nature of the act is not judicial. Undoubtedly, it required the exercise of choice and discretion; and so does the taking of bail by the sheriff, and many other proceedings, which confessedly are ministerial.

The judges of the supreme court of the *United States* declined, *as a court*, to make the requisite enquiries under the law "to regulate the claim to invalidate pensions," because the duty was *not judicial*. It was the proceeding of commissioners. 2 *Dall.* 410. *et seq. in notis.*

To draw the precise line between judicial and ministerial power, in this case, is not necessary. As the justice was not constituted judge, to administer between parties in the forms of law, *the act* performed by him, *in its nature*, is not distinguishable from the appointment of an overseer by selectmen, and other similar doings, which have never been considered as judicial.

As to the *words* of the statute, it provides, that if the parties cannot, or do not, agree in choosing a third appraiser, the officer shall apply to the next assistant or justice of the peace, "who by law may judge between the parties in civil causes," to make the appointment. It is contended, that the expression just recited indicates, that the justice is to act as judge. I am not of that opinion. The phrase, "who may judge between the parties in civil causes" is, merely, a *designatio personæ to secure impartiality*, and equally proper,

whether the authority to be exercised by the justice, be ministerial or judicial.

The object of the clause was not to communicate authority, but that is the subject of the sentence immediately succeeding.

But, let it be admitted, that the justice acted judicially; he has overleaped his jurisdiction, and his proceeding is void. 3 *Cranch* 331.

Had the appointment been of an alien, a female, or a slave to the creditor, it would have been invalid, because they are legally ineligible. Equally so is the nephew of the creditor. The statute alone authorizes the appointment of an *indifferent* freeholder. *Indifference* is an indispensable *adjunct*, and must exist, or the appointment is extrajudicial. 1 *Day's Ca.* 53. *in notis.*

If the question under discussion were doubtful, this is the better construction of the act. The adoption of a principle which would sanction the conclusive appointment of a father, son, or brother of the creditor, to appraise land on execution, is too objectionable to be admitted, unless warranted by the most unequivocal expression.

New trial to be granted as to that part of the demanded premises on which an execution has been duly levied.

JUDAH *against* JUDD and others.

A owed a debt to *B.* which was secured by mortgage, and *B.* was indebted to *C.* to an equal amount. *C.* brought foreign attachment, obtained judgment, made demand of *A.* on the execution, which was returned unsatisfied, and then brought a *scire-facias* and recovered judgment against *A.* who had no means of payment but the land mortgaged to *B.* Pending a bill for foreclosure brought by *B.*, *C.* made application in chancery to become party thereto, and to stand in *B's* place, and take the benefit of his security. Held that C. was not entitled to the relief prayed for.

THIS was a bill in chancery, brought to the superior court, shewing that *Judd* mortgaged certain lands to secure several distinct debts due from him, one to *Pearsall* and *Collins*, one to *Hicks* and *Joseph Shotwell*, and one to *John* and *Jeremiah Shotwell*, which debts were unpaid; that *John* and *Jeremiah Shotwell*, being indebted to the plaintiff, he brought his action against them as absent and absconding debtors, left a copy with *Judd* as their debtor, recovered judgment against them, and within sixty days made demand

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of *Judd* upon the execution, which was returned *nulla bona* and *non est inventus;* that the plaintiff then brought his *scire-facias* against *Judd*, and recovered judgment against him for a sum equal to the demand due to *John* and *Jeremiah Shotwell;* that *Judd* has no means of paying said debt but by the land so mortgaged; that the mortgagees have brought their bill for a foreclosure, and also an action of ejectment, which are now pending; and that the plaintiff is entitled to the beneficial interest in the mortgage. The plaintiff, therefore, prayed that he might be permitted to stand in the place of the *Shotwells*, and be entitled to the benefit of the security which they would have had right to, had there been no process by foreign attachment; and that he might become party to the petition for foreclosure, &c.

To this bill there was a demurrer; and the superior court reserved the question for the consideration and advice of the nine Judges.

T. S. Williams for the plaintiff. It is a settled principle, that the interest in the security follows the debt it was given to secure. 2 *Burr.* 978, 9. It has been repeatedly decided, by our courts, that the beneficial interest in a mortgage passes to the assignee of the debt, without any assignment of the property mortgaged. *Lawrence* v. *Knapp & al.* 1 *Root* 248. *Crosby* v. *Brownson*, 2 *Day's Ca.* 425. *Austin* v. *Burbank*, 2 *Day's Ca.* 474. Our statute relative to attaching the effects of absconding debtors (*a*) makes debts due to such persons *effects* liable to be attached. In this case, *Judah* had attached the debt in question as the effects of the *Shotwells* in the hands of *Judd;* had brought a suit against the *Shotwells*, leaving a copy with *Judd* as their debtor; had obtained judgment against the *Shotwells;* had made a demand of *Judd*, and had the execution returned unsatisfied within sixty days; and upon *scire-facias* against *Judd*, had recovered a judgment against him. This judgment would be a bar to any claim of the *Shotwells* upon this debt against *Judd;* and *Judd* must pay the amount of this debt to *Judah*. This, then, in law must be considered in the same light as an assignment of the debt by the *Shotwells*. It is an assignment under our statute. *Judah* has pursued the mode pointed out by the statute for levying upon this debt as the effects

(*a*) *Tit.* 14. *c.* 3. *s.* 5.

of the *Shotwells;* and *Judd*, instead of being the debtor of the *Shotwells*, has now become the debtor of *Judah*. It would seem that the rights of *Judah* thus acquired by operation of law should be recognized as well as the rights of the assignee of a bond, who has only an equitable, and not a legal, interest. *Judah*, then, having a right to the debt, has also a right to the security which was given to accompany it.

It has been objected, that *Judah* ought to have levied his attachment upon the mortgaged premises. To this it is answered, first, that if the foregoing reasoning be just, it was unnecessary; and secondly, that it could not be done so as to give any additional security. Had *Judah* levied upon it as *Judd's* property, he could have got nothing but *Judd's* equity after payment of the debts specified in the deed, and would not by that means have acquired any new right to the *Shotwells'* interest. Had he levied upon the *Shotwells'* interest, he could have gained nothing, unless he had also acquired an interest in the debt; and the mere fact that he had levied his execution upon the land would have precluded him from taking the steps against *Judd* necessary to acquire that interest.

If the plaintiff is not entitled to this relief, then upon the bill brought by *Pearsall* and others for a foreclosure, the court must pass a decree, which will compel *Judd* to pay the whole mortgage debt, including the sum originally due to the *Shotwells*, for which he is now personally liable to *Judah:* or, if upon such payment *Judd* is protected by the operation of the foreclosure, then the plaintiff must lose the debt, which, by the express words of the statute, *Judd* is liable to pay out of his own effects.

The case was submitted without argument on the part of the respondents.

SWIFT, Ch. J. The plaintiff might have taken the land mortgaged by *Judd* to *John* and *Jeremiah Shotwell* in payment of his debt by legal process; or, they being absent debtors, he had a right by foreign attachment against *Judd* as debtor to them, to collect it of him. The only right which he could acquire against *Judd* was to collect the debt out of his estate; which would operate as a payment to *John*

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and *Jeremiah Shotwell*. A failure of such collection, by the inability of *Judd* to pay, or for any other reason, could not operate as an assignment of the debt to the plaintiff, or as a transfer of the interest of the *Shotwells* in the land mortgaged to secure the debt. The plaintiff, by such proceeding, obtained no title in law or equity to the debt, or the mortgaged premises. A court of equity cannot create a right; it can only give effect to existing rights.

From the facts stated in the bill, it appears, that the plaintiff could now by legal proceedings take the right of the *Shotwells* to the mortgaged premises in payment of their debt; and a court of chancery might with equal propriety in all cases, interfere, and decree that the land of a debtor shall be transferred to his creditor in payment of his debt, as in the present case. But no court of chancery ever claimed or exercised such a power.(*a*)

TRUMBULL, J. expressed his opinion concisely to the same effect.

EDMOND, J. The object manifestly sought by this bill, is, to procure the plaintiff to be substituted as a party in the place of the *Shotwells* in the bill, for a foreclosure, and in that way place himself before the mortgagees in a subsequent mortgage, obtain a foreclosure in his own favour, and by a decree of this court vest the legal estate in himself. This the facts stated in the bill will not warrant.

The plaintiff has not shewn in his bill any transfer of the debt due from *Judd* to the *Shotwells*, to himself. All that appears from it, is, that he has attempted by legal process to obtain the debt or effects of the *Shotwells* in *Judd's* hands, and has failed in the attempt.

I am of opinion that the bill is insufficient; and that the superior court be so advised.

The other Judges concurred.

Bill insufficient.

(*a*) See *Homer & al.* v. *The Savings Bank of New Haven*, 7 *C. R.* 478.

PARMALEE *against* BALDWIN and others.

In an action against the select-men of a town for appointing maliciously, and without probable cause, an overseer to the plaintiff, the appointment produced in evidence appearing to be without limitation of time, and therefore void, it was held that the plaintiff was not entitled to recover without shewing special damage.

Malice and want of probable cause being essential to such action, the *onus probandi* lies upon the plaintiff; and no inference is to be derived from the failure of the defendants to prove that the appointment was made in a case contemplated by the statute, and in conformity with its provisions.

In actions for torts where the law necessarily implies damage to the plaintiff from the act complained of, an allegation of special damage is unnecessary; but where the law does not necessarily imply such damage, the plaintiff cannot recover without specially stating and proving actual damage.

Where a valid appointment of an overseer is made from malice, and without probable cause, the law will imply damage; otherwise where the appointment is a nullity.

THIS was an action on the case against the select-men of the town of *Branford*, for appointing an overseer to the plaintiff. After averring that the plaintiff had at all times been prudent and discreet in the management of her affairs, and had never been likely to be reduced to want by idleness, mismanagement or bad husbandry, &c. the declaration proceed thus: "The defendants while select-men as aforesaid, well knowing the premises, and contriving to injure the plaintiff, and to vex, harrass and oppress her, without law or right, and without any notice given to the plaintiff, or giving her any opportunity to be heard on the subject, on or about the 7th of *August* 1812, appointed one *John Rogers* of said *Branford* an overseer to the plaintiff to direct and controul her in her affairs, thereby forbidding the plaintiff all right of managing her own affairs, and gave public notice to all persons by posting the same upon the public sign-post in said *Branford*, and by leaving a copy of their said appointment in the town-clerk's office in said *Branford;* all which was done without any examination into the concerns or affairs of the plaintiff, and with intent most unjustly and wickedly to vex and harrass the plaintiff, whereby she hath been deprived of the most inestimable privilege of managing her own affairs in her own way, and hath been prevented from disposing of her property and transacting other business, and hath been posted as an idiot, &c., whereby the plaintiff hath been put to great expense, and damnified, as she saith, two thousand dollars."

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The cause was tried at *New-Haven*, at an adjourned term in *February* 1815, before *Trumbull*, *Baldwin*, and *Ingersoll*, Js.

On the trial the plaintiff read in evidence the following appointment of an overseer, made by the defendants: "It being represented to us the subscribers, select-men of the [*814] *town of *Branford*, that the widow *Matty Parmalee* of said *Branford*, by mismanagement and bad husbandry is likely to be reduced to want, Mr. *John Rogers* of said *Branford* is appointed overseer, to order advise and direct said *Matty Parmalee* in the management of her affairs; and said select-men of such their doings hereby give legal notice, that all persons may govern themselves accordingly. *Branford*, the 7th day of *August* 1812." (Signed by the defendants.) Before the cause was committed to the jury, the plaintiff claimed that she had proved, that the defendants in making this appointment gave no notice to her, and did not proceed according to the statute; that they made the appointment without probable cause, and with malice; that it was put upon the post; and that she had thereby been prevented from doing business, and had sustained the damage set forth in the declaration. The defendants, on their part claimed that they had proved, that they made due enquiry, and honestly adjudged that there was just cause for making the appointment, and that there was in fact such just cause; and that, at any rate, as the appointment was without limitation in point of time, it was void; the plaintiff was not in fact under the government of an overseer; and therfore, the defendants could not be liable, unless special damages were alleged and proved. But the court in their charge to the jury, instructed them on that point, that although the appointment was void as to all acts done under it, yet in case they should find the appointment was made maliciously, with intent to injure and oppress the plaintiff, and without probable cause, the fact of its being void would be no protection to the defendants. The court further charged the jury as follows: It is urged, that this appointment was made without notice to the plaintiff, and without due examination and enquiry, or any inspection into her management of her affairs. The court are of opinion, that the law does not require previous notice to the party, nor any formal trial and examination, to render the appointment legal. But in such cases, the select-men are bound to

shew that the party to whom an overseer is appointed, was, on enquiry by them, in their opinion, guilty of mismanagement and bad husbandry to such a degree as to bring the case within the statute, and render the appointment necessary and proper; otherwise such appointment is evidence of malice, or improper motives proper for the consideration [*315] of the jury. It is also urged, that this was not a case within the jurisdiction of the select-men. The only cases in which the statute empowers the select-men to appoint overseers, are *idleness*, *mismanagement* and *bad husbandry*, by which the party is likely to be reduced to want. If they appoint an overseer on any other ground distinct from these, they act without the authority of the statute, and without jurisdiction; and this is also evidence of malice or improper motives, which you are to take into your consideration. If then you shall be of opinion, that the defendants made this appointment from malicious or corrupt motives, or without probable cause, or in a case not within their jurisdiction; or that they made the appointment by a combination, and under the undue influence of those who made the representation, and thus wantonly abused their authority, you will find the defendants *guilty*. On the other hand, if you shall be of opinion that the case under their consideration was within their jurisdiction, and that they adjudged thereon without malicious or corrupt motives, and without any abuse of their power from undue influence and combination with others, you will find the defendants *not guilty*.

The jury found a verdict for the plaintiff, with 350 dollars damages. The defendants moved for a new trial on the ground of a misdirection; and the questions arising on such motion were reserved for the consideration and advice of the nine Judges.

N. Smith and *Denison* in support of the motion. 1. This is an action on the case to obtain redress for a supposed injury to the plaintiff in depriving her of the power of managing her affairs. This, she says, was done by appointing an overseer to her. But it appeared on the trial, and is so stated in the motion, that the appointment in question was without limitation of time, and was therefore void. *Chalker* v. *Chalker*, 1 *Conn. Rep.* 79. In contemplation of law, no appointment was made. If she still claims to recover on the ground that the defendants *in attempting* to appoint an overseer to her, injured her, she must shew

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what damage she has sustained. Though the defendants may have conducted in an improper manner, and from motives the most malicious and corrupt; yet if they have made no appointment, and she has never been subjected to the controul of an overseer, the law will not presume that she has sustained any damage. No damage to the plaintiff is *necessarily implied* in the acts of the defendants. Suppose a private individual had undertaken to appoint an overseer from the worst of motives; could presumptive damages be recovered without averring and proving actual damage?

2. It is incumbent on the plaintiff to make out her case, and to shew that the defendants acted in an improper manner, and from improper motives. They were public officers; and the law will presume that they did their duty until the contrary is proved.(*a*) But the charge relieves the plaintiff from the burden of proof, and requires the defendants to exculpate themselves.

Daggett and *Staples*, contra. 1. The first objection is, that as the appointment was void, and as no special damage is alleged, there can be no recovery. But the declaration does not treat this appointment as a nullity. It states a valid appointment; and avers, that the plaintiff was thereby deprived of the power of disposing of her property, of transacting business, and of managing her affairs, besides being posted as an idiot, &c. The defendants are charged with having done every thing to injure the plaintiff, and the plaintiff is stated to have suffered all the evils which would have resulted from a valid appointment. Now, if there is any thing in the objection, it is this, that the evidence adduced on the trial did not support the declaration. This is a demurrer to evidence, which cannot be regarded in a motion for a new trial.

But admit that the court can now see that the appointment was void, still the select-men had jurisdiction over the case, over the person and property, and acted under the forms of law. If the appointment would have the effect of a valid one, the making of it maliciously, and without probable cause, is actionable *per se*. No other damage need be shewn. In an action for a malicious prosecution, it is no defence that the indictment was ill. The vexation is the same, whether the indictment was good or not. *Jones* v. *Givins*, *Gilb. Rep.* 185, 199, 205.

(*a*) Vide *Williams* v. *The East-India Company*, 3 *East* 192. *Peake's Ev.* 5.

2. As the statute providing for the appointment of overseers may be converted into a powerful engine of oppression in the hands of the select-men, it must have a strict construction, and the authority which it gives must be strictly pursued. 1 *Root*, 246. 1 *Conn. Rep.* 82. The select-men must shew that they have pursued the steps which the statute points out; otherwise the appointment is a fact from which the jury may infer malice.

SWIFT, Ch. J. This is an action against the defendants as select-men for appointing an overseer to the plaintiff maliciously, and without probable cause; and no special damages are alleged in the daclaration. On the trial, the plaintiff produced the appointment of an overseer without limitation of time; which was, of course, null and void. The court instructed the jury, that the plaintiff was entitled to recover on proving malice and want of probable cause, though no special damages were alleged.

In actions for torts, where the law necessarily implies that the plaintiff has sustained damage by the act complained of, it is not necessary to make an allegation of special damages in the declaration; but where the law does not necessarily imply such damage, it is essential to the validity of the declaration that the resulting damages should be stated with particularity.

Where a valid appointment of an overseer is made from malice, and without probable cause, the law will imply damage; for the party is deprived of the power of making contracts, and of transacting business. But if the appointment be a nullity, it imposes no such restraint; and if the party suffers no inconvenience from it, no action will lie. If, however, he sustains any special injury by such void appointment, an action will lie; but as the damage does not necessarily result from the appointment, he must specially allege such damage to entitle him to recover.

In this case, as the plaintiff proved the appointment of an overseer which was an absolute nullity, she failed to prove her declaration; and as there was no averment of special damages, it was not competent for her to prove them. Of course, she was not entitled to recover; and the court ought so to have instructed the jury.

In cases lies the present it is essential for the plaintiff to prove malice and want of probable cause; and the failure of the defendants to prove any fact that might exculpate them

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is no evidence of malice. It was, therefore, incorrect for the court to charge the jury, that the select-men are in any case bound to shew that the party to whom an overseer is appointed, was, on enquiry by them, in their opinion, guilty of mismanagement and bad husbandry to such a degree as to bring the case within the statute, and to render the appointment necessary and proper; otherwise it was evidence of malice, or improper motives, proper for the consideration of the jury. This would be in a measure to throw the burden of proving their innocence on the defendants. They may act in such case from their own knowledge, and they alone could testify what their opinion was; and as they cannot be witnesses, it would be impossible for them to rebut this presumptive evidence of their guilt. (*a*)

In this opinion the other Judges severally concurred.

New trial to be granted.

NICHOLS *against* GATES and others.

A grant by the General Assembly to *A.* and *B.* without the words *heirs* or *assigns*, of the exclusive privilege of running a line of stages on a certain road, during the pleasure of the General Assembly, is a grant to them personally, and terminates at the death of the grantees. And where a person claiming as assignee of such grant, by virtue of an assignment from the administrators of one of the grantees after their death, continued the line for nearly twenty years, without interruption, or the interference of any other line, it was held that these facts furnished no evidence of the existence of the grant, or of an exclusive right.

THIS was an action of debt to recover the double value of six stage-waggons and fifty horses the declaration stated, that in *October* 1784, the General Assembly of this state passed a resolve, granting license to *Tallmadge Hall* and *Jacob Brown* to set up and drive all necessary stage-waggons, and to carry travellers therein, with their baggage and effects, from the city of *Hartford* to *Byram* river, during the pleasure of the General Assembly, and declaring, that no other person should, in the mean time, presume to set up or drive any stage-waggon on the same road, without the special licence of the General Assembly, upon pain of forfeiting every such waggon and the horses used therein, or double the value thereof, to any person who should sue for the same; that *Hall* and *Brown* from the time of the grant to the year 1790, and the plaintiff with one *Lovejoy*, as their

(*a*) See *Chalker* v. *Chalker*, *ante* 79, 83.

assignees, ever since, have constantly kept and maintained on said road all necessary stage-waggons to carry travellers, their baggage and effects; and that the defendants, in *August* 1813, set up and drove the stage-waggons and horses above mentioned on the road between *New-Haven* and *Byram* river.

The cause was tried at *New-Haven*, at an adjourned term in *February* 1815, before *Trumbull*, *Baldwin* and *Ingersoll*, Js.

On the trial, the plaintiff introduced the resolve stated in the declaration, which was as follows: "At a General Assembly of the state of *Connecticut* holden at *New-Haven* in said state, on the second *Thursday* of *October*, *Anno Domini* 1784. Upon the memorial of *Tallmage Hall* and *Jacob Brown*, shewing, that they have, at great expense, furnished themselves with stage-waggons and horses for carrying travellers with their baggage and effects from the city of *Hartford* to *Byram* river; praying for an exclusive right to carry passengers, &c., as per memorial, &c. *Resolved by this Assembly*, that the memorialists shall have, and licence is hereby granted to them, to erect, set up and drive all necessary stage-waggons or carriages, and to carry travellers therein, with their baggage and effects, from the city of *Hartford* to *Byram* river in this state, during the pleasure of this assembly; and that in the meantime no other person or persons whosoever shall presume to erect, set up, or drive any stage-waggon, waggons, or other carriage, for any of the purposes aforesaid, on the same roads, without the special licence of this Assembly, upon pain of forfeiting all such waggon, waggons, or carriages, and the horse or horses used therein, or double the value thereof, to any one who shall sue for and recover the same." The plaintiff then introduced evidence to shew, that *Hall* and *Brown*, immediately after the passing of this resolve, established a line of stages from *Hartford to Byram* river, and continued constantly to run the same until their death; that upon the death of *Brown*, his widow, who was one of the administrators, continued to run the same line of stages until the 15th of *February* 1794, when the administrators made an assignment of all the privilege they had to the plaintiff, who was then a driver on the road; but no order of the court of probate respecting the sale of such privilege was shewn; that the plaintiff, in connexion with *Lovejoy*, has ever since, with-

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out any interruption, continued the line from *New-Haven* to *Byram* river; and that in *October* 1795, after the death of *Hall* and *Brown*, the General Assembly revoked said grant so far as it respects the privilege from *Hartford* to *New-Haven*. The plaintiff also introduced evidence that he and *Lovejoy* had continued in the peaceable and uninterrupted use and occupation of said privilege from the death of *Hall* and *Brown;* that no person, until the injury complained of, ever interfered with or molested them in the enjoyment thereof; and that the public had been well accommodated by them. No assignment or transfer from *Hall* was shewn. The defendants, on their part, claimed and attempted to prove, that the plaintiff run his stage between *New-Haven* and *Stratford* river only, and had no other interest in the line. The court thereupon charged the jury as follows: "In this case, the plaintiff, in order to prove his declaration, produced a resolve of the General Assembly on the memorial of *Tallmadge Hall* and *Jacob Brown*, &c. [reciting its provisions.] It was agreed, that *Hall* and *Brown* have been long since deceased, and previous to the acts of the defendants complained of in the declaration. To prove that the right to the benefit of the grant and licence was vested in the plaintiff, he produced an assignment thereof to him from the administrators of *Brown*. It was thereupon objected by the defendants, that the original license to *Hall* and *Brown* was merely a licence to them personally, and that it ceased on their death. The court are of opinion that this licence was merely of the right to them personally; that the right ceased on their death; and that, of course, the administrators of *Brown* had no title, and their assignment to the plaintiff conveyed none. No other title is claimed or attempted to be proved by the plaintiff. But the plaintiff claims, that he has run his stage for twenty years without interruption, and has thereby acquired a right by possession to that part of the road between *New-Haven* and *Stratford* river; and that a line of stages has, during that period, been kept up through the whole of the road specified in the grant. On this point, the court are of opinion that no exclusive right to run stages on a road can be gained by use and possession only. The decision of these questions of law puts an end to the case; and you will, of course, find a verdict for the defendants." The jury found accordingly; and the plaintiff moved for a new trial on the ground of a misdirection.

The questions arising on this motion were reserved for the advice of the nine judges.

N. Smith and *Staples*, in support of the motion, contended, 1. That the grant to *Hall* and *Brown* was not a mere personal grant. This they argued from the situation of the country, and the hazard attending the experiment, at the time the grant was made; from the object which the legislature obviously had in view; from the words of the grant, making it determinable only at "the pleasure of the General Assembly;" and from the act of the legislature in *October* 1795, after the death of *Hall* and *Brown*, revoking the grant as to a part of the line, and thereby virtually declaring that the grant as to the residue was still subsisting.

2. That the assignment to *Nichols*, being made by the administrators of *Brown*, the surviving grantee, to a man who was in the actual enjoyment of the privilege, was sufficient for the purposes of this action.

3. That the fact of the grantees and their assignee having claimed and exercised an exclusive priviledge for thirty years, in the face of the General Assembly, who had at all times the power of revoking the grant, if an improper use were made of it, ought to have been submitted to the jury as a contemporaneous exposition of the grant. *Shep. Touch.* 89. *n.* [1]. *The Attorney-General* v. *Parker*, 3 *Atk.* 577.

R. M. Sherman and *Denison*, contra, contended, 1. That *Hall* and *Brown*, the grantees, were tenants at will of a franchise, a species of incorporeal hereditament, incapable of being assigned, and which was to terminate with their lives. Though there may be an estate in fee in a franchise, yet it must be created by the words of the grant; and no estate of inheritance can be created unless the grant be to the grantee *and his heirs*. It is an established rule in relation to grants by the public at the suit of the grantee, that such a grant shall not enure to any other intent than that which is precisely expressed in the grant; and if the terms of the grant be doubtful, it is to be construed most favourably for the public, and against the grantee. 4 *Cruise's Dig.* 567. In the grant in question there are no words of inheritance; none to make it assignable even during the life of the grantees; and the franchise is to continue only "during the pleasure of the

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General Assembly." The grant was therefore *personal;* and the grantees were *tenants at will.*

2. To lay a foundation for recovery, the plaintiff must shew that the estate is in some body. It is not in the original grantees; for they are dead. It is not in their heirs or personal representatives; because the estate of a tenant at will is determined by his death. Nor is it in the plaintiff as assignee of the original grantees; first, because an estate at will is not assignable even by the tenant in his life-time; secondly, as it terminates with the death of the tenant, his personal representatives have no interest in it, and can make no assignment of it; thirdly, as incorporeal hereditaments lie in grant, they can be conveyed only *by deed;* fourthly, the administrators could not sell without an order of probate; fifthly, there has been no conveyance whatever from *Hall* or his representatives.

3. The facts relied on as a contemporaneous exposition of the grant are only these; that the original grantees in the first place, and the plaintiff afterwards, have run a line of stages on apart of this road for a considerable length of time, and that no one else has thought proper to run another line on the same road. From these facts no exclusive privilege can be presumed. But if it could, it would not answer the plaintiff's purpose. This is an action for the penalty. Now, admitting that a grant of an exclusive privilege might be presumed from long usage; yet this, at most, would only entitle the party to his action on the case for a disturbance; it would give him no right to the penalty.

SWIFT, Ch. J. This grant is an incorporeal hereditament in the nature of a franchise. To render it assignable, or descendible to heirs, it was necessary that it should extend to heirs and assigns. No such words are used in the grant. It did not, of course, descend to the heirs of the grantees; nor had they any power to assign it. It is evident that the legislature intended a personal grant, and that it terminated at their death.

The prohibitory clause in the resolve was intended to secure to the grantees the benefit of the grant, and could not operate after that had ceased; for it would be a strange construction to say that the legislature intended to prohibit

all persons except the grantees from running a stage on the road in question after the right of the grantees had expired.

It has been urged for the plaintiff, that contemporaneous usage and the exercise of the privilege of the grant from its origin to the present time, ought to have been submitted as evidence to the jury in connexion with the grant, to shew it to be existing. But the grant having terminated at the death of the grantees, the plaintiff could have no right under it. Still he had a right to run his stage on the road in question in common with all the citizens of the state; and the use of a public highway in such manner as all are entitled to use it, can never furnish presumptive evidence of the existence of a grant, or of an exclusive right.

No new trial ought to be granted.

In this opinion the other Judges severally concurred.

New trial not to be granted.

EASTMAN *against* CURTIS:

IN ERROR.

In a plea in bar to a penal action at the suit of a common informer of a prior suit and recovery for the same penalty in the name of a third person, it is not sufficient to state, that the suit was brought, by a writ dated on a certain day, to a certain court, before which judgment was recovered, and then to recite the record; but the plea must distinctly aver that such suit was commenced before the present action, so that the plaintiff may traverse it.

The prohibition in stat. *tit.* 70. *c.* 1. *s.* 6. to use any bush-seine in *Ousatonnick* river, extends to the whole of that river, and is not restricted to the fishing places between the mouth and *Leavenworth's* ferry.

Qu. **Whether the penalty inflicted by stat. *tit.* 70. *c.* 1. *s.* 6. for using a bush-seine in *Ousatonnick* river refers to the *person* or the *offence*.**

THIS was an action *qui tam* against *Eastman*, brought on the statute, tit. *Fisheries*, *c.* 1. *s.* 6. (*a*) to recover the penalty of 67 dollars for using a *bush-seine* in *Ousatonnick* river. The offence was thus charged in the declaration:

(*a*) That section is as follows: "That no person shall use any bush-seine in said *Ousatonnick* river, or in any way obstruct, incumber or impede the drawing of seines, or taking of fish in any of the fishing-places cleared as aforesaid, either by felling trees, or sinking logs, or other incumbrances therein, or in any other manner whatsoever, on penalty of sixty-seven dollars for every such offence; one half to the person who shall sue for and prosecute the same to effect, and the other half to the treasury of the county where the conviction is had.

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"That the defendant, on the 15th of *June* last past, did use in *Ousatonnick* river, in that section thereof which divides the county of *Fairfield* from the counties of *Litchfield* and *New-Haven*, to wit, in the town of *Newtown* in said *Fairfield* county, a certain seine made of bushes fastened together, denominated and being a bush-seine, for the purpose of catching a certain fish called shad; and did, on said day, use and draw said bush-seine, which extended from one side of the river to the other, from the mouth of the *Shippague* river emptying into said *Ousatonnick* river in the town of *Southbury* in said *New-Haven* county, through and over the fishing-places cleared and constantly used by *Benjamin C. Glover* and others to *Mitchell's Ditch*, a place in the town of *Southbury*, being a distance of three miles." The writ was dated the 10th, and served the 16th of *May*, 1814.

To this declaration there was a plea in bar, admitting that the defendant, with *Samuel G. Hawley* and several others, did, on or about the 15th of *June* 1813, use a bush-seine in the *Ousatonnick* river, as stated by the plaintiff, yet averring "that at the county court holden at *Litchfield* within and for the county of *Litchfield*, on the fourth *Tuesday* of *September* 1814, one *Benajah Hawley* of *Roxbury* in the county of *Litchfield*, brought a suit as well in the name of the state of *Connecticut* as in his own name, against the said *Samuel G. Hawley*, by writ bearing date the 19th of *April* 1814; before which court the said *Benajah Hawley* recovered a judgment against the said *Samuel G. Hawley* for the sum of 67 dollars, the one half thereof to the use of said *Benajah Hawley*, and the other half for the use of the county of *Litchfield*, and his costs of suit; which said writ, process and judgment are in the words and figures following;" which were recited in the plea. The writ recited purported to be dated and served the 19th of *April* 1814. The declaration was precisely like the present, *mutatis mutandis*. From the record it appeared that judgment was rendered by the *Litchfield* county court, *September* term 1814, against said *Samuel G. Hawley*, on default, for the sum of 67 dollars and costs of suit, one half for the use of the plaintiff in that suit, the other half for the county of *Litchfield*. The conclusion of the plea was as follows: "Now the defendant in fact says, that said judgment, suit and proceeding are for the same matter, cause and thing as that complained of by the plaintiff against him the defen-

dant in his the plaintiff's declaration against him, and not otherwise or diverse therefrom; and that said judgment has been fully paid and satisfied; all which the defendant is ready to verify."

To this plea there was a demurrer, and joinder in demurrer. The county court adjudged the plea insufficient, and subjected the defendant to a penalty of 67 dollars. The defendant thereupon brought a writ of error returnable to the superior court at *Fairfield*, *March* term, 1815, assigning the general error. By agreement of parties, the cause was continued to the next term of that court; and the questions of law were reserved to be argued in the meantime before the nine Judges.

Sherwood and *N. Smith*, for the plaintiff in error, contended, 1. That the declaration was insufficient. The 5th section of the statute declares, "that where any persons have been at the expense of clearing a fishing-place in *Ousatonnick* river, between the mouth thereof and *Leavenworth's* ferry, and have constantly used the same for taking fish in the seasons thereof," they shall be established in the enjoyment of such fishing-place. The 6th section then prohibits all persons from using a bush-seine, or in any way obstructing, incumbering, or impeding the drawing of seines, or taking fish, "*in any of the fishing-places cleared as aforesaid.*" Now, it does not appear from the declaration, that the defendant used a bush-seine in any fishing-place in the river "between the mouth thereof and *Leavenworth's* ferry;" nor that he used it in such a manner as to obstruct the taking of fish by others; nor that at the time when he used it, there were any fish in the river. The declaration indeed states, that the defendant drew a bush-seine for the purpose of catching *shad*, through and over certain fishing places; but it does not state that they were *shad* fishing-places, or that there were any *shad* there.

2. The plea in bar is sufficient. This depends upon the construction of the following words in the statute: "That no person shall use any bush-seine" &c. "on penalty of 67 dollars for every such offence;" and the question is, whether the penalty refers to the *offence*, or to the *person* committing the offence; in other words, whether each person using the

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bush-seine incurs the penalty, or if more than one are concerned, is it a joint offence.

In considering this question, we derive no aid from the common law. The offence charged is not an offence at common law. We must be governed by the statute, and the rules given for its construction. We are to presume that the legislature understood the meaning and extent of the words by them used; and courts of law are bound to understand the true and correct meaning of all words used by the legislature.

The same phraseology as that under consideration occurs in the 3d, 7th, 10th, and 15th sections of the same statute; and in the additional act of *May*, 1801. (*chap.* 5.) where the penalty is 100 dollars. The construction in this case must govern all those cases.

What is the offence created by this statute? Using a bush. seine. Is not the using a bush-seine a single offence? It is, obviously. Does the statute require more than 67 dollars for one offence? It clearly does not. Suppose then the bush-seine is used only once by twenty persons; there is but one using; of course, but one penalty.

The statute is designed to operate on the *offence*, without regard to the number of persons concerned. The act to be done to incur the penalty, is, in its nature, such as cannot ordinarily be performed by one, but requires a number. The penalty is a large one; and it is not to be presumed, that the legislature meant to multiply the penalty on account of the offence being committed by several, but to provide against a joint offence. There are indeed cases, where the legislature intended to make the penalty operate upon the person rather than the offence; but in those cases they have been careful to use a different phraseology. Thus, in the statute under the title of "*Boats*," the words are, "That *whoever* shall take" &c. So in that under the title of "*Bricks*," *sect.* 3. "And *whosoever* shall put up" &c. So in that under the title of "*Counterfeiting*," *c.* 1. *s.* 10. "Such person or persons, &c. and *every of them*" &c. So in that under the title of *Theatrical Exhibitions*," "That *each person* so exhibiting" &c.

Accumulating penalties are never inflicted, unless the form of expression in the statute is such as to render it necessary. *Chapman* v. *Chapman*, 1 *Root*, 52. *Barber* v. *Eno*, 2 *Root*

150. Had a joint prosecution been brought against all who were concerned in the offence, one penalty only could have been recovered. In *Partridge* v. *Naylor*, *Cro. Eliz.* 480. which was an action upon stat. 1 & 2 *Ph. & Ma. c.* 12. against three for impounding a distress in three several pounds, it was held that but one penalty could be recovered. The words of the statute referred to are, "Every person offending contrary to this act shall forfeit to the party grieved, for every such offence, an hundred shillings." 2 *Cay's Stat. at large*, 291. A similar decision was had in a prosecution upon the stat. 5 *Ann c.* 14. *s.* 4. the words of which are, "That if any person or persons not qualified, &c. shall keep or use any greyhounds, &c. and be thereof convicted, &c. the person or persons so convicted shall forfeit the sum of 5*l.*" *The King* v. *Bleasdale & al.* 4 *Term Rep.* 808. A similar decision was also had in another action upon the same statute in connexion with the stat. 8 *Geo.* 1. *c.* 19. *Hardyman* v. *Whitaker & al.* cited *Bul. N. P.* 189. S. C. reported 2 *East*, 573. *in not.* And wherever there has been a different decision, it will be found to have resulted from a material difference in the words of the statute; as in *The Queen* v. *King & al.* 1 *Salk.* 182. where the words of the statute are, "That they shall *respectively* forfeit 30*l.*"

The penalty is in nature of a satisfaction to the injured party. The act done is in nature of a trespass. All concerned in it are liable; but the party injured can recover but one satisfaction. The form of the action cannot vary the principle of law. If the penalty is all given to the party as in trespass and other cases; or half, as in others; or to any informer, as it sometimes is; or all to the public; the principle of law remains the same.

3. The matter in bar is sufficiently pleaded. It is averred that a former suit was brought for the same matter, cause and thing; the parties are particularly described; and the date of the writ is specified. It is also averred, that in this suit the plaintiff *recovered judgment* before the county court of *Litchfield* county, on the fourth *Tuesday* of *September* 1814. The writ, process and judgment then became *matters of record*, which are set out at length in the plea. Every thing upon this record must now be taken to be as it appears.

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R. M. Sherman for the defendant in error. 1. The prohibition of the statute as to the using of a bush-seine in *Ousatonnick* river is general. The words are, "That no person shall use any bush-seine in said *Ousatonnick* river." The statute then proceeds to prohibit other obstructions "in any of the fishing-places" mentioned in the preceding section; but there is no limitation of place or time as to the using of a bush-seine in that river. The plaintiff's declaration, therefore, brings the offence within the statute.

2. The plea in bar discloses no defence to this action. Every person concerned in the offence is severally liable for the penalty. In support of this position he cited 6 *Bac. Abr.* 393. (*Wils.* edit.) *The Queen* v. *King*, 1 *Salk.* 182. *The King* v. *Clark*, *Cowp.* 610, 612. *Hardyman* v. *Whitaker*, 2 *East* 275. *in not. Barnard* v. *Gostling*, 1 *New Rep.* 245.; and then commented on most of the authorities referred to on the other side. He insisted, that the legislature, by the words of the statute, had subjected every individual who should commit the offence specified, to the penalty. The words are, "*no person* shall use," &c. The statute is a public one; and the object of the legislature was to provide against a public evil, and not to give satisfaction for a private injury. The penalty is not to go to the party aggrieved, but to a common informer and the county treasury. Suppose the punishment inflicted for a violation of this law had been imprisonment; would not each person guilty of the offence be liable for the whole term? Upon a different construction, the greater the number of persons who unite in the offence, the less will be the punishment upon each. The offenders might be gainers by violating the law, notwithstanding the penalty.

3. A plea in bar of a prior suit for the same penalty must shew the precise time when such prior suit was commenced. 1 *Chitt. Plead.* 443. But this plea shews nothing as to the time when the suit in question was commenced. It contains no averment that the writ was ever signed or served. The record which is recited proves nothing as against a stranger. This defect is a substantial, and not a merely formal one.

SWIFT, Ch. J. The prohibition in the 6th section of the statute respecting "Fisheries," to use bush-seines in *Ousatonnick* river, extends to the whole of the river, and is not restricted to the part of it below *Leavenworth's* ferry. The

declaration, of course, has alleged an offence within the statute, and is sufficient. *New-Haven, June, 1815.*

There is no allegation in the plea in bar of the time when the suit therein mentioned was served. It only avers, that the suit was brought to a certain court, and then the proceedings are set forth. Every allegation in the plea may be true, and yet that suit may have been commenced subsequent to the present. It was essential to the validity of the plea in bar, that there should have been an averment, that such suit was commenced prior to this, so that the plaintiff might have traversed it, in order to make it a bar to a recovery in the present action. Eastman v. Curtis.

EDMOND and SMITH, Js. being related to one of the parties, gave no opinion.

The other Judges concurred in the opinion of the Chief Justice.

No error in the judgment complained of.

SHEPARD *against* HALL.

The defence to an action on a promissory note being fraud in obtaining the note, the defendant adduced evidence of certain transactions, which, he contended, amounted to fraud; and the court in their charge left the facts to the jury, and directed them as to the law, that a total fraud in consideration of a note, or in the manner of obtaining it, would render it void; held that this charge was correct and proper.

Promissory notes and bills payable at banks are entitled to three days grace.

Where the parties live in the same town, personal notice must be given of the non-payment of notes and bills; but in other cases, the putting of a letter into the mail addressed to the party entitled to notice, is legal notice.

THIS was an action of *assumpsit* against *Hall* as indorser of a promissory note. The cause was tried at *Hartford, February* term 1815, before *Trumbull, Baldwin* and *Ingersoll* Js.

On the trial, the defence was first, want of due notice of non-payment; and secondly, fraud in obtaining the note. The facts were these. The note was made by *Asahel Loomis*, dated the 30th of *August* 1813, and payable to the defendant or order, at the *Hartford Bank*, four months after date. Allowing three days of grace, it would be payable on *Sunday* the 2nd of *January* 1814. On *Monday* the 3rd of *January* 1814, the plaintiff's attorney addressed a letter to the defendant containing the following notice, which was delivered to him

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personally, on the same day: "You are hereby notified, that the above note [a copy being prefixed] has not been paid, though the same was at the said bank when it became due and payable, and *M. Shepard*, whose property it is by regular assignment, looks to you as indorser thereon, and for payment of the same." On the *Saturday* preceding, immediately after the bank closed, the plaintiff also put a letter into the *Hartford* post office, addressed to the defendant at *Meridan*, his place of residence, containing the same notice.

To shew that the note was obtained by fraud, and held by the plaintiff when he ought to have delivered it back, the defendant offered the deposition of *Reuben Ward* of *New-York*, which was admitted by the plaintiff's agreement. It was to this effect: That the plaintiff, on the 26th of *October* 1813, held *Ward's* acceptance of two drafts, drawn by *Asahel Loomis*, one dated *July* 19th, 1813, for 687 dollars, payable 65 days after date, the other dated *August* 2nd 1813, for 750 dollars, payable 70 days after date; and that *Ward* then paid to the plaintiff 97 dollars, for which the plaintiff agreed to discharge him from all liability on account of said acceptances, and accordingly gave him a writing as follows: "*Hartford*, *October* 26th, 1813. Received of Mr. *Reuben Ward* ninety seven dollars in full satisfaction of all claims I have upon him of every nature and description. *M. Shepard.*" The defendant then endeavoured to prove by the testimony of sundry witnesses, admitted also by the plaintiff's agreement, that said note was one of two notes put into the plaintiff's hands to pay a debt due to the plaintiff from *Loomis* for which the drafts were given; that the plaintiff was to receive the notes in lieu of the drafts, and on the reception thereof, was to deliver up the drafts to *Loomis;* that *Loomis* accordingly, on the 31st of *August* 1813, sent the notes to the plaintiff, then at *New-Haven*, who received the same on the terms stated, but did not deliver up the drafts; that *Loomis* applied to the plaintiff for them, at *Hartford*, several times afterwards, but the plaintiff never delivered to him either the drafts or the notes until the 27th of *November* 1813, previous to which time, and after the reception of the notes, the plaintiff had received a payment on the drafts from *Ward*, the acceptance on one of the drafts had been erased, and the plaintiff had given a discharge to *Ward* without *Loomis's* consent or knowledge; and that *Loomis* then

refused to receive the drafts. The plaintiff, on his part, exhibited evidence to shew, that at the time he received the notes, the drafts were in the hands of his agent in *New-York* for collection; that *Ward* had become insolvent and unable to pay them; and that by advice of his agents, he received by way of compromise from *Ward* the sum of 97 dollars, that sum being the excess of the amount of the drafts beyond the amount of the notes. The cause was submitted to the court and jury without argument.

The court left the facts to the jury; and directed them as to the law, that a total fraud in the consideration of a note, or in the manner of obtaining it, would render the note void, as had been settled by the superior court, particularly in the *Georgia* cases. As to the other point, the court did not instruct the jury whether the putting of a letter into the mail was, or was not, conclusive or *prima facie* evidence of notice, or what the law respecting that fact was; nor whether the notice given on the 3rd of *January* was sufficient.

The jury found a verdict for the plaintiff; and the defendant moved for a new trial. The questions arising on such motion were reserved for the consideration and advice of the nine Judges.

E. Huntington, in support of the motion, contended, 1. That as the notes were sent to the plaintiff to be exchanged for the drafts, and under an agreement that the drafts should be returned if he retained the notes, the plaintiff did not become the proprietor of the notes until the drafts were thus returned; and the drafts not having been returned until after they were discharged, the plaintiff had no title to the notes. The court ought, therefore, to have instructed the jury, that the plaintiff's action could not be sustained.

2. That the charge on the question of fraud was incorrect. Instead of laying down an abstract proposition, the court ought to have told the jury, that if they found the facts proved, which the defendant had attempted to prove, such facts would constitute a sufficient fraud to avoid the notes. While it was the province of the jury to say whether the party had proved his defence, it was equally the duty of the court to decide whether that defence, if proved, was sufficient.

3. That no days of grace ought to be allowed on the note in this case; and therefore, notice was not given in season.

4. That if days of grace were to be allowed, still the notice given on *Saturday* when the time of grace expired, was not

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sufficient. He admitted, that the putting of a letter containing notice into the post-office had in *England* been held equivalent to actual notice; yet he contended, that that rule had not been, and ought not to be, adopted in this state.

E. S. Williams and *J. Trumbull*, contra, insisted, 1. That the notes having been received by the plaintiff in exchange for the drafts, the drafts had thereby become satisfied, and it was immaterial whether they were returned to *Loomis* or not. As the notes were delivered directly to the plaintiff, it cannot be said that the delivery was conditional, or that they were escrows; and as they were *voluntarily* sent, there could be no fraud in obtaining them. If *Loomis* has suffered in consequence of the drafts not being returned, he may look to the plaintiff for redress; but the present defendant is not affected by this transaction.

2. That the question of fraud was properly left to the jury. The charge was in the language of the defence, and as the defendant wished.

3. That by the custom of merchants, and the rules of the banks in this state, sanctioned by repeated decisions of the superior court on the circuit, three days of grace are allowable on promissory notes payable at the banks.

4. That the putting of a letter into the post-office, addressed to the party, is equivalent to actual notice.

5. That the notice actually given on *Monday*, the next day after the note was payable, was in sufficient season.

SWIFT, Ch. J. In this case, it was contended on the part of the defendant, that the note was obtained by fraud; and he introduced his evidence to prove the fact. The court pronounced to the jury the law arising in the case, that notes obtained by fraud were void, and then submitted the case on the evidence for the jury to decide whether the defendant had proved that the note was obtained by fraud. The court stated the principle of law correctly to the jury,(*a*) and properly submitted to them the question of fact.

By the immemorial custom of merchants, sanctioned by judicial decisions, notes and bills payable at banks are entitled to three days grace.(*b*)

(*a*) See *Shepard* v. *Hawley* & al. *post*, 367.

(*b*) See *Norton* v. *Lewis*, 2 *C. R.* 478. *The Savings Bank of New-Haven* v. *Bates*, 8 *C. R.* 505.

Where the parties live in the same town, personal notice of the non-payment of bills and notes must be given; but in other cases, the putting of a letter into the mail is legal notice.(*c*)

In this opinion the other Judges severally concurred, except HOSMER, J. who declined acting, having been of counsel in the cause.

New trial not to be granted.

(*c*) See *Dwight & al.* v. *Scovil & al.*, 2 *C. R.* 654. *Bishop* v. *Dexter*, 2 *C. R.* 419. *Barnwell & al.* v. *Mitchell*, 3 *C. R.* 101. *The Hartford Bank* v. *Stedman & al.*, 3 *C. R.* 489. *Holland* v. *Turner*, 10 *C. R.* 308. *Belden* v. *Lamb*, 17 *C. R.* 441. *Buck* v. *Cotton*, 2 *C. R.* 126.

KING *against* THE HARTFORD INSURANCE COMPANY.

Where the captain of a vessel insured to her port of discharge in the *United States*, dismissed and paid off at her port of arrival all the hands on board except the mate and cook, and immediately shipped an equal number of good hands in their place; held, that these facts did not conduce to prove a termination of the voyage at such port of arrival.

A vessel while proceeding from *New York* for *Middletown*, struck violently upon the rocks in *Hurl-gate*, and was greatly injured; the owner abandoned; and immediately afterwards, upon his receiving intelligence that she was likely to be got off soon, the insurers authorized him to bring her into *Connecticut* river, if practicable, and to do whatever should be needful, *without militating against the abandonment:* Held that this agreement did not affect the owners claim for a total loss.

The sails, rigging, anchors, &c. saved from a vessel thrown upon the rocks, and abandoned, are not a fund in the hands of the insured to defray the expense of getting her off.

In an action on a policy of insurance, it appeared on the trial, that the vessel insured having been got off the rocks in *Hurl-gate*, and brought to *New-York*, was set up for sale at auction by the captain, which, as the plaintiff contended, was done by the advice and direction of the port-wardens; that she was bid off by a third person without the plaintiff's knowledge or consent; and that she was soon afterwards delivered to the plaintiff, by the purchaser, under whom the plaintiff had ever since claimed and held her as his own. It did not appear that any purchase-money was paid; but the plaintiff gave credit for the amount to the defendants in his claim for damages. The defendants contended, that the sale was a mere sham sale, without authority and void; and that the plaintiff could recover only for a partial loss. The court in their charge to the jury omitted to give any direction on this point; and the jury gave a verdict for a total loss. Held, that the charge was incorrect on account of the omission specified, and a new trial ought to be granted. Under those circumstances, the court should have stated to the jury the principle of law applicable to the case, viz. that when an abandonment is properly made, the property is changed, and the abandonment cannot be waived without the consent of both parties express or implied; and should have then told them, if they found the sale was valid, there

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was no waiver of the abandonment; but if it was a mere pretended sale, without authority, with a view to subject the defendants to a total loss; if no purchase money had been paid; and the plaintiff had possessed and used the vessel as his own, without any objection or claim from the defendants; they would be warranted to presume that the parties had waived the abandonment, and the plaintiff would be entitled to recover for a partial loss only.

THIS was an action upon a policy of insurance on the ship *Governour Griswold*, underwriten for 10,000 dollars, in the same form, and upon the same voyage, as that before stated in the case of *King* v. *The Middletown Insurance Company.*(*a*) The cause was tried at *Hartford*, *February* term 1815, before *Trumbull*, *Baldwin* and *Ingersoll*, Js.

[*334] *Much of the evidence on the trial was the same as in the former case. The additional facts are comprised in the following statement. The *Governour Griswold*, having taken in a cargo of salt, was cleared at *St. Ubes* for *New-York*, where she arrived on the 21st of *June* 1812, and lay there twenty-four hours in safety; during which time, the usual entry was made at the custom-house, and the duties, amounting to less than fifty dollars, were paid on that part of the cargo which was liable to duties. The supercargo immediately wrote to the plaintiff for orders respecting the ship's port of discharge; and while she was lying in the stream waiting for orders, the captain dismissed and paid off all the hands on board except the mate and cook, and immediately shipped an equal number of good hands to bring the ship round into *Connecticut* river, if so ordered. The plaintiff returned an answer by the first mail, ordering her to *Middletown*. There was evidence to shew that some of the hands were foreigners, whom it was difficult to keep on board, and that some were discharged at their earnest request. The defendants claimed that these facts established *New-York* the port of discharge, and that the risk there ended.

In pursuance of the plaintiff's orders, the ship, after being lightened, proceeded for *Middletown*, and on the 1st of *July*, struck upon the rocks at *Hurl-gate;* part of her side was knocked in; her rudder lost; and about half of her keel broken off. The salt with which she was loaded soon washed out. In this condition she lay on the rocks on the 4th of *July*, when the plaintiff offered to abandon. Before this time she had been stripped of her sails and rigging, which, with her anchors, were safe

(*a*) Ante, *p.* 184.

on shore. On the 8th, she was got off the rocks, and floated down to *New-York*. The carpenter's bill for repairing her bottom amounted to 600 dollars; his bill for getting her off the rocks amounted to 414 dollars; the riggers bill for repairing her rigging was less than 400 dollars; and a bill of blacksmith's work amounted to 117 dollars. Upon these facts, the defendants claimed, that as long as the plaintiff had sufficient of the ship in his hands to indemnify him against any loss in consequence of his exertions to get off the hull, he had no right to abandon.

The defendants also claimed, that the plaintiff proposed and agreed, that he might get the ship round into *Connecticut* river. The only evidence of such an agreement was the *following letter from the plaintiff to the *Middletown Insurance Company*: "*Hartford, July* 7th, 1812. *Chauncey Whittelsey* Esq. Sir, I wrote you on the 4th inst. informing you of the wreck of the *Governour Griswold*, and abandoning the same to the *Middletown* office so far as they are interested, which I presume you have received; since which my verbal information says, that she will likely be got off soon. The *Hartford* office have authorized me to get the ship into the river as soon as possible, if practicable; and in short, to do whatever shall be needful, without militating against the abandonment. The object of this letter to inquire whether you have any objection; as it is necessary information should be immediately given to the captain, or some other agent in *New-York*. Yours respectfully, *H. King*." The defendants contended, that if the risk did not terminate in *New-York*, they by virtue of the agreement here disclosed, made themselve sliable to pay the expenses of attempting to get the ship off, whether such attempt succeeded or not; although they admitted, that they refused to advance money, lest they should thereby recognize a liability upon themselves. They further contended, that this evidence proved that the plaintiff had waived the abandonment, and could not claim for a total loss. The plaintiff, on his part, introduced evidence to shew, that the *Middletown Insurance Company* had insured the same ship, and refused to allow him to get her off, as he proposed in his letter to them; and that for this reason, as well as because the defendants refused to furnish him with money for the purpose, he never did any thing with the ship.

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After the ship was taken to *New-York*, she was set up for sale at auction, by the captain, as the plaintiff claimed, by the advice and under the direction of the port-wardens;

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was bid off by *John King*, without the plaintiff's knowledge or consent, at about 2,700 dollars; and was soon afterwards delivered to the plaintiff by *John King*, under whom the plaintiff has ever since claimed and held her as his own. It did not appear that any purchase money was ever paid, either by *John King* or the plaintiff; but the latter gave credit for the amount to the defendants in his claim for damages. The defendants contended, that the sale was a mere sham sale, made without any authority, and of no efficacy; and that the plaintiff must, therefore, be considered [*336] as having repossessed himself of his ship, and could now recover only for his expenses and for repairs.

The court charged the jury as follows: "It is contended, that it is in proof that the greater part of the crew of the vessel were discharged and paid off at *New-York;* and that, although others were engaged in their stead, yet this fact makes *New-York* the port of discharge, and puts an end to the policy. On this point, the court are of opinion, that the dismission and paying off of any part of the crew at the port of arrival do not of course terminate the voyage and vacate the policy.

"It is also contended, that the plaintiff, by agreement with the defendants, and as their agent, got the vessel off the rocks; and that this is a waiver of the abandonment, and makes the loss partial only. The court are of opinion that the agreement offered in evidence is no waiver of the abandonment. It being thus decided by the court, that the law is so that the voyage was not ended at *New-York*, your verdict will, of course, be for the plaintiff. In that case, the question will arise whether the plaintiff is entitled to recover for a total loss, or for a partial loss only. As the other questions of law in the present cases are similar to those which were made on the trial of a cause between the plaintiff and the *Middletown Insurance Company*, for an insurance on the same ship and adventure, the court will instruct you in the words of the charge in that case."(*a*)

The jury found a verdict for the plaintiff, with damages for a total loss. The defendants moved for a new trial, on the ground of a misdirection; and the questions of law arising on such motion were reserved for the consideration and advice of the nine Judges.

Dwight and *T. S. Williams*, in support of the motion;

(*a*) Reported ante, p. 186 to 189.

contended, 1. That although it had been decided in the suit against the *Middletown Insurance Company*, that the ship's having cleared out for *New-York*, and having gone there when near the mouth of *Connecticut* river, her making entry at the custom-house there, and her lightening and waiting for orders there, did not constitute *New-York* her port of discharge; yet that these facts, together with the fact that most of the crew were there discharged, was sufficient to shew that *New-York* was her port of discharge; at least, it was *evidence to be left to the jury, from which they might infer [*337] that fact. The court in their charge to the jury, instead of directing them to weigh these circumstances combined, have merely said, that the dismission of any part of the crew does not, of course, terminate the voyage.

2. That if the plaintiff was entitled to recover on the policy, it was for a partial loss only. The contract of insurance is a mere contract of indemnity. 2 *Burr.* 697. 1210. 1213. 3 *Mass. Rep.* 59. The doctrine of abandonment is liable to great abuse. *Marsh. Ins.* 561. (*Condy's edit.*) Justice *Buller* thinks it would have been wiser not to have allowed an abandonment in any case. 1 *Term Rep.* 615, 616. And Lord *Ellenborough* says the privilege is not now to be enlarged. 10 *East* 343. 2 *Marsh. Ins.* 578. *d.*

In the former case, it was said, that an abandonment might be made, if the ship was in extreme hazard of being lost, as the insured would in that event run the risk of losing the expense of attempting to get her off. But here he did not run the risk of losing that expense; as the defendants had agreed that he might get the ship off, and bring her into *Connecticut* river. By this agreement they made themselves responsible for the expense.

Besides, in this case it appears, that all the upper part of the ship, with her anchors, &c. were safe on shore; in short, all was safe except the mere hull, before the abandonment. The plaintiff, then, could be in no danger of eventual loss, if he did not succeed in getting off the ship; for the master would have been justified in making use of the part saved in endeavours to preserve the rest. He would have a right, in the absence of other means, to apply the part saved to the payment of the persons employed on the ship; and if all his exertions had been fruitless, and the plaintiff had then abandoned, so much the less would have been saved for the underwriters.

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3. The court should have left it to the jury to determine whether the plaintiff, having repossessed himself of his ship under a void and illegal sale, had not waived the abandonment. As to an illegal sale see 4 *Binn.* 391, 5, 9. 3 *Mass. Rep.* 54. By an offer to abandon the plaintiff puts himself in a condition to insist upon it. Per Lord *Ellenborough*, 10 *East* 341. An offer once made *and accepted*, is irrevocable except by mutual consent. 2 *Marsh, Ins.* 613. It may be [*338] *revoked by consent, or *waived*. 1 *Johns. Ca.* 152. It can be taken away but by consent of the insured, or by a *reasonable implication*. 6 *Mass. Rep.* 482. 4 *Cranch*, 45. These opinions, with the cases of *Saidler & al.* v. *Church*, 1 *Caines*, 297, 303. 2 *Caines*, 286, 290. *Abbott* v. *Broome*, 1 *Caines*, 292, 303. and *Ogden & al.* v. *The New-York Fire Insurance Company*, 10 *Johns.* 177, 9. shew that the party may do acts from which his consent to waive an offer to abandon will be implied; and a purchase and holding of the property under a sale which was illegal and of no validity, it is contended, is one of these acts.

Terry and *J. Trumbull*, contra. 1. The effect of the entry and payment of duties, lightening and waiting for orders, has already been decided upon by this Court in the suit against the *Middletown Insurance Company*. The only new fact in this case is the discharge of the hands; as to which, it may be remarked, the insured does not warrant that he will have the *same* hands throughout the voyage, only that he will have sufficient hands, that the ship shall be seaworthy, &c. 1 *Marsh. Ins.* 153. 165. *b.* 166. (*Condy's* edit.) The loss did not happen for want of men, nor for want of skill. The captain exercised his discretion. The discharge of the hands was, at most, only evidence of an *intention* to terminate the voyage; and the court have decided, that the intention of the master relative to that subject is wholly immaterial.

2. The fact that some part of the ship was safe on shore did not prevent an abandonment. Had the ship gone to pieces the insured might have abandoned, unless the damage was less than one half her value; and if she were in evtreme hazard of going to pieces, he might, in that case also, abandon, after a notice to the insurers, and a refusal by them to assist. The direction to the jury in the former case, adopted in this, was to find for a total loss, if the *ship* was in extreme danger, not the mere hull. The saving of a part did not excuse the defendants from being at ex-

pense; and the abandonment remained good, unless the defendants got off the ship, or offered to be at the expense of doing it. 6 *Mass. Rep.* 482, 3. They have done neither. But the defendants claim, that the plaintiff had enough of their property to secure him in getting off the ship. It does not appear what sum was necessary; nor what amount was saved; nor that either *party knew that any thing was saved. But if all this were, as is contended, the plaintiff was not bound to advance his money to repair the defendants' ship, because he had security in his hands; nor indeed could he be secured by such possession for moneys advanced by him without the defendants' request. It is not true, that the plaintiff had any of the defendants' property; for if the abandonment took effect, the property was transferred to the defendants, and the master became their agent; if the abandonment was not effectual, then the master remained the plaintiff's agent, and in possession of the plaintiff's property.

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Nor did the agreement made by the plaintiff with the defendants destroy the effect of the abandonment; for both the *Middletown* office and the defendants refusing to advance money, nothing was done under this agreement; and by the very terms of the agreement, it was not to prejudice the abandonment. Besides, the defendants did not appoint the plaintiff their agent in such a sense as to bind them for any expence; they merely permitted him to get the ship into the river.

3. The sale and purchase in *New-York*, did not amount to a waiver of the abandonment. Unless the statement in this motion that the sale was a sham sale, varies the present case from the former one, this point has been decided. There is no former pretence that the sale was fraudulent in any respect. It is contended only, that it was void for want of authority in the master; and an inference is drawn from the plaintiff's possession of the ship under this sale, that he has waived his claim for a total loss. The plaintiff contends, that the master had power to sell; but if he had not, still as it appears that the plaintiff took possession under a belief that he had acquired a new title, it cannot be inferred that he intended to give up his abandonment. If the purchase which he made of *John King* is void, then he gained no title to the ship. But it does not follow that he loses his claim on the defendants.

SWIFT, Ch. J. Several questions arising in this case were

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settled in the case of *King* v. *The Middletown Insurance Company*. It is necessary to notice those points only which did not arise in that case.

A discharge of the seamen without replacing them by *others would be evidence of the termination of a voyage; but a discharge of part of them, and replacing them by others, so that the voyage could be continued, if directed, is a circumstance which does not conduce to prove that the voyage was terminated.

The letter from the plaintiff to the *Middletown* insurance office explicitly states, that the agreement made with the defendants was not to militate against the abandonment. To give it the effect now contended for would defeat the abandonment. This would be contrary to the agreement on which the defendants rely.

The property taken from the vessel after she went on the rocks, was not a fund in the hands of the plaintiff to pay the expense of getting her off. He had no right to dispose of it for that purpose; nor could it then have been determined whether it would have been sufficient. If the vessel had been lost, the plaintiff, in a suit on the policy, could not have retained as much of the property as the amount of the expense in attempting to get her off; but the property saved must have been accounted for, in the estimate of the loss, without allowing for such expense; it could not, therefore, have been a fund.

But admitting the insured would have a right to retain in such cases, there would be instances where he might be exposed to loss. If whenever a vessel is stranded, and some of the property saved, he is bound to attempt to get her off, then should he fail in the attempt, and the amount of the expense should exceed the value of the property saved, he must suffer a loss to that amount; because in an action on the policy he can recover only for the total loss, and not for the expense beyond the value of the property saved. But as an insurance is a contract of indemnity, no construction ought to be given to it, which will in any case necessarily subject the insured to a loss.

With respect to the waiver of the abandonment, it appears, as stated in the motion for a new trial, that after the vessel was got off the rocks, she was set up for sale at auction by the captain; and the plaintiff claimed, that it was done by the advice and direction of the port-wardens; that she was bid off by *John King*, without the knowledge or consent of

the plaintiff; that he delivered her to the plaintiff, who has ever since had her, and claimed to be the owner under *John* *King; that it did not appear that any purchase money was ever paid; and that the plaintiff gave credit therefor in his claim for damages. The defendants claimed, that the sale was a mere sham sale, without authority and void; and the plaintiff having repossessed himself of the ship, can only claim for a partial loss. The testimony is not detailed, nor is it stated that any facts were agreed to by the parties. On this point the court gave no direction to the jury; and if it might have been material, the charge was incorrect.

When an abandonment is properly made, the property is changed, and the abandonment cannot be waived without the consent of both parties, express or implied. If, after the abandonment, the insured continue in possession of the vessel, without sale, using it as his own, and the insurers interpose no objection and make no claim, it may be presumed that both consent to give up the abandonment. So by the same reason, if there be a pretended or void sale, merely with a view to enable the insured to convert a partial into a total loss, no purchase money having ever been paid, the insured continuing to possess and use the vessel as before, and the insurers interposing no objection or claim; this may be deemed a waiver of the abandonment. Now, it does not appear but that from the evidence the jury would have been warranted to make the inference that the parties consented to waive the abandonment. Such, at any rate, was the claim of the defendants. The court, then, ought to have stated to them the principle of law applicable to the case, and then have submitted to them the question of fact upon the evidence before them. They should have told them, if they found the sale was valid, there was no waiver of the abandonment; but if it was a mere pretended sale, without authority, with a view to subject the defendants to a total loss; if no purchase money had been paid; and the plaintiff had possessed and used the ship as his own, without any objection or claim from the defendants; they would be warranted to presume that the parties had waived the abandonment, and the plaintiff would be entitled to recover for a partial loss only. As the court gave no such direction, a new trial ought to be granted.(*a*)

In this opinion the other Judges severally concurred.

New trial to be granted.

(*a*) See C. S. *post* 422.

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BULL and another *against* PRATT.

In an action on the case for fraud in the sale of a privilege under a patent-right, the plaintiff proved that a certain patent had been granted previously to a third person, and then offered parol evidence to shew that the defendant's patent was for the same invention: Held that such evidence was admissible.

A. having a prior patent for the same invention for which *B.* had obtained a patent, entered into a written agreement with *B.* for a valuable consideration, that neither *A.* nor his heirs would thereafter sue or disturb *B.* for a breach of *A.*'s patent-right, but that *B.*, without molestation, might freely act under his patent-right as if *A.*'s had never existed: Held that this agreement gave only a personal licence to *B.*, and conveyed to him no right which he could transfer.

Where a party claiming a patent-right, granted a licence to build and use a patent machine, and in the bill of sale described the machine thus—"one machine for cutting, making and manufacturing combs, like the machines which I use and improve, *and such as I have a patent-right for*:" Held, that the latter clause did not amount to a covenant on the part of the vendor, that he had a valid patent right.

An action on the case will lie for representations made by the defendant, knowing them to be false, as to the validity of a patent-right claimed by him, whereby the plaintiff was induced to purchase.

THIS was an action on the case for fraud in the sale of a patent-right and licence to build, use, and dispose of a machine for manufacturing combs. The declaration was in substance as follows: "That the defendant offered to the plaintiffs to assign and sell to them a patent-right and licence to build, erect, use and improve, and also liberty to dispose of a certain machine for cutting, making and manufacturing combs, in consideration of the sum of 500 dollars to be paid by the plaintiffs to the defendant; and the defendant, that he might induce the plaintiffs to purchase said right and licence, confidently affirmed and declared to the plaintiffs, that he owned and possessed, as the sole proprietor thereof, a good and valid exclusive patent-right for cutting, making and manufacturing combs, and for improvements in machines for making the same, secured by letters patent under the authority and laws of the *United States*; and he further falsely and fraudulently affirmed and declared to the plaintiffs, that the same was of great value, and that he had good right to sell the same, or any part thereof, as and for a good and valid patent-right, and thereby induced the plaintiffs to purchase a pretended right in and to the same; and the plaintiffs giving credit to the said false and fraudulent affirmations of the defendant, paid and secured to be paid, as a consideration for the same, the sum of 500 dollars; and the defendant pretendedly assigned and conveyed to the plaintiffs a right to build, erect, use, and improve a

machine for cutting, making and manufacturing combs, and also the privilege to dispose of the same, under certain limitations and restrictions: Now the plaintiffs say, that the defendant in fact owned and possessed no exclusive patent-right, and had no right to sell the same, nor any part thereof, *for cutting, making and manufacturing combs, but the said [*343] patent-right which the defendant claimed to hold, is, and at the time of said false representations and fraudulent conveyance, was, and ever has been utterly void." The conveyance above specfied was recited in the declaration, and was as follows: Know ye, that I *Abel Pratt* of *Saybrook*, for and in consideration of 500 dollars, secured to be paid to me by *John Bull* and *Ezra Bull* both of said *Saybrook*, do hereby give and grant libety and licence to the said *John* and *Ezra*, or either of them, to build, erect, use and improve, with two hands and no more, one machine for cutting, making and manufacturing combs, like the machines which I use and improve, *and such as I have a patent-right for;* and I do further grant liberty and licence unto the said *John* and *Ezra* to dispose of the right which I have hereby granted them, whenever they are disposed to quit the business, under the same limitations and restrictions as mentioned above, *viz.* that the said machine shall not be used or improved by more than two hands; and the said *John* and *Ezra* shall, in case they dispose of the above mentioned right, take good and sufficient bonds that the secrets of the art or mystery shall never be divulged or disclosed in any way or manner that may be injurious to me, or to any person to whom I have or may dispose of patent-rights, or to whom I have or may grant liberty or licence to use and improve comb-machines. Witness my hand in *Saybrook*, this 27th day of *February*, *A. D.* 1807. *Abel Pratt.*"

The cause was tried at *Middletown*, *December* term, 1814, before *Trumbull*, *Baldwin* and *Ingersoll*, Js.

On the trial, the plaintiffs read in evidence an authenticated copy of a specification of a patent for a machine for making combs, granted to *Phinehas Pratt*, in 1799, and of another specification of a patent for making combs, granted to *Isaac Tryon*, in 1798. The plaintiffs then offered parol evidence to prove, that the machine conveyed by the defendant to them, was the same as that described in the patent of *Phineas Pratt;* and that the latter was the same as that

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described in *Tryon's* patent, and invented by him. The defendant objected, to the admission of any parol evidence to prove these facts. But the court overruled the objection, and admitted the evidence offered.

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The defendant claimed that he had a valid patent-right by *assignment from *Phinehas Pratt*. The plaintiffs contended, that *Phinehas Pratt's* patent was surreptitously obtained from *Tryon*. To repel this charge, and to shew that he had an equitable and legal interest in the machine in question, the defendant offered in evidence the following written instrument: "Received of *Abel Pratt* of *Saybrook*, 300 dollars, in full satisfaction of my suit against him before the circuit court of the *United States* in and for the district of *Connecticut* for breach of patent-rights; and I do hereby release and discharge the same; and in consideration of the premises, I do further agree with said *Pratt*, that neither I, nor my heirs, will ever hereafter sue, or in any manner disturb him, under the pretence of a breach of my patent-right for manufacturing combs, but do agree that without molestation, directly or indirectly, from me, or any under me, or my heirs, *he may freely act under his patent-right as if mine had never existed*. Witness my hand, &c. *Isaac Tryon*."

The court, on the objection of the plaintiffs, rejected this writing as irrelevant.

The charge to the jury was as follows: "If you shall be of opinion from the evidence, that the defendant, to induce the plaintiffs to purchase a licence to use his machine, did affirm that he was the sole owner of the same, and had an exclusive patent-right to use it, and grant licence for its use, and the plaintiffs thereon purchased and paid for a licence; and also find, that the defendant surreptitiously obtained his knowledge, and the model and principles of the machine secured by patent to *Tryon*, and made no new discovery, or essential improvement upon it, which entitled him to secure a right by patent; or that the patent obtained by the defendant was void on any other ground, and that he had no exclusive right; and that the defendant, at the time he made those affirmations, knew that his title was defective and void; and that the plaintiffs have thereby suffered injury and damage; you will find that the defendant is guilty," &c.

The jury found a verdict for the plaintiffs; and the defendant moved for a new trial, on the ground that the decisions

of the court admitting the evidence offered by the plaintiffs, and rejecting that offered by the defendant, and also the charge to the jury were incorrect. The questions arising on this motion were reserved for the consideration and advice of the nine Judges.

**Staples* and *C. Whittelsey*, in support of the motion, contended, 1. That the parol evidence offered to shew that the patent-right sold to the plaintiffs was the same as that described in *Pihnehas Pratt's* patent, and thus shew that the defendant had no letters patent, was improperly admitted; first, because the declaration does not allege that the defendant had no letters patent; secondly, because this can be shewn only by an examination of the books of the patent-office. If the object was to shew that the defendant's letters patent were *void*, the evidence offered was inadmissible, unless such letters, or copies certified according to the laws of the *United States*, were produced. The nature of letters patent cannot be proved by parol; for they are matters of record. At any rate, such evidence ought not to have been received, until the plaintiffs had given the defendant notice to produce his letters patent.

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2. That the writing offered by the defendant, ought to have been received. This grant was a conveyance of *Tryon's* patent so far as it was concurrent with *Phinehas Pratt's* patent. It placed the defendant in the same situation as though there had been but one patent, and that to him. Besides, the evidence was proper to repel the charge of fraud.

3. That as the defendant in his conveyance to the plaintiffs, covenanted that he had a patent-right, the action should have been on the covenant, and not on the case for fraud. The court, therefore, instead of charging the jury that if they found certain facts, their verdict must be for the plaintiff, ought to have told them, that no recovery could be had in this form of action.

N. Smith and *Clarke*, contra, insisted, 1. That the plaintiffs were not bound to resort to the records of the patent-office for evidence to support this action, the gist which is fraud. It was sufficient to shew, that what the defendant claimed under a patent, and sold to the plaintiffs as of value, he well knew was of no value. Any evidence which should tend to establish this point would so far prove the plaintiffs,

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case, and might be properly received. The claim on the part of the defendant, that the plaintiffs must produce a patent, or an authenticated copy from the patent-office, to him, or the person under whom he claims, is absurd; for it would not affect the plaintiffs if no such patent had ever been granted. The defendant claimed that he had a valid patent-right; and the plaintiffs proved that what he so claimed was void and worthless.

2. That the operation of the writing given by *Tryon* to the defendant was only to release the action then pending, to secure the defendant from future suits for breach of the same patent-right, and to give the defendant liberty to act under his own as if *Tryon's* had never existed. This was no conveyance of *Tryon's* patent-right; much less did it authorize the defendant to make an assignment of it.

3. The charge was correct. There is no covenant in the assignment to the plaintiffs, which they could sue upon. Besides, if there was, it would not preclude a recovery in an action on the case for the fraud.

SWIFT, Ch. J. The ground of the plaintiffs, action is, that the defendant sold to them a patent-right, when a previous patent had been given, which secured the same thing. It was not necessary that they should prove, by evidence from the office of the secretary of state, that letters patent had issued to the defendant, or the person from whom he derived his claim. It was sufficient to shew, that a previous patent had been issued to *Tryon*, securing the privilege of using the same machine which the defendant used, and which he had sold to the plaintiffs, whereby it was void. To shew this, the evidence offered was pertinent, and was properly admitted.

The defendant, to shew that he had purchased the patent-right from *Tryon*, offered a certain writing in evidence. This writing contained nothing but a licence to the defendant to use his machine without liability to *Tryon* for violating his patent-right.

The licence was personal, and did not convey to the defendant the power of transferring the right of *Tryon;* nor did it contain any engagement that he would not sue the grantee of the defendant for using his machine. The writing, therefore, was irrelevant, and properly rejected.

The defendant further contended, that here was a sale in writing of the patent-right, with a covenant; and that the plaintiffs can maintain no action but on the written contract.

There was no express covenant in the written contract.

The *gravamen* of the plaintiffs' action is, that the defendant falsely represented to them, that he had a valid patent-right, *by which they were induced to purchase it, when the defendant knew that he had no such patent-right. This is a fraud for which action will lie. (*a*)

In this opinion the other Judges concurred.

New trial not to be granted.

WHITE *against* WILCOX:

IN ERROR.

An action lies at common law against a sheriff or constable for neglect of duty in executing and returning an execution. And in such case, it is not necessary that the writ should be served more than twelve days before the sitting of the court to which it is returnable.

THIS was an action on the case at common law against *Wilcox*, as constable of the town of *Chatham*, for neglect of official duty in executing and returning an execution issued on a judgment of the superior court in the plaintiff's favour. The writ was dated and served the 16th day of *September* 1813, and returned to the *Middlesex* county court on the fourth *Tuesday*, being the 28th day, of the same month.

The defendant pleaded in abatement, that the writ was issued and served only 12 days before the first day of the term. The court decided that this plea was insufficient, and gave judgment *respondeat ouster*.

After final judgment for the plaintiff in the county court, the defendant brought a writ of error in the superior court, assigning as ground of error, first, that the declaration was insufficient, and secondly, that the plea in abatement was sufficient. The superior court reversed the judgment of the county court. The present writ of error was then brought, assigning the general error.

C. Whittlesey, for the plaintiff in error, contended, 1. That an action at common law lies against an officer for neglect of duty in levying and returning an execution. He cited *Huntington* v. *Lathrop*, 1 *Root*, 90. and refered to the constant practice throughout the state.

2. That this being an action at common law brought to the county court, relating to an execution issued by the su-

(*a*) *See Culver v. Webb*, 12 *C. R.* 441. *Pottle & al. v Thomas*, 12 *C. R.* 565.

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perior court, the defendant was not entitled to more than twelve days notice. By the 14th section of the statute under the title of "*Sheriffs*" (*a*) the process there spoken of must be served fourteen days before the court to which it is returnable; but that process is a very different thing from the ordinary process in an action at common law. The 13th section provides for the punishment of delinquent officers, by a fine to the public, and damages to the party aggrieved. The mode of proceeding is by complaint to the court to which the writ or execution is returnable. The whole proceeding is created and governed exclusively by the statute; and to such proceeding alone are the provisions of the 14th section applicable. For the service of writs in actions at common law another statute (*b*) has made adequate provision; and by that statute, the service in this case was good. The words "which process" in the 14th section, so manifestly refer to the proceeding pointed out in the 13th, and to that only, that there is no room left for construction.

If there have been any cases of actions at common law in which it has been decided on the circuits, that fourteen days notice was necessary, they were cases where the execution issued from the same court to which the action was brought.

Clark, for the defendant in error, was about to contend, 1. That the declaration was insufficient, but it being intimated from the bench that actions of this sort had been too often sustained to admit of any doubt on the subject, he proceeded to the principle point, insisting

2. That the defendant in this case was entitled to fourteen days notice. The statute which requires process against officers for neglect of duty with regard to writs and executions to be served fourteen days before the sitting of the court, is a *remedial* statute, and as such is to be construed. The evil under the former law was, that the officer after he was sued had not time to sue the receipt-man before the same court; and the object of the provision in question was to give the officer such an opportunity. Now, in order to advance the remedy, and prevent its being a dead letter, it ought to apply to actions at common law. And such has been the uniform construction given by the superior court. 2 *Swift's Syst.* 189. 2 *Back. Sh.* 220. *Howe* v. *Goodale*,

(*a*) *Tit.* 146. *c.* 1. (*b*) *Tit.* 6. *c.* 1. *s.* 2

Hartford county, *November* term, 1808. In an action for an escape, which was as much an action at common law as *this is, the court held that the case was within the 15th section of this statute. *Benedict* v. *Hoit*, 1 *Root*, 153.

Whether the court from which the execution issued was the same court as that to which the action is brought, or a different one, is wholly immaterial. The construction of the statute must be the same in both cases.

SWIFT, Ch. J. The statute requiring the service of a writ upon a sheriff or constable fourteen days before the sitting of the court to which it is returnable, is confined to actions brought on that statute, and does not extend to suits at common law.

It has been the practice in some parts of the state to give fourteen days notice in suits brought at the common law; and there have been decisions in the superior sanctioning such construction of the statute.(*a*). But this is an erroneous construction, which, as the question now comes before this Court for the first time, it is our duty to correct.

In this opinion the other Judges severally concurred.

Judgment reversed.

(*a*) This practice and construction may be satisfactorily accounted for, by examining the history of the statute. At the revision in 1750, all the public acts then in force relating to the duty of sheriffs and constables were collected and embodied in one act. The 14th section was taken from part of an act passed in *May*, 1744, which was as follows: "*Be it enacted*, &c. that when any action or complaint is brought against any sheriff or constable, for neglect in his service of any writ of execution, or a false or undue return thereon, the writ or complaint brought against such officer, shall be served at least fourteen days before the sitting of the court wherein it is to be tried." *Colony Records*, vol. 7. p. 245. While this act remained in its original form, there could not be a doubt whether its provisions extended to actions at common law as well as to complaints upon the statute. And it did in fact thus remain long enough to establish a practice under it, and to acquire a settled construction. Whether the committee of revision in digesting the materials of the present statute, or the legislature in giving it their sanction, intended to vary the act of 1744 in substance, or only to adapt its phraseology to its new connexions, must, at this day, rest upon conjecture. But if we suppose what is not improbable, that the latter is true, it is easy to account for the continuance of a practice and a course of decisions, which had been previously begun. Still, however, the statute must be read as it now stands. Looking only at its present language, the construction of the text is so obviously just, that the existence of a different one seemed to require some explanation from historical facts. *R.*

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Doan v. Smith.

DOAN *against* SMITH.

A. and *B.* being jointly interested in certain notes executed by *C.*, *A.* appointed *D.* his agent and attorney, with power of substitution, to collect such notes, and to compound with *C.* respecting them. *D.* appointed *E.* his substitute, who received of *C.* in satisfaction of his notes, a note executed by *F.*, and gave up *C.*'s notes to be cancelled. *E.* afterwards collected about one half of *F.*'s note, and took a new note for the balance; and then failed, with the money collected of *F.* in his hands. A small part of the last mentioned note was afterwards paid to *D.* who paid it over to *A.*; and this was all that *A.* received from *C.*'s notes. More than three years after these transactions, *B.* gave a note to *A.* for the amount of *B.*'s interest in *C.*'s notes, to which was annexed a condition, that if the amount of *C.*'s notes were secured to *A.*, or collected by *D.*, within one year from the date, *B.*'s note should be void. Nothing further having taken place in relation to this subject within the year; it was held, in an action on *B.*'s note, that the condition was not fulfilled, and that the plaintiff was entiled to recover.

THIS was an action on a promissory note for 187 dollars 50 cents, dated *April* 12th, 1804. The following condition was annexed to the note at the time of executing it: "Whereas *C. W. Goodrich* of *New-York* has had the collection of the notes *Charles Magill* gave for the sloop *Hebe*, and has, as we suppose, secured 750 dollars on said notes, in *Wilmington*, of which Capt. *Hezekiah Smith* [the defendant] owns one quarter: Now it is agreed, that if the said 750 dollars is secured to me, or collected by said *C. W. Goodrich*, within one year from this date, then the above note is to be null and void; and also, if any part of the above is collected, one fourth part so collected is to apply on the said note." [Signed by the plaintiff.]

The cause was tried at *Middletown*, *December* term, 1814, before *Trumbull*, *Baldwin* and *Ingersoll*, Js.

The following statement of facts was agreed to by the parties. The plaintiff and defendant were jointly interested in *Magill's* notes given for the *Hebe*, the plaintiff's share being three fourths, and the defendant's one fourth. On the 4th of *March*, 1800, the plaintiff delivered these notes to *Goodrich*, and at the same time gave him a letter of attorney, with power of substitution, authorizing him to collect the notes, and to compound and agree with *Magill* respecting them, and to do all other acts regarding them, as fully as the plaintiff himself could do. By virtue of this power of substitution, *Goodrich*, on the 13th of the same month, delivered over the notes to *George Gibbs* of *Wilmington*, *North Carolina*, and invested him, by a letter of attorney, with all the powers which he had himself. On the 30th of *May* fol-

lowing, *Gibbs* received of *Magill*, in full satisfaction of his notes, which were delivered up to be cancelled, a note executed by one *John M'Clellan* for the sum of 784 dollars 25 cents. *M'Clellan* soon afterwards paid *Gibbs* on this note 400 dollars. On the 30th of *April* 1801, *Goodrich* transferred the powers *which he had given *Gibbs* from him to *Isaacs & Bishop* of [*351] *Wilmington*, and authorized them to receive of *Gibbs* the *M'Clellan* note, or the avails thereof. *Gibbs* accordingly delivered over the note, with the payment of 400 dollars indorsed thereon, and gave them his acceptance for 400 dollars, which was duly paid. *Isaacs & Bishop* then gave up *M'Clellan's* note, and took a new note for the balance due on the note given up, amounting to 403 dollars 80 cents. They afterwards failed, with the sum of 400 dollars received from *Gibbs* in their hands. *Goodrich* then ordered *M'Clellan's* note to be delivered to one *Barrett* of *Wilmington* for collection; who collected on it the sum of 37 dollars 95 cents, and paid it over to *Goodrich* in *November* 1801. *Goodrich* has never received any further sum on the note.

Upon these facts the court gave judgment in favour of the defendant; and the plaintiff moved for a new trial. The questions arising on such motion were reserved for the consideration and advice of the nine Judges.

C. Whittelsey, in support of the motion, contended, that the condition annexed to the note had not been performed; and, of course, the plaintiff was entitled to recover. The condition is, that if the amount of *Magill's* notes should be secured to the plaintiff, or collected by *Goodrich*, within one year, the defendant's note should be void. By the statement of the case it appears, that this money has never been *secured* or *collected*, but was lost, except a small sum, long before the date of the defendant's note. The question then is, whether the plaintiff must suffer the whole loss, or whether it must be the joint loss of the parties interested. As to this property, the plaintiff and defendant were partners; the plaintiff being the acting partner, and the defendant the dormant one. If the law of partnership is to govern, the result is obvious. The general principles of justice will lead to the same result. *Goodrich* was the agent of both parties; and his acts are as much the acts of the defendant as of the plaintiff. Suppose the defendant had given no

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note, but had brought an action against the plaintiff for the amount of his interest in *Magill's* notes; could he recover? Does the defendant now stand on more favourable ground for subjecting the plaintiff to the whole loss than he would in that case? It appears, that *Goodrich*, and his substitutes, in

[*352] *1800 and 1801, had made considerable efforts to obtain payment or security; but their efforts proved unsuccessful; and in 1804, the debt was desperate, and ever since has been. Nor is any fault imputable to the plaintiff. He has done nothing, and there has been nothing for him to do, since the execution of the defendant's note in 1804; when *Goodrich* was recognized by both parties as their joint agent.

Staples and *Clarke*, contra, insisted that *Goodrich*, *Gibbs* and *Isaacs & Bishop* were the agents and attorneys of the plaintiff, appointed by him solely; and that they and all their transactions were entirely unknown to the defendant. It follows as a legal inference, that every act of theirs is the same as if it had been the personal act of the plaintiff: that is, the giving up *Magill's* notes, and taking *M'Clellan's*, without the consent or co-operation of the defendant, has the same legal effect as if the plaintiff had done it personally. Now, the legal operation of this transaction was the *security* and *payment* specified in the condition of the defendant's note. The delivering up a note or bill, and receiving another in lieu of it, is equivalant to payment. *Evans* v. *Drummond*, 4 *Esp.* 92. *Anderson* v. *Henshaw*, 2 *Day's Ca.* 272. On the facts stated in the case, the present defendant could sustain *indebitatus assumpsit* against the plaintiff for his share of the *Magill* notes, as for money had and received. *Floyd* v. *Day*, 3 *Mass. Rep.* 403.

Further, the second note of *M'Clellan* for 403 dollars 80 cents must be deemed paid, on the priciple that if a bill is taken in payment, it shall be presumed to be paid, unless the contrary is shewn. *Hebden* v. *Hartsink*, 4 *Esp.* 46. And as to the residue of the money, it was collected by *Isaacs & Bishop*, the agents of the plaintiff, and lost in their hands; which is of the same operation as though it had been collected by the plaintiff himself.

The condition of the note in suit is no ratification of what the plaintiff had done by his agents; for the defendant, at that time, was ignorant of what had been done.

SWIFT, Ch. J. The plaintiff had right to appoint an agent to collect the notes against *Magill;* and when this note was executed, the defendant ratified what had been done by the plaintiff. *Goodrich* is, therefore, to be considered as the *agent of both parties. At this time, all the proceedings respecting the collection of the notes against *Magill* had taken place which now appear; but they were not known to the parties. The condition of the note was, that if the money due from *Magill* were secured to the plaintiff, or collected by *Goodrich*, in one year, the note was to be void. From the facts stated and agreed to by the parties, it appears that the money has never been secured or collected. Of course, the condition has not been complied with; and as *Goodrich* was the agent of both, any act done by him cannot subject the plaintiff to the loss of the whole debt, and operate as a payment of this note.(a)

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The evidence is not sufficient to support the evidence in favour of the defendant, and a new trial ought to be granted.

In this opinion EDMOND, SMITH, BRAINARD and GODDARD, Js. concurred.

TRUMBULL, J. dissented.

BALDWIN, J. also dissented. He expressed his opinion in substance as follows. From the facts in this case it appears that the plaintiff had the controul of *Magill's* notes, in which the defendant had an interest to the amount of the note now in suit; and that the plaintiff, by his agents, gave up and cancelled those notes without any authority from the defendant. This as to the defendant's part is payment, and fulfils the condition. If the ordinary course of collection had failed, the defendant must have shared the loss; but the plaintiff could not cancel or compromise *Magill's* debt, without making himself responsible to the defendant. His agents could have no greater powers. I am, therefore, of opinion that a new trial ought not to be granted.

INGERSOLL, J. was of the same opinion with Judge *Baldwin.*

HOSMER, J. gave no opinion, having been of counsel in the cause.

New trial to be granted.

(a) See *Warren* v. *Powers* & al. 5 *C. R.* 373.

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Barrett v. French.

BARRETT and WIFE *against* FRENCH and FRENCH.

A. with *B.* her husband, in consideration of love and good will, executed a deed purporting to give, grant and confirm certain lands to *C.* and *D.* their sons, and to their heirs, with the usual covenants of seisin and warranty, *reserving to the grantors the use and improvement of the premises during their lives:* Held, that though this deed could not operate as a feoffment, because it purported to convey a freehold *in futuro*, yet it was good as a covenant to stand seised to the use of the grantors during their lives, and after their death, to the use of the grantees and their heirs.

In an action of disseisin by one tenant in common grounding his claim to recover on the common title, his co-tenants are incompetent witnesses for him; because the possession of one tenant in common, recognizing the title of his co-tenants, being in contemplation of law the possession of all, a recovery by the plaintiff will enure to the benefit of all.

The declarations of the grantor, made prior or subsequent to the execution of the deed, not in the presence of the grantee, are inadmissible to invalidate the deed.

To avoid a deed on the ground of duress *per minas*, the threats must be such as to strike with fear a person of common firmness and constancy of mind; duress by mere advice, direction, influence and persuasion being unknown to the law.

THIS was an action of ejectment for a tract of land in *Southbury*. The cause was tried at *New-Haven*, at an adjourned term in *February* 1815, before *Trumbull*, *Baldwin* and *Ingersoll*, Js.

On the trial, the plaintiffs claimed title to the land in question, in right of the wife, as a child and heir at law of *Anna French*. The defendants, who were also children of *Anna French*, claimed under a deed from her and her husband *William French*. This deed, in consideration of love and good will, purported to *give*, *grant* and *confirm* to the defendants, and to their heirs and assigns forever, the land in question, *reserving to the grantors the use and improvement thereof during their natural lives*. It was in other respects in the usual form, containing covenants of seisin and warranty. The plaintiffs stated, that *Anna French*, at the time when the deed purported to be executed, was insane, and incapable, for want of understanding, of executing it; that she stood in great fear of her husband, was intimidated by his threats, and was overpowered and compelled to sign and acknowledge the deed, contrary to her free will and choice. As evidence of this statement, the plaintiffs offered to prove her declarations made before and after the date of the deed, that it was her desire and intention to give her estate to her sons and daughters in equal portions, but that her husband would not permit her so to do; that he declared to her when alone, that she should not give any of her estate to her daughters; that her master (meaning her hus-

band) would not permit her to do as she chose in respect to her property; and that she was obliged to convey the land in question and her other lands to her sons, to keep in peace with her husband. These declarations were not made in the presence of her husband, nor at the time when the deed was executed. [*355] The defendants, therefore, objected to their admission. The court decided that the evidence offered was admissible only for the purpose of shewing Mrs. *French's* state of mind.

In further proof of the statement made by the plaintiffs, they offered the deposition of *Aner Hinman*, one of the daughters of Mrs. *French*, and the testimony of *Joel Pearce*, the husband of another daughter. The defendants objected to the competency of these witnesses, on the ground that they were interested in the judgment which might be rendered in this suit, as a recovery in favour of the plaintiffs would enure to their benefit; for if the deed to the defendants is void, these daughters, togethe rwith the other children, will own the land as tenants in common. The court rejected the evidence.

Before the cause was committed to the jury, the plaintiffs prayed the court to instruct the jury, that the deed to the defendants, by reason of the reservation contained in it, was void, and conveyed no title to the land in question. But the court instructed the jury, that such reservation did not render the deed void, nor in any respect affect its validity. As to the other points the charge was as follows: "It is agreed that *Anna French*, deceased, owned the land in question in fee-simple; and that she died leaving seven surviving children and heirs at law, among whom are the two defendants, and *Mercy*, the wife of *Oliver Barrett*, one of the plaintiffs. If then Mrs. *French* never parted with the property during her life, but died seised and possessed of it, and intestate, the plaintiffs have good title to the same, and ought to recover the seisin and possession of it as tenants in common with the defendants, and the rest of the heirs at law, or those claiming under them. To oppose this claim the defendants produced a deed executed in due form of law by Mrs. *French* in her life, and her husband *William French* the elder, conveying the land in question to the defendants, and their heirs forever; by virtue of which deed the defendants claim the title and seisin of the land in fee, and allege that they are in possession of the same, holding out the plaintiffs and all other persons therefrom, and have right by law so to do. To

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destroy the force and effect of this deed, the plaintiffs allege that it is void in law, and is not the free act and deed of Mrs. *French* for these reasons: first, that at the time of executing it, Mrs. *French*, from the weakness and disability of her mind, was incapable of making any legal contract, or conveyance of her property; secondly, that the deed was not her voluntary act, but obtained from her by coertion of her husband; and thirdly, that the deed was obtained from her by fraud, falsehood and imposition. On these points much testimony has been adduced, which it becomes your province to weigh and determine. The duty of the court is only to direct you as to those principles of law which are to assist you in forming a correct decision. Such mental disabilities in the grantor as will render a deed void in law must exist at the time when it was executed. This may be proved in two ways. If the grantor, previous to the execution of a deed, is proved to have sunk into a state of idiocy, fatuity or settled insanity, and so to have continued; this is full evidence to warrant a jury to determine the deed void, although no direct testimony should be adduced of the state of the grantor's mind at the precise time of its execution. But in case a grantor, when in usual health, is capable of transacting business, and disposing of property, but is subject to fits of lunacy, delirium or derangement, which incapacitate during their access and continuance, it is incumbent on the party who would avoid the deed, to prove that the grantor, at the time of its execution, was actually labouring under such an attack of lunacy or derangement; otherwise the deed cannot be declared void. To this point the testimony of physicians and other persons who saw the grantor at or near the time of executing the deed, and the acknowledgment of the grantor against the validity of the deed, are admissible evidence for the consideration of the jury. On the second ground, that the deed was obtained by coertion, and was not the voluntary deed of the grantor, the court inform you, that the law is so that the only kind of coertion which can render a deed void in a court of law, must amount to duress, by which the grantor is compelled to execute it contrary to his will. No coertion or duress *by imprisonment* is claimed in this case. But where a person *by threats* is so far intimidated and put in fear as to be thereby compelled, contrary to his will, to execute a deed in order to escape from the consequences of these threats, this is called in law *a duress by*

threatenings. But the threats must be such as to strike with fear a person of common firmness and constancy of mind; *and the law knows of no compulsion and duress by mere advice, direction, influence and persuasion. In respect to the third ground, that the deed is void in law because it was obtained by fraud, falsehood and imposition on the grantor, the court are of opinion that no deed can for this reason be adjudged void in law, unless the fraud and imposition be such as induced the grantor to execute it under material and essential misapprehension and mistake as to its nature, contents, legal operation and effect. It is true, that in respect to the probate or disaffirmance of a last will and testament, the law admits of a greater latitude of enquiry, construction and objection; and that voluntary deeds by the ancestor for the purpose of a family settlement of the estate among the heirs, are considered in many respects as in nature of a testamentary disposition of the property. Still the nature of these several instruments must not be confounded. Such deeds of settlement are subject to the same rules of law as are all other deeds, and are considered as instruments of equal solemnity. They cannot be adjudged void in law unless on the same grounds and reasons as would avoid any other voluntary deed of conveyance. If the grantor, at the time of executing the deed on which the defendants rely, was in such a state of derangement, stupidity and mental disability as rendered her incapable of disposing of her property, and executing a valid deed of conveyance; or if you shall be of opinion that she did not execute the deed as her voluntary act, but was, contrary to her will, compelled to execute it, by fear and terror from such coertion and duress as would render her acts void; or that she was deceived by fraud, falsehood and imposition, and executed the deed under an essential and material misapprehension and mistake as to its nature, contents, legal operation and effect; you will find for the plaintiffs to recover the seisin and possession of the demanded premises as tenants in common with the defendants, with damages and costs of suit." The jury found a verdict for the defendants; the plaintiffs moved for a new trial; and the questions arising on such motion were reserved for the consideration and advice of the nine Judges.

N. B. Benedict in support of the motion. 1. The deed

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from *Anna French* to the defendants was void, because it purported to create an estate of freehold to commence *in futuro*. By the common law of *England*, recognized in this state, such an estate cannot be created. 2 *Bl. Comm.* 165. 311. 313. *Barwick's* case, 5 *Co.* 95. *a.* *Bishop* v. *Selleck*, 1 *Day's Ca.* 300. n. (*a*). After the delivery of the deed, the grantor was not in as of a new estate. While she continued to hold, the qualities of it remained as before. She would not be liable for waste; nor would she be responsible to the grantees for the manner in which she might use it. This is not like the case of a person's giving an absolute deed, and then taking back from the grantees a lease for life; for here the grantor retained her interest in the land; it never passed from her; nor did she hold, in any sense, by a title derived from her sons. But if it were such a case, it would make no difference, it being all one transaction, and having but one object in view. It would then be like the case of *Guilford* v. *Woodbury* in *New-Haven* county, in which the court decided, that a man, who purchased an estate of more than 100 dollars in value, and who received an absolute deed of the land, but gave back a mortgage of the same land to secure the purchase money, it being all one transaction, did not acquire a new settlement under his deed.

But it will probably be contended by the defendants, that the deed in question having in it the usual covenants of seisin and warranty, the grantor thereby engaged to stand seized of the land to the use of the grantees, and then the *English* statute of uses being operative here, executed the use, or created a possession in the grantees. To this it may be answered, that *Anna French*, the grantor, was a feme covert at the time of the conveyance, and therefore the covenants in the deed did not bind her; that though by our law, a feme covert may convey away her estate, she can enter into no covenants which will oblige her to secure the title; and that though her husband united with her in the conveyance, the covenants were ineffectual as to him, because he was not seised of the inheritance, and so could not raise any covenant which would operate upon it. From the whole of the deed in question, it is apparent that no trust was intended to be created for the benefit of the grantees out of which an use could be raised.

2. The witnesses offered by the plaintiff were improperly rejected. The objection is, that they were sisters of Mrs. *Barrett*, one of the plaintiffs, and children and heirs at law

of *Anna French;* and if the plaintiffs should succeed in setting aside the conveyance, they would obtain possession under the judgment for all the heirs, who would be tenants in common. To this it may be answered, in the first place, that the plaintiffs would obtain possession for themselves only. The execution would not put upon the land any persons who were not parties to the suit. Secondly, if the plaintiffs should take possession under the judgment, and hold the land as tenants in common with the defendants, it would be of no use to the other owners to enable them to recover; because for that purpose they would be obliged to establish the same facts in regard to the deed as the plaintiffs must now do; and they could make no use of this judgment for an obvious reason, that they are not parties to the suit. Should the defendants prevail in this suit, and afterwards *Pearce* and *Hinman* with their wives should commence an action to recover the same land, the judgment rendered here would be no evidence for them. No right of a public nature, such as a custom pervading a whole manor, or a right of way, is in dispute between the parties. It is admitted, that if the plaintiffs obtain possession, the witnesses may bring their action against more defendants; but their remedy will not be enlarged; their proportion of interest will remain the same.

Further, it is altogether *contingent* whether the plaintiffs will take possession under the judgment. If they should not, but should convey their interest in the property to the defendants, no possible advantage could be obtained by the decision.

3. The declarations of Mrs. *French* made before and after the date of the deed, ought to have been received for the purpose of proving that the deed was not her voluntary act, but was obtained from her by the coertion of her husband. This is the only way of ascertaining the truth in such a case. It is not to be supposed, that threats of violence to the wife from her husband will be made before witnesses. He may terrify her in secret to such a degree that she will not dare to refuse a compliance, or to intimate in his presence that her act is not voluntary. And in this case, there is no danger that a title created by her will be improperly defeated, inasmuch as her declarations were not made with a view to enable her to resume her property, and the

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only effect of the evidence, if admitted, would be to dispose of the property equally among the children.

4. The charge was incorrect as to the nature and degree of coertion necessary, in a case circumstanced like this, to avoid the deed.

N. Smith and *R. M. Sherman*, contra, contended, 1. That the deed of Mrs. *French* and her husband, conveying the land in fee-simple, with a reservation of the use and improvement thereof to themselves during their lives, was effectual. They admitted, that no doctrine of the common law is better established in *England*, than the rule that an estate of freehold cannot be created to commence *in futuro*, but must take effect presently, either in possession or remainder. The reason of this rule is, that by the common law livery of seisin is essential to pass a freehold estate; and livery of seisin, from its nature, must operate immediately. But in this state, livery of seisin is dispensed with, and the freehold of lands becomes vested by a record of the deed in the town-clerk's office.(*a*) There is, therefore, no more reason here, why a freehold estate may not be created to commence at a future period, than there is why a chattel interest may not be thus created.

But if this view of the subject should not be satisfactory, the validity of the deed may be established on another ground. It was a grant from a mother to her sons, in consideration of blood, with a covenant that the grantor was well seised of the premises in fee, and a reservation of the use to the grantor during her life. This conveyance, in legal effect, is a covenant by the grantor to stand seised of the land, to her own use during her life, and after her death to the use of the grantees and their heirs. If the operation of such a conveyance is the same here as in *England*, the grantor became vested with an estate for life in the land, with remainder in fee to the grantees. No freehold was created to commence *in futuro*, but it took effect instantly upon the execution of the deed. The statute 27 *Hen.* 8. had long been in force when our ancestors emigrated to this country, and was considered by them as a part of the common law; our courts, therefore, gave effect to it as a part of our common law. In *Bacon* v. *Taylor*, *Kir.* 368. it was held,

(*a*) Vide *Chalker* v. *Chalker*, ante, 88.

that a use at common law is executed in the *cestui que use*; and such has been the commonly received opinion of judges and counsel in this state. In *Massachusetts* also the statute of uses has been judicially adopted. *Wallis* v. *Wallis*, 4 *Mass. Rep.* 135. It probably has been adopted in the same manner in most of our sister states, although no such act as the 27 *Hen.* 8. is to be found in their statute-books.

The deed in question is not a novelty in this state. The usual mode in which parents make settlements upon their children is by a grant of the premises in fee, reserving the use to themselves during life. Formal covenants to stand seised to uses are also in frequent use.

If there be a doubt whether there are sufficient words in this deed to create a covenant to stand seised, it may be observed, that the word "*grant*" alone is sufficient. It is an abridgement of the word "*warrant*," and of itself imports a covenant. *Doe* d. *Milburn* v. *Salkeld*, *Willes* 673. *Roe* d. *Wilkinson* v. *Tranmarr*, *Willes* 682. In *Osmere* v. *Sheafe*, *Carth.* 307. (S. C. by the name of *Osman* v. *Sheafe*, 3 *Lev.* 370.) the words of the deed were "*give and grant*;" and the court held, that this was a good conveyance by way of covenant to stand seised. Indeed, no position can be clearer than that the words of this deed, according to the *English* decisions, would constitute such a covenant. Are not those decisions applicable here? Whatever difference there is between the *English* law and ours is in favor of their application.

2. The wives of *Pearce* and *Hinman* had an interest in the event of the suit. If the conveyance to the defendants were set aside, all the children of Mrs. *French* would take as heirs at law, and would be tenants in common of the estate. The possession and seisin of one tenant in common being the possession and seisin of all, when the plaintiffs recovered, they would have recovered for the benefit of all. 2 *Cruise's Dig.* 551. *s.* 11. The witnesses might then have their action of account for the rents and profits, or a writ of partition. The witnesses before were disseised; then they would not be.

3. As to the point regarding the declarations of Mrs. *French*, it ought to be remarked, in the first place, that the plaintiffs stand in the same situation as the ancestor under whom they claim. The question then is, whether Mrs.

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French, if she were living, could come in and shew her own declarations, made before and after the date of the deed, but not at the time of its execution, nor in the presence of her husband, or the grantees, to avoid that deed? If she were disinterested, such declarations could not be received, because they were not made under oath; and they are not to be received as confessions, because they are in her favor. Besides, the prattle of this woman, which was offered in evidence, would prove no material point in the case, if it were not otherwise exceptionable.

4. The charge of the court as to the free will of the grantor, is supported by all the authorities from *Bracton* to the writers of the present day. To avoid a deed, the threats must be of a specific kind, *viz.* such as relate to death, mayhem or loss of limb, and must be made under such circumstances as would operate upon a mind of common firmness. *Bract. lib.* 2. *fol.* 16 *b.* 2 *Co. Inst.* 483. 1 *Bla. Comm.* 131. 4 *Cruise's Dig.* 406.

SWIFT, Ch. J. In this case, the plaintiffs claimed as heir at law, in right of the wife, to *Anna French*; and the defendants claimed by deed from said *Anna* and her husband *William French*. The deed is in usual form, with a reservation of the use of the land to the grantors during their natural lives. It is contended, that this is an attempt to create a freehold estate to commence in future, and that the deed is void.

But this mode of conveyance has been practised in this state from a period beyond memory; (1) and no inconvenience

(1) Many proofs of this observation are to be found in our state and town records. It may not be amiss to refer the reader to one or two instances of an early date. The first is a conveyance in consideration of *marriage*, dated *April* 20th, 1644, about eight years only after the establishment of the colony at *Hartford*. *William Lewes*, sen. of *Hartford*, covenanted with *Mary Whitehead* of *Windsor*, in consideration of a marriage to be solemnized between *William Lewes*, jun. and *Mary Hopkins*, daughter of the said *Mary Whitehead*, to give unto his son and the said *Mary*, if *God* dispose of a marriage betwixt them, one moiety of his house and land in *Hartford*, now in his possession, together with one half his household goods, &c. to them and their heirs forever; " and after the natural lives of the said *William Lewes* sen. and *Felix* his now wife, to give unto his son and *Mary* his intended wife, the other moiety of his land in *Hartford*, with the houses built or to be built thereon, in possession and reversion, to them and their heirs forever." *Colony Records*, vol. 1. p. 417. The other instance is a conveyance in consideration of *blood*, by a deed dated *August*,

has resulted from it. This constant and immemorial usage is sufficient to make it a part of our common law; and a deed of this description may be deemed one of the common assurances of real estate. Nor was this intended to innovate upon the common law, or impugn the maxim that a freehold cannot be created to commence in future. That originated from the circumstance that livery of seisin was essential to constitute a freehold estate. But prior to the emigration of our ancestors from *England*, methods had been devised to supersede the necessity of conforming to that regulation. It is well known, that to avoid forfeitures, it was a common expedient to vest the fee of lands in one, to the use of another; and that to counteract this, the statute of the 27 *Hen.* 8. was passed, declaring that the fee should vest in him to whom the use was granted. It then became only necessary to convey to the use of one, and the statute transferred the use into possession, and the title passed without livery of seisin. Among the various modes devised was a *covenant to stand seised to uses*. This is where a man seised of lands in fee, covenants, in consideration of blood or marriage, to stand seised of the same to the use of his child, wife, or some other relation.

In the construction of deeds, courts adopted the liberal principle, that greater consideration was to be had for the

1st, 1673. The words of the grant are as follows: "This writing witnesseth, that I, *Thomas Curtice*, of *Wethersfield*, in the county of *Hartford*, for and in consideration of the natural love and affection which I have and bear unto my son *Samuel Curtice* of the same town and place, have given, granted, assigned, set over and confirmed, and do by these presents fully, clearly and absolutely give, grant, assign, set over and confirm unto my said son *Samuel Curtice*, his heirs, executors and assigns forever, all the estate, right, title, use, property, possession, claim and demand whatsoever, I the said *Thomas Curtice* have, or in time to come might or should have, in or to a dwelling-house, and land three acres and an half, bounded, &c.; and also that barn which standeth within the land thereunto appertaining, containing forty perches, more or less, bounded, &c.; and also one piece of upland lying in the little west-field, containing twelve acres three roods; and thirty perches, bounded, &c.; to have and to hold the said dwelling-house, home-lot, barn and that rood of land, and the twelve acres three roods, and thirty perches of upland, with all the profits, privileges and appurtenances to the same belonging, immediately after my decease, and the decease of my now wife *Elizabeth*, unto my said son *Samuel Curtice*, his heirs, executors and assigns forever, and to his and their only proper use and behoof forever, my own life, and the life of my wife as aforesaid only reserved in the premises." Then follows a covenant of warranty. *Colony Records*, vol. 1. p. 436. *R.*

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passing of the estate, which is the substance of the deed, than the manner how, which is the shadow; and that a deed should never be laid aside as void, if by any construction it could be made good. Thus, a grant by one seised in fee of lands to his brother to be holden after the death of the grantor, with a covenant that he was well seised in fee, and that it should be lawful for the grantee to enter after the grantor's death, and peaceably to hold the same, has been construed to be a covenant to stand seised to the use of the grantee, and pass to the estate. *Roe* d. *Wilkinson* v. *Tranmarr*, *Willes*, 682. So in the state of *Massachusetts*, it has been held, that a deed from father to son to have and to hold after the death of the grantor, with a covenant that he was seised in fee, and that he would warrant and defend the premises after his decease to the grantee, his heirs and assigns, was to be considered in law as a covenant by the grantor to stand seised to his own use during his life, and after his decease to the use of the grantee and his heirs. *Wallis* v. *Wallis*, 4 *Mass. Rep.* 135.

The deed in question was from a mother, with the assent of her husband, to her sons, expressed to be for the consideration of love and good will; and though it cannot operate as a feoffment, because it is calculated to create a freehold estate after the death of the grantor, yet being between relations, in consideration of blood, it may be deemed to be a covenant on the part of the grantor with her husband to stand seised to their use during life, and after their decease to the use of the grantees and their heirs; and then the legal effect of the deed is, that the grantor was tenant for life, and that the grantees had an estate in remainder in fee simple.

The plaintiffs offered two witnesses, who were tenants in common with them, if they had title, to shew that the deed was not valid; who were rejected by the court as interested in the event of the suit.

Where one tenant in common brings an action of disseisin, and grounds his claim to recover on the common title, he recovers for the benefit of the whole; the possession of one tenant in common recognizing the title of his co-tenants, is, in legal consideration, the possession of all. Of course, if a tenant in common in such action obtains possession of the land, his co-tenants become likewise possessed. In this case, the

witnessess were called upon to testify in support of their own claim of title to the land; and if the plaintiffs had recovered, they would, with the plaintiffs, have obtained possession of the land of which they were then disseised, and could have maintained an action of partition, or of account for the rents of the land. They were, therefore, directly interested in the event of the suit, and were properly excluded.

It has uniformly been dicided, that the declarations of the grantor, when the grantee is not present, prior or subsequent to the execution of the deed, cannot be admitted in evidence to invalidate the deed.

The principles of law relating to the case were correctly stated by the court in their charge to the jury.

In this opinion the Judges severally concurred.

New trial not to be granted.

Regulæ Generales.

Party to furnish three copies of motion or writ of error for use of the Court. An abridgment may be substituted, on obtaining an order of Court for that purpose. Counsel to furnish three copies of their briefs for use of the Court.

Ordered, that the party who shall move for a new trial in any case which shall be reserved for the opinion of the Judges of the Supreme Court of Errors, and the plaintiff in a writ of error which shall be brought to that Court, shall furnish three copies at least of such motion or writ of error, and lodge the same with the clerk thereof for the use of the Court, at or before the second opening of the Court: Unless the party moving for a new trial shall obtain an order of the Court which shall allow such motion, dispensing with the same, and substituting in lieu thereof an abridgment of the case approved by said Court; and like order by the Judge who shall sign said writ of error; in which cases lodging said abridgment shall be a compliance with this rule.

Ordered, that it shall be the duty of the counsel on both sides, in every case to be argued before the Judges of the Supreme Court of Errors, to furnish for their use three copies of a brief containing a statement of the points on which they rely, and of the authorities intended to be used in support of them. (*a*)

(*a*) These rules are soon to be superceded, by a new set of rules, now in the hands of the Chief Justice for revision which will appear in the 18th vol. *Conn. R.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT,

IN NOVEMBER TERM, 1815.*

SHEPARD *against* HAWLEY and LOOMIS.

Where a note or bill is made payable to two or more persons, and by them jointly indorsed in their individual names, each is entitled to non-payment. Therefore an acknowledgment of due notice by one will lay no foundation for an action against all.

Where the defence to an action on note was fraud in obtaining it, the defendant stated, that the note was given as security for a debt due from him to the plaintiff in lieu of certain accepted drafts, which the plaintiff was to give up on receiving the note, but which he retained for several months afterwards, and then, having received a payment thereon from the accepter, and given him a receipt in full, gave them up with the acceptances erased; held that proof of these facts was relevant to establish the defence.

THIS was an action of *assumpsit* against the defendants as indorsors of a promissory note. The cause was tried at *Hartford*, *February* term 1815, before *Trumbull*, *Baldwin*, and *Ingersoll*, Js.

On the trial, it appeared that the note was made payable to *Hawley* and *Loomis*, and by them indorsed. The first ground of defence was, want of notice of non-payment. The only evidence of notice was an acknowledgment at the bottom of the note in these words: "Due notice was given me

* EDMOND and INGERSOLL, Js. were absent during the whole of this term, from indisposition.

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as indorsor on this note. *A. Loomis.*" The defendants contended, that notice to *Loomis* alone was not sufficient. But the court instructed the jury, that notice to one indorser on a note executed to two or more jointly, and indorsed by all, is legal notice to all the indorsers; and that the acknowledgment by one only that he has received such notice, is good evidence of the fact.

The other ground of defence was fraud in obtaining the note. The defendants stated, that this was one of two notes put into the plaintiff's hands by *Loomis* for the payment of a debt which he owed the plaintiff, and for which the plaintiff then held *Loomis's* drafts on *Reuben Ward* of *New-York*, which had been accepted; that the understanding between *Loomis* and the plaintiff was, that the plaintiff, on reception of the notes, should deliver up to *Loomis* the drafts, with the acceptances on them; that at the request of the plaintiff, *Loomis*, in pursuance of such agreement, sent the notes to the plaintiff at *New-Haven*, who, on the 31st of *August* 1813, received them on said terms but omitted to deliver the drafts to *Loomis* at that time; that *Loomis* applied for the notes and drafts several times afterwards to the plaintiff at *Hartford*, who refused and neglected to deliver them up until the 27th of *November* 1813, when he sent the drafts to *Loomis* with the acceptances erased; previous to which the plaintiff had received from *Ward* a payment on the drafts and given him a receipt in full without the consent or knowledge of *Loomis;* and that *Loomis* refused to accept the drafts when so sent, and had never received them. To prove this statement, the defendants offered the deposition of *Ward*, and the testimony of sundry competent witnesses. The plaintiff objected to the admission of the evidence offered on the ground of irrelevancy. The court decided, that the same was irrelevant, and excluded it, except so far as it respected the payment of any sum of money on the drafts, which ought to be applied on the note.

The plaintiff having obtained a verdict, the defendants moved for a new trial on both grounds; and the questions arising on such motion were reserved for the consideration and and advice of the nine Judges.

E. Huntington in support of the motion. 1. The general rule of law is, that one joint-tenant, or person jointly inter-

ested with another in any property, can of himself do no act which shall bind the other, unless it be *for his benefit*. *Rud* v. *Tucker*, *Cro. Eliz.* 803. *Right* d. *Fisher & al.* v. *Cuthell*, 5 *East* 494, 498. 3 *Bac. Abr.* 690. (*Wils.* edit.) *Chitty on Bills* 32. By the law merchant, one partner may accept or indorse for the firm such bills as concern the partnership; but even among partners the act of one on his private account, though in the partnership name, will not bind the other. In this case, there is no pretence of a partnership. The note being payable to *Hawley* and *Loomis*, both indorsed it, each in his own name, and on his own account. In this act, one neither had, nor claimed to have, authority to bind the other. Why, then, should notice to one affect the other? If *Loomis* could not, by his indorsement, bind *Hawley*, could he make an acknowledgment of notice which should bind him? But, it is to be remarked, that *Loomis* does not profess to acknowledge notice for *Hawley*. He says, due notice was given to *him as indorser;* not to him and *Hawley* as indorsers. Now, admitting that the defendants as to this transaction were partners, and that one partner may acknowledge notice for the rest; yet here was an acknowledgment made by one partner in his individual capacity, and not in the partnership name, nor purporting to be on the partnership account. If the charge to the jury in this case be law, one of the indorsers may at any time, by his own fraudulent act, render the other liable on an indorsement from which he has long been discharged by the laches of the holder. Not a *dictum* is to be found in support of such a doctrine.

2. The facts stated by the defendants on the trial, and offered to be proved, would shew that the plaintiff became possessed of the note under conditions which he had not complied with, and consequently that he had no right of action upon it. The facts being relevant, the evidence to support them ought to have been received.

T. S. Williams and *J. Trumbull*, contra, 1. relied upon *Carvick* v. *Vickery*, *Doug.* 653, 4. n. as an authority to shew, that joint payees and indorsers of a bill are partners as to that transaction, and are liable to be treated as such. Notice to one member of a firm is notice to the whole partnership. *Alderson* v. *Pope*, 1 *Campb.* 404. n. So, if seve-

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ral are jointly bound to do an act upon notice to them, notice to one is sufficient. 3 *Com. Dig. tit.* Condition. (L. 9.) 5. *Com. Dig. tit* Pleader. (C. 71.) So, where several are jointly liable to an attorney for business done, the delivery of a copy of the bill to one of them is sufficient as to all. *Crowder & al.* v. *Shee*, 1 *Campb.* 437. In analogy to the doctrine for which we contend, it is settled that an acknowledgment by one joint debtor of a debt barred by the statute of limitations, takes the case out of the statute. *Whitcomb* v. *Whiting*, *Doug.* 652. *Smith* v. *Ludlow*, 6 *Johns.* 267. 2 *Wms. Saund.* 64. *b.* n.

2. If the notes were valid originally,—not vitiated by fraud or illegal consideration,—the right of property became vested by the delivery to the plaintiff, and the subsequent transaction could not avoid them. If the drafts have been retained by the plaintiff contrary to his agreement with *Loomis*, he is liable to *Loomis;* but his right of action on the notes is unimpaired.

SWIFT, Ch. J. In this case, it is contended, that the joint indorsement of a negotiable note, payable to two or more promisees, constitutes the indorsers partners in that transaction, and that notice of the non-payment of the note to one, is notice to both, as in the case of partners. The only authority to this point is the case of *Carvick* v. *Vickery*, *Doug.* 653, 4. n. It is true, there the court of King's Bench granted a new trial on that ground; but on the trial of the cause, Lord *Mansfield* permitted the defendant to prove the usage, and the jury declared they knew the usage to be otherwise, and found a verdict accordingly. This case, then, cannot be considered as an authority; and we are at liberty to settle the question on principle.

Where there are two or more promisees in a negotiable note, it is necessary that each should indorse it, in order to transfer it; but such joint act, from the nature of the thing, can no more constitute them partners than any other joint transaction. The legal effect of such indorsement is to make them all liable to the indorsee, on failure of the payment of the note, if due notice is given them; but, there is no reason for saying that such an act amounts to an agreement that they will be liable as co-partners with respect to notice; for this is to extend the terms and nature of the contract. Such

construction ought not to be given to a contract, if it be unnecessary; for it may subject the parties to inconvenience. In the case of partners, as all have a joint interest, notice to one is sufficient; for he may withdraw the effects of the company, and pursue all the remedies to which they are entitled; but where they are merely joint indorsers, no copartnership actually existing, each may have a separate interest, both as to withdrawing effects, and pursuing legal remedies. The consequence then might be, that by giving notice to one indorser only, the others might lose their claims against those that are liable to them. Cases also may occur where the liability on the indorsement has been discharged by want of due notice, or some other laches, yet one of the indorsers, who may be a bankrupt, will have it in his power, by his acknowledgment of notice, to revive such extinguished liability, without the knowledge or consent of those who are thus rendered chargeable. This can easily be avoided by requiring notice to be given to all the joint indorsers to whom the holder of the note intends to look; and then every one can protect his separate rights.

The defendants also contended, that the plaintiff obtained the note by fraud, and offered testimony to prove the fact, which the court rejected as irrelevant. The facts stated constituted a fraud; the evidence offered was pertinent to prove them; and it ought to have been admitted.

In this opinion TRUMBULL, SMITH, BRAINARD, and BALDWIN, Js. severally concurred.

GODDARD, J. I am of opinion that the direction to the jury was wrong. If the principle laid down is correct, it must be applied to all cases where by the law merchant notice of the dishonour or non-payment of a bill of exchange or promissory note is necessary. This rule, if adopted, it is obvious, may open a door to fraud, and create or continue responsibilities, which parties never meant to assume. A negotiable bill or note having been dishonoured, and due notice having been given, a right of action has accrued to the holder, and he may then hold the note or bill for an indefinite time without enforcing his demand by suit. *A.* and *B.* are joint promisees in a note. They indorse it to C. Payment is refused, when at maturity. *A.*, who is the friend of

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C., is embarrassed for funds. Notice is given to him, but no notice is given to *B.*, who is responsible. *C.* is content to suffer his money to remain on interest; and out of favour to *A.*, he neglects to collect his money until *A.* fails. He then commences his suit against *B.* without notice, and collects his debt after a lapse of years, during which time *B.* has supposed that the bill or note had been paid at maturity. *B.* may have had funds in the hands of the drawee to pay his part of the bill or note, which he has failed to collect, supposing they had been applied to the payment of this bill or note. Prior indorsers, who would have been liable to him, have not been notified, and he has lost his claim on them. Or if no notice was ever in fact given, and he had been discharged from the claim, it is in the power of *A.*, who has become bankrupt, to revive or create a claim against him, by acknowledging that notice had been given to him. A principle so dangerous ought not to be adopted, unless settled rules of law imperiously demand it.

I have not been able to find any decision which supports such a principle. I find principles opposed to it.

What is the object of requiring notice? To enable the drawer or indorser to withdraw his effects, which, in contemplation of law, are in the hands of the drawee; to enable the indorser of the note to obtain payment of the maker; to notify others who may be liable to him. It is always presumed that the maker of a bill has effects in the drawee's hands, and that the indorser has given value for it, and that each may sustain a loss by want of notice. It is on this principle that notice is required. *Bickerdike* v. *Bollman*, 1 *Term Rep.* 410. *Vere & al.* v. *Lewis & al.* 3 *Term Rep.* 182. *Whitfield* v. *Savage*, 2 *Bos. & Pull.* 280, 281. *Chitty on Bills*, 162. In the case of *French* against the *Bank of Columbia*, reported in 4 *Cranch*, 154. Chief Justice *Marshall*, in delivering the opinion of the court, says, "Why is it that notice must immediately be given to the drawer that his bill is dishonoured by the drawee? It is because he is presumed to have effects in the hands of the drawee, in consequence of which the drawee ought to pay the bill, and that he may sustain an injury by acting on the presumption that the bill is actually paid. The law requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury which may result from the laches

of the holder of the bill. To this security, then, it would seem, the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule." It is apparent that none of these ends of notice are attained by notice to one only of two or more joint indorsers or drawers.

But the principle contended for is attempted to be maintained by considering joint indorsers or drawers as partners *quoad hoc.*

To constitute a partnership, there must be either an agreement to share in profit and loss, or two or more must hold themselves out to the world as partners. The case in question does not state the defendants to be partners by any such agreement. Have they held themselves out to the world as partners? There is nothing on the face of this note, or the indorsement, which has any tendency to hold out to the world such an idea; and I believe it is against the universal sense of the mercantile world so to consider them. Partners usually transact business under some name. This note is payable to *Asahel Loomis* and *Samuel Hawley*, and by *Asahel Loomis* and *Samuel Hawley* indorsed.

In cases of *actual* partnerships, it is said, that he who draws, accepts or indorses a bill for himself or partner, should always express that he does so for himself and partner, or it will be doubtful whether his partner is bound. *Chitty on Bills* 35. and the following cases there cited: *Pinkney* v. *Hall*, 1 *Salk.* 126. S. C. 1 *Ld. Raym.* 175. *Smith* v. *Jerves & al.*, 2 *Ld. Raym.* 1484. *Carvick* v. *Vickery*, *Doug.* 653. *The King* v. *Wilkinson*, 7 *Term Rep.* 156. *Meux & al.* v. *Humphry*, 8 *Term Rep.* 25. *Lepine & al.* v. *Bayley*, 8 *Term Rep.* 325. If several persons employ one factor, and he draws a bill on them all, the acceptance of one will not bind the rest. *Bull. N. P.* 279. *Chitty on Bills* 34, 5.

But the case of *Carvick* v. *Vickery*, *Doug.* 653. n. is relied on as an authority to support this case. In that case, *John Maydwell* and his son, *John Maydwell*, drew a bill on *Abraham Vickery*, payable to their own order, and the son only indorsed it thus: "*Jn. Maydwell.*" In an action by the indorsee against the acceptor, the court of *King's Bench* decided, that the indorsement was good, and said, that it was better that the father should suffer by the act of the son, than that the world, who would collect the condition and relation of the parties to each other from the face of the bill itself,

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should be deceived by it; and Lord *Mansfield*, to maintain the position he had taken, denominated the promisees in that case partners to that particular transaction, although the case stated that they had no other connexion in business than the drawing of that bill.

But it is remarkable, that in the trial of that very case afterwards, Lord *Mansfield*, upon objection, admitted evidence to prove, that by the universal custom and usage of merchants and bankers, such indorsement was held to be bad; and the jury *una voce* said they wanted no evidence to prove that; they knew it to be as stated; and gave a verdict for the defendant.

Let it be remarked, that the rule established by the court was for the benefit of trade, founded on the supposed law merchant, and opposed to the general doctrine of the common law that one tenant of a personal chattel can do no act to affect his co-tenant.

But it is said, that admitting one joint promisee cannot indorse for himself and the other, yet that having done so, he shall be responsible for all the consequences of this last joint act; and on this ground notice to one ought to be considered as notice to both. I answer, that if one cannot indorse for both by the law merchant, they are in no sense partners. They are not supposed to have drawn upon the credit of joint funds; they have not held themselves out to the world as partners; the holder has not been deceived; their acts have had no tendency to deceive the world. The holder will know, that they may draw or indorse upon the credit of separate funds, and will perceive the importance of notice to each to enable each to secure himself in relation to others, and to have all the security to which he is entitled by law.

But it is said, that if a promise is made to several persons to pay on request, a request to one is sufficient. So notice to one member of a firm is notice to all. So where by statute an attorney is obliged to present his bill one month before suit, several underwriters being holden to pay, presenting to one is sufficient to maintain his action. In all these cases, it is presumed that if one person liable to pay money is called on to do so, he will notify all who are liable to contribute a part of it; and if this is not done, they are

only subject to the inconvenience of a suit for money without being first notified.

Cases arising under the statute of limitations have also been cited, where an acknowledgment of one joint promisor has been held sufficient to take a case out of the operation of the statute as to him and his joint promisor. These cases are not analogous. Slight evidence has been held sufficient to operate as a waiver of that statute, where courts have been satisfied that the debt had never been paid; and whether they have gone too far or not, it is not now necessary to enquire. They do not apply to the case under consideration.

I am of opinion, that it will be most conducive to justice, most consonant to mercantile usage, and the principles of law requiring notice, that all who may be affected by it, should have notice of the dishonor of a bill or note; and that in this case, a new trial ought to be granted. (*a*)

HOSMER, J. gave no opinion, having been counsel in the cause.

New trial to be granted.

WOLCOTT *against* COLEMAN.

After verdict and judgment for the plaintiff, on the issue of *not guilty*, in an action by *C.* one of two covenantees, against *W.* the covenantor, for fraudulently taking and pleading a discharge from *T.* the other covenantee, the defendant brought a petition for a new trial on the ground of *mispleading* when he had a good defence, consisting of a general deed of release from *C.* to *T.*, who was a joint tort-feasor with *W.* It appeared, that *C.*, wishing to obtain the deposition of *T.* to be used in said suit against *W.* then about to be commenced, agreed with *T.* to give him a release of all demands to take effect after the final determination of said suit; and accordingly wrote, signed and sealed such release, and left it upon the table with other papers; that *T.* wrote his deposition, and then took up and carried away the release; and that about two months afterwards, *T.* made oath to this deposition, and lodged the release in the hands of *B.*, there to remain until the final determination of said suit, and then to be delivered by *B.* to *T.* Held that such release was an *escrow*, lodged in the hands of *B.* to hold until the final determination of said suit, and then to deliver it to *T.*, from which delivery alone it would take effect; and, of course, *W.* could never avail himself of it by way of defence to said suit.

THIS was a petition for a new trial on the ground of mispleading. On the trial of the original action, (reported on a motion for a new trial *ante* 285.) the present petitioner, then defendant, pleaded *not guilty*, and a verdict was given

(*a*) *See Shepard v. Hall, ante*, 229.

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against him. He now states, that he missed his plea; as he had a good ground of defence, which, if pleaded, would have saved him from the demand of the plaintiff in that action. *Taylor* was equally liable with *Wolcott* to *Coleman* for such demand, being equally concerned with him in the transaction. *Coleman* knowing this applied to *Taylor*, on the 11th of *September*, 1812, and claimed from him the whole amount of damages sustained in consequence of his giving and *Wolcott's* receiving the discharge mentioned in the declaration; which *Taylor* accordingly paid; and *Coleman*, in consideration thereof, executed and delivered to *Taylor* a general release and discharge.

The respondent in his answer denied the truth of the facts stated in the petition. The parties then proceeded to a hearing before the superior court; but the evidence being all in writing, it was agreed that the case should be reserved with the exhibits for the advice of the nine Judges.

There were two depositions of *Taylor*. The first was as follows: "On the 19th of *November* 1814, I called on *Isaac C. Bates*, Esq. of *Northampton*, and informed him, that I had understood, from good authority, that the motion for a new trial in the case of *William Coleman* against *Alexander Wolcott* had been decided against *Wolcott*, and that according to the terms of the agreement between *Coleman* and myself, a release of all demands from *Coleman* to me, dated *September* 11th, 1812, and which was left by me in the hands of *Bates* as an escrow to abide the event of the trial between *Coleman* and *Wolcott*, ought then to be delivered to me. *Bates* replied to me, that he had been instructed by *Coelman* not to let that release go into his hands without consulting him; and that he could not comply until he had consulted *Coleman*, which he engaged to do immediately; and if *Coleman* had no objections, he would hand the discharge to me. He has not since handed it over to me, or said any thing to me on the subject. It is in the hand-writing of *Coleman*, and under seal. Its contents are better described, as well as the terms upon which it was to rest in *Bates'* hands, by the receipt which he gave me at the time it was left in his hands, than I could otherwise do from memory; and for that purpose I annex it to this deposition. It was left with *Bates*, at the request of *Coleman*, sometime after it was executed and delivered to me, to prevent its operation in bar of *Coleman's* action against *Wolcott*." *Bates'* receipt. "Received of *John Taylor*, a discharge from *Coleman* to him of all actions, causes of action, or demands whatsoever, either in law or

equity, dated *September* 11th, 1812; which discharge I am by agreement to retain in my hands until the termination of said *Coleman's* suit against *Alexander Wolcott* in contemplation at the time said discharge was signed, and now actually commenced, as an escrow, to have no operation whatsoever; and at the termination of said suit, I am to deliver the same discharge to said *Taylor*, whatever may be the event thereof, to have from that time full force, operation and effect. *November* 23rd, 1812. *Isaac C. Bates.*"

Taylor's second deposition relates to the same transaction. It begins the history farther back, and contains some particulars omitted in the other. The following is extracted.

"In the month of *September* 1812, *Coleman* applied to me for a deposition in his suit against *Wolcott*. I objected to it, and offered *Coleman*, if he would not press me to give a deposition, that I would neither give one to *Wolcott*, nor appear to testify in court. But I yielded to his importunity, upon a promise on his part to give me a discharge in full of all claims either in law or equity. Such a discharge was written by *Coleman*, and either handed to me by him, or laid on the table, to be taken as soon as the deposition which then only wanted being sworn to, was completed. I went to dine, and was to meet *Coleman* at 8 o'clock at the same place. I went there, and tarried about half an hour, and then went away, *Coleman* not appearing as I expected. The discharge I had in my possession when I left the room where the deposition was prepared: and it continued in my possession until *November* 23rd, 1812. I never had any condition named to me of its being placed in the hands of a third person, or of having it lie as an escrow, until that time; when I swore to the deposition."

Bates's deposition. "On the 11th of *September* 1812, *Coleman* was at *Northampton* for the purpose of procuring the depositions of sundry persons, and among others the deposition of *Taylor* to be used in his suit against *Wolcott*. *Coleman* and *Taylor* came to my office where they had a conversation in relation to that cause, and the facts to which it was supposed *Taylor* could testify, and the necessity of obtaining his deposition to disclose and prove them. *Taylor* expressed a reluctance at giving his deposition, or in any way meddling with said suit, and a wish to be freed as well from the present embarrassment as the consequences

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of the transaction out of which that suit grew; and remarked, either that *Wolcott* had given, or had engaged to give him, a discharge or release therefrom. *Coleman* observed, that whatever might be the event of that suit, he had no disposition to resort to him, *Taylor*, for any further remedy; that his reliance was upon *Wolcott;* and that he had no objection to give him, *Taylor*, a release, if he desired it, to take effect after the final determination of his suit against *Wolcott;* and thereupon he wrote, and signed and sealed a release, which I attested, in the words and figures following, *viz.* 'Know all men by these presents, that I *William Coleman* of *New-York*, do hereby, for myself, my heirs, executors and administrators, remise, release and forever quit-claim unto *John Taylor* of *Northampton*, his heirs, executors, or administrators, all actions, causes of actions or demands whatsoever, either in law or equity, which against the said *John Taylor* I ever had, or now have, by reason of any act or cause from the beginning of the world to this day. In witness whereof, I have hereunto set my hand and seal this 11th of *September*, 1812.

Attest. *I. C. Bates.* *William Coleman.*' [L. S.]

This deed of release lay upon the table among other papers until the close of the conversation, when *Taylor* read it, and put it in his pocket. Some time afterwards, I called upon *Taylor*, in behalf of *Coleman*, and told him he ought not to retain that deed, nor to have taken it; that I would see it delivered to him whenever the event happened upon which it was to take effect; that as it was intended as an escrow, it was obviously proper it should remain in some other hands than his own; to which he readily assented, and delivered me the deed. And to guard against uncertainty and accident, I proposed to give, and did give him a receipt or memorandum in writing, expressing, as nearly as I can recollect, the original intention of *Coleman* and *Taylor* in relation to said deed, and my engagement to carry that intention into effect. I then took the deed, and now retain it, to be delivered to *Taylor* whenever said suit shall be finally settled, and not before; for which deed no consideration was paid or suggested at the time it was made, or at any other time, to my knowledge; nor were any damages, on any account whatever, claimed or demanded by *Coleman* of *Taylor;* but

sad deed was, on the part of *Coleman*, a gratuitous act, done under the circumstances I have herein before detailed."

There were two other depositions proving that *Taylor* read *Bates'* deposition before it was sworn to; and being asked whether it was correct, said that it was, except one word, which *Bates*, not conceiving it to be material, immediately erased.

It appeared, that *Wolcott's* counsel advised him to try his cause on the plea of *not guilty*, though they were apprized of *Coleman's* deed of release to *Taylor*.

Daggett and *N. Smith* for the petitioner. If it appear that *Wolcott* had a good defence, which he failed to make use of from having missed his plea, a new trial will be granted. The superior and county courts are expressly authorized by statute, (*a*) to grant new trials of causes that shall come before them, for *mispleading*. This is a provision of law essential to the due administration of justice where double pleading is not allowed. (*b*)

In support of the general proposition, that *Wolcott* had a good defence, they contended, 1. That a release to one of two trespassers or tort-feasors is a release of the trespass or tort, and shall enure to the benefit of both. If *Coleman* had received of *Taylor* all the damage which he claims to have sustained, he must clearly be barred of a recovery against *Wolcott*.

2. That a release *by deed* is conclusive evidence of a full satisfaction. 5 *Co.* 117. *b.* 118. *a. Co. Litt.* 212. *b.*

3. That this release operated from the delivery to *Taylor* on the 11th of *September* 1812. From that time until the 23d of *November* 1812, it was in *Taylor's* hands, and was unconditional. It took effect immediately; and its oparation could not be defeated as to *Wolcott* by any subsequent transaction between *Coleman* and *Taylor*.

4. That if the release had been delivered to *Bates* in the first instance, and had never been in *Taylor's* hands; yet as it was to be delivered to *Taylor* on the happening of an event which must certainly take place, and *Bates* was a trustee of it for this purpose. it was the absolute deed of *Coleman*, and

(*a*) *Tit.* 6. *c.* 1. *s.* 13.

(*b*) Our statute allowing double pleading, was passed after the trial of this cause in the superior court.

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will be considered after the event as taking effect, by relation, from the time of the first delivery. *Belden* v. *Carter*, 4 *Day's Ca.* 66.

5. That the tort complained of was the joint act of *Wolcott* and *Taylor*.

R. M. Sherman and *Staples* for the respondent, contended, 1. That where a party has chosen his defence, and gone to trial upon facts adapted to that defence, he is not entitled to a new trial, on the ground that he might have made out a different defence by other facts. A new trial for *mispleading* is to be granted only where the form of pleading is not adapted to the facts constituting the defence. It is no ground for a new trial that a party has missed his *defence*. *Vernon & al.* v. *Hankey & al.*, 2 *Term Rep.* 113, 125. 6 *Bac. Abr.* 671. (*Wils.* edit.)

2. That where the verdict is agreeable to the equity and justice of the case, the court will not grant a new trial to let the party into a *technical* defence. *Wilkinson* v. *Payne*, 4 *Term Rep.* 468, 470. *Edmondson* v. *Machell*, 2 *Term Rep.* 4. *Smith* v. *Page*, 2 *Salk.* 644. *Deerly* v. *Duchess of Mazarine*, 2 *Salk.* 646. *King* v. *Alberton*, 3 *Salk.* 361. *Gist* v. *Mason & al.*, 1 *Term Rep.* 84. *Cox* v. *Kitchin*, 1 *Bos. & Pull.* 338. *Berton* v. *Thompson*, 2 *Burr.* 664. The petitioner admits that he was guilty of the fraud alleged against him; that he has got *Coleman's* money, and refuses to pay it over. A new trial would only tend to defeat justice.

3. That the petitioner has not shewn a good defence. First, because the release was never *delivered* by *Coleman*, and therefore it is not his *deed*. *Shep. Touch.* 58. n. [1]. Secondly, because it was at most an *escrow*, which takes effect only from the second delivery. *Perk.* 60. *pl.* 137. *Shep. Touch.* 58, 59. 2 *Mass. Rep.* 452. The event on which the release was to be delivered over, has not taken place; this petition being a continuation of the suit. Thirdly, because admitting the deed to have been absolute, or to have become so, yet it does not discharge *Wolcott*. He and *Taylor* were not joint tort-feasors. The gist of the action against *Wolcott* is *pleading* the discharge. *Taylor* might have acted innocently. At any rate, it does not appear that he was guilty of fraud, or that *Coleman* could sustain any action against him.

SWIFT, Ch. J. The question in this case is, whether the discharge from *Coleman* to *Taylor* was *delivered*, or whether it was an *escrow*. It appears from the evidence stated, that *Coleman* agreed with *Taylor* to give him a release of all demands to take effect after the final termination of his suit against *Wolcott;* and that *Taylor* agreed to give his deposition to be used in that suit. *Coleman* executed the release, and laid it on the table. *Taylor* completed his deposition, excepting making oath to the truth of it and then took the release without delivery to him. At a subsequent period, *Taylor*, according to the original agreement with *Coleman*, completed and made oath to his deposition, and then consented that the release should be lodged in the hands of *I. C. Bates*, Esq. there to remain till the final termination of the suit of *Coleman* against *Wolcott*, and then to be delivered by *Bates* to *Taylor*. The legal effect of this transaction was, that the release was an escrow, to take effect on the happening of a certain event, and was loged in the hands of *Bates* to hold till that event should happen, and then he was to deliver it to *Taylor;* from which delivery it was to take effect. The event on which the release was to take effect and be delivered, was the termination of the suit of *Coleman* against *Wolcott;* but this very petition proves that this suit has not terminated, and is now pending. If a new trial should be granted because *Coleman* had given this release to *Taylor*, it would not be competent for *Wolcott* to plead it in bar of the suit; for it was to have no operation, and was not to be delivered, till the termination of the suit. The event then not having happened on which it was to take effect, the release continues to be an escrow in the hands of *Bates*, without any legal operation whatever; of course, *Wolcott* could not avail himself of it, if a new trial was to be granted.

In this opinion the other Judges severally concurred, except GODDARD and HOSMER, Js. who declined acting, having been concerned as counsel in the cause.

New trial not to be granted.

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CHALKER and others *against* DICKINSON and others.

Chalker v. Dickinson.

The right of a fishery in a navigable river is *prima facie* public; and though it may be exclusively vested in an individual by grant from the state, or by prescription, yet such exclusive right cannot be acquired merely by an uninterrupted possession and use for fifteen years.

In order to gain such exclusive right by possession and use in any case, the possession and use must be exclusive as well as uninterrupted.

IN an action of trespass, the plaintiffs declared that they, and those under whom they claimed, for more than twenty years past, had used, occupied, possessed and enjoyed the valuable fishery for shad and other fish in *Connecticut* river, between *Fort-Point* and *Pipestave-Point* in the town of *Saybrook;* which fishery had been thus occupied and enjoyed by the plaintiffs to the entire exclusion of all the citizens of this state, and all other persons; and that the defendants, well knowing these facts, and intending to injure the plaintiffs, and deprive them of the use and profits of their fishery, did, with force and arms, and without right, wilfully disturb, vex and hinder the plaintiffs in fishing at said place, and in the free and full enjoyment of their right and privilege of the fishery aforesaid, and did with like force enter upon said fishing-place within the plaintiffs' limits, and draw a seine over the same, and take and carry away a great quantity of fish, &c.; by means whereof the plaintiffs were greatly injured and disturbed in their said right and privilege, and prevented from taking with their own seine said fish so caught by the defendants, and their fishery was greatly injured in value by the doings of the defendants, &c.

The cause was tried at *Middletown*, *December* term 1814, before *Trumbull*, *Baldwin*, and *Ingersoll*, Js.

On the trial, the plaintiffs claimed the free, several and exclusive right of fishery in *Connecticut* river from a point near the fort in *Saybrook* down to *Pipestave-Point*, extending in front to the channel, by an uninterrupted possession and use for more than fifteen years. The defendants contended, that the right claimed could not be gained by such possession and use. On this point, the court instructed the jury, that an exclusive right in the fishery in question might be acquired by an uninterrupted possession and use during a period of more than fifteen years; and left the question of fact, whether the plaintiffs, and those under whom they claim, had enjoyed such an undisturbed possession and use, to the jury to determine from the evidence. A verdict

being found for the plaintiffs, the defendants moved for a new trial on the ground of a mis-direction; and the question of law arising *on such motion was reserved for the consideration and advice of the nine Judges.

N. Smith and *R. M. Sherman*, in support of the motion, contended that an exclusive right of fishery in a navigable river could be acquired by an individual in one of two modes only, *viz.* by an express grant from the public, or by prescription, which presumes a grant; and that no such right could be gained in analogy to the statute of limitations, by the uninterrupted enjoyment for fifteen years of a privilege which was common to him and all other citizens of the state.

Daggett and *Staples*, contra. They cited *Pitkin* v. *Olmstead*, 1 *Root*, 217. *Weld* v. *Hornby*, 7 *East* 195. *Bealy* v. *Shaw & al.* 6 *East* 215. *Peake's Ev.* 294. *Sherwood* v. *Burr*, *Day's Ca.* 244.

SWIFT, Ch. J. In this case, the court directed the jury, that an exclusive right of fishery could be acquired in a navigable river by an uninterrupted possession and use for more than fifteen years.

The right of fishery by the common law in the ocean, in arms of the sea, and navigable rivers below high water mark, is common to all, and the state only can grant an exclusive right. In rivers not navigable, the adjoining proprietors own the fishery, and can grant a right of fishing. *Connecticut* river being navigable in the place where this right of fishery is claimed, it could be acquired only in such manner as a public right can be appropriated or transferred. By the common law, no right could be acquired by use, possession and occupation, unless it had been from time immemorial; and this is called a right by prescription. In *England*, by statute 21 *Jac.* 1. *c* 16. *s.* 1. it was enacted, that no person that has any right or title of entry, shall enter but within twenty years next after his right or title shall accrue. Courts extended the principle of this statute to similar cases within the same reason. A like statute was at an early period enacted in this country, limiting the right of entry to fifteen years; and courts extended the principle to similar cases. Hence it has become an established rule of the common law, that easements may be acquired by uninterrupted

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possession for fifteen years; such as rights of way, flowing another's land, diverting water courses, fisheries and the like. But in every case of this description, the use and possession in the first instance are a usurpation of the rights of some other person; and an action would always lie till the fifteen years were elapsed. It is considered, that no man would permit another thus to occupy and possess his right without a grant; and in all these cases the law presumes there has been a grant; for the idea is not entertained that a man by being a trespasser for fifteen years can by the common law acquire a right. But as the grant depends upon a presumption of law, it is always competent to rebut it by proof of such circumstances as shew no grant could have been made. The general rule, then, is, that certain rights may be acquired against individuals by fifteen years uninterrupted possession and use, unanswered and unexplained. 2 *Wm. Saund.* 175. n. (2).

But the case under consideration is of a very different description. The fishery in *Connecticut* river below high water mark is common to all the citizens; the use and possession of the plaintiffs was lawful; and the mere lawful exercise of a common right for fifteen years has never been considered as conferring an exclusive right. This case, therefore, does not compare with the cases where a right is acquired by uninterrupted use and possession.

Further, it does not appear that the plaintiffs were the *sole* possessors and occupiers of this fishery. They might have used it without interruption for the term of fifteen years; and so might others. At this rate, several persons might, at the same time, be acquiring an exclusive right to the same fishery; an absurdity that demonstrates the fallacy of the principle contended for.

The public may grant an exclusive right of fishery in a navigable river; and if it may be granted, it may be prescribed for. Such a right shall never be presumed, but the contrary. It is however capable of being proved. In this case, the plaintiffs relied on the presumption arising from uninterrupted use and possession for fifteen years. This would be presuming, not proving, the prescriptive right. If he claims such right, he is bound to *prove* it. *Carter & al.* v. *Murcot & al.* 4 *Burr.* 2162. (*a*)

(*a*) *See Lay* v. *King*, 5 *Day*, 72. *Adams* v. *Pease & al.*, 2 *C. R.* 431.

In this opinion the other Judges severally concurred, except HOSMER, J. who declined acting, having been of counsel in the cause.

New trial to be granted.

WINCHELL *against* ALLEN:

IN ERROR.

An executor is not liable in foreign attachment for a legacy in his hands.

THIS was a *scire-facias* in a process of foreign attachmet against *Israel Allen*, as the debtor, &c. of *Ezekiel Allen* brought to the county court of *Hartford* county.

On the trial, it appeared that *Reuben Allen* bequeathed to *Ezekiel Allen* "one hundred dollars, and his said *Reuben's* wearing apparel, to be paid in grain or neat cattle in two years from his said *Reuben's* decease;" and appointed the defendant his executor. *Reuben Allen* died on the 4th of *February* 1810. The process of foreign attachment, which was regularly pursued, was commenced and a copy left in service with the defendant, on the 5th of *February*, 1812. The defendant had previously accepted his appointment, and caused the will to be duly proved and approved. The estate was solvent; and the time limited by the court of probate for its settlement was one year from the 28th of *February* 1810. No demand of the legacy had been made by the legatee. On these facts the court instructed the jury, that the defendant was in contemplation of law the debtor, &c. of *Ezekiel Allen*, and liable to pay the plaintiff's claim out of his own estate. To this charge the defendant filed a bill of exceptions; and after a verdict and judgment for the plaintiff, brought a writ of error in the superior court. The judgment of the county court was there reversed; whereupon the original plaintiff brought the present writ of error.

H. Huntington, and *Edwards*, for the plaintiff in error, contended, that as the legacy in question had become payable before the defendant was served with process, he was then the debtor and trustee of *Ezekiel Allen*, and was of course liable on the *scire facias*.

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T. S. Williams and *Scarborough*, for the defendant in error, insisted that this legacy in the hands of the executor was not subject to the process of foreign attachment; and that if it could be under any circumstances, it was not in this case, because no demand had been made by the legatee, and no assent given by the executor. As the legatee could not sue for the legacy, the creditor of the legatee cannot recover the amount of it by this process. They urged the embarrassment and delay in the settlement of estates which the doctrine contended for would produce. The executor would be obliged to settle his account in a manner different from that prescribed by law; and much confusion would result from this change of forum and encroachment upon the exclusive jurisdiction of courts of probate. They cited *Barnes* v. *Treat & al.* 7 *Mass. Rep.* 271. *Brooks* v. *Cook & al.* 8 *Mass. Rep.* 246. *Wilder* v. *Baily & al.* 3 *Mass. Rep.* 289. *Chealy & al.* v. *Brewer & al.* 7 *Mass. Rep.* 259.

SWIFT, Ch. J. An executor cannot be considered as the debtor of a legatee. The claim is against the testator or his estate; and the executor is merely the representative of the deceased. There cannot be a debt due from the executor within the meaning of the statute. Nor can a person, like an executor, deriving his authority from the law, and bound to perform it according to the rules prescribed by law, be considered as a trustee, agent, attorney or factor within the statute; and this for the best of reasons. In the common case of agents, trustees and factors, the creditor can easily place himself in the shoes of the absconding debtor, and prosecute his claim without inconvenience to the garnishee. But such would not be the case with an executor. It would not only embarrass and delay the settlement of estates, but would often draw them from courts of probate, where they ought to be settled, before the courts of common law, who would have no power to adjust and settle his accounts. Such an interference might produce much inconvenience, and prevent the executor from executing his office as the law directs.(*a*)

I am of opinion that the judgment ought to be affirmed.

In this opinion the other Judges severally concurred.

Judgment affirmed.

(*a*) *See Stanton, Admx. v. Holmes*, 4 *Day*, 87.

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Phelps v. Foot.

PHELPS *against* FOOT:

IN ERROR.

In an action by the holder of a promissory note against the indorser, the defendant offered in evidence a writing signed by the plaintiff acknowledging an agreement between them that the plaintiff should sue out a special writ against the maker, and direct the officer to secure the debt, if possible: Held that such evidence was admissible.

In such action a deed conveying land to the maker of the note, recorded while the execution obtained against him on the note was in force, is relevant and material evidence for the defendant; and may be proved by a copy from the register's office, the original not being in the possession or power of the party. Where it became material on the trial of a cause to shew want of due diligence in the service of a former attachment, it was held that evidence of answers given by strangers to enquiries made by the officer respecting the debtor, was admissible, such answers being part of the *res gesta*.

This was an action of *assumpsit* against *Foot* as indorser of a promissory note. The declaration, after alleging the execution and indorsement of the note, proceeded to state, that a suit was immediately commenced against one *Stocking*, the maker, by attachment; that *Stocking* avoided process so that the officer could not take him, nor could he find property other than a small article of the value of one cent; that a recovery was had before the court of common pleas in *Hampshire* county in *Massachusetts* for the amount of the note and interest; and that execution was taken out and put into the hands of a deputy-sheriff, by whom it was regularly returned *non est inventus*.

On the trial before the county court, it was claimed by the defendant's counsel, that the officer who served the writ of attachment acted negligently and unfaithfully, and that the body of *Stocking* might, at any time between the date and return of the writ, have been attached. To disprove this statement, the plaintiff produced the officer as a witness, who testified, that he went to *Stocking's* place of residence in *Southwick*, to serve the writ, called at the shop which he occupied, and there found a man and a boy at work, of whom he enquired after *Stocking*; that they informed him that *Stocking* was at his house, a few rods distant from the shop; that he immediately went to the house, and enquired of a woman who, he learned, was *Stocking's* wife, where *Stocking* was, and at the same time mentioned to her his business; and that Mrs. *Stocking* informed him that her husband was then at his shop at work, the place where the officer had just

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before made enquiry. To this evidence, so far as it respects the answers of the man and the boy at the shop, and of Mrs. *Stocking* at the house, the counsel for the defendant objected, and urged that it could not by law be received. The court were of that opinion, and excluded it accordingly.

The defendant, on his part, offered in evidence the following writing signed by the plaintiff: "*Southwick, August* 11th, 1812. This may certify, that I *Seth Phelps*, to save expense of depositions, do agree, that I was to have the writ against *Amasa Stocking*, on a note indorsed to me by Col. *Enos Foot*, special, and to direct the officer to secure the debt, if he could, or if possible. *Seth Phelps*." The plaintiff objected to the admission of this evidence; but the court overruled the objection, and admitted it.

The defendant also offered in evidence a certain paper, purporting to be a copy of a deed of bargain and sale, conveying to *Stocking* in fee thirty acres of land in the town of *Russel* in the county of *Hampshire*, executed in the presence of two subscribing witnesses, and recorded in the register's office while the execution against *Stocking* was in force. On this paper were two certificates in these words: "Received, *August* 3d, 1811, and registered from the original, per *Edward Pyncheon*, Register." "*Hampshire*, viz. *Springfield, August* 19th, 1812. I certify, that the foregoing is a true copy of record, examined by *Edward Pyncheon*, Register." No other evidence was offered to prove that the paper was a copy of an original deed. The plaintiff objected to its admission, first, on the ground that it was irrelevant; and secondly, that if relevant, the original ought to be produced, and its execution proved by the subscribing witnesses. The court decided that the copy offered was legal evidence, and permitted it to be read to the jury.

A verdict being found for the defendant, the plaintiff filed his bill of exceptions, and thereupon brought a writ of error in the superior court. The judgment of the county court was there affirmed. The present writ of error was then brought.

T. S. Williams for the plaintiff. 1. The testimony of the officer who had the execution against *Stocking* ought to have been received. The question on the trial was, whether the officer had done his duty. What his duty required in that particular case depended upon the information which he had received. What was said to the officer while he was making

search constitutes a part of the transaction to be proved as much as what he said and did. The answers given to the enquiries made at the shop and at the house were offered as facts, *and not as mere evidence of facts. These facts were material as to the question of negligence. If the defendant could shew that the officer had been informed where *Stocking* was, and had neglected to make search in pursuance of such information, it would establish the defence. The plaintiff ought then to be permitted to shew what information the officer did receive, and how he acted in pursuance of it.

2. The writing given in evidence on the trial, was nothing more than an admission on the part of the plaintiff, that the fact therein mentioned could be proved. The question as to the relevancy of that fact is still open, as much as though it had been proved by witnesses before the court. Now, if witnesses were offered to prove a parol agreement between the indorser and indorsee of a note, extending or restraining, or in any way varying the effect of the indorsement, it is clear that such evidence would be inadmissible. If it was in pursuance of the contract implied by law in the indorsement, it was irrelevant, and could only mislead.

3. The copy of a deed to *Stocking*, if it were not otherwise exceptionable, was irrelevant; for the indorsee was not bound to attach *land*. But aside from its irrelevancy, this copy was not properly authenticated. Our courts cannot know, without proof, what the office of a "register" in *Massachusetts* is; what are his powers and duties; nor what credit is due to his certificates. Still less can they know, that *Edward Pyncheon* is, or ever was, register. It does not appear that the certificate in question was given under oath. Further, there was no proof of the execution of the original deed; nor was any reason shewn why the subscribing witnesses might not be had.

Mitchell for the defendant. 1. It was not necessary, in order to satisfy either the contract implied by the indorsement, or the express agreement of *Phelps*, that the officer should take the body of *Stocking*. It follows, that all the evidence relative to the officer's search for the body, and the information that he had, was irrelevant. Again, the information received by the officer devolved no new duty upon him. An officer is not bound to go to every place where he is told that a debtor is, unless it be first shewn that the

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debtor is in fact there. The duty to make search is independent of the information received. *Cui bono* then introduce what was said at the shop and at the house?

2. As to the admission of the writing signed by *Phelps*. First, it does not appear that the agreement was by parol; and if it was necessary in order to its validity that it should be in writing, and made at the time of the indorsement, it will be presumed that such was the fact. The acknowledgment of *Phelps* evidently regards a valid agreement. Secondly, it did not vary the contract implied in the blank indorsement. Thirdly, if it did, the parties could legally vary such contract.

3. As to *Stocking's* deed. First, it was relevant to shew that *security* might have been obtained. It shewed that *Stocking* owned land which might have been taken on the execution. Secondly, the copy was admissible, as the original was not in the power or possession of the party. The only objection made on the trial to the copy was, that the original ought to be produced, and proved by the subscribing witnesses. This court will not look at any other points than such as are presented by the bill of exceptions.

SWIFT, Ch. J. In this case sundry questions arise upon the bill of exceptions.

It was contended, that the defendant should not prove a certain agreement at the time of the indorsement of the note, that a writ special should be issued, and the debt secured, if possible. But the plaintiff has acknowledged such agreement; and it does not appear but that it was reduced to writing at the time of the indorsement, and it must now be presumed to be legal and valid. It was therefore admissible evidence.

As to the admission of the copy of the deed; though by law a sworn copy ought to be produced, and a certified copy from a town clerk is not admissible, yet no objection was made on that account; and it does not appear that there was not proper evidence of the copy. The objection apparent on the record is, that the original ought to have been produced, and not a copy; but the original was not in the power of the party; of course, a copy was the best evidence, and was admissible.

The deed was relevant evidence; for by the above agreement the plaintiff was bound to secure the debt, if possible;

he was bound to secure it by taking land, if in his power. It was pertinent, therefore, to prove the maker of the note was the owner of land so that it could be taken; and as it appears the deed was recorded while the execution was in force, so that the plantiff might have levied upon it, this evidence was material.

The court refused to admit the officer, who served the writ of attachment issued on the indorsed note, to testify to the answers that were given to his enquiries when he was making search after the maker of the note. It was a material point on the trial whether the officer made due search and enquiry upon the attachment. It was his duty to make enquiry at all proper places, and to make search wherever it was probable he might be found. To shew that he had done this, it was necessary that he should state the enquiries and the answers made, and that he had made search accordingly. Such answers are a part of the transaction; they are facts, and do not stand on the footing of hearsay evidence. On this ground, I am of opinion that the judgment complained of is erroneous.

In this opinion the other Judges severally concurred.

Judgment reversed.

HUNTLEY and others *against* DAVIS:

IN ERROR.

In a *qui tam* prosecution on the statue for punishing disorders committed in the night season (*tit.* 119), where the damage claimed exceeded seventy dollars, it was held that the defendant was entitled to an appeal from the county to the superior court.

THIS was a *qui tam* prosecution on the statute "to prevent unreasonable night walking, and for punishing disorders committed in the night season,"(*a*) against *Huntley* and others, alleging that on the night of the 1st of *January* 1815, the defendants entered upon the complainant's land, and with force and arms, and against the peace, cut, girdled and destroyed forty-eight apple trees, and two pear trees, then and there growing, of the value of five hundred dollars, and to the damage of the complainant five hundred dollars.

(*a*) *Tit.* 119.

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The defendants were tried before the county court on the plea of *not guilty*; and the jury found a verdict against them, with one hundred and fifty dollars damages. The court accepted the verdict, and also inflicted a fine on the defendants of twelve dollars payable to the county treasurer. The defendants then moved for liberty to appeal the cause to the superior court. This motion was denied. The defendants filed a bill of exceptions, and then brought a writ of error in the superior court, which was continued to the next term, for the purpose of taking the advice of the nine Judges in the mean time on the question of law.

Peters, for the plaintiffs in error, relied upon the words of the statute (*a*) as conclusive in favor of the right of appeal. This case is very distinguishable from *Coit* v. *Geer*, *Kirby* 269. which was an action *qui tam* for theft, and the appeal was not sustained; for there the defendant had been acquitted of a crime to which the law has annexed a corporal punishment, and the effect of the appeal would be to put him in jeopardy twice for the same offence. Here the Judgment is only for the payment of a sum of money; and it is the defendant himself who moves for the appeal.

W. Perkins, for the defendant in error, contended that if a right of appeal existed in this case, it belonged equally to both parties; and if the complainant could appeal, the defendant might be put in jeopardy twice, in opposition to a fundamental principle of law. In *England*, there is no instance of a new trial where the party has been proceeded against *criminaliter*. 5 *Com. Dig.* 493. (*Rose's* edit.) *Anon.* 3 *Salk.* 362. *Rex* v. *Silverton*, 1 *Wils.* 298. *Fonereau* v. ——, 3 *Wils.* 59. *Mattison*, q. t. v. *Allanson*, 2 *Stra.* 1238. In *Dormer* v. *Walker*, before the superior court in *Tolland* county, which was a prosecution on this statute, the question came up whether the court could send out the jury to reconsider their verdict; and it was decided that they could not.

SWIFT, Ch. J. The question in this case is, whether a *qui tam* prosecution on the statute for punishing disorders committed in the night season is appealable from the county to the superior court? The statute respecting appeals enacts,

(*a*) *Tit.* 6. *c.* 1. *s.* 15.

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that in any action brought to, heard and tried by any county court, wherein the title of land is in question, or wherein the value of the debt, damage or matter in dispute shall exceed the value of seventy dollars, except it be on bond or note vouched by two witnesses, either party may appeal to the superior court. (*a*) These words are sufficiently comprehensive to include every possible action that can be brought by parties. The present case is an action wherein the damage or matter in dispute exceeds the value of seventy dollars. It is unnecessary to decide whether this action be civil, criminal, or partaking of the nature of both; for it can make no difference as to the right of appeal. It is, at any rate, an action between two parties, wherein the matter in dispute exceeds seventy dollars: it comes within the express words of the statute, and is appealable. Though there has been some doubt respecting the construction of this statute, some variety in the practice, and contradiction in the decisions; yet it is too explicit to be misunderstood, and too imperative to be disobeyed. For this construction there is the strongest reason. It is inconsistent that in ordinary actions appeals should be allowed, and be prohibited in *qui tam* prosecutions on statutes, where the demand in damages may be equally important in point of sum, and the matter in dispute equally interesting in point of character.

I would advise the superior court that there is error in the judgment complained of.

In this opinion the other Judges severally concurred.

Judgment to be reversed.

PRESTON *against* GRIFFIN.

It is not a badge of fraud, that all a debtor's estate has been disposed of at different times, by deeds, and the levy of executions.

THIS was an action of ejectment for a piece of land in *Newtown*. The cause was tried at *Danbury September* 1815, before *Trumbull*, *Baldwin* and *Ingersoll*, Js.

On the trial, the plaintiff claimed title to the land under a deed from the administrators of *Richard Nichols*, deceased, dated the 24th of *August* 1809, who, it was admitted, originally owned the land. The defendant claimed, that he was

(*a*) *Tit.* 6. *c.* 1. *s.* 15.

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well seised, by virtue of a deed to him from *Zalmon Tousey*, jun., dated the 2d of *February* 1802; and a prior deed to *Tousey* from *Philo Norton*, dated the 25th of *August*, 1800; and a judgment in favour of *Norton* against *Richard Nichols*, *Austin Nichols*, and *Daniel Nichols* upon which an execution had been taken out and levied upon the land in question. The plaintiff contended, that this judgment was fraudulent and void; and whether it was so or not, was the principal question of fact on the trial. In support of the plaintiff's claim, several other judgments and levies of executions in favour of *Norton*, and of *Norton* and others, against *Richard Nichols*, and deeds from the latter to the former, whereby the lands of *Richard Nichols* were, at different times, specifically set off and conveyed, were adduced in evidence. There was also evidence to shew, that early in *January* 1798, it was proposed by *Norton* to *Richard*, *Austin* and *Daniel Nichols*, and agreed to by them, that they should go off and leave the country, and he would undertake to settle their business for them, and *save them a good property;* that *Richard* and *Austin Nichols* should convey some of their lands to *Norton* by deed, and he should cover the residue with executions on suits already commenced; that in pursuance of this arrangement, deeds were executed to *Norton*, on the 8th of *January* 1798, by *Richard* and *Austin Nichols*, who immediately afterwards shut themselves up until some time in *March* following, when all three absconded; and that judgments to a large amount were suffered by default, and executions taken out, which were levied upon the residue of their lands. The defendant insisted, that the jury ought to be instructed, that they could not infer that the judgment in question was fraudulent from such other judgments. The court charged the jury, that no other fraudulent transactions between the same parties are evidence that the transaction in question is also fraudulent; but these judgments, levies and deeds are admitted only for the purpose of shewing that *Richard Nichols* had conveyed away, and suffered himself to be divested of, his whole property, and that the same passed chiefly into the hands of *Norton;* because when a debtor conveys away his whole property, this is one of the badges of fraud. The jury found a verdict for the plaintiff; and the defendant moved for a new trial on the ground of misdirection. The question of law arising

on this motion was reserved for the consideration and advice of the nine Judges.

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N. Smith, in support of the motion.

Daggett and *Sherman* contra.

SWIFT, Ch. J. I am of opinion that a new trial ought to be granted, because the court charged the jury, that deeds and conveyances of all a man's estate specifically described, and executed at different times are a badge of fraud.

It has been decided in cases where conveyances of property are challenged as fraudulent, that it is not competent to prove that other conveyances, made at other and different times, were fraudulent, to raise a presumption that the sale in question was fraudulent; but conveyances of other property made at the same time with that in question may be given in evidence in order to shew a combination to dispose of the property with a fraudulent intent; or to shew that a *bona fide* consideration was not paid for the whole; or it may be shewn, that any one of these contemporaneous conveyances was fraudulent, to shew, or raise a presumption, that the conveyance in question was fraudulent. Where general words are made use of in a conveyance; as where a man sells all his property; so where a man specifically conveys all his estate at one and the same time; these are presumptive evidence of a fraudulent intent; for it can hardly be supposed, that a man would strip himself of all his property, but that his intent was to put it all beyond the reach of his creditors, with a view to derive a benefit to himself. But where a man at different times is making specific dispositions of his property, though he may in the end dispose of the whole, yet this has never been deemed a badge of fraud.

On this ground I would advise a new trial.

In this opinion TRUMBULL, SMITH, BRAINARD, GODDARD, and HOSMER, Js. concurred.

BALDWIN, J. I agree generally in the principles advanced by the Chief Judge; but I differ in the application of them to the case before us. From the statement, as present-

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ed to us, though imperfect, I think it evidently appears to have been claimed by the plaintiff, that in *January* 1798, with intent to defraud their creditors, *Richard*, *Austin*, and *Daniel Nichols* agreed with *Philo Norton*, that they should convey all their property in trust to him, and abscond; that this was to be effected by deeds and judgments; that in pursuance of that combination, on the eve of bankruptcy and absconding, deeds were executed on the 8th of *January*, and afterwards judgments suffered to pass by default, to a large amount, with a view to the same object; which deeds, records of judgments and executions levied, were in proof on the trial. In this view of the case, and with such claim of proof, the court charged the jury, that "when a debtor conveys away his whole property, that is one of the badges of fraud." As an abstract proposition, I agree that this would not be correct; but when taken in connexion with the facts claimed to have been proved in this case, I think it was. It surely can make no difference in principle, whether a man on the eve of bankruptcy conveys at the same time, and to the same person, all his property, by one, or by several deeds. The effect will be the same; and the presumption of law will equally apply, that he meant to deceive his creditors, and derive a future benefit to himself. The statement does not warrant the supposition that the conveyances were at different times; and it was claimed that the judgments were in pursuance of the agreement upon which the deeds were given. Conveyances thus made, have, I think, a badge of fraud, and as such ought to be weighed by the jury, in support of the claim of a fraudulent combination, and of a fraudulent transaction.

The charge on this point is not expressed with all the caution it might have been; but in connexion with the statement, it must be understood as having reference to a case so circumstanced. I am therefore of opinion, we ought not on that ground to grant a new trial.

New trial to be granted.

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M'Lean *against* M'Lean.

M'Lean v. M'Lean.

In an action for money had and received to the plaintiff's use, it is no defence that the defendant has a distinct claim against the plaintiff for an equal or a greater sum, unless there has been an agreement between the parties to apply the latter claim in satisfaction of the former.

THIS was an action of *indebitatus assumpsit* for money had and received to the plaintiff's use. The cause was tried at *Danbury*, *September* term 1815, before *Trumbull*, *Baldwin*, and *Ingersoll*, Js.

On the trial it appeared, that the plaintiff and defendant, and their mother *Deborah M'Lean*, were executors of the last will of *John M'Lean*, deceased. Evidence was introduced to shew, that the estate of the deceased was settled, and the administration accounts of the executors were closed; that long after such settlement, *viz.* in *December* 1808, there was discovered in the city of *New-York* a loan-office certificate of 550 dollars, together with 107 dollars 25 cents interest, belonging to the estate, which had not been inventoried; that the plaintiff and defendant, only surviving sons of the deceased, were each entitled, under a residuary clause in the will, to two tenths of all the personal estate of the deceased not specifically devised, after payment of debts, the daughters of the deceased being entitled to the other six tenths; that the legatees soon afterwards agreed, that this certificate should not be inventoried, but should be sold, and the avails divided among them, and that the defendant should go to *New-York* as their agent for this purpose; that the defendant accordingly went to *New-York*, and sold the certificate, and paid over to all the legatees, except the plaintiff, their respective proportions of the avails, but had never paid to the plaintiff his share; to recover which is the object of this action. There was also evidence to shew, that before the discovery of the certificate the legatees received their several portions of the personal estate of the deceased, and gave their receipts in full for the same; that the time limited by the court of probate for the exhibition of claims against the estate expired on the 15th of *November* 1805; that on the 2d of that month, the legatees agreed that distribution of the personal estate of the deceased should be made immediately, and in order to secure the executors against such claims as might be exhibited within the time limited by the court of probate, by creditors in this state, or afterwards by creditors out of the state other than such as were then

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known to the executors, bonds were given by the daughters; that there was then known to be out-standing and unpaid, a claim in favour of *Franklin*, *Robinson* & Co., of the city of *New-York*, of 500 dollars and interest thereon, which claim was for a sum of money borrowed of them by the deceased in his lifetime for the use of the plaintiff, who had received the money before the death of the testator, and had given him a note for the amount; that this note came into the hands of the plaintiff as executor; and that the plaintiff, at the time of the division of the personal estate, agreed that he would pay this debt, as it was contracted for his benefit, and as security for such payment, delivered over his note to the other executors. The defendant claimed and offered evidence to prove, that the executors had been sued on the claim in favour of *Franklin*, *Robinson* & Co., and, the plaintiff having become a bankrupt, the defendant had been compelled to pay the same, and had no estate in his hands of the deceased or of the plaintiff, by which he could reimburse himself, except the sum demanded in this action. He therefore contended, that the court ought to instruct the jury, that although they should find that the estate was settled as before stated, and that the legacy had become the property of the legatees, and that the defendant received the money on the certificate as agent to the legatees, and not as executor; yet if they should find the other facts to be as claimed by the defendant, they should find that the defendant had no money in his hands, which *ex æquo et bono* could be demanded by the plaintiff, and on that ground return a verdict in the defendant's favour. The court, however, charged the jury, that if they should be of opinion that the executors had unconditionally given up all claim to the certificate in that capacity; that the certificate, by their assent, had become the absolute property of the heirs and legatees; and that the defendant received it from them as their agent, to sell and pay over to them the avails; they should find the issue for the plaintiff. A verdict was returned for the plaintiff, with one hundred twenty-four dollars, thirty-three cents, damages; and the defendant moved for a new trial on the ground of a misdirection. The questions of law arising on this motion were reserved for the consideration and advice of the nine Judges.

N. Smith and *Sherman*, in support of the motion, conten-

ded that the *gravamen* of this action being that the defendant *ex æquo et bono* ought to pay the plaintiff money, there could be no recovery in a case where it appeared that more money was due from the plaintiff to the defendant. The condition of the parties at the time of bringing the action is to be looked to. On this ground *payment* may be given in evidence on *non assumpsit*. 1 *Chitt. Plead.* 471. Here there was no *indebtedness* at the time of bringing the action. The law, therefore, will not imply a promise to pay.

Daggett and *Hamlin*, contra, admitted, that in this form of action the plaintiff can recover so much only as appears to be due after making all reasonable deductions; but they insisted, that the jury ought not to be permitted to go beyond the transaction which gave rise to the plaintiff's claim. *Dale* v. *Sollet*, 4 *Burr.* 2134. *Longchamp* v. *Kenny*, *Doug.* 138. The plaintiff's recovery is not to be defeated because the defendant has a distinct claim against him. This point has already been settled in *Gunn* v. *Scovil*, by a unanimous opinion of this Court, *June* term 1811.(*a*)

(*a*) GUNN v. SCOVIL.

THIS was an action of *indebitatus assumpsit* for the rent of a house and piece of land. On the trial, the defendant claimed, that he had sold and delivered to the plaintiff a yoke of oxen and a horse, and had furnished lumber, nails and other materials, which were used in building a house for the plaintiff, and had also performed services for the plaintiff; but the defendant did not claim, that there was any particular agreement that the property delivered and services rendered by him should be paid for in rent, or should be set off against the rent. The plaintiff contended, that the jury could not apply the defendant's claims in payment of the rent, nor deduct the amount therefrom, unless an agreement to that effect were proved. But the court charged the jury, that the action being founded on an implied promise to pay rent, was to be governed by equitable principles; that the plaintiff was not entitled to recover unless a debt was due to him in equity; and that they might consider the expenditures and services of the defendant, and apply the same on account of the rent, without an express agreement to make such application. Under this direction the jury found a verdict for the defendant; and the plaintiff moved for a new trial. This motion was afterwards argued before the nine Judges, and a new trial granted. Their opinion was delivered to the following effect by

TRUMBULL, J. The action on implied *assumpsit* is an equitable action. The sum only which was justly due at the time of the promise laid in the declaration can be recovered; and the defendant is admitted to prove all equitable circumstances which can avail him to lessen the sum demanded.

But these must be such facts and circumstances as arose out of the transactions which are the ground of the action and from the consideration of the

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The claim of the defendant is in reality a claim of set-off. It is not a satisfaction; for there has been no accord. It cannot be payment, for a similar reason, that it never was agreed by the parties to apply the defendant's demand in payment of the plaintiff's. But in this case there could be no set-off. First, because the claims are not *mutual* claims. 1 *Selw. N. P.* 167. 6 *Bac. Abr.* 136. (*Wils.* edit) *Thomason* v. *Frere*, 10 *East* 418. Secondly, because the defendant's claim is not *certain* and *liquidated*. 1 *Selw. N. P.* 598.

SWIFT, Ch. J. The plaintiff in this action claims to recover a certain sum of money which the defendant received to his use. The defendant offers to apply in satisfaction thereof a sum due for money paid on his account, and which is a separate and independent demand. It has been urged, that mutual debts for money only may in this action be applied in satisfaction of each other. But we have no statute of set-off; and at common law no such application can be made, without an agreement of the parties, express or implied. Where in mutual dealings it appears from the nature of the transaction, that money, or any articles, were received on account, and to apply in payment of each other, the law will imply a promise only for the payment of the balance. But if the demands, though mutual, are unconnected, each gives a separate, independent right of action. If we admit the defendant to make such set off, the plaintiff then might rebut such claim by another; and in this way, in an action of *assumspit* for a small sum, a great variety of mutual demands on both sides might be exhibited; the plaintiff could recover only for the balance due on adjusting the whole;

promise. The defendant can set up no separate, independent claim, nor can any set off of mutual demands in equity be made, in this action, with more propriety than in any other action at law.

It seems, that in the present case, the defendant contended, that although there was no particular agreement concerning the rent to be paid for the use of the land, or the application of the amount of the articles advanced and services rendered by the defendant in payment; yet from the nature of the transaction, and the conduct of the parties, it appeared in evidence, that it was their understanding and agreement that these mutual demands should be settled on a final adjustment of their accounts, and that the one should be applied in satisfaction of the other. If this were the case, it was solely in the province of the jury to find and decide it accordingly; and the evidence of the fact ought to have been left to their consideration. Until that fact should be established, the law would not warrant them to apply those services and advancements in satisfaction for the use and occupation of the land. S. C. 5 *Day* 113.

while the defendant could not recover, if the balance should be in his favour. Such enquiries in this form of action would be attended with great inconvenience, while complete justice could not be accomplished. It is much better to leave the parties to their mutual remedies than to introduce such a principle and practice.

In this opinion the other Judges severally concurred.

New trial not to be granted.

THE STATE OF CONNECTICUT *against* MINER BABCOCK.

It is an indispensable qualification of jurors that they should be freeholders, and if it be discovered after verdict that one of the jury was not a freeholder, it is a sufficient ground of arrest of judgment.

But judgment will not be arrested merely because the jury, after the cause was committed to them, separated before they had agreed on a verdict.

AFTER a verdict of *guilty* on an indictment for murder, the prisoner moved in arrest of judgment on the following grounds. 1. That one of the jurors was not, at the time of empannelling the jury, nor at the time of giving their verdict, a freeholder; which fact was unknown to the prisoner, or his counsel, at the time of the trial.

2. That the jury were not, after the cause was committed to them, confined under the custody of an officer appointed by the court until they had agreed on a verdict, but were immediately permitted to separate, and go to their respective places of abode, and did not meet again until the next morning, when they agreed on and brought in a verdict that the prisoner was guilty.

The questions arising on this motion were reserved for the consideration and advice of the nine Judges.

The case was now submitted without argument.

SWIFT, Ch. J. The statute of the state(*a*) makes it an indispensable requisite that jurors should be freeholders, and by the common law such deficiency in the qualification of a juror discovered after verdict, is a sufficient ground of arrest. Though this defect does not affect the capacity or moral qualification of a juror, and is strictly technical; yet the law is too positive to be dispensed with; and in a criminal case of a capital nature, it cannot be presumed, that the party intended to waive any advantage or privilege given him by law.

(*a*) *Tit.* 96. *c.* 1. *s.* 1. 3. 8. This provision of the statute referred to has been recently repealed.

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As to the objection that the jury, after the cause was committed to them, were permitted to separate before they agreed *on a verdict, it may be said, that such has been the immemorial usage in this state; and the practice has been sanctioned by a decision of this court.(a)

(a) BRANDIN *against* GRANNIS & WIFE, in error, *November* term, 1811.

IN an action for slander against *Brandin*, the defendant pleaded *not guilty*, and the jury found a verdict against him with large damages. The defendant then moved in arrest of judgment, on the ground that the jury, immediately after the cause was committed to them, dispersed into different parts of the city of *New-Haven*, (the place of trial,) and did not remain under the care or charge of the officer whose duty it was to attend them, and remained in that situation until about an hour before the opening of the court the next morning, when they met by appointment at the jury room, considered the cause, and agreed on their verdict. The court adjudged the motion insufficient, and rendered judgment for the plaintiffs. The defendant then brought a writ of error in the Supreme Court of Errors.

N. Smith and *Staples*, for the plaintiff in error, relied upon the explicit provisions of the statute; *tit.* 6. *c.* 1. *s.* 11.,) the exposition given it by the superior court soon after it was passed, (*Nicolls* v. *Whiting*, 3 *Day's Ca.* 287. n.) and recently by the circuit court of the *United States* in this district; *Lester* v. *Stanley*, 3 *Day's Ca.* 287. *Howard* v. *Cobb*, 3 *Day's Ca.* 310. and other cases not reported), and forcibly urged the danger of departing from the letter of the statute and the ancient practice.

Daggett, for the defendants in error, relied principally upon the construction given to the statute by long and established practice, and the inconvenience that would result from a literal compliance with its provisions.

BALDWIN, J. The question presented by this record is, whether consistently with the act entitled "An act for the directing and regulating civil actions," a jury may separate after a cause has been committed to them, and before they have agreed on a verdict. The only clause applicable is in these words: "When the court have committed any cause to the consideration of the jury, the jury shall be confined under the custody of an officer, appointed by the court, until they are agreed on a verdict."

Whatever might have been my opinion of the effect of this statute, had I been called to decide upon it, without the aid of a practical construction, I do not feel myself now at liberty to oppose an uniform practice under it for a century, unless the construction shall appear unreasonable, and the practice in pursuance of it, be followed with greater mischief, than would flow from a literal compliance with what is claimed to be the letter of the statute. I have never known in our courts a jury confined in the manner claimed. Reliance has always been placed on the guard set upon our jurors by the peculiar form of their oath. It is evident from that, that our ancestors, (for it was adopted in the year 1640, soon after the settlement of the country,) did not mean to introduce the system of starving a jury into agreement, but that their verdict might be the result of cool deliberation. The oath, therefore, implying that they may separate, binds them "to keep secret their own and their fellow's counsel, and to speak nothing to any one, nor suffer any to speak to them, of the business in hand, but among themselves, and when agreed upon a verdict, that

I am of opinion that the motion in arrest is sufficient, for the reason that one of the jurors was not a freeholder.

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In this opinion the other judges severally concurred.

Judgment to be arrested, and a new trial had.

they will keep it secret, till they deliver it up in court." These guards and provisions are here still in force, and are not contained in the oath administered to jurors in *England*, or in any of those states where jurors are strictly confined.

The subsequent statute now in question, though it is said to have been literally enforced, in some instances, soon after it was enacted, has since received a construction, sanctioned by long usage, till lately universally acquiesced in, and repeatedly recognized of late by the superior court. This construction is, that the jury should be attended to and from court by an officer; should deliberate by themselves, under his protection; and that he should guard them from intrusion; but it does not require that they should be otherwise restrained, nor that they should be prevented from adjourning and separating when occasion requires.

No evils that I perceive, result from the practice in pursuance of this construction, which would not follow the separation of jurors after they had agreed on, and before they had delivered up their verdict. This the statute permits. I presume also, that with us where courts are in the habit of returning juries to a second consideration, if the jury should agree upon a verdict, and then separate, and after reflection, should, on the next day, agree upon a different verdict, they might lawfully do so. If they may, the agreement is of no avail; and under a different practice, would soon be a mere pretence for separation. Nothing then short of a rigorous confinement, according to the rule of the common law, till the verdict is delivered up, would attain the object sought.

Many inconveniences would follow a liberal execution of the statute as claimed. It would hazard many late judgments now considered at rest. It would make a very unpleasant innovation upon the habits of our jurors; and I am confident that justice would not be promoted, truth more clearly discovered, or parties be better satisfied, by hurrying on the jury to a hasty decision, and denying them respite or repose till they should agree. Causes are often committed to the jury, at a late hour of the day, which require much reflection, investigation, and sometimes calculation. They will generally be ill prepared for this immediately after the fatigues of a tedious trial, and may be unable to come to a result in seasonable hours; yet such are the cases to which the rule will most frequently apply. In ordinary cases, the jury have no occasion to separate, and seldom do.

This construction of the statute does not appear to me unreasonable. It is certainly conformable to the temper of the times, and the habits of our citizens. And I am not convinced, that we are now bound to abandon it, after it has been sanctioned by so long and quiet usage; nor that the advantages would over-balance the inconveniences resulting from a change.

I would therefore establish the construction, by affirming the judgment of the superior court.

In this opinion the other Judges severally concurred, except SMITH, *J.* who dissented.

Judgment affirmed.

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Bacon v. Page.

BACON *against* PAGE:

IN ERROR.

Where no time of payment is specified in a promissory note, the plaintiff must declare upon it, according to its legal effect, as payable on demand; otherwise the declaration will be insufficient.

THIS was an action against *Bacon* on a promissory note. The declaration stated, "That the defendant, in and by a certain writing or note under his hand, by him well executed, dated the 7th day of *June* 1813, promised the plaintiff to pay to him, or order, for value received, the sum of two hundred ninety dollars and seventy cents, as by the said writing or note ready in court to be shewn appears;" and concluded by averring, "That the defendant, his promise aforesaid not regarding, hath never performed the same, though often requested and demanded; which is to the damage of the plaintiff," &c. The note was as follows: "For value received, I promise to pay *Thomas G. Page*, or order, the sum of two hundred ninety dollars and seventy cents. *Petersburgh*, *June* 7th, 1813. *Joseph Bacon.*" In the superior court, the defendant made default of appearance, but was afterwards heard in damages. The court assessed the damages, and rendered judgment for the plaintiff. The defendant then brought the present writ of error, assigning for error, that the declaration was insufficient.

E. Huntington and *Sherman*, for the plaintiff in error, contended that the declaration was ill, because it does not declare upon the note according to its legal effect. Where no time of payment is specified in a note, the conclusion of law is, that it is payable on demand; but that conclusion must be stated; for it is a *fact* inferred from another fact. The jury will see, when this note is presented to them, that it is evidence of a promise to pay on demand; and the court will direct them to find accordingly; but if such evidence, and that only be stated in the declaration, the court cannot make the inference. So, an acknowledgment of indebtedness is evidence of a promise to pay; from such acknowledgment the jury will be directed to find a promise; but must not the promise be stated in the declaration? If the acknowledgment were found in a special verdict, could the court infer a promise? If a general verdict should find a promise where none was alleged in the declaration, would

not judgment be arrested? *Bronson* v. *Bronson*, 2 *Root* 73. [*Smith*, J. Can the plaintiff claim that this money was *payable immediately, without an allegation to that effect?] He cannot. There is nothing in this declaration inconsistent with proof by the defendant of a promise to pay at a future day. In short, the plaintiff has not shewn that the note was due when he commenced his action.

This declaration stands upon the same footing after judgment by default as though it had been upon demurrer. 1 *Wms. Saund.* 228. n. (1).

Staples, for the defendant in error, insisted that it is sufficient in *assumpsit* to set forth the contract, *either* in the words in which it was made, *or* according to its legal effect; and cited 1 *Chitt. Plead.* 299. *Dole* v. *Weeks*, 4 *Mass. Rep.* 451. *Herrick* v. *Bennett*, 8 *Johns. Rep.* 374. This declaration is not like that in *Bronson* v. *Bronson*, which stated only the *evidence* of a promise. Here the promise itself is stated. There is also a negation of performance co-extensive with the promise, which shews a right of action.

SWIFT, Ch. J. The plaintiff should declare on a contract according to its legal effect, and not on the evidence of the contract. The declaration should shew a consideration, a promise, and a breach of promise. In this case, it does not appear from the declaration that the note had become payable. The defendant might have produced a written agreement that it should be paid at some distant time. The legal effect of such note is, that it is payable on demand. The plaintiff should have so declared upon it; and then the note, when produced in evidence, would have proved the fact, unless the defendant could have proved the contrary; and on such averment the question when the note was payable would have been put in issue. But now no allegation having been made of the time when the note was payable, no evidence could have been admitted on that point. The plaintiff then has declared not according to the legal effect of his contract, but on the evidence only. He has stated no breach of contract. The declaration, therefore, is insufficient.(*a*)

(*a*) *See Sherman* v. *Goble & al.*, 4 *C. R.* 246. *Rossita* v. *Marsh*, 4 *C. R.* 196. *Canfield* v. *Merrick*, 11 *C. R.* 425. *Newell* v. *Roberts & al.*, 13 *C R.* 417. *Betts* v. *Hoit*, *Id.* 469. *Dale* v. *Dean*, 16 *C. R.* 579. *Spencer* v. *Curtis*, 15 *C. R.* 56.

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Such a defect is not aided by default, nor would it have been by verdict.

I am of opinion that judgment ought to be reversed.

In this opinion the other Judges severally concurred.

Judgment reversed.

[*406] *KINGSBURY *against* CLARK.

Where a magistrate holding a court of enquiry, on the complaint of a private individual, bound over the prisoner for trial before the superior court, in a bond, the condition of which was, that the prisoner should "appear before said court, and abide final judgment on said complaint;" it was held, that the failure of the prisoner to appear and answer to an information filed against him by the state's attorney for the offence charged in the complaint, was no forfeiture of the bond.

THIS was an action of debt on bond payable to the plaintiff as treasurer of the state. The declaration set forth the condition of the bond, and the proceedings to which it related.

The condition was as follows: "Whereas *Alfred Clark* of *Milford* in the county of *New-Haven*, was brought before me *William Durand*, justice of the peace for the county of *New-Haven*, by legal warrant, on a certain complaint made by *Julia C. Wilmot*, stating that on the 25th day of *September* 1813, the said *Alfred Clark* did an assault make on her body, with an intent to commit a rape; whereupon the said justice did adjudge, that the said *Alfred Clark* stand committed for trial before the next superior court to be holden at *New-Haven* within and for the county of *New-Haven*, on the third *Tuesday* of *January* next: Now, if the said *Alfred Clark* shall well and truly appear before said court, and abide final judgment on said complaint, then the above bond to be void."

The judgment of the justice (omitting the recital) was as follows: "Whereupon it is considered by this court, that the said *Alfred Clark* be held for trial before the honourable superiour court to be holden at *New-Haven*, within and for the county of *New-Haven*, on the third *Tuesday* of *January* next, by giving bond with good sureties in the recognizance of 1000 dollars, payable to the treasurer of the state of *Connecticut*, for his appearance before said court to answer to said complaint, and abide the judgment of said court thereon."

The bond, accompanied with an exemplification of the justice's record, was returned to the superior court; the attorney for the state filed an information against *Alfred Clark*, for the offence

charged in the complaint of *Julia C. Wilmot;* the prisoner and his bail being duly called, made default of appearance; and judgment was rendered as follows: "Whereupon it is considered by this court, that the said *Alfred Clark* and *Treat Clark* [the present defendant] have forfeited their recognizance."

To this declaration there was a demurrer. By agreement of parties, the cause was continued to the next session of the superior court, that the questions of law might, in the meantime, be argued before the nine Judges. [*407]

Sherman and *Staples*, in support of the demurrer, contended, 1. That no recovery could be had upon the bond, because the justice had not jurisdiction. The complaint, on which the process was founded, was made by a private individual, and not by a grand-juror, as it should have been.

2. But waiving this objection, still the proceedings were irregular, because a *bond* was taken instead of a *recognizance*. The words of the statute are, "Such authority shall *recognize* with surety." (*a*) And the judgment of the justice, in pursuance of the statute, required "A *recognizance* of 1000 dollars." A bond under hand and seal, therefore, was neither warranted by the statute, nor supported by the judgment. The power of justices of the peace to bind over for felonies, both in *England* and in this country, depends upon statutory provisions, which must be strictly pursued. (*b*) The word "*recognize*" in our statute is a technical term, and must be understood in its technical sense.

3. The condition of the bond is such that it could not be performed; or if it could, it has never been broken; and in either case, no action lies. The condition is, that *Alfred Clark* shall appear before the superior court, and abide final judgment on the complaint of *Julia C. Wilmot;* not, as it ought to be, that he should appear and answer to such information as should be filed against him, and abide final judgment thereon. Now, *Alfred Clark* could not be required to comply with this condition. No such proceeding could be had. At any rate, he has never broken it; because as appears from the record of the superior court, he was called to answer to an information filed against him by the attorney for the state, and not to the complaint mentioned in the bond.

(*a*) *Tit.* 46. *c.* 1. *s.* 3.

(*b*) The powers of justices in *England* are defined with precision, in 1 *Burn's Just.* 144.

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If this bond is to stand on the footing of a judicial proceeding, it is irregular; if on the footing of contract, there has been no breach.

Daggett and *N. Smith*, contra. 1. A justice may issue his warrant to apprehend a criminal, and bring him before a magistrate for examination, without the intervention of a grand juror. This power is incidental to his general authority to to preserve the peace. His proceedings in this case are not the less valid because he heard the complaint of *Julia C. Wilmot* before he issued his warrant.

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Further, the objection comes too late. The justice unquestionably had jurisdiction of the offence for the purpose of binding over. If the prisoner claimed that there was any irregularity in the manner of his being brought before the justice, he ought to have taken advantage of it before he answered in chief.

Again, it is not necessary, in order to recover on the bond, to shew that the proceedings before the justice were regular. The bond imports a sufficient consideration, and must be deemed valid until it is shewn to be illegal. If a man without any judicial proceedings, should give a bond to the treasurer of the state, to appear before the superior court, and be tried for an offence imputed to him, could it be said that such bond would be illegal, or opposed to sound policy?

2. The bond in question is substantially a recognizance. The condition is the same. The defendant appeared in court, and executed it before the court; of which a record was made. It had every essential requisite of a recognizance. Could the additional solemnities of signing and sealing render it the less valid? In the language of our statute-book and the acceptation of our court, "bond" and "recognizance" are convertible terms. On an appeal, the statute requires a "bond" to be given (*a*); but the invariable practice is to take a recognizance. In *Potter* v. *Kingsbury* 4 *Day's Ca.* 98. the justice took a *bond;* but the court treated it as a recognizance. So in *Dickinson* v. *Kingsbury* 2 *Day's Ca.* 1. a bond was taken by the sheriff after commitment; and it was held to be valid.

3 The complaint and proceedings before the justice were returned to the superior court. *Alfred Clark* and his surety (the defendant) were called in the usual form and made default of appearance. This was a breach of the bond.

(*a*) *Tit.* 6. *c.* 1. *s.* 15.

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SWIFT, Ch. J. This action is brought on a penal bond conditioned that *Alfred Clark* should appear before the superior court, and answer to the complaint of *Julia C. Wilmot*, *and abide the judgment of the court on said complaint. This complaint was a nullity; *Julia C. Wilmot* could not prosecute it; and no proceedings could be had against said *Clark* thereon. The condition, then, could not be performed or broken. It was totally void, and no action can be maintained on the bond.

It was no part of the condition of the bond that *Alfred Clark* should appear and answer to a complaint exhibited by a proper informing officer. His not appearing to answer to the complaint thus filed against him was no forfeiture of the bond, and to render him now liable would be to subject him on a contract he had never made.

I should advise the superior court, that this action is not sustainable.

In this opinion the other Judges severally concurred.

Judgment to be for defendant.

BARTSCH *against* ATWATER and others.

Where a promissory note of a third person payable at a future day was taken in the state of *New-York* for goods there sold and delivered, and a receipt in full given by the seller, and before such note fell due the maker became bankrupt; it was held, in an action against the purchaser for the original demand, that the plaintiff was entitled to recover. But whether the same principle would be adopted with respect to a similar transaction arising in this state, was left undecided.

THIS was an action of *indebitatus assumpsit*. The declaration contained two counts. The first was general, stating that on the 11th of *August* 1810, the defendants and one *Norton*, since deceased, became indebted to the plaintiff in the sum of 2000 dollars for goods sold and delivered in the city of *New-York* on a credit of six months. The second count stated more particularly, that on the 11th of *August* 1810, the defendants and *Norton* being owners of three fourths of the schooner *Grace-Ann Green*, and being then about to load her for a *European* voyage, with a cargo to be purchased in *New-York* on credit, agreed with *E.* and *A. Townsend*, that they, as the agents of the defendants and *Norton*, should give their notes for it to the persons of whom it might be purchased, and the defendants and *Norton* would

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furnish funds to meet the payment of such notes; that the defendants and *Norton* accordingly purchased of the plaintiff a quantity of spices, of the value of 1963 dollars, at six months credit, for which *E.* and *A. Townsend* gave the *plaintiff their note, payable to him or order in six months; that these spices constituted part of the cargo of the *Grace-Ann Green*, and were bought on the joint account of the defendants and *Norton*; that *E.* and *A. Townsend* became utter bankrupts before their note to the plaintiff was payable, and have never paid any part thereof; and that in consequence of their bankruptcy, the defendants and *Norton* did not place funds in their hands to meet their note, and the same has never been paid.

The cause was tried on the general issue, at *New-Haven*, *August* term 1815, before *Edmond*, *Smith* and *Goddard*, Js.

The case, as it appeared from the evidence on the trial, was as follows. The spices mentioned in the plaintiff's declaration constituted a part of the cargo of the *Grace-Ann Green*, and were purchased by the defendants, or some of them, on an agreement that the note of *E.* and *A. Townsend*, payable in six months, should be given to the seller at the time of delivery, and that *Atwater* and *Daggett*, two of the defendants, should place funds in the hands of *E.* and *A. Townsend* to meet the note when it should fall due, and indemnify them against it; and that the other defendants should severally furnish their respective proportions of the note to *Atwater* and *Daggett* for that purpose. The note was given accordingly; and at that time *E.* and *A. Townsend* were considered as solvent, and in good credit. The plaintiff when he received the note, gave them a writing in these words: "Received, *New-York*, 14th *August* 1810, of *E.* and *A. Townsend* their note of the 11th instant, at six months, for 1963 dollars, balance in full of four boxes of spices sold Capt. *D. Green*, amounting to that sum exclusive of debenture that I retain. *E. G. Bartsch.*" The plaintiff made no demand upon the defendants for payment of this claim until some time in the month of *August* 1811. In the month of *January* 1811, before the note fell due, *E.* and *A. Townsend* failed, and became utter bankrupts. The defendants, by reason of their failure, did not place funds in their hands for the payment of the note, except the sum of 118 dollars, being the balance which remained in their hands of funds placed there for the payment of other notes given for the same cargo; and on the 14th of *February*, 1811, the sum of 1845 dollars remained due from the defendants, or some of them, to complete the payment for the cargo. At the

time of the failure of *E.* and *A. Townsend*, they were justly indebted to some of the defendants in their private and individual capacity to a greater amount than the demand in question, for which they have never received either payment or security, and have no prospect of obtaining any.

One ground of defence taken by the defendants was, that they were not jointly concerned in purchasing the cargo, and did not incur a joint liability. They claimed, that the contract for the spices was made by *D. Green*, one of the defendants, on his individual account, to furnish his own several share, and that in this transaction he was in no respect the agent of the other defendants, and had no authority to make a contract which would be obligatory on them. On this point the court charged the jury, that if they should find the facts, as claimed by the defendants, they must find a verdict in the defendants' favour. But if they should find that all the defendants were jointly liable originally, it was the opinion of the court upon the other facts in the case which were not controverted, that the plaintiff was entitled to recover of the defendants the sum remaining unpaid at the time when the note fell due, being 1846 dollars, with interest. The jury found a verdict for the plaintiff accordingly; and the defendants moved for a new trial on the ground of a misdirection. This motion was reserved for the consideration and advice of the nine Judges.

N. Smith and *T. S. Williams*, in support of the motion, contended that the note of *E.* and *A. Townsend* having been received by the plaintiff in satisfaction of the goods at the time of sale and delivery, must be deemed *payment*. It has been uniformly decided in *England* until within a short period, that the giving of a note for goods purchased at the time, is payment; and this too without any thing to shew the intention of the parties but the nature of the transaction. *Clark* v. *Mundall*, 1 *Salk.* 124. S. C. 12 *Mod.* 203. *Bank of England* v. *Newman*, *Bull. N. P.* 277. S. C. 12 *Mod.* 241. *Anon.* 12 *Mod.* 408. *pl.* 694. *Anon.* 12 *Mod.* 517. *pl.* 866. The first case apparently of a different complexion is *Puckford* v. *Maxwell*, 6 *Term Rep.* 52. decided in 1794; but there the bill was given *for an antecedent debt*, and of course the decision was perfectly consistent with the former cases. *Owenson* v. *Morse*, 7 *Term Rep.* 64. which occurred

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soon afterwards, (in 1796,) was an action of trover against the seller, and the case turned partly upon the defendant's right of stopping the goods *in transitu*, and partly upon the fact that the notes were worth nothing *at the time*. The case of *Stedman* v. *Gooch*, 1 *Esp.* at *Nisi Prius*, only determines, that if the bill is of no value *at the time*, as if drawn on a person who has no effects of the drawer's in his hands, he may treat it as waste paper, and resort to his original demand. The later decisions, founded on extrajudicial opinions thrown out in the cases cited, are not to be considered, in opposition to all the old authorities, as conclusive evidence of the common law.

The same remark is applicable to the decisions in the state of *New-York*. In *Roget* v. *Merritt & al.* 2 *Caines* 117. and *Markle* v. *Patfield*, 2 *Johns.* 455. the notes were of no value *at the time when they were offered*. In *Toby* v. *Barber*, 5 *Johns.* 68. and *Putnam* v. *Lewis*, 8 *Johns.* 389. the notes were given *for a precedent debt*. In *Johnson* v. *Weed & al.* 9 *Johns.* 310. plaintiff was entitled to recover upon the *special contract* between the parties. The cases are very distinguishable from the present; and any opinions given in them which can affect the present case must be extra judicial.

In *Massachusetts* it has long been settled, that a negotiable note given in consideration of a simple contract debt, is a discharge of it. *Thatcher & al.* v. *Dinsmore*, 5 *Mass. Rep.* 299. 302. And the reason of the decision is unanswerable; for if the original cause of action were not discharged, the debtor might be obliged to pay the money twice; once to the original creditor, and once to an indorsee of the note ignorant of the consideration. In *Ellis* v. *Wild* 6 *Mass. Rep.* 321. it was decided, that if the seller of goods receives promissory notes in payment, and those notes are afterwards discovered to be *forged*, yet if the purchaser was ignorant of that fact, the seller cannot afterwards resort to him for payment of the goods.

In this state, the position for which we contend has been established by the highest judicial authority. In *Anderson* v. *Henshaw* 2 *Day's Ca.* 272. the defendants gave a bill in satisfaction of a book debt; this bill being protested, the defendants took it up, and gave another bill for the amount; and it was held in an action for the original demand, that no evidence was admissible to shew that the latter bill was

unproductive. According to this decision, the court, in the present case, ought not to have admitted evidence to shew that *E.* and *A. Townsend's* note to the plaintiff was unpaid, or they should have told the jury that the fact was immaterial.

Further, the plaintiff has acknowledged by the receipt which he gave, that the note in question was accepted by him *as payment*. There has been an agreement between the parties, evidenced by a writing under the hand of the plaintiff, that this note should be "*in full*" for the goods.

If it be said, that according to the decisions in the state of *New-York*, a receipt is not conclusive, but is open to examination; it may be answered, in the first place, that in our courts the decisions have been otherwise; (*Carter* v. *Bellamy*, *Kirby*, 291. *Herd* v. *Bissel*, 1 *Root*, 260. *Palmer* v. *Corbin*, 1 *Root*, 271. *Fuller* v. *Burrel*, 2 *Root*, 296.) and as this is a question of *evidence*, the law of this state must govern. Secondly, admitting that this writing may be explained, yet if it be considered in the light of parol evidence only, it is sufficient to prove an agreement between the parties that the plaintiff should receive the note as payment, and make it his own. At any rate, such an agreement was claimed by the defendants, and the question whether it was proved ought to have been submitted by the court to the jury. This was a matter of fact for them to find. They might have inferred it from other circumstances, such as the plaintiff's having no account with the defendants, his long neglect to call upon them, &c. as well as from the terms of the receipt.

Daggett and *Sherman*, contra, remarked in the first place, that as the defendants had received the goods, and had neither placed funds in the hands of *E.* and *A. Townsend* to pay for them, nor disbursed any thing for them in any other way, the justice of the case is clearly with the plaintiff; and the court will not grant a new trial on technical grounds.

It is contended, that although the defendants have disbursed nothing, and the plaintiff has received nothing of value, yet there has been a technical payment. This would be a novelty in mercantile law. The plaintiff sold the goods to the defendants, and took the note of *E.* and *A. Townsend*, not as payment, but as an arrangement through which he was to get his money. He did not intend to buy a note.

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Where the goods are bought, and a note given, the giving of such note is no payment, unless there is an express agreement between the parties that the note shall be at the risk of the taker, or the circumstances of the transaction are such as to imply an agreement to that effect. There is some confusion in the old cases on this subject; but the position just laid down is fully supported by modern decisions. In *Puckford* v. *Maxwell* 6 *Term Rep.* 52. the decision does not turn on the circumstance of a precedent debt, but on the broad ground of justice; *that the bill is not that which it purports to be, and which the party receiving it expects it to be.* *Owenson* v. *Morse*, 7 *Term Rep.* 64. is placed upon the same ground. These authorities have since been recognized repeatedly, by judges and common-place writers. Indeed, there cannot be a doubt as to the *English* law at present on the subject.

Nor has a different doctrine been established by our own courts. The case of *Anderson* v. *Henshaw*, 2 *Day's Ca.* 272. turned on the fact, that the bill of one partner was taken long after the dissolution of the partnership, by which the joint security of both was waived.

But the transaction in question took place in the state of *New-York*, and the laws of that state must govern it. The cases there, are numerous and explicit in the plaintiff's favour. *Roget* v. *Merritt & al.* 2 *Caines*, 117. *Tobey* v. *Barber*, 5 *Johns.* 68. *Putnam* v. *Lewis*, 8 *Johns.* 389. *Johnson* v. *Weed & al.* 9 *Johns.* 310. Nor is the plaintiff's claim prejudiced by the receipt which he gave. *Schermerhorn & al.* v. *Loines & al.* 7 *Johns.* 311. The following cases also establish the point that a receipt in full is not conclusive, but may be explained by parol. *Ensign* v. *Webster*, 1 *Johns. Ca.* 145. *House* v. *Low*, 2 *Johns.* 378. *M'Kinstry* v. *Pearsall*, 3 *Johns.* 319. and *Tobey* v. *Barber*, *Putnam* v. *Lewis*, and *Johnson* v. *Weed*, *ut supra.*

In a more general point of view the plaintiff is entitled to recover. If the defendants had placed property in the hands of *E.* and *A. Townsend* to pay the debt to the plaintiff, their assignees could not hold that property; but the plaintiff would be entitled to it, and he might recover it from the holders. *Scott* v. *Surman*, *Willes*, 400. *Tooke* v. *Hollingworth*, 5 *Term Rep.* 215, 226. But the defendants are not to stand on more favourable ground for having neglected to

fulfil their engagement. They are now trustees for the plaintiff of the funds destined for the payment of the note; and are liable on the general count in the declaration.

Further, *E.* and *A. Townsend* acted in this transaction as the mere agents of the defendants, buying goods of the plaintiff for them; and therefore, a recovery may be had against them. *Kymer & al.* v. *Suwercropp*, 1 *Camp.* 109. *Schemerhorn & al.* v. *Loines & al.* 7 *Johns.* 311.

SWIFT, Ch. J. The question is, whether the plaintiff's receiving the note of *E.* and *A. Townsend* discharged the original right of action against the defendants for the goods sold and delivered. On this subject there have been contradictory decisions in different counties. In the case of *Anderson* v. *Henshaw*, 2 *Day's Ca.* 27. the principle was adopted, that where a bill was received in full of an antecedent debt, it discharged the original demand, and that no action could be maintained upon it, though the bill turned out to be unproductive, and there was no proof of an agreement to take the bill at the risk of the plaintiff. In the case of *Ellis* v. *Wild*, 6 *Mass. Rep.* 321. a similar question arose, and it was there determined, if *A.* sells merchandize to *B.*, and agrees to receive certain promissory notes in payment, if the notes are afterwards discovered to be forged, and *B.* was ignorant of the fact, *A.* cannot afterwards resort to *B.* for the merchandize; otherwise if the original bargain was for cash, and the notes were received by the vendor as an accommodation to the vendee. Here the principle is adopted, that if the notes were received in payment, the original contract is discharged, though they were of no value, and the plaintiff did not receive them at his risk. If the authority of these cases is to govern, the court should have charged the jury, that if they found the note from the *Townsends* was received in payment for the spices, their verdict must be for the defendants; otherwise for the plaintiff.

A different doctrine seems to have been adopted in *England.* In *Puckford* v. *Maxwell*, 6 *Term Rep.* 52. Lord *Kenyon* says, if the bill which is given in payment does not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be; and therefore, he may consider it as a nullity, and act as if no such bill had been given at all. In *Owenson* v. *Morse*,

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7 *Term Rep.* 66. he says, "If the defendant had agreed to take the notes as payment, and to run the risk of their being paid, that would have been considered as payment, whether the notes had, or had not, been afterwards paid." By these cases it appears not only to be essential that the notes should be received in payment, but that the party receiving them should agree to risk their being paid; otherwise the original right of action is not discharged if the notes prove unproductive. The principle adopted in these cases would warrant the charge of the court; for it does not appear that there was an agreement that the plaintiff should risk the ability of the *Townsends* to pay their note.

The same doctrine has been recognized in the state of *New-York;* and it seems there to have been determined, when notes are taken and a receipt in full is given, yet it is to be understood they are in full when paid, and if not productive they do not discharge the original contract, unless there was an absolute agreement to risk their being paid. *Tobey* v. *Barber*, 5 *Johns.* 68. *Putnam* v. *Lewis*, 8 *Johns.* 389(*a*). These authorities would warrant the decision of the court; and as this transaction took place in the state of *New-York* where these authorities are binding, they are conclusive in the present case.(1) Without considering, then, what principle ought to be

(*a*) See also *Fuller* v. *Crittenden*, 9 *C. R.* 401. *Tucker & al.* v. *Baldwin*, 13 *C. R.* 136.

(1) The law of New York is now firmly settled the other way.—If a vendor of goods receive from a vendee the note of a third person in respect of whose solvency no misrepresentation is made, it will be deemed to have been accepted in payment and satisfaction, till the contrary is proved; *Whitlock* v. *Van Ness*, 11 *John. R.* 409.; *Breed* v. *Cook*, 15 *Id.* 241. In *Arnold* v. *Camp.* 12 *John R.* 409, it was held, that where a partnership note had been taken up, by substituting the individual note of one of the partners, the latter note was a payment; and that if the payee were afterwards to get back the partnership note, by giving up the other, the other partner might avail himself of such payment as a bar. In *Frisbie* v. *Larned*, 21 *Wend. R.* 450, it was held, that the acceptance of the note of a third person from one of the members of a firm, and by him endorsed, together with the balance of the indebtedness in cash, was *prima facie* an accord and satisfaction of the firm debt; and that a judgment confessed by one partner, had the like effect. *Cole* v. *Sackett*, 1 *Hill. R.* 511., disapproved of the decision in *Arnold* v. *Camp*, and held that the individual note of a partner was not a bar to an action against the firm for the demand which it was given to pay; and *Waydell* v. *Luer*, 5 *Hill. R.* 448, went still further, and held, that the note of one of several partners or joint debtors, given for a debt antecedently due from all, did not extinguish their liability, *though the creditor expressly agreed to receive it in satisfaction:* but the Court of Errors, (3 *Dennio R.* 410,) reversed the judgment of the Supreme Court in the last case; overruling *Cole* v. *Sacket*, and reaffirming *Arnold* v. *Camp.*

adopted in a similar case arising in this state, I am of opinion, that a new trial ought not to be granted, on the authority of the decisions in the state of *New-York*, which, being the law of the place, must govern this transaction.

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In this opinion the other Judges severally concurred.

New trial not to be granted.

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*BENNETT *against* HALL: [*417]

IN ERROR.

In a prosecution upon the statute of bastardy by the mother of a bastard child against the father for its maintenance the court having found the issue in favour of the complainant, and ascertained the amount of child-bed expenses, gave judgment for the complainant to recover of the defendant one half of such expenses, and further ordered the defendant to pay to the complainant for the support of he child the sum of fifty eight cents per week for the term of four years, seven months and twenty-seven days, and directed the clerk to issue execution at the end of every successive period of three calendar months for so much of that sum as should then be in arrear, so long as the child should live within said term; and also required the defendant to become bound in a recognizance with surety to save the town harmless, but made no order for security to be given to comply with the judgment of the court: Held that such judgement was not erroneous.

THIS was a prosecution upon the statute of *Bastardy*, (*a*) by the mother of a bastard child against the father, for its maintenance. To the original complaint returned to, and the supplemental complaint filed in the county court, which were in the usual form, the defendant pleaded *not guilty;* and thereupon the following judgment was rendered: "This court having fully heard the parties, with their testimony, and by their counsel, do find that the facts in said original and supplemental complaints alleged are true, and that said *Bennett*, is guilty in manner and form as in said original and

(*a*) *Tit.* 22. That part of the act on which this prosecution is founded, is as follows: "That he who is accused by any woman, to be the father of a bastard child, begotton of her body, she continuing constant in such accusation, being examined upon oath, and put to the discovery of the truth in the time of her travail, shall be adjudged the reputed father of such child notwithstanding his denial thereof, and shall stand charged with the maintenance thereof, with the assistance of the mother, as the county court in that county in which such child is born shall order; and give security to perform such order, and also to save the town or place where such child is born free from charge for its maintenance."

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supplemental complaints is alleged; and on due examination, do moreover find, that the expenses necessarily incurred by the said *Pamela* (the complainant) for said child at its birth, and nursing the same until the 21st day of *April* 1815, have amounted to the sum of 120 dollars, and that of right the said *Bennett* ought to pay thereof the sum of 60 dollars; and it is thereupon considered by this court that the said *Pamela* do recover of the said *Bennett* the said sum of 60 dollars, and her costs, taxed at 26 dollars and 3 cents; and this court do order that the said *Bennett* stand charged jointly with the said *Pamela* with the maintenance and support of said child for four years, seven calendar months and twenty-seven days next following said 21st day of *April* 1815, and do pay her therefore at and after the rate of 58 cents per
[*418] *week, and that the clerk of this court do issue execution therefore at the end of every successive period of three calendar months from the said 21st day of *April* 1815, for so much as shall be in arrear of said sum of 58 cents per week at the end of each of said periods respectively so long as said child shall live in said term of four years, seven months and 27 days. And this court do moreover order, that the said *Bennett* become bound to said town of *Weston*, (where the child was born) with one sufficient surety, by recognizance in this court, in the penal sum of 500 dollars, to save said town of *Weston* harmless of and from the support and maintenance of said child; and that the said *Bennett* stand committed until he shall become bound as aforesaid." The defendant thereupon brought a writ of error in the superior court, assigning for error, that said county court ought not to have adjudged, ordered and directed, that the clerk of said court should issue execution in favour of the said *Pamela* and against the said *Bennett* for any sum should be in arrear, or not paid according to the order of said court. The superior court affirmed the judgment of the county court; and thereupon the present writ of error was brought.

N. Smith and *Staples* for the plaintiff in error.

Sherman for the defendant in error.

SWIFT, Ch. J. The judgment in this case is conformable to the practice in most of the counties in this state from time immemorial; and it would introduce much confusion and inconvenience now to change a form of judgment which has been so long and so

well settled. This should never be done, unless there is some serious objection; but no inconvenience has ever been experienced. The present mode is now well known and understood; but if a new one should be introduced, it would be long before the several county courts would be able to adopt it; and many judgments would probably be reversed before a uniformity could be established throughout the state. Nor is the form of this judgment opposed to the requirements of the statute. The county court has the power to make an order for the maintenance of a bastard child. This enables them to direct not only as to the sum to be paid, but the manner of payment; of course, they may direct *execution to be issued by the clerk from time to time as [*419] the exigencies of the case may require; and this is no more delegating judicial power to the clerk, than it is to direct him to issue execution in any other case. Nor can contests arise respecting payments any more in one case than in the other.

The only respect in which this judgment does not literally conform to the statute, is, that it does not require the defendant to give a bond with surety to perform the order of the court. This has not been required where execution has been directed to be issued; and the defendant cannot object to the form of a judgment which is more favourable to him than a literal compliance with the law. At any rate, immemorial usage has sanctioned this practice.

I am of opinion that there is no error.

In this opinion TRUMBULL, BRAINARD, BALDWIN, GODDARD, and HOSMER, JS. concurred.

SMITH, J. I have formed a different opinion from the one expressed by my brethren in this case. The statute concerning bastards and bastardy is not ambiguous in its terms, or doubtful in the construction, but contains a plain, sensible and consistent system. It provides, that upon the accusation of the mother, and on certain specified evidence, the accused shall be adjudged the reputed father of a bastard child. It then provides, that such reputed father shall stand charged with the maintenance of the child, with the assistance of the mother, as the court shall order; and that he shall find surety to perform such order, and also to save the town where the child is born free from charge. The stat-

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ute, in the last place, directs, that such reputed father shall stand committed until the order is complied with.

How extremely obvious, then, is the duty of the court under this statute. If the evidence is found to be insufficient, the accused is to be acquitted; but if found to be sufficient, he is, in the first place, to be adjudged the reputed father of the bastard child; the court, in the second place, is to order what portion of the support shall be furnished by the father, for what period, and when payable; and thirdly, to direct that he find surety as the statute requires. The accused is then, in the fourth place, to be, by the court, committed *to the custody of the sheriff until the order is complied with.

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In the room of this very obvious course, the court, in this case, have taken a course not only altogether unauthorised by statute, but one in which we meet with insuperable difficulties. We here find *no order* made as required by statute; *no surety directed;* no commitment to the custody of the sheriff. But we find a judgment made up, that the reputed father shall pay to the mother quarterly a certain sum per week, for four years and upwards, provided the child so long lives; and that the clerk issue execution for what shall remain in arrear of the weekly allowance once a quarter, provided the child shall live. It would seem enough to say in this case, that the statute does not warrant the judgment; and that the whole proceedure on complaint of the mother is authorised only by statute, and not by any principles of the common law. But in my view there are still greater objections arising from the particular form of the judgment. It obviously, in the terms of it, transfers judicial power to the clerk; for whether there is any thing in arrear or not, and if any thing, how much; and whether the child continues to live; are points of fact, to be ascertained by the clerk before he can issue his execution.

To obviate this objection, it was said by counsel in argument, that the clerk could not indeed make enquiry into the facts of payment, and of the life of the child, but must issue his execution of course at the end of each quarter, to the whole amount of what would accrue to that time, and leave the injured party to seek relief by *audita querela.* I think, however, that a little attention to this argument will satisfy us that it will not remove the difficulty; and provided we

were about to adopt such a principle, new and still greater difficulties would appear in our way. I would ask why is it, that the clerk cannot make enquiry into those facts; for I admit that he cannot. It surely is not because the judgment, in the terms of it, does not warrant the enquiry; because what is the sum in arrear and the life of the child are facts which can be learned only by hearing, enquiring and judging. And the clerk is authorised by the judgment to issue his execution only for what is in arrear, and that on condition that the child shall be alive. Should he issue execution for any other sum than the precise one for which *the party is in arrear; or for that, after the child should be [*421] dead; there would be no judgment to support it. The true reason, therefore, why the clerk does not possess such power, is, that the attempt to transfer judicial power to the clerk is not only erroneous, but void. But it by no means follows, that because the clerk has not the power to judge of these facts, he is to issue execution for a debt becoming due in future, whether it is in fact due or not. The judgment itself warrants no such proceedure; and if such were its form, it would be no less erroneous. It is in either view a novel attempt to render judgment for a debt accruing and becoming due at future periods; and where the precedent will lead to, it is not easy to foresee. In all cases of payments to be made by instalments, there would be the same reason for entering up judgment at once for the whole as there is in this; and in many other cases it might be thought convenient to enter up sweeping judgments, leaving the real facts in the case to be settled by the clerk.

If any farther objection to this judgment were necessary, I would remark, that when the court were about forming this new system there ought to have been one fact more submitted to the clerk, to be found by him as a condition precedent to issuing his execution; for as this judgment is, the mother may abandon her child to the town, and never expend a farthing for its support herself, and yet have her execution and collect the weekly allowance of the reputed father to her own use. It ought, at least, to appear, then, as a condition to her having execution, that she continues to *support the child* (*a*).

But it has been said, that this judgment accords with the practice of our various county courts in the state. How that

(*a*) *See Comstock* v. *Weed*, 2 *C. R.* 155. *Judson* v. *Blanchard*, 4 *C. R.* 557. *Judson* v. *Blanchard*, 3 *C. R.* 579.

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fact is, I have it not in my power to say. I have never known of such a practice in any case, though I now believe there has been snch an one in some of the counties; but I know nothing of its extent, or uniformity; and there is no regular mode known to the law of bringing before this Court the precise practice of the various county courts. Nor do I deem it of the least importance, unless it be to shew a necessity for the interposition of this Court. If the county courts have adopted a practice which is in opposition to a plain statute, the more general it has been, so much the more pernicious have been its effects; and the more it has
[*422] been repeated, so much the *more does it call for the due exercise of the corrective power vested in this Court. It is peculiarly the duty of this Court to correct the errors of subordinate tribunals, and not to give them its sanction.

Judgment affirmed.

KING *against* THE HARTFORD INSURANCE COMPANY.

In order to constitute that extreme danger of utter destruction, in the case of a stranded vessel, which will entitle the insured to abandon, such danger must exist notwithstanding all the means within the power of the crew to use, and all the assistance within the power of the master to obtain, to save her.

Where a vessel was thrown upon dangerous rocks and considerably injured, in consequence of which all her cargo on board was lost, but she was shortly afterwards got off, and repaired at an expense much less than half her value so as to be able to perform her voyage; it was held that the insured on the vessel could not abandon on the ground that the voyage was defeated.

A NEW trial having been granted in this case pursuant to the advice of the nine Judges, (*ante*, 333. 341.) the cause came on for trial at *Hartford*, *September* term 1815, before *Edmond*, *Smith* and *Goddard*, Js.

The defendants suffered a default, and moved to be heard in damages. They admitted that the plaintiff was entitled to recover as for a partial loss, and that damages ought to be assessed for the amount of the actual damage which the ship sustained by means of the perils insured against, and no more. The plaintiff claimed, that having made an abandonment of the ship to the defendants, he was entitled to recover as for a total loss.

It appeared, that the ship, on the 1st of *July* 1812, while proceeding from *New-York* to *Middletown*, in attempting to pass through *Hurl-gate* near *New-York*, was stranded by running stern foremost upon a ledge of rocks among the rocks in that place called the *Hog's back*. She immediately bilged

between the main and mizen chains, discharged her cargo of salt, and filled with water to her lower deck. In that situation she remained uutil the 4th of *July*, when the plaintiff being informed thereof abandoned her to the defendants. The defendants refused to accept of the abandonment; and also refused to furnish any funds to get the ship off the rocks, or to do any thing about her. The plaintiff wrote to the master of the ship informing him that he had abandoned her to the defendants, who had declined doing anything about her; and instructing him that it was his duty, notwithstanding, to remain by the wreck, and do every thing in his power for the preservation of the property. This he did, without any further directions. He employed several persons not of the *crew of the ship to assist in getting her off the rocks, which was [*423] effected on the 8th of *July*, without her having sustained any material injury other than what she sustained at the time of her first going upon the rocks. The expense incurred by the master in getting her off was 965 dollars and 6 cents, for which, by the laws of the state of *New-York* where the accident happened, the persons employed in getting her off had a lien upon her, and for which also the master was personally liable.

At the time of the abandonment, the ship, by reason of the perils insured against, was in a situation of extreme hazard of ultimate loss, without other assistance than such as could be furnished her by any exertions of the master and crew; and without incurring the expense aforesaid, and without adopting the means for which that expense was incurred, there was very little chance of her being saved or extricated from that condition. There was also danger of her being disengaged from the rocks, and sinking, before those means could be applied; and that danger would have been increased, and become great if a severe storm had in the mean time arisen. But no storm did arise until the means were successfully applied. At the time of the abandonment, many good judges were of opinion that she could not, by the use of any means, be got off in safety; while others, of the same character, were of a different opinion. She lay in such a situation that the contact of her bottom with the rocks could not be discerned; but the chances were in favour of the success which did attend the experiment.

The plaintiff, acting under the belief of such probable success from intelligence received, wrote a letter to the *Middletown Insurance Company*, who had made insurance upon the same ship,

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for the same voyage, stating that the *Hartford* office had authorized him to get the ship into *Connecticut* river as soon as possible; and to do whatever should be needful, without militating against the abandonment, and enquiring whether the *Middletown* office had any objection to this measure;(a) but the proposition therein contained was not acceded to by that office, and for that reason nothing was done under the agreement therein stated to have been made with the defendants.

[*424] *The ship, when got off the rocks, was capable of being repaired at much less expense than half her value.

After she was got off, she was taken to *New-York*, by the master, who there applied to Messrs. *E. & H. Averill*, merchants in *New-York*, who had usually done the plaintiff's business in that city, for advice; and was by them referred to the wardens of the port of *New-York*. The master acting under the advice of those wardens, advertised the ship, her tackle and apparel in a daily paper in *New-York* for sale to the highest bidder; of which the defendants had information expressly communicated to them by the plaintiff. The port-wardens of *New-York* had no authority by the laws of that state to advise, order or direct the sale of the ship; and the master had no other power or authority than every master of a ship by law possesses under like circumstances. But if such authority in the master does exist to make the sale; for all the purposes of selling the ship to the best advantage, and for the highest price, the sale was conducted perfectly fairly. The purchase of the ship, her tackle and apparel, was made by *John King* of *Hartford*, through the agency of others, without any authority from the plaintiff; but nothing was paid by either of them to the auctioneer, or the master of the ship. On the return of *John King* from *New-York*, he informed the plaintiff of the purchase, presuming that he would take her on his own account. The plaintiff accordingly took possession of the ship, caused all the bills against her for getting her off the rocks to be paid, repaired her, and brought her round into *Connecticut* river, where she remained in his possession until after the termination of the late war with *Great-Britain*, when he sent her to sea under the register which she had previous to the loss.

The ship, her tackle and apparel sold for the sum of 2794 dollars, 58 cents; which sum the plaintiff, after deducting the sums expended in getting off the wreck, including seamen's wa-

(a) See the letter transcribed at length in the former report of this case, *ante*, p. 335.

ges, offered the defendants to discount with them in part payment of the amount of the loss; but they declined the offer.

Upon these facts the court reserved the question whether the plaintiff was entitled to recover as for a total loss, or as for a partial loss only, for the consideration and advice of the nine Judges.

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*Terry and *J. Trumbull*, for the plaintiff, contended that the plaintiff was entitled to recover as for a total loss, 1. Because the voyage was defeated. *Abbott* v. *Broome*, 1 *Caines' Rep.* 302. *Alexander* v. *Baltimore Insurance Company*, 4 *Cranch* 377. *King* v. *The Middletown Insurance Company*, ante, 202. *Marsh. Insur.* 585. (*Condy's* edit.)

2. Because the ship, at the time of the abandonment, was in extreme danger of being utterly destroyed. *King* v. *The Middletown Insurance Company*, ante, 184. 201. *Wood* v. *The Lincoln and Kennebeck Insurance Company*, 6 *Mass. Rep.* 483.

3. The right of abondonment being established, the plaintiff has done nothing to waive that right.

Edwards and *T. S. Williams*, contra.

SWIFT, Ch. J. The question is, whether the plaintiff is entitled to recover for a total or partial loss. He claims to recover for a total loss; and this depends on the validity of the abandonment.

In the case of *King* v. *The Middletown Insurance Company*, it was decided, that if the injury of the vessel be such only as to delay the voyage, and there was no extreme hazard of her loss, even if she were stranded, but under such circumstances that she might be got off without danger of sinking, or going to pieces; this would not be a total loss, at any time; but if the situation of the vessel is extremely hazardous, and she is in danger of being utterly lost, this would be a total loss, and the insured might abandon, unless the insurers would consent to bear the expense of getting her off and of repairing her. It is now a question of fact upon the case and evidence stated, whether the situation of this vessel was extremely hazardous so as to warrant an abandonment.

To constitute extreme hazard, the situation of the vessel must be such that there is imminent danger of her being lost, notwithstanding all the means that can be applied to get her off; all the means within the power of the crew to use, and all the assistance

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within the power of the master to obtain. A vessel may be in a situation where her loss would be inevitable, without the application of means to save her, and yet *by the application of such means there would be no difficulty in preventing a loss. This certainly would not be called extreme hazard; for on this principle there could be few instances where vessels are stranded, in which the insured could not abandon, unless the insurers would agree to be at the expense of getting them off. This would be introducing a novel principle into the law of insurance. Extreme hazard, then, can only exist where the situation of the vessel is such that there is little prospect or chance of saving her with all the means and assistance that can be obtained; for then, as the insured can recover nothing for his expense if the vessel is lost, it would seem unreasonable to require him to incur expense for the probable benefit of the underwriters only. But if there is a reasonable prospect that the vessel can be extricated from her dangerous situation, by the exertion of means at command, then the insured is bound to use them, and wait the event.

The question then is, on the facts stated, whether this vessel was in extreme hazard of being lost, notwithstanding any means within the power of the master or insured to make use of, to extricate her. It appears that the vessel had remained on the rocks four days at the time of the abandonment without increase of danger; that the chances were in favour of getting her off, though good judges differed as to the success of the experiment. Under these circumstances, it cannot be pretended, that this vessel was in extreme hazard of being lost. There was such reasonable prospect that she might be extricated from her situation by the use of means within the power of the master to command, that he was bound to make the experiment. Until the issue of that experiment was known there could be no right to abandon; for it would be a solecism to say, that when the situation of a vessel that is stranded is such that the insured are bound to use all the means in their power to extricate her, they can have a right at the same time to abandon her to the insurers unless they will agree to be at the expense. This would be adopting the principle that a vessel when stranded may be abandoned unless the underwriters will agree to be at the expense of getting her off. But it is a most unquestionable rule in the law of insurance, "that mere stranding of itself can never be deemed a total loss so as to enable the insured immediately to abandon. If by some fortunate accident, by

the exertions of the crew, or by any borrowed assistance, the ship can be got off and rendered capable of continuing her voyage, it is not a total loss, and the insurers are liable only for the expenses occasioned by the stranding. It is only where the stranding is followed by *Shipwreck*, or where the ship in any other way is rendered incapable of prosecuting her voyage, that the insured is entitled to abandon." *Marsh. Insur.* 582. *c.* 583. (*Condy's* edit.) The vessel in question was got off the rocks by the exertions of the crew and borrowed assistance, and rendered capable of prosecuting her voyage at an expense much less than half her value; of course, there never was that actual or technical total loss that would warrant an abandonment; and the plaintiff is entitled to recover for a partial loss only.

But it is insisted, that the voyage was defeated, and was not worth pursuing; for which the plaintiff had a right to abandon. But it appears that a part of the cargo had been saved; that the vessel had been repaired, and rendered capable of pursuing her voyage, at an expense much short of half her value; and had arrived at *New-York*, within a few days sail of her port of destination. From these facts it does not appear that the voyage was not worth pursuing.

Admitting, however, that such was the loss that the voyage, as it respected the cargo, was defeated; this can make no difference, for the policy was on the vessel only. The engagement in such policy is, that the vessel shall be of sufficient ability to perform the voyage, not that she shall actually perform it; for this may depend on the will of the insured. There may be such a loss of the cargo by the perils insured against as to render the voyage not worth pursuing, while the vessel sustains no material injury. To say, under such circumstances, it is optional with the insured to give up the voyage, abandon the vessel, and call on the insurer for a total loss, would be to subject them for a loss where no injury had arisen from the perils insured against, and where there had been no violation of the contract; it would subject the underwriters of the vessel for damage done to the cargo; they would be obliged to pay for the vessel when in a state of safety, capable of prosecuting her voyage, uninjured by the perils contemplated in the policy. No case can be found to warrant such a doctrine as this.

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In this opinion SMITH, BRAINARD, BALDWIN and GODDARD, Js. concurred.

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TRUMBULL and HOSMER, Js. dissented.

Judgment to be entered for a partial loss only.

LUNG'S case.

Powers and duties of the grand jury.

THE prisoner has been tried before the superior court, at a special session in *Middlesex* county, on an indictment for murder, and found guilty. Before the time appointed for his execution, he applied to the General Assembly for a pardon, or other relief; alleging some informalities in the proceedings of the court preparatory to his trial. The General Assembly thought proper to order a new trial at the next session of the superior court in *Middlesex* county. As some doubts had been expressed relative to the power and duty of the grand jury, the following directions were submitted at this term for the consideration of the nine Judges, and were approved.

Directions to the Grand-Jury.

YOU will retire to some convenient apartment to be provided for you by the sheriff. You will choose some one of your number to be your foreman. The attorney for the state will lay before you such bills as he may think proper, and refer you to the witnesses to support them. You will cause the prisoner and the witnesses to come before you. You will admit no counsel on the part of the state, or of the prisoner. You will permit the prisoner to put any proper questions to the witnesses, but not to call any witnesses on his part. You will admit no spectators to be present during your enquiries and deliberations. At least twelve of your number must be agreed to find a bill. Such bills as you find supported by the evidence you will return into court endorsed by your foreman—*A true bill.* Such bills as you find not supported by the evidence you will return in like manner indorsed by your foreman—*Not a true bill.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT,

IN JUNE TERM, 1816.

SLOCUM *against* WHEELER and others.

To render the sentence of a district court of the *United States*, sitting as a court of admiralty, and deciding the question of prize, conclusive on the same point arising incidentally in the state courts, such district court must have had jurisdiction of the subject matter; and whether it had or not, the state courts are competent to examine and decide.

Where the president of the *United States*, under the authority of congress, issued a commission to the commander and crew of a private armed vessel *to seize any armed or unarmed British vessel, public or private, within the jurisdictional limits of the United States, or elsewhere, on the high seas, or within the waters of the British dominions, and to seize all vessels and effects, to whomsoever belonging, which should be liable there unto, according to the laws of nations, and the rights of the United States as a power at war, and to bring the same into some port of the United States in order that due proceedings might be had thereon:* it was held, that the goods of *British* subjects, seized by the officers and crew of such private armed vessel, *on land* within the territorial limits of the *United States*, and in their peaceable possession, could not be lawful prize of war, nor subject to the jurisdiction of a prize court.

Quære, whether property taken in one district of the *United States* as prize of war, can be carried into another district for adjudication.

THIS was an action of trespass *vi et armis* against the defendants, for breaking and entering, on the 21st of *October* 1814, the plaintiff's dwelling-house at the island of *Nashawinna*, in *Dukes* county in the commonwealth of *Massachusetts*, and taking and carrying away several articles of personal property belonging to the plaintiff, particularly specified. The cause was tried at *Norwich*, *September* term, 1815, before *Swift*, Ch. J. and *Brainard* and *Hosmer*, Js.

On the trial, the taking of the goods was clearly proved,

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and that they were, when taken, at *Nashawinna*, in the plaintiff's possession.

The defendants justified the taking on the following facts. The island *Nashawinna* is within the state and district of *Massachusetts*, and when the goods were taken, was within the actual jurisdiction of that state, and not in possession of the *British*. The plaintiff was an *American* citizen. The defendants were the commander and crew of the row-boat, called the *Yankee*, commissioned by the president of the *United States* on the 25th of *August* 1814, as a privateer.

The commission authorized the officers and crew "to subdue and seize any armed or unarmed *British* vessel, public or private, which should be found within the jurisdictional limits of the *United States*, or elsewhere, on the high seas; or within the waters of the *British* dominions; and such captured vessel, with her apparel, guns, &c. and the goods and effects which should be found on board the same, to bring within some port of the *United States*," &c. It further authorized them "to retake any captured vessels or effects, and to obtain, seize and take all vessels and effects to whomsoever belonging, which should be liable thereunto according to the law of nations and the rights of the *United States* as a power at war, and to bring the same within some port of the *United States*, in order that due proceedings might be had thereon." There was an endorsement on the commission as follows: "District and Port of *New-London*, 24th of *September*, 1814. The within named boat *Yankee* being too small for her crew, they are permitted to use the boat lately named the *Experiment*, now called the *Yankee*, and to which this commission is to apply. *Jedediah Huntington*, Collector."

The property taken was brought into *Connecticut;* and on the 13th of *January* 1815, a libel was filed by the defendants to procure the condemnation of it as prize, before the district court of the district of *Connecticut*, sitting as a court of admiralty. The libel propounded, 1st, the act of Congress passed on the 18th of *June* 1812, declaring war against *Great-Britain;* 2dly, the commission granted to the row-boat *Yankee;* 3dly, that on the island *Nashawinna* in the *Vineyard* sound, the row-boat *Yankee* seized as prize of war, the goods and chattels in question; all which property belonged to the government of the United Kingdom of *Great*

Britain and *Ireland*, or the officers, soldiers and subjects of the same; and were, by the proponents and others on board the row-boat *Yankee*, carried into the port of *Mystick* in the district of *Connecticut*, for adjudication. A monition was duly issued and published; and on the 28th of *February* 1815, no person having appeared to claim the goods and chattels seized, they were condemned as good and lawful prize to the captors.

The court charged the jury, that the commission did not authorize the defendants to seize and capture the goods and chattels aforesaid, admitting them to be *British* property, in the island of *Nashawinna;* that if duly captured, the defendants were not authorized to bring them into the district of *Connecticut* for adjudication; and that, as it appeared on the face of the libel, that they were taken on the island of *Nashawinna*, and thence brought into the district of *Connecticut* for adjudication, they were not within the jurisdiction of said district court; that therefore, the decree of condemnation proved nothing for the defendants.

The jury found a verdict for the plaintiff; and the defendants moved for a new trial on the ground of a misdirection. The questions arising on this motion were reserved for the consideration and advice of the nine Judges.

The case was argued at the last term of this Court, by *Brainard* in support of the motion, and by *Cleaveland* contra; and was continued to advise. At this term, the Court declined hearing further argument.

In support of the motion, it was argued, that each of the three propositions contained in the charge was a misdirection; but if either was, a new trial ought to be granted.

If the first direction be correct, it must be either because the taking "as enemy's property" was *on land*, or *in another district*. Captures on land by a naval force are sanctioned by the usage of every country in every war, and recognized as legal in the sentences of every court of admiralty. *Lindo* v. *Rodney*, *Doug.* 613. n. 4 *Dall. Append.* vii. *Brown & al.* v. *Franklyn*, *Carth.* 474. The capture in this case was also justified by the *lex talionis*, which is part of the law of nations.

The terms of the commission were comprehensive and unambiguous. The construction given on the trial is too

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narrow. It is opposed to the very object in granting the commission.

But a capture of enemy's property is justified *without* commission, though in that case, the disposition made of it by the admiralty is different. *The Rebeckah*, 1 *Rob.* 197, 8. [236.] 1 *Wills.* 213.

The second part of the direction under consideration is equally incorrect; for the captors may be compelled *from necessity*,—by stress of weather, or by the enemy,—to make a port in *any* district; and that port must be the place of condemnation; as it may be impossible to remove the property, and the evidence, to a distant district. It is for the benefit even of the claimants to have a trial where they are carried with the property; and the admiralty of the district furnishes all persons with the most appropriate remedy. To deny this privilege in a case of *necessity*, where the capture is admitted to be lawful, is absurd.

Upon the point that the jurisdiction in the case stated belongs to the district court in *Massachusetts*, and not to that in *Connecticut*, the charge exposes itself to two objections: that the superior court had no right to decide that question at all; and if they had, that they decided it wrong.

The district court is empowered by the constitution, and the judiciary law, to decide for itself the question of its own jurisdiction; and to the discharge of this duty it must be presumed competent. The only security against the possible abuse of authority which can ever be given, is given in this case, by appeal to the circuit and supreme courts of the *United States*. If this be not the exclusive remedy, the supreme court of the *United States* may sustain the jurisdiction of a district court in the very case where the party in whose favour they thus decide, is suffering as a trespasser the judgment of a state court whose opinion upon the same question collaterally given happened to be different. *Doane's* admrs. v. *Penhallow & al.* 1 *Dall.* 220. 221. 4 *Dall. Append.* ix. x. *Wilkins* v. *Despard*, 5 *Term Rep.* 117. 4 *Cranch* 18. 294.

But the question which of the two district courts has jurisdiction, can in no case come before this court. In order to arrive at the question which of two admiralty courts has jurisdiction, they must necessarily decide a previous question: Is it of admiralty jurisdiction? To decide that it is, is to

decide that it is not of common law jurisdiction; for they never have concurrent powers when the former is a *prize* court. The question, therefore, what prize court is to decide, will always be *coram non judice* in a court of common law; for they must say either that it is not a question of prize, or if it is, that they have no further jurisdiction; and so an answer to an ulterior question would be extra-judicial. *Lothian* v. *Henderson*, 3 *Bos. & Pull.* 499. *Baring* v. *Clagett*, 3 *Bos. & Pull.* 201. 215. *Penhallow* v. *Doane's* admrs. 3 *Dall.* 85, 9. *Geyer* v. *Aguilar*, 7 *Term Rep.* 681. *Bernardi* v. *Motteux*, *Doug.* 574. *Ladbroke* v. *Crickett*, 2 *Term Rep.* 653. 4 *Cranch* 23. 294. 1 *Conn. Rep.* 7, 8.

But if they could decide, they have decided wrong. The charge denies the power of the district court of this district, because it appears upon the face of the decree, that the fact took place in the island of *Nashawinna*. The decree speaks of the island of *Nashawinna* in the *Vineyard* sound, without saying in what district it is, or whether it is in any district; and no inference or intendment can presume a defect in a record which does not exist. The fact, then, from which the court drew their conclusion, is otherwise.

The judgment of a court of competent jurisdiction, cannot be attacked collaterally. Nor is there one invariable rule by which the competency of different courts is to be tried. The rule as to a court of admiralty, is, whether it has jurisdiction of the *subject matter*. The question is, *prize or no prize;* that is, in this case, enemy's property or not. But the court admit it to be enemy's property; and every attack is a collateral one, which is not in the course of appeal.

The jurisdiction of a prize court is bounded by no local limits; it decides upon every species of property *jure belli et jure gentium*, and its suitors come from every nation. Every district court in the *United States* has, in time of war, all the powers of an *English* prize court. All courts of admiralty have a concurrent jurisdiction upon this question; and have, of course, a right to decide whether that question is before them. Arguments drawn from a possible abuse of power indicate a dangerous jealousy, and are as applicable to one court as to another. *Menetone* v. *Gibbons & al.* 3 *Term Rep.* 270. *Oddy* v. *Bovill*, 2 *East* 479. *The Christopher*, 2 *Rob.* 173. [209.] *The State of Georgia* v. *Brails-*

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ford & al. 3 *Dall.* 16. *Rose* v. *Himely*, 4 *Cranch* 250, 1, 2, 3. 258. 264. *& seq.*

A court of common law cannot claim to participate in the powers of a prize court; for it has not the means of using them. This case is stronger than any of the *English* cases relied upon by the plaintiff; for this is a domestic judgment; and this court has no superintending authority by which it can issue a prohibition. *Talbot* v. *Johnson*, 3 *Dall.* 161. *Ladbroke* v. *Crickett*, 2 *Term Rep.* 649. 4 *Dall. Append.* viii. *Smart* v. *Wolf*, 3 *Term Rep.* 341 to 347. *The King* v. *Brown*, *Carth.* 398.

The validity of the commission, and the extent to which the decree will operate, are questions not before the court. They were suffered to go to the jury; and no exception was taken to their admission. They are now to be regarded as proper evidence; and whether the directions accompanying them were proper or not, is the only enquiry.

All the questions involved in this case are settled by the cases cited. They decide, that enemy's property may be taken on land or water, with or without commission; that it may be brought into the port of a belligerent, of his ally, or of a neutral; that the prize court may be holden in the country of the belligerent, or his ally; that it is a competent court, if it has jurisdiction of the question *prize or no prize;* that every *United States* district court has all prize jurisdiction, and every court of common law has none; and that the judgment of a court thus competent cannot be collaterally attacked. It is also to be considered, that in the case of a domestic judgment these positions apply more strongly than with regard to a foreign one; particularly, to a court that cannot issue a prohibition.

The argument *contra* was in substance as follows.

It is claimed the court erred in directing the jury, that the commission offered in evidence gave the defendants no authority to capture property on the territory of the *United States*, in the peaceable possession of the *United States*, and not in the possession of the *British*. This is denied,

First, Because the commission offered in evidence shews that it was of no validity. The indorsement on the commission shews that it was by the commander relinquished and given up as a commission to the boat for which it was first issued.

Secondly, It could not be indorsed over as a commission to another boat; because when given up, it was *functus officio* and ceased to be a commission; because the collector had no authority to indorse it over by the law of the *United States;* because it did not answer to the description of the boat on which it had first been taken out; and because the laws of the *United States* had authorized the president ef the *United States* only to issue commissions to private armed vessels, and that under particular requirements prescribed by the law, which were not complied with at all by such indorsement. See 2 *Grayd. Dig.* 145.

This was a commission from the collector, and not from the president, and was opposed to the practice in *England* under their prize act. See 5 *Rob.* 42. 252. 3 *Rob.* 224. 195. (*Lond.* edit.)

Thirdly, The law of the *United States* never meant to authorize the president of the *United States* to issue commissions *to boats without tonnage.* The requirements of the law are, that tonnage shall be made known by the owners; that a description of the vessel shall be sent to the secretary of state, and there lodged, stating the tonnage. The boat in question cannot be so described; her tonnage cannot be taken. See 2 *Grayd. Dig.* 145.

Fourthly, Admitting the commission to be valid, it gives no authority to capture property on the territory of the *United States*, in their peaceable possession.

Every government has a right to say what belligerent rights they will, and what they will not, exercise.

Belligerents, whether of the army or of private armed vessels, receive their authority from the commission issued by their government, and must confine themselves within the limits prescribed by such commission, except in cases of necessity. *Vattel, lib.* 3. *c.* 15. *s.* 223, 4, 6, 7.

In *England*, the rights and powers of private armed vessels have always been governed by the terms of the commission. 1 *Rob.* 196. 197. 3 *Rob.* 134, 5, 6, 7. 1 *Edwards' Adm. Rep.* 113. 114.

In 1798, our government declared a partial war against *France*, and authorized the president to issue special commissions. Private armed vessels could not exceed the authorities given in such commission. See *Laws of U. S.* vol. iv. p. 163.

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In the present instance, the government have declared war, and authorized the president to issue commissions in such form as he may think best. By the terms of the commission they must be governed. But the terms of this commission give no authority to capture on land, much less upon the territory of the *United States* in their peaceable possession.

In *England*, the commission authorizes a capture from sea upon land; yet in no case has it ever been construed to give authority to capture within the *British* territory in their peaceable possession. See *Doug.* 591. 4 *Dall. Append.* vii. *Carth.* 474.

But at any rate, this property, if *British* property, on the territory of the *United States* in their peaceable possession, was only liable to be confiscated to the government, and never was a subject of capture, or capable of being claimed as prize. If it had been on water, it could have been no more than a *droit* in admiralty; and then not subject to capture, or capable of being claimed as prize. See 1 *Rob.* 236. 237. 283. 2 *Rob.* 164, 5. 6. 7. 4 *Rob.* 403.

It would be opposed to the very idea of capture, that property in our own possession should be liable to be seized by a privateer. His commission is to go out and take property, and bring it in; but not to seize property already in our possession, to take which no force is or can be necessary.

Another ground on which it is said the court have erred, is, that the defendants have taken the property *as prize of war*, and therefore the court cannot enquire whether it was rightfully or wrongfully taken.

It is admitted, that if the property was taken, and could have been taken, as prize of war, this court could not adjudge upon it. But a court of common law must always have the power to enquire whether it was thus taken or not, and whether it was a subject capable of being claimed as prize. *Doug.* 591. *et seq.*

The court below have enquired, and have found that it was *not* taken as prize of war; and if not, they must have jurisdiction to the full extent of their powers.

But, it is said again, the court could not make this enquiry, because the defendants have produced a decree of the district court of the state of *Connecticut* condemning the prop-

erty as prize; and this decree is conclusive, and cannot be enquired into.

But a decree of admiralty on default, without claim, may always be enquired into between third persons. This is proved by the case decided before the supreme court of the *United States* in case of *The Ship Mary and cargo, in January*, 1815. If this decree is not conclusive, the court have put the question at rest; for they have not only found that the court had not jurisdiction, but also that the property was not taken as prize.

Further, admitting the district court had jurisdiction, it cannot be admitted to prove any thing more than what is expressly found by the court. But no fact is found by the court in this decree.

Again, no court of admiralty had jurisdiction of the case, as appears from the record itself. To entitle a court of admiralty to jurisdiction, it must appear to be a subject within the jurisdiction of the court; that is, the subject must be capable of being claimed in admiralty. No property on the territory of the *United States*, in their peaceable possession, can possibly be brought before a court of a admiralty, admitting it to be liable to confiscation. If seized in behalf of the king in *England*, it is brought into the court of *Exchequer*.

It is thought to have been shewn it could not be taken as prize. If it cannot be taken or claimed as prize, and this appears from the facts stated in the libel as to the location and description of the property, it cannot be claimed that it was a subject of admiralty jurisdiction.

Further, by the laws of the *United States*, the property, as disclosed in the libel, was not even liable to confiscation. If not liable to confiscation, it could not be a subject capable of being claimed as prize. This was decided by the case in favor of the *United States* against a quantity of timber at *Boston*, libelled as the property of the government of *Great-Britain*, in *January* 1814, by the supreme court of the *United States*.

But admitting the subject was of admiralty jurisdiction, yet the district court of *Connecticut* district had not jurisdiction, on the ground that it appeared from the record the property was not seized on the high seas, but on land, not within this district. The laws of the *United States* have

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given the district court jurisdiction of admiralty and maritime causes only where the seizure was on the high seas, or on waters navigable from the sea, by vessels of ten or more tons burthen, within their respective districts. 1 *Grayd. Dig.* 146. *sect.* 54. The law respecting private armed vessels provided, that the district courts should have jurisdiction of prize cases "*as in other cases*" of admiralty and maritime jurisdiction. 2 *Grayd. Dig.* 144. From the expression made use of, it is a fair construction, that the district courts have jurisdiction only under the same conditions they have jurisdiction in other cases of admiralty and maritime jurisdiction. A seizure under the laws of impost, navigation, &c. if made on water, as provided by law, is a case of admiralty and maritime jurisdiction. There is the same reason that a seizure by a captor should be tried within the district where seized, as if seized under the impost law. That the place of seizure determines what court has the jurisdiction, see *Keene* v. *The United States*, 5 *Cranch*, 304. and many other cases decided by the circuit court.

But it is said again, you cannot enquire into the question of jurisdiction of the court, but are concluded by the decree.

This proposition is denied to be law. In the first place, you may always enquire into the jurisdiction of the court, if from the face of the record it appears the court had not jurisdiction. *Grumon* v. *Raymond*, 1 *Conn. Rep.* 45. *Perkin* v. *Proctor*, 2 *Wils.* 482. *Stanyon* v. *Davis*, 6 *Mod.* 224. Lord *Coningsby's* case, 9 Mod. 95. *Rex* v. *Corden*, 4 *Burr.* 2279.

Further, the district court is a court of *limited jurisdiction;* and on that ground it must not only have jurisdiction, but it must be shewn *by the record* that it had jurisdiction. That the judgment is void, if the court has not jurisdiction, see *Rose* v. *Himely*, 4 *Cranch*, 241. 243. 271. 1 *Conn. Rep.* 45.

Finally, this was a judgment by default, without a claim, and may be enquired into. If so, the question of jurisdiction is decided by this court, and cannot on this motion be reviewed.

SWIFT, Ch. J. The question is, as to the effect of the decree of the district court condemning the property in question.

In all cases of courts of limited jurisdiction, their proceedings must be in matters within their jurisdiction, or they

are void; and when such proceedings are questioned before another tribunal of general jurisdiction, it is competent for them to examine whether the subject matter was within the jurisdiction of such court. This rule is equally applicable to courts of admiralty; and such, I apprehend, has been the course of decisions. This point was settled in the case of *Rose* v. *Himely*, 4 *Cranch*, 241. where it was decided that the condemnation of a vessel and cargo by a court of admiralty in *St. Domingo* did not change the property, because such court had no jurisdiction. It is true, this case was over-ruled in the case of *Hudson* & *Smith* v. *Guestier*, 6 *Cranch*, 281.; but that was on the ground that the court at *St. Domingo* had jurisdiction; and in both cases it was considered that the question of jurisdiction was examinable.

This principle is essential to the due administration of justice. Suppose a self-created tribunal should exercise maritime power, and pass decrees affecting individual rights; if its jurisdiction could not be questioned, the greatest injustice would be done. No one will pretend that the proceedings of such a court would be valid; and yet it might as well be said in this case as in any other, that the validity of the acts of a court of admiralty was impeached; and that if it might be done in one case, it might in all. Suppose one should obtain a tortious possession of another's horse in some interior place, and exhibit a libel in the district court and obtain a sentence of condemnation, no one can think that this would change the property; yet such would be the effect of the condemnation, if the jurisdiction of the court could not be called in question.

There can be no doubt, then, but the validity of the sentences of prize courts may be examined; and Lord *Mansfield* has laid down the correct rule in *Lindo* v. *Rodney*, *Doug.* 619. n. "*The question prize or no prize is the boundary line.*" This must be understood to mean *lawful* prize or *not lawful* prize. If the circumstances of the case are such as to admit of the possibility that the capture was lawful and the prize good, then the prize court alone has jurisdiction, and the decree is conclusive on all other tribunals; no enquiry can be made whether it be correct. But if the capture can by no possibility be lawful, then the prize court cannot have final jurisdiction: it will be a mere question of tort, cognizable by the courts of common law; for it would be

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inconsistent to say it was a question of prize, when it would be impossible there should be a lawful capture. If the court be a self-created tribunal, or the capture in a place where there can be no prize of war, the question of prize or no prize cannot arise, the tribunal can have no jurisdiction, and it would be the greatest absurdity to say that their decrees should change the title to property.(*a*) The question, then, arising in this case, is, whether from the facts appearing on record there could have been a lawful capture of the property in dispute.

It appears, that Congress declared war against *Great-Britain*, and authorized the president of the *United States* to issue to private armed vessels, commissions, or letters of marque and general reprisal, against the vessels, goods and effects of the government of *Great-Britain*, and the subjects thereof; that the president issued a commission to the private armed vessel in question, to subdue, seize and take any armed or unarmed *British* vessels, public or private, within the jurisdictional limits of the *United States*, or elsewhere, on the high seas, or within the waters of the *British* dominions; and the same, with all effects and persons on board, to bring into some port of the *United States;* also to retake any captured vessels or effects, and to take, seize and detain all vessels and effects to whomsoever belonging, and to bring them into some port of the *United States*, in order that due proceedings might be had thereon. Here no power is given to a private armed vessel, or any person whatever, to capture or seize the goods or effects of *British* subjects or others *on land*, within the territorial limits of the *United States*. The authority is limited to the *high seas;* and such was the manifest intent and object of the government. It is true, by the right of war, they might have seized the effects of *British* subjects within our territorial limits; but until they have given such authority, no individual can do it; and such is understood to have been the decision of the Supreme Court. It will be admitted, that there may be cases where there may be a seizure on land within our territory; as where an enemy's vessel flying from pursuit should convey goods on to the land, the privateer pursuing might seize such goods; for this would be in effect a naval capture. Such, however, is not the present case.

It further appears from the record, that the property in

(*a*) See *Perry* & al. v. *Hyde* & al. 10 *C. R.* 329.

question was taken on the island of *Nashawinna* in the district of *Massachusetts*, within the territorial limits of the *United States*, and not on the high seas, or within the *British* dominions. The act of Congress and the commission of the president gave the defendants no authority to capture *British* effects in such place. They could not be a lawful prize of war. The district court had no jurisdiction; and the sentence of condemnation is no protection to the defendants.

I would not advise a new trial.

In this opinion TRUMBULL, SMITH, BRAINARD, BALDWIN and GODDARD, Js. concurred.

HOSMER, J. If the property taken were *American*, it is not pretended that it was liable to capture. It was seised upon the supposition, that it belonged to the *British* government, or a *British* subject, and under the same view, it has been condemned as prize. To test the legality of the seizure and the decree of the admiralty, I will admit, for the purpose of this decision, that the above supposition was correct. Two enquiries are naturally presented; was the seizure of the property (if it were *British*) authorized by law; and had the district court of *Connecticut*, *as a court of admiralty*, jurisdiction over it as a prize of war?

1. The legality of the seizure must be decided by the laws of the *United States*.

The defendants have argued, that by the common law, every individual has right to capture the property of the public enemy, wherever he may find it. I ask by *what common law?* The reply is, the common law of *England*. If this answer were correct, unless the same rule has been adopted as the *common law of the United States*, *or of the state in which the seizure was made*, it is entirely unavailable. Of this there is not the slightest evidence, nor is there any such common law in *England*. An *obiter dictum* of a single judge to this effect (1 *Wilson* 213.) is all that has been exhibited, to substantiate the doctrine in the face of multiplied authority.

Public war is that state in which a nation prosecutes its rights by force, and is carried on in the name of the government, and by its order. (*Vattel*, *lib.* 3. *c.* 1. *s.* 1.) It belongs to the government to say, what belligerent rights they will,

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and what they will not, exercise. Individuals may not commit hostilities without the sovereign's order; (*Vattel, lib.* 3. *c.* 15. *s.* 223.) nor may they fit out private ships of war to cruize against the enemy, unless commissioned for this purpose. (*Id. s.* 259.) Depredation committed on or near the sea without authority from any prince or state, is piracy, wholly unauthorized, and highly criminal by the law of nations; and without any pretence for divesting the dominion of the former proprietor. 2 *Woodes.* 421. 5 *Bac. Abr.* 310. 1 *Rob. Adm. Rep.* 196, [236.]

The *commission* of the row-boat *Yankee* was next adverted to, to justify the seizure. No little surprize is excited, in the attempt to give such a construction to this instrument. That the dwelling of an *American* citizen in the heart of our country, may, with force and strong hand, under power delegated by our own government, be entered by a privateer's crew, and rifled of the furniture and other valuable property, under the pretext that they are *British* goods, no person will be disposed to believe.

To establish a proposition so extraordinary, resort was had to the *English* adjudications on this subject.

In *Great-Britain* the right of captors over the property of a public enemy, depend entirely on the commission granted them. Of what importance would it be to the defendants could they show, that the *English* letters of marque and reprisal authorized captures *on land*. The rights of the defendants did not result from *a British commission*, but from an *American commission*. As, however, it is not to be presumed that the *United States* are more regardless of the rights of their own citizens or of others, than the *British* government are, it may aid in the construction of the powers granted by the president to prove, that an *English* privateer has no such right as is pretended. This shall be done in a few words.

An expression in the case of *Lindo* v. *Rodney*, *Doug.* 617. *n.* [1]. through inadvertency has occasioned a mistake. It is said, "that the commissions to fit out ships against the enemy, expressly authorize the persons to whom they are granted to take the enemy's goods *by land* as well as by sea." This was an assertion made by Doct. *Wynne*, and in proof he cited an instance occurring in the 37th of *Elizabeth*. What has been the tenor of commissions from that remote

period to the present time does not appear, nor is it of any importance to enquire. It never was imagined, that either the *public* or *private* ships of war had authority to seize the goods of the public enemy *on British soil*. The land mentioned in the commission spoken of, was the territory of the public enemy. The law of *Great-Britain* on this subject appears from an opinion expressed by Sir *William Scott*, in a case before him in the year 1809. (1 *Edwards' Adm. Rep.* 102. 113.) A privateer had taken *public property* on the *Danish* island of *Stromoe*, and the rights acquired by it were in question. "I take it," says Sir *William*, "that the operations of privateers are confined to the attack of fortified places on land. The words of the 3d section of the prize act extend only to the capture of any of his majesty's ships, of *any fortress* upon the land, or any *ammunition*, *stores of war*, *goods*, *merchandize*, and treasures *belonging to the state*, or to *any public trading company* of the enemies of the crown of *Great-Britain* upon the land." "Here then the interests of the king's cruisers are expressly limited with respect to the property in which the captors can acquire any interest of their own, the state still reserving to itself all private property, in order that no temptations might be held out for unauthorized expeditions against the subjects of the enemy on land. With regard to private ships of war, the lords of the admiralty are empowered by the 9th section to issue letters of marque to the commanders of any such ship or vessel,—for what purpose? Why, for the attacking and taking any place or fortress upon the land, or any ship, or vessels, arms, ammunition, stores of war, goods, or merchandize belonging to or possessed by any of his majesty's enemies. Where? In *any sea*, *creek*, *river*, *or haven*. I perfectly recollect, that it was the intention of those who brought this bill into parliament, that privateers should not be allowed to make depredations upon the coast of the enemy, for the purpose of plundering individuals, for which reason they were restrained *to fortified places*, *and fortresses*, *and to property waterborne*."

On recurrence to the law of the *United States*, it will be seen, that the authority of *American* privateers is in no respect greater, and in one particular is less, than that conferred by the *British* prize act on *British* privateers. The president of the *United States* is authorized (11th vol. *L. U. S.*

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p. 227.) "to issue to private armed vessels of the *United States* commissions, or letters of marque and general reprisal, in such *form as he shall think proper*, against the vessels, goods and effects of the government of the United Kingdom of *Great-Britain* and *Ireland*." The power thus delegated he has thought fit to exercise by granting to the row-boat *Yankee* a commission limiting the field of enterprize *to the waters only*. The words of it authorize the privateer, "to seize, subdue, and take any armed or unarmed *British* vessel, which shall be found within the jurisdictional limits of the *United States*, or elsewhere on the *high seas*, and such captured vessel, &c. to bring within *some port of the United States*." *This, so far as relates to the public enemy, is the whole power granted.* There is nothing contained in the commission on which to found a pretence that the crew of the *Yankee* was empowered to capture property of any description, on the *territory of the public enemy;* much less, that they might seize *British effects on our own soil.*

The standing instructions given by the president of the *United States* to the private armed vessels, define the duty of the commanders, and are a commentary on the commission issued. They commence with this expression: "The tenor of your commission under the act of congress, entitled, "An act concerning letters of marque, prize and prize-goods," a copy of which is hereto annexed, "*will be kept constantly in your view*." They then proceed to specify the scene of action. "The *high seas* referred to in your commission, you will understand, generally, to extend to *low-water mark*, but with "the exception of the space within one league, or three miles, from the shores of countries at peace both with *Great-Britain* and the *United States*. You may, nevertheless, execute your commission within that distance of the shore of a nation at war with *Great-Britain*, and even *on the waters* within the jurisdiction of such nation, if permitted so to do." This is all that relates to the place of executing the commission, and is a perpetual construction of it; so accurately defining the limits of enterprize, that they cannot be mistaken.

The prize act accompanying the commission, if further explanation were needful, most abundantly furnishes it, by giving such direction in relation to the bringing *into port*, and dealing with vessels and effects taken, as to leave no doubt,

that capture was limited exclusively "to property water-borne."

The supreme court of the *United States*, (*January* 1814), on a prosecution by the *United States* against a quantity of timber seized at *Boston* as being *British* property, decided, that it was not liable even to confiscation.

The result on this head is, that the property at *Nashawinna* was *not* liable to capture; that it was not, and *could not* be, taken *as prize;* and that the taking of it was a clearly unauthorized, unqualified trespass,—an open and violent robbery, punishable in the courts of common law. Of consequence, the charge to the jury, that the commission to the *Yankee* did not authorize the defendant to seize and capture the goods and chattels on the island *Nashawinna*, was strictly legal.

2. The next enquiry is, had the district court of *Connecticut, as a court of admiralty, jurisdiction* over the property taken on *Nashawinna* as prize of war?

I am of opinion, that it had *no jurisdiction*, and that the sentence pronounced by it is *utterly void*. First, as a *court of admiralty*, the district court had no cognizance of the matter brought before it.

It must constantly be borne in mind, that the property condemned, without the shadow of authority, was taken *on land* within the territory of the *United States*. It was not, and *could not* be, seized *as prize;* but the seizure was an act of plunder and rapine. It must likewise be recollected, that the libel no where avers the taking of the goods to have been *on water*, but that it explicitly alleges it to have been "upon an island, called *Nashawinna*, in the *Vineyard* sound." This island, the motion states, is within the actual jurisdiction of the state of *Massachusetts*. Independent of this, the court will judicially take notice of a fact of such publicity as that an island adjoining a well known sound or sea, is part of the *United States*. (*Peake's Ev.* 81, 3.)

The courts of the *United States* are universally of *limited jurisdiction*, and their proceedings are erroneous, if the jurisdiction be not shown upon them. (5 *Cranch* 185.) This observation is applicable to the district court as a court of admiralty, equally as to the common law tribunals. "It is the *place of seizure* which decides the jurisdiction," say the supreme court in *The United States* v. *The Betsey* and *Charlotte*, 4 *Cranch*. 452.

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The seizure, to give admiralty jurisdiction, must be on *navigable water*. If it is on land, the district court may have cognizance as a court of *common law*, on a prosecution by the *United States*, but in no other capacity. These principles will be apparent, on recurrence to the law defining the jurisdiction of the courts of the *United States;* and besides, have the advantage of being established by a direct decision of the supreme court. The ninth section of the judiciary act, (vol. i. *L. U. S.* p. 53.) having conferred criminal jurisdiction on the district courts in certain cases, provides, that they "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the *United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen*, within their respective districts." It further enacts, that the district courts shall have cognizance of "seizures *on land or other waters than as aforesaid;*" but the latter clause refers merely to seizures at common law, and so are the adjudications.

"It is clear" (say the court in 4 *Cranch*, 452.) "that Congress meant to discriminate between seizures *on waters navigable* from the sea, and seizures upon land or upon waters not navigable, and to class the *former* among the civil causes of admiralty and maritime jurisdiction." The same principle has been recognized in many determinations made by the supreme court of the *United States*, so that it is past all question, that *admiralty causes* of which the district court has cognizance, must originate from *seizures made on navigable waters only*. 3 *Dall.* 301. 2 *Cranch* 406. 4 *Cranch* 452. and *United States* v. *Watkinson* and *Hubbard*, before *Livingston*, J.

I am not aware that there is any act of Congress on this subject, except the one referred to, and one passed on the 26th of *June* 1812, a few days posterior to the declaration of war. It is entitled, "An act concerning letters of marque, prizes and prize goods." 11th vol. *L. U. S.* p. 238.) In the 6th section of the law it is enacted, that "in the case of all captured vessels, goods and effects which shall be *brought within the jurisdiction* of the *United States*, the district court of the *United States shall have exclusive original cognizance thereof*, as in cases of *admiralty and maritime jurisdiction*." This

clause clearly relates to captures on the high seas. The jurisdiction of the district court is in no other respect enlarged by it, than by extending the ordinary jurisdiction before conferred on it as a court of admiralty, to questions *of prize;* at the same time the symmetry of the judicial system is preserved. The *admiralty jurisdiction comprizes the navigable waters only.*

If the enquiry be made, why was not jurisdiction given to the district court as a court of prize, of captures *made on the land?* I reply, it was because no captures could *there* be made. Whenever it shall be considered expedient to enlarge the sphere of capture, there will be a correspondent extension of the court's jurisdiction. It is admitted, that the district courts of the *U. S.* have exclusive cognizance of all cases of admiralty and maritime jurisdiction, 3 *Dall.* 6. 4 *Cranch*, 2. But *British* property may not be taken *as prize* on the land; and therefore the courts above named have not *admiralty jurisdiction* of such seizures.

Thus far I have endeavoured to show that the district court, the seizure having been made on land, could not have any admiralty jurisdiction of the property taken. But if the objection to the exercise of admiralty jurisdiction, in any *possible* case of seizure on land, is considered as unfounded, I am of opinion, that the taking of the property by the crew of a privateer is decisive to negative the court's jurisdiction. This fact appears on the libel. The defendants aver the seizure of property *on land*, upon the island *Nashawinna*, by virtue of their commission exhibited to the court. They declare upon it as being *captured*, and pray the condemnation of the property *as prize.*

I have shown, I trust, that the taking of the property was not a *capture*, that it was not *prize*, but unauthorized *plunder*. The jurisdiction of the district court, as a court of admiralty, *turns upon this point.* The property has been condemned, "*as prize of war.*" The question is, had the defendants, under the commission granted to the row-boat *Yankee*, authority to go with force and strong hand upon the island *Nashawinna*, to enter the plaintiff's dwelling-house, and to rifle it of his furniture, under the pretext of its being *British* property? If they had, then the property seized was *prize.* But, if they had not, it was a wanton depredation

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and robbery, meriting severe punishment. I am of opinion that the act was of the latter description. I should regret extremely, if in the allowed exercise of belligerent rights, this country had transcended the limits, which the *British* have assigned to themselves. They do not allow their privateers, except against a fortress, to go upon the land of their enemy, "that no temptation may be held out for unauthorized expeditions." But, the pretext set up in this case, that *our own territory* is open to the invasion and depredations of privateersmen, is so perfectly novel as to defy all precedent. Had not the subject passed before the district court without opposition and *sub silentio*, I make no doubt, that the judge, instead of having condemned the property, would have dismissed the libel as without his jurisdiction.

There yet remains another objection, to the exercise of jurisdiction on the libel by the district court. The property was taken in the district of *Massachusetts*, on the island of *Nashawinna*. I have not found any law of the *United States*, which authorizes the *seizure* of property in one district, and carrying it into another place for adjudication. When property is taken on the high seas and brought into port, even the captor may not range from place to place, to seek an expedient jurisdiction to condemn. "The owner or owners of any private armed vessel, or his or their agent, may, at any time before libel shall be filed against any captured vessel or her cargo, remove her from any port into which such prize vessel or property may first be brought, to any other port of the *United States to be designated at the time of removal.*" 11th vol. *L. U. S.* p. 252. The designation of a certain port, is a *condition precedent* to the first and only removal the law admits, of a ship captured on the high seas and brought into port. But if property is *seized* within any district, it may not be removed; the trial must be in the district where the seizure is made. *Keene* v. *The United States*, 5 *Cranch*, 304. This is the construction given by the supreme court of the *United States*, of any *seizure* made on land, by virtue of the 9th section of the judiciary act; and I know not of any other law relating to this subject.

Under this head of argument the result is, that the district court sitting *in admiralty* had no jurisdiction of the property libelled, because the seizure of the property was *on land*, and was not, and could not be, *taken as prize:* and because

the jurisdiction, if any where, was in the courts of the state and district of *Massachusetts*.

What, then, is the legal effect of a decree pronounced by a tribunal that had no jurisdiction? The court on this point charged the jury, that it *proved nothing* for the *defendants*, for this obvious reason undoubtedly, that it was void and of no *legal effect*. Whether this part of the charge was correct, is the remaining question.

The objection to the charge may be resolved into this proposition, that the judgment of a court having no jurisdiction, is voidable by process *ex directo* to a superior tribunal, but is not void. In opposition to this I aver, that the sentence of a court, that has not jurisdiction of the *person*, *the process*, and *the subject matter*, is an entire nullity, and may collaterally be disallowed.

On this subject, I lay down the following propositions. 1. That the judgment or decree of a court without or beyond its jurisdiction is void.

2. That the necessary facts to evince the want of jurisdiction may be enquired into, unless the court, whose judgment is under discussion, has precluded the examination, by having *found the facts*.

3. That in all limited jurisdictions, (and of this description are the district courts of the *United States*,) the facts requisite to give jurisdiction must appear of record; and so far as regards the party to the suit, he must plead that the cause of action was within the court's jurisdiction.

4. *A fortiori*, That if the want of jurisdiction appears from *the facts found*, the judgment or decree is an entire nullity. This formal mode of proving well established principles is resorted to, that the determination may be satisfactory to the party in interest, who, it is presumed, places some confidence in the objections which have been urged.

1. Then, the judgment or decree of a court without or beyond its jurisdiction is void.

It has been an invariable distinction, that if a court has jurisdiction, but decides erroneously, its judgment is voidable only, and stands good until reversed. If, however, there is no jurisdiction, the judgment rendered is of no effect, and by all tribunals must be deemed a nullity. In the latter case, there is no *court*, no *judge*; and hence any sentence pronounced is destitute of all authority.

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A leading determination on this subject, is the *Marshalsea* case, 10 *Co.* 76. *b.* This was an action of trespass for false imprisonment. The defendants justified under a judgment rendered by the court of *Marshalsea*, a court of limited jurisdiction. The objection was, that it did not appear, as by law it should, that one of *the parties was of the king's household.* By the court it was "resolved, that the action well lies against the defendants; and a difference was taken *when a court has jurisdiction* of a cause, and proceeds *erroneously;* there the party who sues, or the officer, or minister of the court who executes the precept or process of the court, no action lies against them. But, when the court has *no jurisdiction of the cause*, there the whole proceeding *is coram non judice*, and actions will lie against them without any regard of the precept or process, and therefore the said rule cited by the other side, *sc. Qui jussu judicis aliquod fecerit* (but when he has no jurisdiction *non est judex*) *non videtur dolo malo fecisse, quia parere necesse est*, was well allowed; but it is not of necessity to obey him *who is not judge of the cause*, no more than it is a mere stranger; for the rule is, *judicium a non suo judice datum nullius est momenti.*"

To the same effect is the case of *Perkins* v. *Proctor*, 2 *Wils.* 384. "Where courts of justice *assume a jurisdiction which they have not*, an action of trespass lies against the officer who executes the process, because the whole *proceeding was coram non judice*; where there is no jurisdiction at all, there is no *judge;* the proceeding is as nothing."

The case of *Smith* v. *Bouchier*, 2 *Stra.* 993. is much in point. The vice-chancellor of the University of *Oxford*, who granted a warrant, the officers who acted under it, and the party who procured it, were all subjected in trespass, because it issued on oath that the plaintiff *suspected Smith* would not appear, but would run away, whereas the oath ought to have been that he *believed* these things.

To cite cases in proof of the proposition advanced were endless. I shall content myself with mentioning the case of *Grumon* v. *Raymond & al.*, in this court (1 *Conn. Rep.* 40.) wherein it was decided, that a search-warrant which issued without some of the preliminary requisites, was *coram non judice* and void, and no justification to the magistrate who signed, or the officer who executed it. In delivering their opinion, the court said, "Where there is want of jurisdiction

over the person, as in the *Marshalsea* case; or over the cause, as if a justice should try a man for murder; or over the process, as in the case cited from *Hobart;* it is the same *as though there was no court.* It is *coram non judice.*"

2. The next proposition advanced results of course, that the necessary facts to evince the want of jurisdiction may be enquired into, unless the examination is precluded by the facts *having been found.*

There can be no doubt, that every court of limited authority, has right to ascertain the facts requisite for the exercise of jurisdiction. But, if they are not ascertained, it is equally clear, that they may be enquired into for the purpose of showing, that the court had no cognizance of the matter decided.

If want of jurisdiction renders a decree of no effect, the facts requisite to evince it may be proved. The contrary supposition would be absurd. In the case of *Wheelright* v. *Depeyster*, 1 *Johns. Rep.* 471. trover was brought for a quantity of coffee. The defendant justified under a purchase and condemnation by a court of admiralty. The property was carried into *St. Jago de Cuba*, and condemned at *St. Domingo.* "The plaintiffs" (says *Kent*, J.) "prove a property in the coffee, and the defendants justify under capture, condemnation, and sale abroad; but before the defence can be received, it must appear that the condemnation was by a court having *competent jurisdiction* in the case, and *so far we have, of necessity, an incidental jurisdiction.* It would be a *monstrous doctrine to hold, that we were concluded by every assumed authority.* We are not to examine into the validity of the capture, but we must look so far as to see, whether the condemnation was by a *tribunal competent to pronounce it* in the given case; and if that is once ascertained, I agree, that we must admit the defence to be conclusive. In the case of *Oddy* v. *Boville*, 2 *East*, 437. a similar question arose as to the legality of a *French* prize court sitting in *Spain*, and no objection was raised as to the competency of the court of *King's Bench* to sustain the enquiry, and in the case of *Havelock* v. *Rockwood*, the same court did not hesitate to declare, that the *French* court of admiralty at *Bergen* was illegal." This case alone, if admitted as an authority, most fully establishes the principle advanced. The case of *Rose* v. *Himely*, 4 *Cranch*, 241. and *Cheviot* v. *Foussat*, 3 *Binney*, 250.

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hereafter cited for a different purpose, establish the same principle.

3. In all limited jurisdictions, the facts requisite to give cognizance must appear of record, and the party claiming the judgment to be valid, must plead *that the court had jurisdiction.* This was the third proposition advanced.

No fact can be the subject of enquiry, unless it is directly averred, or arises by necessary inference from the record. (1 *Day's Ca.* 187.) It follows as a consequence, that there never can be a presumption, that a limited jurisdiction was rightfully exercised, unless the facts requisite to give jurisdiction so far appear, that the court may legally have made enquiry concerning them.

To cite the numerous decisions on this point, must be unnecessary. In Lord *Coningsby's* case, 9 *Mod.* 95. a bill was exhibited in the duchy court for lands. The defendants demurred because the plaintiff did not *aver the lands were within the duchy.* The demurrer was held sufficient by *all* the judges, because "the duchy was a circumscribed jurisdiction." Even as to the superior courts of *Westminster-Hall*, it was said "That in courts of general jurisdiction, though universal as to the right, yet being circumscribed or *limited* as to *persons*, *such averment must be made.*

I refer to many determinations to the same effect, without particularly stating them. *The Flad Oyen*, 1 *Rob.* 114. *Stanyon* v. *Davis*, 6 *Mod.* 223, 4. —— v. *Lee*, 1 *Ld. Raym.* 211. *Peacock* v. *Bell & Kendall*, 1 *Saund.* 74. *Trevor* v. *Wall*, 1 *Term Rep.* 151. *Waldock* v. *Cooper*, 2 *Wils.* 16. *Havelock* v. *Rockwood*, 8 *Term Rep.* 268. *Donaldson* v. *Thompson*, 1 *Campb.* 429. *Terremoulin* v. *Sandys*, 12 *Mod.* 143.

The averment on the record of the facts requisite to give jurisdiction, will constitute a justification to all persons acting under the sentence or judgment, except the plaintiff. It is not only necessary for him to show, that the record has sufficient allegations to confer jurisdiction, but he must stand or fall by the fact, that the court had competent jurisdiction of the case.

Many are the decisions on pleas to justifying acts performed by virtue of the judgments of courts. I will select a few of them. The first class shall consist of *the judgments of inferior courts.*

In *Johns* v. *Smith*, *Cro. Jac.* 314. an arrest under process from the *Marshalsea* was considered false imprisonment, because it did not show *that the parties were of the king's household.*

A justification failed in *Higgingson* v. *Martin*, *Bull. N. P.* 83. because the court, whose judgment was pleaded, had not jurisdiction. "The plaintiff" (say the court) "ought to know the extent of the jurisdiction to which he applies for justice; and it is not enough that *the cause of action was laid within the jurisdiction of the court.*"

In *Dye* v. *Olive*, *March* 17. it was declared, that "when the defendant justifies under process of a court of *limited jurisdiction*, the plea should shew, that *the cause was properly subject to such jurisdiction.*" These determinations are peculiarly applicable to the district courts of the *United States*. "Courts which originate in common law, possess a jurisdiction, which must be regulated by common law; but courts which are created by *written law, and whose jurisdiction is defined by written law, cannot transcend their jurisdiction.*" 4 *Cranch*, 93.

The court in *Moravia* v. *Sloper*, *Willes* 30. decided, that "where the party (the plaintiff below) pleads a justification under process of an inferior court, he must shew, that the cause of action was within the jurisdiction of that court." See also *Morse* v. *James*, *Willes* 128. *Adney* v. *Vernon*, 3 *Lev.* 243. In 3 *Cranch* 331. is reported a determination of the supreme court of the *United States*, in which an action of false imprisonment was sustained by a justice of the peace who had been arrested under a warrant issued by a court martial for the non-payment of a fine. A decision of such a tribunal" (say the court) "in a case *clearly without its jurisdiction*, cannot protect the officer who executes it."

The only cases to be found, so far as I know, which maintain a contrary doctrine, are *Gwynne* v. *Poole*, 2 *Lutw.* 935. and *Truscott* v. *Carpenter* and *Mann*, 1 *Ld. Raym.* 229. The former was directly overruled by the court in *Moravia* v. *Sloper*, *Willes* 35. and on the most convincing reasons; and the latter seems to have been passed by without notice in every discussion on the same subject since its publication. It was determined on the strength of *Gwynne* v. *Poole*, and the *Marshalsea* case was directly questioned by its being "a hard resolution." But, the *Marshalsea* case is considered as

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good law, and is referred to as a leading authority, while the case questioning it is scarcely heard of. *Moravia* v. *Sloper*, *Willes* 30. *Perkin* v. *Proctor*, 2 *Wils.* 382. *Johns* v. *Smith*, *Cro. Jac.* 314. *Yates* v. *Lansing*, 5 *Johns.* 290. *Herbert* v. *Cook*, *E.* 22. *G.* 3. *Willes* 37. n.: *Grumon* v. *Raymond*, 1 *Conn. Rep.* 40. and many more decisions expressly confirm it.

The law respecting a plea of justification by a foreign judgment requires that the extent of the court's jurisdiction be made to appear.

In *Collet & al.* v. Lord *Keith*, 2 *East* 260. it was said by the court, that "in justifying under process of a foreign court it seems, that the plea should be formed in analogy to similar justifications under the process of inferior courts." The *infra jurisdictionem* was averred; but the plea, as being too general, was adjudged to be insufficient.

The last class of decisions under this head, which I propose to cite, are *decrees* in *admiralty*.

The case of *Wheelwright* v. *Depeyster*, 1 *Johns. Rep.* 471. has been cited already for a different purpose; but it is explicit to shew, that to render a decree of admiralty of any validity, the competency of the *court's jurisdiction* must be apparent.

The same doctrine is fairly to be implied from *Otto* v. *Selwin*, 2 *Lev.* 131.

In *Rose* v. *Himely*, 4 *Cranch* 241. a decree of admiralty was considered a nullity for want of jurisdiction in the court, and especially, because the property had not been *legally seized*. The enquiry regarded part of the cargo of the schooner *Sarah*. After having traded with the *brigands* at *St. Domingo*, and proceeded *ten leagues* from the coast, the *Sarah* was arrested by a *French* privateer, and carried into the *Spanish* port of *Barracoa* in the island of *Cuba*. She was afterwards condemned at *St Domingo*. The decree of admiralty was opposed on three grounds. 1. Because she was seized more than *two leagues* from *St Domingo*, which was supposed to be the utmost limit of seizure. 2. Because she was not brought into a port of *St. Domingo*. 3. Because there existed a right to enquire into the legal exercise of jurisdiction, and if the court had transcended its powers, *to adjudge the decree coram non judice and void*.

On all these grounds of objection the supreme court deci-

ded against the decree. *Marshall*, C. J. (p. 268.) on the right of enquiry to ascertain the jurisdiction of the court, thus expresses himself: "This is a claim for a cargo of coffee, &c. which after being shipped from a port in *St. Domingo*, in possession of the *brigands*, was captured by a *French* privateer, and carried into *Barracoa*, a small port in the island of *Cuba*, where it was sold by the captor. The cargo having been brought by the purchaser into the state of *South Carolina*, was libelled in the court of admiralty, by the original *American* owner. The purchaser defends his title by a sentence of condemnation pronounced by a tribunal sitting in *St. Domingo*, after the property had been libelled in the court of this country; and by an order of sale made by a person styling himself delegate of the *French* government of *St. Domingo* at *St. Jago de Cuba*. The great question to be decided is,

"*Was this sentence pronounced by a court of competent jurisdiction?*

"At the threshold of this interesting enquiry, a difficulty presents itself, which is of no inconsiderable magnitude. It is this,

"*Can this court examine the jurisdiction of a foreign tribunal?*

"The court pronouncing the sentence, of necessity decided in favour of its jurisdiction; and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country. This proposition certainly cannot be admitted to its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever. The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into; and its authority to decide questions, which it professes to decide, must be considered.

"But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the *situation*

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of the particular thing on which the sentence has passed, may be enquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned *was in a situation to subject her to the jurisdiction of that court*, also examinable? This question in the opinion of the court, must be answered in the affirmative.

"Upon principle, it would seem, that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases, that jurisdiction unquestionably depends as well *on the state of the thing*, as on the constitution *of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property.* Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its *being within or without* their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

"Passing from principle to authority, we find, that in the courts of *England*, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation *that it has, in the given case, jurisdiction of the subject matter.*

"This general *dictum* is explained by particular cases." He then states the cases of *The Flad Oyen*, 1 *Rob.* 114. *The Christopher*, 2 *Rob.* 173. *The Kierlighett*, 3 *Rob.* 82. *The Henrick and Maria*, 4 *Rob.* 35. *The Comet*, 5 *Rob.* 255. *and The Helena*, 4 *Rob.* 3. and proceeds: "The manner in which this subject is understood in the courts of *England*, may then be considered as established on uncontrovertible authority. Although no case has been found in which the validity

of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted *in examining the jurisdiction of a foreign court*, by which a sentence of condemnation has passed, not only in relation to the constitutional powers of the court, but also *in relation to the situation of the thing on which those powers are exercised;* at least, so far as the right of the foreign court to take jurisdiction of the thing is regulated by the laws of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is, therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case."

In conformity with the above principles, the court decided again in *Hudson* v. *Guestier*, 4 *Cranch*, 294. that "When a seizure is thus made for the violation of a municipal law, the mode of proceeding must be exclusively regulated by the sovereign power of the country, and no foreign court is at liberty to question the correctness of what is done, *unless the court passing the sentence loses its jurisdiction* by some circumstance which the law of nations can notice. *Recapture*, *escape*, or a *voluntary discharge of the captured vessel* would be such a circumstance, because the sovereign would be thereby deprived of the possession of the thing, and of his power over it. While this possession remains, the *res* may be either restored or sold, the sentence of the court can be executed, and therefore this possession seems to be the essential fact on which the jurisdiction of the court depends."

The determination in *Rose* v. *Himely*, so directly maintaining the right of enquiry into the exercise of admiralty jurisdiction, to ascertain whether the *subject matter* to be affected by the decree, *was within their cognizance*, has been pointedly opposed. It is said to have been overruled in *Hudson* v. *Guestier*, 6 *Cranch*, 284. It is undoubtedly true, that *the case was overruled;* but the general principle abovementioned contained in the opinion of the court as recited, has never been questioned. In the case last quoted it was decided, that *the property might be seized upon the high seas*, and *condemned while lying in a neutral port.* But, not a hint is to be found from any quarter, (Judge

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Johnson excepted, who was in the negative from the beginning,) discrediting *the general principle, that there existed a right to enquire into the competency of the court's jurisdiction.*

Besides, since the determination in 6th *Cranch*, in the case of *Cheriot* v. *Foussat*, 3 *Binney*, 250. the same doctrine that is maintained in *Rose* v. *Himley*, is recognized. "The general principle," says *Tilghman*, C. J. "is, that what has been decided by a *court of competent jurisdiction* in one nation, shall not be questioned in the court of another. This would seem to leave the question of competency open. And there is strong reason why that question should be open; for otherwise we should *be subject to the greatest abuse.* But even where the authority of the court has clearly emanated from the sovereign power of the nation, it is going too far to say, *that its jurisdiction cannot be questioned.* I conclude, therefore, that we may enquire into the jurisdiction."

Lastly, If the want of jurisdiction appears from the *facts found*, (or which are of record) the decree is an entire *nullity.* I shall not waste time in proving this assertion. If either proposition before advanced is supported, it follows by necessary consequence.

This is the only principle it was indispensable to establish; and the point has been explicitly determined in *Wooster* v. *Parsons*, *Kirby*, 110. "If" (say the court) "it had appeared *on the face of the process* that the cause of action did arise *out* of the jurisdiction of the city court, all the proceedings would have been *coram non judice* and void, and could have been no justification or excuse for any thing done under them; nor would any neglect to plead, or any concession of the parties, make it good." *The seizure of the goods on Nashawinna by a privateer's crew appears from the decree*, and renders it utterly nugatory.

In the application of the principles established to the case under discussion, I shall be very brief.

The district court, as *a court of admiralty*, has no jurisdiction of property taken *on our own territory;* but the property, as the record exhibited verifies, was thus taken; therefore, the proceedings before the court were *coram non judice* and void.

The district court, *as a court of admiralty*, has no jurisdiction of property taken on our own soil by *privateersmen;* for such caption cannot be *as prize*, but is *plunder* and trespass. But the property, as the record verifies, was thus

taken by privateersmen; therefore the proceedings before the court were *coram non judice* and void.

The district court of *Connecticut* has no jurisdiction of property *seized* in the district of *Massachusetts;* but the property, as the record verifies, was thus seized; therefore, the proceedings before the court were *coram non judice* and void.

It necessarily results, that the charge to the jury, instructing them that the decree of the district court proved nothing for the defendants, was entirely legal.

EDMOND and GOULD, Js. not having heard the arguments of counsel, gave no opinion.

New trial not to be granted.

STRONG *against* WRIGHT.

Where the civil authority and select-men of a town abated the state taxes of sundry indigent persons to a less amount than one eighth of the whole tax of the town, and gave the collector a certificate addressed to the state treasurer that they had abated one eighth, and then took from the collector a promissory note payable to the town treasurer for the difference between the amount actually abated and one eighth; it was held that the consideration of such note was not illegal, the abatement being an allowance to the *town*, and the certificate a matter of form not required by law.

THIS was an action on a promissory note given to the plaintiff as treasurer of the town of *Hebron*. The note was as follows. "On demand I promise to pay *Amos Strong*, treasurer of the town of *Hebron*, or his successor in office, one hundred dollars and sixty-three cents, unless abated by the select-men. It is understood that the overcharge of the treasurer of *Connecticut* of seven dollars and twenty cents is to be indorsed, if there is no mistake in the levy of the town of *Hebron*. *Hebron, March* 8th, 1814. *Samuel Wright*, Jun." The defendant pleaded in bar, that being collector of state taxes in the town of *Hebron* for the year 1813, he received from the state treasurer, on the 18th of *June* 1813, a warrant to collect of the inhabitants of that town two cents on the dollar of the list of polls and rateable estate, amounting to 1077 dollars 23 cents; that he immediately made out a rate-bill, including the names of the persons entered in the levy lodged in the town clerk's office, who were liable by law to pay their proportion of the tax, and affixing to each person's

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name his proportion; that on the 8th of *March* 1814, the civil authority and select-men of *Hebron* abated to sundry indigent persons, whose names were inserted in the rate-bill their several taxes to the amount of 34 dollars 2 cents, and no more, and then gave a certificate to the state treasurer, that they had abated from the tax in the defendant's hands to collect one eighth of the whole, being 134 dollars 65 cents; and for the difference between the sum actually abated and the sum last mentioned, the note in suit was given, and for no other consideration. To this plea there was a demurrer; and the cause was continued for the consideration and advice of the nine Judges.

SWIFT, Ch. J. This is an action by the plaintiff, as treasurer of the town of *Hebron*, against the defendant, a collector of state taxes.

The civil authority and select-men gave the defendant a certificate to the state treasurer of the abatement of one eighth part of the tax of the town, taking his note for the whole sum under an agreement that he should pay such part as should not be abated to individuals;—and this suit is brought to recover the sum not abated.

The defendant contends, that the whole eighth part ought to be applied to the abatement of the taxes of the indigent;—that the town have no right to it;—that the consideration of the contract is illegal, and the note void. The statute on this subject is, "That on all warrants issued by the treasurer of the state, there shall be allowed to the several towns an abatement of one eighth part of the true list of said towns respectively, which eighth part the civil authority and select-men are empowered to apply for the relief of the indigent in the abatement of their particular rates, in whole or in part, in such way and manner as they shall judge most proper, just, and reasonable." *Tit.* 135. *c.* 1. *s.* 18.

Prior to the passing of this statute the civil authority and select-men had a discretionary power to abate taxes due to the state from towns. The exercise of such a discretion by so many different tribunals produced so much inequality among the towns, and opened the door to such abuse, that the legislature found it necessary, by the present law, to limit the towns to a certain sum, and to render them responsible for the residue, whether collected or not. The expressions of the statute make an unconditional allowance of one eighth part to the town, and imply a relinquishment of all

claim, in any event, to any part of it. The civil authority and select-men are vested with a discretionary power to apply it to the relief of the indigent. If their taxes are sufficient to absorb the whole sum, it is the duty of the civil authority and select-men to make the application. But cases may occur where there are so few indigent persons that the taxes will not amount to an eighth part. The question is, what shall then be done? The state can make no claim, for the allowance to the town is absolute. The law will not warrant the abatement of the taxes of the rich, or of those who are not indigent, and are able to pay them; for it can be no relief to the indigent that the taxes of the rich should be abated; and it would be unequal and unjust that the taxes of a part of those who are able to pay should be abated, and the rest compelled to pay. It never could have been the intention of the legislature to require the abatement of the taxes of those who are able to pay them. The probability is, that they supposed there would always be a sufficient number of indigent to require an application of an eighth part; and therefore made no provision for a different event. Under these circumstances, there is nobody to claim this money but the town; and it is perfectly reasonable and equitable that they should make such an arrangement as that in question to secure it to their benefit. It is opposed to no principle of law, justice or policy.

It is objected, that the certificate of abatement was false, and a fraud on the treasurer. But the law does not require such certificate to entitle the town to the allowance; it does not require an actual abatement of one eighth part before the allowance is to be made by the treasurer. The certificate of abatement is a matter of form, prescribed by the treasury department. Whether correct or not, it operated no actual fraud; for nothing was obtained but what the town was entitled to without any certificate.

But the most plausible objection is, that on this construction the civil authority and select-men will be enabled to encrease the funds of the town, and lessen their own taxes; and of course, they will be under strong temptation to oppress the poor. It will, however, be found in practice, that their individual interest will be too trifling to have any serious influence on their minds; and that it might very properly be disregarded by the legislature when they made

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the law. In this case, there is no pretence that there has been a refusal to abate the taxes of any indigent person. For aught that appears, the defendant has collected all the money, and is taking this mode to keep it. It is he that is attempting to practice a fraud.

I am of opinion that the consideration of the note is good, and that the plaintiff is entitled to recover.

In this opinion TRUMBULL, SMITH, BALDWIN, GODDARD and HOSMER, Js. concurred.

EDMOND, J. The decision of the question in this case depends upon the construction that ought to be given to the 18th section of the act which provides for the collection and payment of taxes. *Tit.* 135. *c.* 1.

If the abatement of the one eighth part there mentioned, is *a gift* of so much money to the towns respectively, to be equally applied for the benefit of the inhabitants generally, and to be collected and distributed at the discretion of the civil authority and select-men, there can be very little, if any, doubt of their power to leave the rate unabated in the hands of the collector, and to take his note for the amount. But in my opinion such a construction is inadmissible. There is a deference due from the court to the legislature. In examining statutes it is proper to conclude the framers of them had some beneficial object in view; and when the words used, or the location of them is such as to admit of different constructions, that ought to be adopted, which, in its application, will be remedial, and especially where it will deliver the statute from what must otherwise appear a palpable absurdity.

If the legislature intended by the provisions of this section a *gift* to the town, or in other words, to the inhabitants, then every individual in the town liable by law to the payment of taxes, whether *rich* or *poor*, has an interest in the gift proportioned to his list compared with the whole list of the town. Let us then examine the nature of this gift in this view of the subject, and what is it?—The Assembly grant a tax of one eighth *more than the public exigence demands*, to be levied upon all the inhabitants of the state liable to the payment of taxes in proportion to their lists made out and returned according to law, and then, by a solemn act, give back *as a gift* this unnecessary eighth to the towns, or what

is the same thing in substance, to all those from whom it is ordered to be collected, to be disposed of as they may judge expedient. The extent of the gift then, is, the legislature levy a tax on the towns for their benefit, charge them with the amount, and then *generously* relinquish this claim, and leave the towns to do as they please with the money when collected. To show the absurdity of such a process no comment is necessary.

Let us then examine this section, and see whether it will not fairly admit of a construction widely different, more rational, and more useful in its application. In the laws which provide for and regulate the manner in which the general list shall be made out, a special regard to the poor and unfortunate constitutes a prominent feature. Tender infancy and advanced age are exempted; and every tenth poll may be abated "for sickness, lameness and other infirmities." Consider then the grant in this section as being made in the same spirit, as *a gift to the indigent whose names are on the levy*, and who are liable to distress for the payment of their rates, and the wisdom of the legislature, as well as the humanity of the law will be equally apparent. In granting a tax of one eighth more than is necessary to supply the treasury and meet the ordinary demands on the state, every wealthy man, not specially exempted, is compelled to advance to the collector his proportion of this eighth according to his list. It creates a liability which nothing but payment can legally mitigate or discharge. This surplus revenue raised from the *rich*, constitutes *a fund for the relief of the indigent who are holden for the payment of rates*, and for their relief only. By this extra payment of the rich, the state is enabled to remit one eighth of the tax granted. The authority and select-men are made the distributors. To do this, they have the power within the limits of their commission, and not otherwise. Their authority as to the *objects* to which they may apply it, or the purpose to which it may be applied, cannot by words be more clearly defined: "which eighth part the civil authority and select-men of the respective towns are hereby empowered to apply for the relief of the indigent in the abatement of their particular rates, in whole or in part, in such way and manner as they shall judge most proper, just and reasonable." The way and manner of making the distribution is left to the

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discretion of the authority and select-men; but the *indigent who have rates to pay* are the sole objects to be relieved by the bounty, and that relief is to be afforded only "in the abatement *of their particular rates.*" The law allows of no other application whatever. To apply it in this way is the duty of the authority and select-men. To neglect to do it, is a breach of the trust reposed in them by the law. To allow of a different application, is, in effect, to defeat the only beneficial and salutary purpose for which this section of the law was enacted.

Should it be objected, if the law be so, why is it said, "that on all warrants, &c. there shall be *allowed to the several towns* in this state *an abatement* of one eighth part of the true list of said towns respectively?" The answer is obvious. By the sixteenth section of the same act, the several towns are made "*chargeable with and responsible for the full amount of the state tax or rate* that may at any time be granted by the General Assembly, in proportion to the sum total of the respective lists of said towns, as the same shall be annually made and returned according to law." It became, therefore, not only proper, but necessary, in an after act by which one eighth was granted to be abated to the indigent on their particular rates, to make provision in the same act that the abatements so to be made should be allowed, or credited, to the town, on the warrant, or in account with the state.

It is further observable from this section (*s.* 18.) that to entitle the town to such credit with the state, the abatement to the indigent in the manner described must be actually made; for we find at the close of the section immediately following the words which give the power of making the abatement to the indigent, these words: "and *no other or further* abatement shall be allowed in settlement of said taxes with the treasurer to the respective *towns* or collectors."

On the whole, I am of opinion, that, should the civil authority and select-men of any town in the state leave the rates of the indigent unabated with the collector for him to enforce payment; give a certificate that the one eighth was abated to enable him to obtain a credit with the treasurer, and take the collector's note for the amount; it would be a transaction which the law does not warrant, calculated in its effect to deceive the treasurer, to oppress the indigent

and transfer either to themselves, or the town treasury, a portion of the tax devoted by law exclusively to the benefit of the indigent in the abatement of their particular rates.

I would therefore advise that the plea in bar is sufficient, and that judgment ought to be rendered for the defendant.

BRAINARD, J. I am also constrained to dissent from the opinion delivered by the Chief Justice, and concurred in by a majority of the court.

The case is stated, and the ground of the plaintiff's claim fully disclosed, in the plea in bar.

The question arises upon the construction of the 18th section of the statute respecting "The collection and payment of rates or taxes." That section is, "That for all warrants to be issued by the treasurer of this state, for the collecting of taxes, there shall be allowed to the several towns in this state, an abatement of one eighth part of the true list of said towns respectively; which eighth part the civil authority and select-men of the respective towns are hereby empowered to apply for the relief of the indigent in the abatement of their particular rates, in whole or in part, in such way and manner as they shall judge most proper, just and reasonable; and that no other or further abatements shall be allowed in settlement of said taxes with the treasurer to the respective towns or collectors."

The 16th section says, "That the several towns in this state shall be chargeable for the full amount of the state tax that may be granted by the General Assembly; and the treasurer of this state shall not allow any bills of abatement for any part of such rates, save only such as are expressly mentioned to be allowed, and are certified conformable to the direction given in the law of this state, entitled "An act for the direction of listers in their office and duty." This statute was first passed in *May* 1765, and still continues with some small modifications. It describes the *subjects*, but does not limit the *quantum* of abatement, nor the time of extension. It adds, "that in every bill of abatement shall be certified the reason of such abatement by the persons who have a right by law to make the same." Inconveniences in practice on the statute of 1765 were experienced, and not improbably suspicions arose of its abuse. Those considerations doubtless gave rise to the modification of the present statute, which

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says, "that on all warrants there shall be allowed to the several towns an abatement of one eighth part of the true list" &c. Here is a limitation of the power of abatement. The apportionment and distribution are still left to the discretion of the civil authority and select-men of the respective towns; they are to apply this eighth "for the relief of the indigent in the abatement of their particular rates, in whole or in part, in such way and manner as they shall judge most proper, just and reasonable."

The expression "there shall be allowed to the several towns an abatement of one eighth" must be taken according to the subject matter. As explained and qualified in the direction of the disposition, we are to understand not an allowance of that portion of the state tax to the town as a body corporate, but to the poor and indigent, who may be subjects of abatement. This allowance is in no sense *a gift* to the town of the one eighth, but a remission of that amount to the poor and indigent; and the civil authority or select-men are made almoners of the bounty. By the word "*empowered*" they are not only authorized, but commanded. It is, in statute language, imperative. It is their duty to apply this eighth among the fittest objects they can find in their respective towns; to abate to the poor and indigent their rates, in whole or in part, until the eighth is absorbed. Because a man can *possibly* pay his taxes, it does not follow that he is not a subject of this allowance. *Rich* and *poor* are relative terms.

By the 16th section of the existing statute, we find that the treasurer can make no allowance of abatement, unless there be a certificate; and by the reference there made, we further find by whom that certificate shall be given, by the persons who have right by law to make the abatement; and who they are the 18th section informs us; the civil authority and select-men of the respective towns. What then shall entitle a town to the allowance of this eighth part? A certificate of the *truth* from the civil authority and select-men, that they have applied the one eighth for the relief of the indigent for the abatement of their taxes. This is the only currency that will pass at the treasury in discharge of this eighth part.

It appears to me, that a different principle and practice would be repugnant not only to the spirit, but to the letter

of the law. It may be that every man in a town can *possibly* pay his tax. The civil authority and select-men, to avail themselves of the eighth, certify as matter of form, that they have applied it for the relief of the indigent in the abatement of their respective taxes; and proceed to the collection of the whole, and put "*this eighth*" into their treasury. The consequence is obvious; this allowance for the poor is, by a falsehood, converted into a bounty for the rich, who are so far eased of the burthen of supporting the poor, and of other expenses of the town. This, to my mind, would be an abuse and manifest misconstruction of the law.

GOULD, J. I should certainly conclude, from the general scope, and what appears to me the reasonable construction, of the statute, that the original intention of the legislature was, not to *grant* any part of the state tax to the respective towns, in any event; but merely, to permit them to make a *deduction* of one eighth of it, by *abating* the taxes of the indigent, to that amount, and in no other way. And according to this construction, the note in question, would, doubtless, be illegal and void. But, as the words of the act may be made to bear the opposite interpretation, and have practically received it, as I believe, by a usage of considerable extent, which cannot have escaped the notice of the legislature, I am not inclined, upon the whole, to dissent from the opinion, in which a majority of the court has concurred.

Judgment to be rendered for the plaintiff.

BROWN and another *against* LANMAN, administrator of *Billings* and *Barber*:

IN ERROR.

Where a court of probate ordered a sale of real estate, without finding that the debts allowed exceeded the personal estate, it was held, that though such proceeding was erroneous, and would be set aside on appeal, yet as the court had jurisdiction of the subject matter, and there was no fraud in the case, the decree was valid until thus set aside, and could not be collaterally called in question.

THIS was a bill in chancery, brought by the present plaintiffs in error to the superior court, praying that certain promissory notes given by them to the defendant, in his capacity of administrator, should be given up or cancelled.

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The case, as stated in the bill, and found by the court, was as follows. In *January* 1807, the defendant was appointed administrator of the estates of *Barber* and *Billings*. He soon afterwards exhibited an inventory of each estate. That of *Barber* amounted to 1079 dollars, 45 cents, of which 800 dollars was an equity of redemption in an undivided half of a lot of land and a dwelling-house thereon, and the residue personal property. The inventory of *Billings'* estate amounted to 891 dollars, 83 cents, of which 800 dollars was an equity of redemption in the other half of said land and dwelling-house, and the residue personal property. On the 7th of *October* 1807, the court of probate gave an order to the defendant in each case to sell the real estate of the deceased, without ever having found or allowed any debts or charges against their estates, or either of them. The order of sale was as follows: "*James Lanman*, Esq. administrator of the estate of *David W. Barber*, late of *Norwich*, deceased, has exhibited a statement of debts due from said estate, by which it appears necessary to dispose of the real estate of said deceased for the payment of the same; this court doth therefore empower and direct said administrator to dispose of the real estate of said deceased, either at public or private sale, as he shall judge best, giving proper notice of the time and place of said sale, give a proper conveyance to the purchaser, and make return to this court." The other order of sale, with a change only of the intestate's name, was in the same words. Under these orders, the defendant gave a quit-claim deed of the whole equity of redemption in said land and dwelling-house, to the plaintiffs, and took from them in payment several promissory notes, amounting to 1020 dollars, 38 cents.

Upon these facts the superior court decided, that the plaintiffs were not entitled to the relief prayed for, and dismissed the bill with costs. To reverse that decree the present writ of error was brought.

Cleaveland, for the plaintiffs, contended that the administrator having no power at common law to sell real estate, but the only authority he can have to sell in any case being derived from the statute, the provisions of the statute must be strictly pursued, and complied with in every particular; otherwise no title is conveyed. But the statute authorizes

the judge of probate to order a sale of real estate only in case the *debts allowed* exceed the personal estate. (*a*) If no debts are allowed, an order of sale is a nullity. A court of probate being a court of *limited* jurisdiction, it must appear from the face of its proceedings that it had jurisdiction. Here a fact is wanting without which a court of probate has no more cognizance of the question of *sale* than a justice of the peace has. In the absence of that fact, he has no authority to interfere. *Rex.* v. *Croke*, *Cowp.* 26. *Jackson* d. *Cooper & al.* v. *Cory*, 8 *Johns. Rep.* 385. *Stead's* exrs. v. *Course*, 4 *Cranch* 403.

Daggett, for the defendants, was stopped by the court.

SWIFT, Ch. J. This is a bill to set aside notes given for land sold by order of a court of probate; which, it is contended, was void or erroneous.

The court of probate had jurisdiction of the matter in question; and the order of sale is valid on the face of it. Though the proceedings of the court, from the facts stated in the bills, and found by the superior court, were erroneous, and would be set aside on a proper appeal; yet till set aside, the judgment is valid.

The plaintiffs are strangers to the judgment. They can never directly call it in question; and cannot collaterally impeach it, excepting for fraud. As the finding of the court negates all fraud in obtaining the judgment, it is binding, and the plaintiffs cannot call it in question.

It does not appear that any appeal can ever be taken from the order of the court of probate to sell the land, so as to affect the title of the plaintiffs; but even if it could be done this would make no difference; for the possibility that the judgment might be reversed, would be no ground for vacating a title. Many instances have occurred of such sales; and this has never been deemed a ground to set aside a conveyance. (*b*)

(*a*) *Tit.* 60. *c.* 1. *s.* 22. It is as follows: "That when the debts and charges allowed by the court of probate in the settlement of any intestate estate, (or of any testate estate, where sufficient provision is not made by the will of the testator) shall exceed the personal estate, it shall be lawful for the judges of such courts respectively to order the sale of so much of the real estate as shall be sufficient to pay the same, with the incident charges of sale, in such manner as shall appear to them to be most for the benefit of such estates; which sales shall be good and effectual in law."

(*b*) See *Griffin* v. *Pratt* & al. 3 *C. R.* 513. *Wattles* v. *Hyde* & al. 9 *C. R.* 10. *Bryan* v. *Hinman*, 5 *Day*, 211.

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The title was matter of public record, which the plaintiffs could examine, and ascertain its validity. There was no fraud, or misrepresentation. Knowing all the facts, they purchased, and took a release deed. Upon these facts, they are not entitled to any relief.

I am of opinion that there is no error.

In this opinion the other judges severally concurred

Judgment affirmed.

HITCHCOCK *against* HOTCHKISS.

Where land in which the debtor had an estate for life only, is levied upon, appraised and set off as an estate in fee-simple, the creditor acquires a title to the estate which the debtor had.

THIS was an action of ejectment for one equal and undivided moiety of a piece of land and a dwelling-house, of which the plaintiff averred that he was seised and possessed in his own right in fee-simple, as tenant in common with the defendant and one *Russel Hitchcock*, until a certain day, when the defendant entered and disseised him. The cause was tried at *New-Haven*, *January* term 1816, before *Trumbull*, *Baldwin*, and *Ingersoll*, Js.

On the trial, the plaintiff claimed title to the demanded premises by virtue of the levy of an execution against the defendant, and the subsequent proceedings required by statute. The defendant insisted that the plaintiff gained no title by such levy and proceedings. The officer's return stated, that he levied the execution on the land and building in question; that he procured the appointment of appraisers in the mode prescribed by law; that the appraisers, being duly sworn, appraised said land and building at 650 dollars; and that the amount of the execution and costs being 64 dollars 90 cents, he set off to the creditor "an undivided right in said land and building, at the sum of 64 dollars 90 cents, in proportion as that sum is to 650 dollars, in full payment and satisfaction of the execution." The certificate of the appraisers was thus: "We the subscribers, indifferent freeholders, &c. appointed to appraise the above described land and building, do appraise the same at 650 dollars." It appeared that the defendant was in possession of the premises at the time of the levy, but that he had only a life estate therein, the fee being vested in his wife. Upon these facts, the

defendant claimed, that the plaintiff was not entitled to recover in this action, because the declaration averred that he owned the premises in fee-simple, and demanded the same as such; and because the estate, which the defendant had in the premises at the time of the levy, was never appraised, nor set off. But the court, as to these points, directed the jury as follows: "If a plaintiff in his declaration claims title to lands in fee, and proves title only to an estate for life in them, this mistake is not fatal to his demand; but he may recover the seisin and possession of the premises. The defendant in this case had an estate for life in the lands demanded; and a levy on that is good, and the plaintiff will have right to the seisin and possession." The jury accordingly found a verdict for the plaintiff; and the defendant moved for a new trial on the ground of a misdirection. The questions of law arising on this motion, were reserved for the consideration and advice of the nine Judges.

Staples, in support of the motion, contended that as the mode of acquiring title to real estate by execution is unknown to the common law, and rests wholly upon the express provisions of the statute, (*a*) the requisites of the statute must be strictly complied with, which must appear upon the face of the title. In this case, the debtor had only an estate for life in the land; and *that* estate was never appraised or set off.

N. Smith, contra, insisted that all the steps requisite to make a good title had been taken. The statute only requires that the *land*, and not the precise interest which the debtor has in it, shall be appraised and set off. The title in question is analogous to a conveyance by deed of a fee-simple estate in land, where the grantor owned only an estate for life. This is sufficient to pass the interest which the grantor had. The greater estate includes the less. Nothing has been done by which the defendant is injured; and no one else is affected.

SWIFT, Ch. J. The question is, whether the levy of an execution on land, and an appraisal as a fee-simple estate,

(*a*) *Tit.* 68. *c.* 1. *s.* 6, 7, 8. See also, 1 *Swift's Syst.* 332, 3, 4.

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when the debtor had only an estate for life, will give such a title to the creditor that he can maintain ejectment.

It has been insisted on for the defendant, that the estate or interest he had in the land has not been appraised; and therefore the statute has not been pursued so as to vest a title in the plaintiff.

The execution was levied on the land in the usual form; and the land was appraised as an estate in fee. The defendant had a freehold estate; he had an interest in the land. By appraising the whole estate, all his interest in the land was appraised. That there was a mistake in the quantity of his interest, so that a greater interest was appraised than he owned, can constitute no objection to the levy of the execution; for all the interest of the defendant was appraised, and the maxim well applied, that *omne majus continet in se minus*. If a less interest had been appraised, the objection would have been valid.

Here the whole land was levied upon, and taken; and this must comprehend any lesser interest, in the same manner as a deed of land as an estate in fee will comprehend any interest of the vendor in the land, however small.

I am of opinion that we ought not to advise a new trial.

In this opinion the other Judges severally concurred.

New trial not to be granted.

BARTHOLOMEW *against* CLARK.

A new trial may be granted by the superior court, on motion, for a verdict against evidence.

THIS was an action on the case for false and fraudulent representations respecting the responsibility of a mercantile house, whereby the plaintiff was induced to sell them goods to a large amount on a credit, in consequence of which he sustained a loss.

The cause was tried at *Litchfield*, *February* term, 1816, before *Edmond*, *Smith* and *Hosmer*, Js. The questions of fact, whether the representations were made by the defendant with a fraudulent intent, and whether the plaintiff was deceived by them, being submitted to the jury upon the evidence, they found a verdict for the plaintiff, with 2747 dollars 81 cents, damages. The court did not accept this

verdict, because in their opinion it was against evidence; and therefore they returned the jury to a second consideration of the cause. The jury again brought in the same verdict; and the court, on the same ground, returned them to a third consideration. The jury still adhered to their verdict; and the court ordered it to be recorded. The defendant immediately filed a motion in arrest of judgment, which was found not to be true. He then moved for a new trial, because the verdict was found not only without any evidence that the representations claimed to have been made by the defendant were made with a fraudulent intent, or that the plaintiff was deceived or defrauded by them, but against clear and satisfactory evidence to the contrary. The questions of law arising on this motion were reserved for the consideration and advice of the nine Judges.

N. Smith and *R. M. Sherman*, for the defendants, observed, that, as this was a clear case of a verdict against evidence, the only general question on the motion was, whether the court had the *power* to grant it. Under this general question they proceeded to consider, first, whether the court had the power of granting a new trial for a verdict against evidence *on any form of application;* and secondly, whether an application *by motion* was a proper form.

1. In no country where the common law of *England* prevails, has the verdict of a jury in civil causes been regarded as final in the first instance. Some mode of revision has always existed. Anciently, the mode in *England* was by *attaint* of the jury; and in *Connecticut*, by an application for a *review*, which was granted of course to the unsuccessful party, until there had been two verdicts the same way. (*a*) In both countries the ancient mode has given way to the practice of granting new trials; and this is always done in *England* where the judge who tried the cause is dissatisfied with the verdict as being against evidence. 3 *Bla. Com.* 387. *Bul. N. P.* 327. *Bright* v. *Eynon*, 1 *Burr.* 397. Lord *Mansfield* says, in the case last cited, that trials by jury in civil causes could not now subsist without the power of granting new trials. He considers the exercise of this power, upon many occasions, as absolutely necessary to the

(*a*) This practice still exists, to a certain degree, in some of the *New-England* states. *R.*

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attainment of justice. 1 *Burr.* 393. There are many other authorities to the same effect. *Goodtitle* d. *Alexander* v. *Clayton & al.*, 4 *Burr.* 2224. *Rex* v. *Mawbey & al.*, 6 *Term Rep.* 619. 638. *Goodwin* v. *Gibbons*, 4 *Burr.* 2108. *Tyley* v. *Roberts*, cited in *Musgrave* v. *Nevison*, 1 *Stra.* 584. 6 *Bac. Abr.* 663. *et seq.* (*Wils.* edit.) 2 *Ves.* jun. 288.

It is every day's practice, in *England*, to grant a new trial for excessive damages. This is taking much stronger ground than the present case requires.

There are two important objects in the trial by jury; first, the protection of the citizen against the oppression of government; and secondly, the ascertainment of facts. The first of these objects relates exclusively to criminal prosecutions; and is effectuated by aid of the maxim, that a prisoner once acquitted shall not be tried again. But where the controversy is between two citizens regarding their civil rights, there is no danger of oppression from the government. The second object, so far from being counteracted, is promoted, by a discreet exercise of the power in the court to bring a cause before another jury for a rehearing.

In this country there is not a decision to be found denying the power in question. In *Massachusetts*, Ch. J. *Parsons*, delivering the opinion of the supreme court in *Hammond* v. *Wadhams*, 5 *Mass. Rep.* 353. 355. says, "We may, and we ought to grant a new trial, when the verdict is against the evidence, or when it is manifestly against the weight of the evidence. In such cases, the facts ought to be enquired into by another jury." In another case in the same court, *Sedgewick*, J. delivering the opinion of the court, says, "The objection in this case is, that the verdict is against evidence; and if it be clearly and manifestly so, it certainly ought to be set aside." *Wait* v. *M'Neil*, 7 *Mass. Rep.* 291. 263. In *New-York*, the granting of a new trial on the ground of a verdict against evidence, is familiar in practice, and sanctioned by the courts as established by law. *Talcott* v. *The Commercial Insurance Company*, 2 *Johns. Rep.* 128. 130. *Talcott* v. *The Marine Insurance Company*, 2 *Johns. Rep.* 137. It has also been universally admitted in that state, whenever the question has been agitated, that their courts have a legal right to grant new trials for *excessive damages* in actions for *torts*; and that right has been frequently exercised.

M'Connell v. *Hampton*, 12 *Johns. Rep.* 234. The same law prevails in *Pennsylvania*. *Shippen*, President, delivering the opinion of the court in *Cowperthwaite* v. *Jones & al.*, 2 *Dall.* 56. says, "Whenever it appears with reasonable certainty, that actual and manifest injustice is done; or that the jury have proceeded on an evident mistake, either in point of law or *fact; or contrary to strong evidence;* or have grossly misbehaved themselves; *or given extravagant damages;* the court will always give an opportunity, by a new trial, of rectifying the mistakes of the former jury, and of doing complete justice to the parties." In *Keble's* Lessee v. *Arthurs*, 3 *Binn.* 29. *Tilghman*, Ch. J. asserted it as the undoubted right of the court to grant a new trial, even where there had been two verdicts in favour of the same party, upon *a simple matter of fact.* That a verdict against evidence is regarded in *Virginia* and *Kentucky* as a legal ground for a new trial, is apparent from the cases of *M'Rea's* Executors v. *Wood's* Executor, 1 *Hen. & Munf.* 548. and *Casky* v. *January*, *Hardin's Rep.* 539.

Such being the established law and practice of the courts in *England* and in our sister states, what is there in *Connecticut* to produce an anomaly? If there is any thing, it may be safely affirmed, it is some statutory provision. And the fact is, we have a statute on the subject of granting new trials. It provides as follows: "That the superior and county courts in this state, shall and may, from time to time, as occasion shall require, and as shall by them be judged reasonable and proper, grant new trials of causes that shall come before them, for mispleading, or discovery of new evidence, or for *other reasonable cause* appearing, *according to the common and usual rules and methods* in such cases."(*a*) Do these provisions *take away* the power in question? If a verdict against evidence is a "reasonable cause" for granting a new trial, it would rather seem that the power is here conferred, or at least sanctioned.

It may be said, that the power of the court to return the jury to a further consideration of the cause, when, in the opinion of the court, the verdict is against evidence, or the weight of evidence,(*b*)—a power peculiar to this state,—is a substitute for the power of granting a new trial on the

(*a*) *Tit.* 6 *c.* 1. *s.* 13. (*b*) See *tit.* 6. *c.* 1. *s.* 11.

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same ground. But it is absurd to suppose that the latter power is superseded by the former. The provisions authorizing the court to send out the jury, had existed, without variation, for more than half a century when the statute regarding new trials was passed.(*a*). Besides, the power of returning a jury who had already made up their minds upon a question of fact to a further consideration of it, is by no means equivalent to that of bringing the cause before another jury, who are uninfluenced by pride of opinion, and unshackled by fixed views of the subject.

2. The present mode of application for a new trial is a proper one. It is difficult to conceive why the application in this case should be in a form different from applications for the same object on other grounds. Our statute regarding new trials makes no distinction. We have no other statute which makes one. Nor is there any principle of the common law which makes one. The court unquestionably have the power to adopt such a course of practice in relation to this subject as appears to be most convenient and subservient to the ends of justice. By the exercise of this power, many late improvements have been made in our jurisprudence; particularly, that of directing the jury, when the cause is first committed to them, on all the questions of law, and of granting a new trial, on motion, for a misdirection. *Swift's Ev.* 169. 170. There may still be cases where a new trial can be applied for only by petition; as where the cause is no longer pending, and the parties are out of court. In such case, a petition and citation are necessary to bring the cause and the parties before the court. But that necessity cannot exist where the application is made at the same term at which the trial was had. Motions for a new trial for misbehaviour of the jury, under the name of motions in arrest, having been long known in the practice of our courts.

Daggett and *Bacon*, contra. 1. There is no *case* before this Court upon which they can act. The judges before whom the cause was tried, ought to have reported the evidence, as well as their opinion upon it, so that this Court may judge for themselves whether the verdict was right or

(*a*) See the editorial notes to the 11th and 13th sections.

wrong. All that appears to this Court is, that a majority of the judges who were present at the trial, were dissatisfied with the verdict as being against evidence. If that evidence were stated to this Court, a majority of the judges might be of a different opinion. According to the established practice in *England*, and in our sister states, where new trials are granted on motion, the certificate of the judge at *Nisi Prius* contains a minute report of the evidence, with his opinion upon it. 3 *Bla. Com.* 391, 2.

2. Admitting that this application presents the case sufficiently, yet the court will not take cognizance of it *on motion*. The application should have been by petition, with a citation regularly served upon the adverse party. Formerly, this was a practice in all cases. Before 1762, the petition was addressed to the General Assembly; afterwards, to the court that tried the cause. In *May* 1807, an act(*a*) was passed authorizing the judges of the superior court to institute rules of practice; in pursuance of which the rules in 3 *Day's Ca.* 28, 9. were adopted. But those rules do not touch this case. The same form of application for a new trial on this ground must be pursued, and the same steps taken, now, as would have been required half a century ago.

The statute authorizing new trials provides, that they shall be granted according to the *usual methods*. The only method then known in this state was by petition.

Further, the verdict and the judgment in this case have been *recorded;* and the judgment of a court of competent jurisdiction cannot be set aside *on motion*.

3. It is asked, ought a verdict to stand which is against evidence? The terms in which the question is proposed are imposing and deceptive. The true question is, ought a verdict to stand which is against the opinion of the court? In the case under consideration, how does it appear that the verdict is against evidence? The jury were of opinion that the evidence proved the issue; the court were of opinion that it did not. And it is now taken for granted, that the jury were wrong, and the court right. This is the basis of the argument and of the motion. But does it necessarily follow, that when the court and jury differ on a question of

(*a*) *Tit.* 42. *c.* 15. *s.* 2.

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fact, the jury are wrong, and the verdict is to be set aside? If so, of what use is our boasted trial by jury?

The verdict of a jury on a question of fact is conclusive, or it is nothing. If the opinion of the court can govern it, the trial by jury is of no worth. When the court and the jury differ on a question of law, the court are certainly right; when they differ on a question of fact, the jury are certainly right. Hence the maxim of the *good, old* common law, "*ad questionem facti non respondent judices; ad questionem legis non respondent juratores.*" From this maxim no court in *Connecticut* has yet departed. It is admitted, that no new trial was ever granted in this state for the cause assigned in this motion. Whenever questions of this kind have been agitated, our courts have with one voice said, "The jury are the constitutional judges of questions of fact; their verdict is conclusive; we have not power to set it aside, because, in our opinion, it is against evidence. Whatever may be the inclination of our opinion as to the conclusion the jury make from the testimony, it is their province, and not ours, to make those conclusions." That these are the sentiments of our courts and jurists will be found from 2 *Swift's Syst.* 264. *Kirby* 61. 142. 273. 277. 1 *Root* 150. 2 *Root* 144.

All the precedents of our courts are against the motion. And in *Fonereau* v. *Bennet*, 3 *Wils.* 59. and *Brook* q. t. v. *Middleton*, 10 *East* 268. the courts of Common Pleas and King's Bench severally refused a new trial, in a penal action, where the verdict was against evidence, not because it was a penal action, but because the application was against the precedents of fifty years. On the same principle this Court ought to refuse this motion, because it is against all our precedents of more than one hundred years.

Our trials in civil actions are regulated by various statutes; by which the powers of our courts and juries are distinctly marked. By the statute of *February* 1644, the court were empowered, if they thought the verdict was not according to the evidence, to cause the jury to return to a second consideration of the cause. If they still adhered to their verdict, they were to be discharged, and another jury to be impannelled. In *May* 1694, this statute was repealed, so far as it regarded the impannelling of another jury, and the court were prohibited from exercising the power claimed

by this motion. (*a*) In 1702 it was enacted, "That the judges of the court shall have liberty, if they judge the jury have not attended to the evidence given in, and the true issue of the case, in their verdict, to cause them to return to a second consideration of the case; and shall for the like reason have power to return them to a third consideration, *and no more.*" (*b*)

It is apparent, that while these statutes stand and are regarded, the court cannot allow this motion, and impannel another jury to try the issue.

This verdict, like every other verdict which has been given in this state since the statute of 1694, must stand. The plaintiff is entitled to it, and to the judgment which has been rendered upon it, by a court of competent jurisdiction.

The courts in *England* are not restrained by positive statutes from granting new trials. They have no statute authorizing them to return the jury to a third consideration, *and no more*, and prohibiting them from impannelling another jury to try the issue.

When we consider the direction which the court can give to the verdict while the cause is on trial; when we consider the definite manner in which all questions of law are settled by the court; and when we consider that the court can return the jury to a second and a third consideration of a question of fact, with powerful and unanswered arguments on the evidence; it is apparent, that the court must now have an almost commanding influence over the verdicts of the jury. *Experientia docet.* If to this is to be superadded the power now claimed; if the court are to set aside the few verdicts that are now given against their opinion; there is an end of the trial by jury. The form may be preserved, but every vestige of the right is gone.

Little as we now esteem this right, the time may come when we shall value it at its worth. In the language of an eminent jurist of our own time,* "It is essential to preserve

(*a*) *Stat. Conn.* 37. *n.* 21. The act referred to was as follows: "Whereas in the Law, title "*Juryes and Jurors*," in the 4th paragraph, it is said, it shall be in the power of the court to impannel another jury, &c. it is now repealed, and it is ordered it shall not be in their power to impannel another jury."

(*b*) *Tit.* 6. *c.* 1. *s.* 11,

* Chancellor *Kent.*

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a just balance between the distinct powers of the court and jury, that the parties may enjoy, in undisturbed vigour, their constitutional right of having the law decided by the court, and the fact by the jury."

The case before us is comparatively of trifling importance; but the distinction goes to the very root and essence of trial by jury, and may become of inestimable value, and perhaps of perilous struggle, when the present parties shall have ceased to exist.

Our juries are taken by lot from the middle walks of life; from the substantial yeomanry of the state. This will be the last class which will be reached, and thoroughly corrupted, by the baneful influence of party spirit. The trial by jury will be our last stake; and may yet be our only security against the systematic influence and tyranny of party spirit in judicial tribunals.

SWIFT, Ch. J. The question in this case is, whether the superior court have a legal power to grant a new trial where the verdict is against evidence.

To all courts acting on the principles of the common law, the power is incidental to grant new trials for various causes, among which one is, that the verdict was against evidence. This has ever been done in *England*, as well as in sundry states in the union. Courts in this state, then, acting according to the common law, have this power unless prohibited by positive law. The statute respecting this subject authorizes courts to grant new trials, "for mispleading discovery of new evidence, or other reasonable cause, according to the common and usual rules and methods in such cases." This is so far from being a prohibition, it may be considered as conferring a power to grant new trials where the verdict is against evidence; for this comes clearly within the expression, "for reasonable cause according to the common rules." It would then seem clear, both by the common and statute law, our courts possess this power.

It has been supposed from the power of the court to return the jury to the second and third consideration, the necessary implication is, that they shall have no further control of the verdict; and that in those countries where new trials are granted on the ground that the verdict is against evidence, the courts have no such power. But there is no

inconsistency or impropriety in the exercise of both these powers; and it may often happen, that a new trial is rendered unnecessary by returning the jury to a further consideration where the verdict is wrong. Though the courts in this state have the peculiar power of returning the jury to a further consideration, yet they elsewhere exercise as great or even greater authority over the jury. They, in the first instance, give them their opinion on the sufficiency of the evidence, which is much more likely to affect the verdict than an opinion given after they have agreed. It would seem, then, that the exercise of this power can furnish no reason why the courts in this state should not grant a new trial where the verdict is against evidence.

No objection can arise from the danger that this power may be abused. It is in criminal cases that juries are considered to be the guardians of the rights of the people against the tyranny and oppression of the government; but in such cases the power is not claimed to grant new trials.

It is said, that this power has never been exercised; and that it has always been understood that courts did not possess it. It is true, there has been a peculiar practice in this state with respect to trials by jury. An idea seems to have been entertained, at an early period of our government, probably originating from the power of returning juries to a further consideration, that courts had no other controul over them. The usage was to state to them the testimony and the law, as claimed by each party, avoiding, with the utmost caution, any hint of their opinion with respect to either. When the verdict was brought in, if the court dissented, they returned them to a further consideration, giving them their opinion both as to the law and the evidence. If the jury adhered to their verdict on the third consideration, the court were obliged to submit, let the verdict be ever so clearly against law or evidence. Though for a long time this right of the jury was deemed so sacred that our courts did not venture to change the practice, yet when they assumed their constitutional authority to direct the jury in questions of law, so palpable was the propriety of it, that it met with universal approbation. Precisely the same objection lies against the innovation of directing the jury in matters of law, and granting a new trial if the verdict is against it, as there does against granting a new trial if the verdict is con-

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trary to evidence. If an objection of this kind is to prevail, there can be no improvement in jurisprudence. The science of the law would become stationary. We ought not to be influenced by such narrow views. We ought to adopt every improvement calculated to promote the cause of truth and justice. It is essential to the due administration of justice that such power should be lodged in courts. What can be more preposterous than to say, that the verdict of a jury, often composed of men unaccustomed to weigh testimony, and peculiarly liable to local and personal prejudices and partialities, should never be re-examined and corrected, though opposed to the clearest evidence?

It may be said, that judges are liable to the same influence and partialities. But they do not decide the question of fact; they only furnish the means for a fair investigation of the truth, and an impartial trial of the cause; and from their situation, they act under a responsibility for the rectitude of their conduct, which cannot be supposed to operate on the minds of jurors.

I think a discreet and prudent exercise of this power can be attended with no inconvenience or danger; that it is necessary to adopt it to complete the fabric of jurisprudence, and to give to courts all the powers essential to a due execution of the law. It should be exercised only in clear cases, which will rarely occur. It will leave to juries an important and valuable power in the trial of civil causes; and when it is understood that an erroneous verdict can be corrected, the public confidence in the trial by jury will be increased, instead of being impaired.

I think, therefore, that the motion ought to be sustained.(*a*) (1)

In this opinion TRUMBULL, SMITH, BRAINARD, BALDWIN, GODDARD and HOSMER, Js. concurred.

(*a*) *See State* v. *Lyon*, 12 *C. R.* 487. *Witter* v. *Latham*, *Id.* 392. *Talcott* v. *Wilcox*, 9 *C. R.* 184. *Kinne* v. *Kinne & al.*, 9 *C. R.* 102. *Newell* v. *Wright*, 8 *C. R.* 319. *Lafflin & al.* v. *Pomeroy*, 11 *C. R.* 440. *Bulkley* v. *Waterman*, 13 *C. R.* 328. *Jackson* v. *Packer & al.*, 13 *C. R.* 342. *Johnson* v. *Scribner*, 6 *C. R.* 185. *The Eagle Bank* v. *Smith & al.* 5 *C. R.* 71. *Yale* v. *Sales*, 13 *C. R.* 185. *Johnson* v. *Hebard*, 13 *C. R.* 337.

(1) A new trial will not be granted, unless the verdict is very clearly and decidedly against the weight of evidence; the courts not interfering with the appropriate function of the jury, as the tribunal for the decision of questions of fact, except in extreme cases. Setting aside verdicts as against the weight of evidence, is not the "daily bread, but the extreme medicine," of the law, and like other powerful remedies, should be very sparingly administered. See *Astor* v. *The Union Insurance Co.* 7 *Cowen R.* 202. *Douglass* v. *Tousey*, 2 *Wend. R.* 352. *Kirby* v. *Sisson*, *Id.* 550. *Smith* v. *Hicks*, 5 *Id.* 48. *Jackson* v. *Loomis*, 12 *Id.* 27. *Eaton* v. *Benton*, 2 *Hill R.* 576, *and Keeler* v. *The Fireman's Ins. Co.*, 3 *Id.* 250.

EDMOND, J. I did not expect to be called upon, at this time, to give my opinion, and assign the reasons which have governed me in the decision of the questions which in this case are presented to the court, and am not very well prepared to do it. I regret this the more, as the opinion I have formed differs from that of my brethren whose opinions I highly respect. It is, however, my opinion, which I am bound to express; and from the consideration I have given *the subject, I cannot persuade myself that the superior court [*483] have a right by law, to exercise the power, which they are called upon to exercise, as claimed by the motion; or, in other words, to grant a new trial after the jury have been returned to a third consideration upon an issue joined on any matter of fact, and have returned a verdict, which, in the opinion of the court, is against, or not warranted by, the evidence in the case.

In actions cognizable by the superior and county courts in this state, the right to have questions of fact tried by a jury, has, from a very early period, been considered as a privilege of primary importance; and *the power and duty* of the court in relation to verdicts of the jury found upon issues in fact, has been repeatedly the subject of legislative contemplation, and regulated by statute. A slight attention to the various acts which have been passed, will evince that the possibility of a question like the present has not escaped without due consideration. By an act passed in 1644, the court were empowered to return the jury to a second consideration, when in their opinion the verdict was not according to the evidence, and if the jury adhered to their verdict, to discharge them and cause another jury to be impannelled for the trial of the issue, a power every way equivalent in effect to the power of granting a new trial for the same cause after judgment rendered. In 1694, so much of this act as gave to courts the power of rejecting the verdict and impannelling a new jury, was repealed; by which it appears, that an experiment of fifty years had proved to the satisfaction of the legislature, the inexpediency of vesting the courts with a power, which, in its exercise, might render the privilege of a jury to try issues in fact merely nominal. After this repeal, the only power remaining with the court, in cases where they were of opinion that the verdict of the jury was not warranted by the evidence, was to send them to a second consideration of the case. Within a short period after the repeal mentioned, as appears by our statutes as revised in 1702, it was enacted "That the judges of the court shall have liberty, if they judge the jury

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have not attended to the evidence given in, and the true issue of the case in their verdict, to cause them to return to a second consideration of the case; and shall, for *like reason*, have power to return them to a third consideration, *and no more.*" *(*Tit.* 6. *c.* 1. *s.* 11.) This is the extent of power which the legislature thought it expedient at that time to grant to the court. Accordingly we find in the same act (*s.* 8.) it is enacted, "That all actions that shall be tried before the superior or county courts, when issue is joined on any matter of fact, shall be tried by a jury of twelve men of the neighbourhood, qualified, impannelled and sworn according to law; who shall find the matter in issue, with the debt or damages, according to law and their evidence; *and the judges shall make up and declare the sentence thereon.*" To this section there is indeed a proviso, that the parties by agreement may put issues in fact to the court; but that does not affect the present question. In these several acts of the legislature, previous and up to 1702, we have the *power and the duty* of the court, when there happened to be a difference of opinion on the facts put in issue between the jury and the court, clearly stated and defined; and since 1702 these acts have not been varied. With the common law power of courts, or their practice, either in *England* or the neighbouring states, in relation to the subject of granting new trials in cases like the one now under consideration, our courts had nothing to do. The common law of *England* could give to our courts no authority on a subject contemplated by our own legislature, and expressly provided for by positive law; or if it could, which I cannot admit, it is to be remembered that the sole and exclusive power of granting new trials was retained by the Assembly, and remained in the general court, or assistants' court, (so called) from 1644 to 1762, except so far as that power may be said to have been delegated by the act of 1644 repealed in 1694, as already mentioned. Antecedent to 1762, applications for new trials were by petition to the assembly; and it is worthy of observation, that from 1694, when the power of the court to discharge the jury and impannel another was taken away, or even from 1644 up to 1762, not a precedent has been shewn, and I presume there is none to be found, where a new trial has been granted by the Assembly, or any court in this state, on the ground now claimed. The law, plain and explicit, had put the question at rest. In 1762, it was enacted, "That the superior and county courts in this state, shall and may, from time to time, as occasion shall require, and as shall by

them be judged reasonable and proper, grant new trials of *causes that shall come before them, for mispleading, or discovery of new evidence, or for other reasonable cause appearing, according to the common and usual rules and methods in such cases." (*Tit.* 6. *c.* 1. *s.* 13.) From this statute is derived all the power in relation to the subject of granting new trials, which the court have a right to claim. Does this statute convey the authority contended for? The motion is not founded on mispleading, or the discovery of new evidence. Is it embraced in the words "for other reasonable cause appearing?" Can that be considered as a reasonable cause for granting a new trial, which has been considered by the legislature, and provided for, in another way, by a statute defining and restricting the powers of the court in relation to it? Certainly not.

Should it be said, by the words "common and usual rules and methods in such cases," reference is had to the *English* rules and methods, and that new trials are there granted, when, in the opinion of the judge, the verdict is against evidence, or the weight of evidence given in the case; I answer, the reference, if to the *English* practice at all, can only be to like cases, presented under like circumstances. They have no statutes similar to ours on the subject in question. Their example, therefore, on this point, can furnish neither precedent nor authority.

If the words "common and usual rules and methods," &c. refer to those rules which had been common and usual in this state, it would be absurd to suppose the statute confers the power claimed; for not a solitary instance has been produced to prove the existence of such a rule, or a claim that the court by virtue of this or any other statute might exercise such a power, although the *English* practice must have been well understood. Adopt the construction contended for, and the result is, you give to a statute of more that fifty years standing a construction it has never before received, a meaning not obvious or necessary to render it intelligible; and invest the courts with an extraordinary power, which, in point of expediency, it may be doubtful whether it is best they should possess, and which, if possessed, it is admitted, should be exercised with extreme caution. Let me remark here, that power should be arrogated with caution, and on clear authority, in the exercise of which extreme caution is required.

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Further, admit the principle, and by necessary consequence, you repeal, as to their beneficial effect, all those statutes which secure to the parties, the right to have issues in fact decided by a jury of twelve men of the neighbourhood; for of very little consequence is that right, if after all, the court may grant new trials without limitation as to number, and until a jury can be found to decide the issue correctly in the opinion of the court. I say, without limitation as to number, for so long as the cause remains for which the new trial was first granted, so long the process of granting a new trial (if the court act consistently) must be repeated.

In respect to any imagined failure of justice in case of an obstinate jury, if the courts are not permitted to exercise such a power, this may be a proper subject for the consideration of the legislature, but furnishes no proof that such a power exists. If, however, it was admissible as an argument, might it not be said, that questions of fact must be ultimately decided somewhere; that the decision may as safely be entrusted to twelve disinterested jurymen of the neignbourhood, as to the judges of the several courts; and that a possible failure of justice may be apprehended in either case.

I will only add, to grant a new trial on the ground stated in the motion, either on a motion in court after verdict, or on a petition brought for that purpose, would be, in my opinion, an innovation on our system of jurisprudence; an assumption of power not warranted by the laws of the state; an invasion of the right given to parties to have issues in fact decided by a jury; a measure unsupported by any precedent of our own; not contemplated in, or adapted to, the organization of the superior court; and wholly unnecessary, not to say an impediment, to the due and speedy administration of justice.

GOULD, J. gave no opinion, having been of counsel in the cause.

New trial to be granted.

WILLIAMS and others *against* GRANT and others.

A common carrier is liable, under a general acceptance, for all losses except such as are occasioned by the act of God, the act of the public enemies, or the act or default of the bailor himself.

The term "act of God" comprehends all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent.

The striking of a vessel upon a rock not generally known, and not actually known to the master, is *prima facie* an act of God, for which the carrier is not responsible.

But though the situation of the rock was not generally known, and was not actually known to the master, yet if he exposed the vessel to such accident by any culpable act or omission of his own, he is not excused.

THIS was an action on the case against the defendants as common carriers. The declaration stated, that the defendants, being owners of the sloop *M'Donough*, a vessel used by them in the business of transporting goods for hire, received on board 450 bushels of salt belonging to the plaintiffs, to be transported, for a certain sum *per* bushel, from *Providence* to *New-York*, and there delivered, the danger of the seas only excepted; and that while the sloop was proceeding down *Providence* river, by the negligence and unskilfulness of the master, and in consequence of his ignorance of the navigation of that river, she struck upon a rock and bilged, so that the plaintiff's salt was ruined and lost.

The cause was tried at *Norwich*, *January* term 1816, before *Swift*, Ch. J. and *Brainard*, J.

On the trial, it was admitted, that the defendants undertook to transport the salt in question from *Providence* to *New-York*, on board a vessel of about twenty tons, owned by the defendants, for hire, as alleged in the declaration. The master gave the plaintiffs a bill of lading in the usual form, and containing the usual exception of the danger of the seas. While the vessel was on her passage, she run against a rock in *Providence* river, under a moderate breeze in fair weather, and bilged, so that the salt was lost. The plaintiffs contended, and produced witnesses to prove, that this rock, called *Sergeant's* rock, was well known to the people in the neighbourhood, and those concerned in the navigation of that river; that the vessel, when she run against it, was out of the usual course of navigation; that the master was not acquainted with the navigation of the river; and that it was usual to have a pilot, but that none was taken on board. The defendants, on their part, produced evidence to prove, that the rock was not generally known. The court charged the jury, that

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if they should find from the evidence, that the rock was generally known, the loss would be imputable to the negligence of the defendants, and they must return a verdict for the plaintiffs; but *if they should find it was not generally known, then the loss was occasioned by a peril of the sea, and their verdict must be for the defendants. The jury found a verdict for the defendants; and the plaintiffs moved for a new trial on the ground of a misdirection. The questions of law arising on this motion were reserved for the consideration and advice of the nine Judges.

Cleaveland and *T. S. Williams*, in support of the motion. The direction of the court to the jury makes the defendants' liability turn entirely upon the question of fact whether the rock was generally known. This was wrong, because a common carrier is in the nature of an *insurer*. Although the rock was unknown, so that no negligence was imputable to the master in running upon it; yet as the weather was fair, and the vessel was entirely under his controul, the act of running upon the rock was his act, and not within the established exceptions of a carrier's liability. There is no such rule as that a carrier is to be liable only where negligence or misconduct is imputable to him. *Forward* v. *Pittard*, 1 *Term Rep.* 27. 33. *Trent Navigation* v. *Wood.* 3 *Esp. Rep.* 131, 2. In the case of a robbery, the carrier is subject to a force which he cannot resist; but still he is liable. In *Barclay* v. *Heygena*, cited 1 *Term Rep.* 33. it was proved, that an irresistible force broke into the ship, and stole the goods; yet the defendant was held answerable. In *Morse* v. *Sluce*, 1 *Vent.* 190. 238. S. C. T. *Raym.* 220. it appeared from a special verdict which was found, that *there was not the least negligence in the defendant;* and yet by the opinion of the whole court, at the head of which was Chief Justice *Hale*, judgment was given for the plaintiff. It was part of the case of *Forward* v. *Pittard* that the goods were consumed by fire, which broke out at the distance of 100 yards, and raged with unextinguishable violence, *without any negligence in the defendant.* The same doctrine is recognized in *Coggs* v. *Bernard*, 2 *Ld. Raym.* 918. *Gibbon* v. *Paynton & al.* 4 *Burr.* 2300, *Dale* v. *Hall*, 1 *Wils.* 282. *Hyde* v. *The Trent and Mersey Navigation Company*, 5 *Term Rep.* 394. *Elliot & al.* v. *Rossell & al.* 10 *Johns. Rep.* 1. 11. The rule is too well settled to require argument or to admit of doubt, that a carrier is liable for every accident except by the act of God, or the public enemy. The

act of God, in its technical sense, means inevitable accident *not arising from the intervention of man.* 1 *Term Rep.* 33. 10 *Johns. Rep.* 11.

But if the case is to be decided on the ground of *negligence*, every loss is to be imputed to negligence which might have been avoided by human foresight. *Trent Navigation* v. *Wood*, 3 *Esp. Rep.* 131, 2. *Abbott on Shipping, part* 3. *c.* 4. *s.* 1. 8. *Colt* v. *M'Mechen*, 6 *Johns. Rep.* 168. per *Kent*, Ch. J. *Schieffelin & al.* v. *Harvey*, 6 *Johns. Rep.* 170. 177. *Elliot & al.* v. *Russell & al.*, 10 *Johns. Rep.* 1. *M'Clure* v. *Hammond*, 1 *Bay* 98.

Another and stronger ground of our motion is, that the court omitted to give any direction to the jury on facts which were material. There being evidence which tended to prove that the vessel received her injury out of the usual course of navigation in the river, the court ought to have submitted the case to the jury on this point; because if the fact were proved, the defendants were liable, whatever might have been the *immediate* cause of the injury. If the master had kept the usual course, as he ought to have done, the accident would not have happened. *Abbott, part* 3. *c.* 3. *s.* 7. The evidence offered to shew that the master was unacquainted with the navigation of the river, and had no pilot, though it was customary to have one, was also material, and ought to have been submitted. If, under the circumstances of this case, there ought to have been a pilot of competent skill on board, it will avail the defendants nothing to shew that the accident did not happen from any want of skill in the master. *Law* v. *Hollingsworth*, 7 *Term Rep.* 160. *Bell* v. *Reed & al.* 4 *Binn.* 127.

The form of the bill of lading in this case makes no difference; for *dangers of the seas* and *the acts of God*, as applicable to this subject, are convertible terms. The exception in the bill of lading is, therefore, no other than that which the law makes in all cases.

Further, the exception of dangers of the *seas* is not applicable to *river* navigation. *Abbott, part* 3. *c.* 4. *s.* 5.

Daggett, contra. As this is an attempt to fix the defendants with a loss by a very rigid rule of law, the court will not be inclined to extend its application. In cases of theft and robbery, the carrier has been held liable, though without negligence or blame; but these decisions have proceeded entirely upon the

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ground of public policy, *viz.* to prevent combinations with thieves and robbers. In the present case, there was no room for collusion; there is no reason, therefore, why the defendants should be responsible further than other bailees for hire.

But admitting the defendants to be responsible for all accidents, except by the act of God, or the enemies of the state; yet they are clearly within the first of these exceptions. In *Buller* v. *Fisher*, *Abbott*, *part* 3. *c.* 4. *s.* 5. where the ship in which the goods were conveyed, was run down in day-light, and not in a tempest, by one of two other ships that were sailing in an opposite direction to her, under such circumstances that no blame was imputable to the master of the defendant's ship; the loss was considered as having happened by *a peril of the sea*, and was held to fall within that exception. *Abbott* says, "If a ship is forced upon a rock or shallow by adverse winds or tempest, *or if the shallow was occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety;* the loss is to be attributed to *the act of God, or the perils of the sea.*"(*a*) In *Amies* v. *Stevens*, 1 *Stra.* 128. and *Colt* v. *M'Mechen*, 6 *Johns. Rep.* 160. there was as much agency of man connected with the loss or damage, as in this case, and yet these cases were held to be within the exception. If the event be such as human prudence could not guard against, it is considered in law as *the act of God.* The charge of the court was therefore correct in resting the defendants' liability upon the fact of the rock's being generally known; for if it was, then the master could have avoided it; if it was not, the utmost skill and care would have been unavailing. The very case of goods lost or injured in consequence of the ship's sailing in fair weather, against a rock or shallow, is put by *Emerigon* and *Roccus:* and the master's liability is made to turn upon the fact of the rock or shallow being *generally known*, or *known to expert mariners.*(*b*)

As to the exception of *the dangers of the seas* in the bill of lading, it may be remarked, that the object of the parties was evidently to *limit* the carrier's liability, and the court will give those words effect, if they can.

That the course of the vessel down the river was not the

(*a*) *Part* 3. *c.* 4. *s.* 6, citing *Roccus* not. 55. *Strac. de nautis*, part 3. num. 32.

(*b*) *Abbott, part* 3. *c.* 3. *s.* 9. and *c.* 4. *s.* 6. citing *Emerigon*, tom. 1. p. 373. *Roccus*, not. 55.

usual one, is an immaterial fact in this case. The rule of law as to a deviation in case of insurance, is inapplicable. A carrier takes goods at one place, and is to deliver them at another; but he may take what route he pleases. It is not shewn that the course taken was not as safe and as short as the usual one. A similar answer may be given to the other objections, *viz.* that the master was not acquainted with the navigation of the river, and that it was usual to have a pilot, but there was none on board. It is not shewn that the loss was occasioned by any ignorance of the master, or for want of a pilot. Nor does it appear that greater skill in the master, or the presence of a pilot, would have been of any use. It may be usual for a carrier to go in the day-time; but he goes in the night, and his vessel or his waggon is struck by lightning, and the goods destroyed; he is not liable, unless it be shewn that the loss happened in consequence of his departure from the usage.

SWIFT, Ch. J. Common carriers are liable for the loss of goods entrusted to their care, in all cases, except where the loss arises from the act of God, the enemies of the state, or the default of the party sending them. Under the term *act of God* are comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee or prevent; and in cases of this description, they may be liable for a loss arising from an inevitable necessity existing at the time of the loss, if they had been guilty of a previous negligence or misconduct, by which the loss may have been occasioned.

If the rock on which this vessel struck had been generally known, then it was the duty of the master to have known and avoided it, and the loss would be imputable to his negligence. If the situation of the rock was not generally known, and the master did not actually know it, then if he conducted properly in other respects, and no fault was imputable to him, his striking on the rock would be an act of God, an unavoidable accident, and he would not be liable for the loss. For, though the rock had been there for ages, yet if it had never been discovered before, it is the same thing as if it had been created and placed there immediately before the

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accident happened.(1) The charge of the court to the jury on this point was correct.

In this case, however, the plaintiffs offered evidence to prove that the master was ignorant of the navigation; that he had no pilot, as was customary; and that the vessel went out of the usual course. It does not appear but that the running of the vessel on the rock may be attributed to this negligence. Of course, the court should have submitted these facts to the jury, and should have instructed them, that though the situation of the rock was not generally known, yet if they found the other facts to be true, so that the loss was imputable to the negligence of the master, then he was liable for it, and they must find a verdict for the plaintiffs.

For this reason I would advise a new trial.

In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN and HOSMER, Js. concurred.

GOULD, J. It is very clear, that a common carrier is liable, under a general acceptance, for all losses, except such as are occasioned by inevitable accident, the act of the public enemies, or the act, or default, of the bailor himself. In the case now before the court, neither any act of public enemies, nor any act or default of the plaintiffs, is in question. With respect to the other ground of exemption, (inevitable accident,) the defendants are, indeed, by an express exception in the bill of lading, excused, so far as regards losses caused by "dangers of the sea." This exception, however, does not seem at all to qualify their liability: for, by "dangers of the sea," are meant no other than *inevitable* perils, or accidents, upon that element; and by *such* perils or accidents, common carriers are *prima facie* excused, whether there is any such express exception or not. In either case, however, it is a condition precedent to their exoneration, that they should have been in no *default;* or, in other words, that the goods of the bailor should not have been *exposed* to the peril, or accident, which occasioned the loss, by their own misconduct, neglect, or ignorance. For, though the immediate, or proximate, cause of a loss, in any given instance, may have been what is termed *the act of God*,

(1) *See M'Arthur & Hurlbert* v. *Sears*, 21 *Wend. Rep.* 190. 198-9.

or inevitable accident; yet, if the carrier unnecessarily exposed the property to such accident, by any culpable act or omission of his own, he is not excused. I recollect a case [illegible]t, in some book, to this effect: That if a common hoyman unnecessarily puts to sea, under circumstances which render a loss of the goods on board probable—as in very tempestuous weather—he is liable, in the event of a loss, though it were *immediately* occasioned by the elements, over which he had no control. This I take to be law.

In the present case, the plaintiffs claimed and attempted to prove, at the trial, that the master unnecessarily deviated from the ordinary course; that he was ignorant of the navigation of the river; and, that it was usual, in that navigation to have a pilot—(whom he confessedly had not.) Now, such a deviation would certainly have been misconduct; the alleged ignorance of the master, (there being no pilot on board,) would have been a species of deficiency, in the nature of a want of sea-worthiness; and the want of a pilot, where one is, by common usage, employed, and the master ignorant of the navigation, is manifestly a culpable neglect. And, as the plaintiffs made it a ground of claim, that this misconduct, deficiency, and neglect, contributed to occasion the loss, by bringing the property on board within the reach of the peril; the existence of the facts, on which the claim was founded, should have been left to the jury, and the legal effect of them, upon the supposition of their existence, explained. As this was not done, the plaintiffs are, in my opinion, entitled to a new trial.(*a*)

GODDARD, J. having been of counsel in the cause, gave no opinion.

New trial to be granted.

(*a*) *See Clark & al. v. Richards, ante,* 54. *Richards v. Gilbert,* 5 *Day,* 415. *Crosby & al. v. Fitch & al.* 12 *C. R.* 410. *Barber v. Brace & al.* 3 *C. R.* 9. *Hall v. The Connecticut River Steamboat Company,* 13 *C. R.* 319. *Hale v. The New Jersey Steam Navigation Company,* 15 *C. R.* 539. *As to the liability of common carriers by land, See Merwin v. Butler,* 17 *C. R.* 138.

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SHEPARD *against* HALL.

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A. being the holder of certain accepted drafts as security for a debt due to him from *B.*, the latter transmitted to *A.* two promissory notes, endorsed in blank, to be substituted for the drafts, requesting him, if he accepted such notes, to return the drafts; *A.* kept the notes, and refused to return or give up the drafts undischarged, but collected a part of the acceptor, and gave him a discharge in full: Held that the notes were not legally delivered so as to vest the property of them in *A.*, and he could not maintain an action on them as indorsee against the maker.

THIS was an action on a promissory note. The cause was tried at *New-Haven*, *January* term 1816, before *Trumbull*, *Baldwin*, and *Ingersoll*, Js.

The case, as claimed by the defendant, was as follows. Before the note in suit was given, the plaintiff, being the holder of two drafts, drawn by *Asahel Loomis* of *Middletown*, on *Reuben Ward* of *New-York* and accepted by him, applied to *Loomis* and requested of him that he would substitute other security for the drafts, and take them up. It was thereupon agreed by the plaintiff and *Loomis*, that the latter should procure two notes to the amount of the drafts, and send them to *New-Haven* in a letter directed to the plaintiff; on the receipt of which the plaintiff was to return the drafts. In pursuance of this agreement, *Loomis* procured the note declared on, with another to the amount of the drafts with 97 dollars, endorsed in blank, and enclosed them in a letter directed as above, of which the following is a copy: "*Middletown*, *September*, 1, 1813. Sir, I herewith send you two notes, which, I presume, will answer your purpose, though a little different from what we talked of. I will see you in a few days, and pay you the difference of interest. Please write me, and enclose the drafts, if you accept the notes. Yours, *A. Loomis*." The plaintiff received the letter and took the notes, but refused to return the drafts. Soon afterwards, he received on them of *Ward*, the acceptor, 97 dollars, and thereupon erased the acceptance from one, and gave the following discharge: *Hartford*, *October* 26th, 1813. Received of Mr. *Reuben Ward* ninety-seven dollars in full satisfaction of all claims I have upon him of every nature and description. *M. Shepard*." The defendant also claimed that he had proved by witnesses, and by sundry letters read on the trial, (*a*) that *Loomis* was always ready and willing to pay the difference between the notes and drafts, and repeatedly demanded of the plaintiff either the notes

(*a*) These letters were annexed to the motion; but it is not necessary, for the present purpose, to state their contents at length.

or the drafts, which the plaintiff refused to deliver until after said erasure and discharge. He then offered to return the drafts, but *Loomis* refused to accept them, and never has accepted them.

The plaintiff offered evidence to prove, and claimed that he had proved, that at the time he applied to *Loomis* for other and better security for the amount of the drafts, the indorsers had failed; that *Ward*, the acceptor, was in failing circumstances, and soon afterwards failed; that *Loomis* also had failed in the meantime; that at the date of the discharge, *Ward* had conveyed all his property to trustees, which produced to his creditors only 15 cents on the dollar; and that *Loomis*, at the time he drew the drafts, had no funds in the hands of *Ward*, the acceptance being for the honour of the drawer. The plaintiff also claimed, that *Loomis* assented to his holding both the notes and the drafts until payment of the 97 dollars; that at any rate, he had a right to retain both the notes and the drafts for a reasonable time, until he should make his election; and that the time for which he retained the drafts, was a reasonable time only.

The court charged the jury as follows. "If on consideration, you shall find from the evidence, that by agreement of the parties the notes were to be substituted in exchange for the drafts, and the plaintiff had no right to hold both the notes and drafts as a double security on his demand, but was bound immediately, on electing to accept the notes, to return the drafts; and that the notes were sent enclosed to the plaintiff on that agreement, for the purpose only of being exchanged for the drafts, and were never, in any other way, delivered to the plaintiff; and that the plaintiff kept the notes, and refused to return or give up the drafts undischarged, and afterwards received on them 97 dollars, and gave the acceptor a discharge in full; in that case, the court are of opinion that by law there is no such delivery of the notes as will vest the property of them in the plaintiff, and give him a right to maintain this action against the defendant, and your verdict must be for the defendant. On the other hand, if you shall find that the defendant has failed of proving that the agreement was such as he has claimed, and that the notes were to be delivered to the plaintiff as further security, and not in exchange for the drafts, and that the plaintiff was not bound, on his accepting them, to return the drafts, and relinquish all claim thereon; in that case, your

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verdict must be for the plaintiff. The jury returned a verdict for the defendant, and the plaintiff moved for a new trial on the ground of a misdirection. The questions arising on such motion were reserved for the consideration and advice of the nine Judges.

N. Smith and *Trumbull* in support of the motion.

E. Huntington and *Staples*, contra.

SWIFT, Ch. J. The notes in question were transmitted by *Loomis* to *Shepard* the plaintiff, to be substituted for certain drafts he held in his hands for a debt due from *Loomis*. The proposition was, that if he accepted the notes, he should return the drafts. On this condition only had he a right to retain the notes. It was then optional with him to accept the notes and return the drafts; or to return the notes and hold the drafts; but he could not hold the notes, if he retained the drafts. As he refused to return the drafts, collected a part, and cancelled the whole, he never did the act which gave him a right to the notes; of course, there was no legal delivery of the note in question, but he retained it wrongfully. As then this note was not legally delivered so as to vest a right and interest in him, as he retained it wrongfully, he cannot, as indorsee, maintain an action upon it against the maker; for in such case, it is necessary that he shew an interest, and that he came lawfully by the note, to entitle him to recover.

I am of opinion that a new trial ought not to be granted.

In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, and GODDARD, Js. concurred.

GOULD, J. This motion, I think, ought not to prevail. It was incumbent on the plaintiff to show a title; but this he could not do, if there was no effectual delivery of the note to him; or in other words, if the delivery was not such as to entitle him to retain it. For though he might, by a breach of trust, make a valid transfer, and thus communicate a right of recovery to a subsequent *bona fide* receiver; he certainly could not, by his own wrongful act, make a title in *himself*. And according to the finding, he actually holds the note in

his own wrong; *i. e.* by the breach of a condition, which *Loomis* prescribed, and had a right to prescribe. For by accepting and retaining the two notes, enclosed in the letter of *September* 1st, the plaintiff must be deemed to have acceded to the *terms*, which the letter contained; unless, from other evidence, a different agreement or understanding is shown. But the court distinctly left the question to the jury, whether the notes were actually delivered upon those terms; and the finding is, that they were.

The rules relating to *escrows*, can have no application to the case, according to any view of it. The notes were not, like *escrows*, placed in deposit, or delivered provisionally, to take effect upon some *future* contingency, or the *future* performance of some condition; but were delivered, in consideration, and in confidence, of a *simultaneous* act, to be performed by the plaintiff, but which he has not performed. And the case does not, I think, differ at all in principle, from that of *A.*'s delivering to *B.* a deed of black-acre, under an agreement, that *B.*, *on receiving it*, shall deliver to *A.* a deed of white-acre, and *B.*'s refusing, on the receipt of *A.*'s deed, to deliver his own: A case, in which it is perfectly clear, that *B.* would acquire no title.

It is said, however, that the defendant *Hall*, being no party to the condition prescribed by *Loomis*, can take no advantage of it. But it should be recollected, that *Hall*, standing upon the defensive, has a right to claim, that the plaintiff make out his title. The objection, upon this point, is *preliminary*.

With respect to the claim, that *Loomis* ultimately *waived* the condition, prescribed in his letter of *September* 1st, there was, indeed, no direction to the jury; but there appears to have been no need of any: for no waiver is pretended, unless it may be collected from the "letters," and "receipts," annexed to the motion. And as these writings are now presented upon the face of the record, and the alleged waiver it is to be deduced *exclusively* from them; the question is reduced to a matter of mere legal construction, on which it was not necessary, (for the *plaintiff's* sake, at least,) to instruct the jury: Though, if the verdict had been the other way, the *defendant* might, perhaps, have complained of the omission. For there can be no hesitation, I trust in deciding, that those letters and receipts neither amount in

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law, to a *waiver* of the condition, nor conduce, at all, to prove it in evidence.

HOSMER, J. having been of counsel in the cause, gave no opinion.

New trial not to be granted.

BRAY and others *against* ENGLISH and others:

IN ERROR.

A submission to referees by rule of court being irrevocable; and it being incidental to their power, where the rule makes no provision on the subject, to appoint the time and place of trial; if either party, upon due notice, refuse or neglect to attend, the referees may proceed *ex parte*.

Nor can such power of the referees be controled by an agreement between the parties at the time of the submission.

THIS was an action against the present plaintiffs in error for a disturbance in the enjoyment of a shad-fishery in *Ousatonnick* river.

The cause, while pending in the county court, was referred, at the desire of the parties, to *Asa Chapman*, *Benjamin Stiles*, and *Shadrach Osborne*, Esqrs. who were appointed referees pursuant to the statute.(*a*) They afterwards made their report, stating that they met at the house of *A. B.* in *Derby*, on the 23d of *February* 1815, when and where the defendants appeared with their witnesses, but the plaintiffs neglected to appear to prosecute their action, and thereupon finding that the defendants were *not guilty*, and awarding to them their costs.

The plaintiffs remonstrated against the acceptance of this report, and stated the following facts. At the time the referees were appointed, it was agreed by the plaintiffs and defendants, that the time of meeting for a hearing of the cause should be subsequently agreed on by the parties, and should be when all persons concerned could attend. In pursuance of this understanding, the parties soon afterwards agreed to meet at the house of *A. B.* in *Derby*, mentioned in the report, on the 19th of *January* 1815, notice of which was seasonably given to the referees. The parties met at said time and place with their counsel and witnesses, fully prepared for trial; but *Asa Chapman*, Esq. one of the referees, did not attend; and no trial was had, or adjournment made, to any other time. The referees and the defendants met

(*a*) *Tit.* 12. *s.* 3.

again, at the same place, on the 13th of *February;* but the plaintiffs did not attend, and nothing was done. Soon afterwards, the referees, at the request of the defendants, and without the knowledge or consent of the plaintiffs, appointed the 23d of *February*, at the same place, for the trial of the cause; and issued a citation to the plaintiffs to meet accordingly, which was duly served. The plaintiffs being unable to prepare for trial, and to attend with their counsel and witnesses, at that time and place, gave notice thereof in due season, to the defendants and to the referees, requesting them not to meet, as it would only make needless expense. The referees, notwithstanding, did meet, at the time and place appointed. The defendants attended with their counsel and witnesses, although they well knew that the plaintiffs would not, and could not, attend. The referees, at the request of the defendants, in the absence of the plaintiffs, and without hearing any witnesses on either side made up and signed their report in favour of the defendants, and taxed 48 dollars 7 cents for their services, and 45 dollars 12 cents as the defendants' cost.

The remonstrance further stated, that the action was brought to try the title of the plaintiffs to the fishery; that the defendants claimed title to the same, and on that ground their defence rested; and that the merits of the cause had never been tried.

The court found the allegations in the remonstrance to be true, but adjudged them insufficient; accepted the report; and rendered final judgment thereon in the defendant's favour. On a writ of error in the superior court, that judgment was reversed. The present writ of error was then brought by the original defendants.

N. Smith and *Bristol*, for the plaintiffs in error, contended, 1. That there was no unfairness on the part of the referees. Their report was made upon full notice to all parties, and was properly accepted. The only objection to their conduct is, that they proceeded *ex parte*. This power they have necessarily; for otherwise one of the parties, by non-attendance, might defeat the object of the reference. 1 *Bac. Abr.* 212. (*Wils.* edit.)

2. That referees derive their powers from the law, and the act of the court appointing them.

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3. That the agreement set up in the remonstrance was designed only for the convenience of the parties, and can neither enlarge, control or impair the authority of the referees.

4. That no *fraud* appears to have been practised, by the party in whose favour the report was made, in obtaining it.

Staples and *Wales*, for the defendants in error, contended, 1. That by our statute, the appointment of referees is founded on the agreement of the parties; and the referees are to be governed throughout by such agreement, so far as it is reasonable, and not inconsistent with established rules of law. The agreement in question was perfectly reasonable and legal; and had the implied sanction of the court at the time of the appointment; for in consideration of it, the court prescribed no time for the hearing.

2. That if there had been no agreement in this case, and if the rule had been general, the referees would have no such power as they assumed. The principle on which they proceeded, was, that referees may compel the attendance of the plaintiff by awarding on the merits *ex parte*. This principle cannot be supported.

3. That this report was made under such circumstances that it ought to be set aside. The conduct of the defendants in procuring a meeting of the referees at a time and place at which the plaintiffs could not attend, as the defendants well knew, was *fraudulent*.

4. That it does not appear from the record that the referees were *sworn*. This omission is fatal. Even the form of the oath is prescribed by statute. (*a*)

5. That the cause referred was not a *personal action*, and therefore not a subject of reference within the statute.

6. That it was not within the province of the referees to award against the plaintiffs the expenses of the reference, and the costs of suit. *Candler* v. *Fuller*, *Willes*, 62. *George* v. *Lousley*, 8 *East*, 13.

SWIFT, Ch. J. The agreement respecting the time of meeting for a hearing by the referees, was no part of the submission, and, as such, cannot be noticed by the court; but if it was made use of to practice a fraud, and while the plain-

(*a*) *Tit.* 123. *c.* 3. *s.* 6.

tiffs relied upon it, the defendants, in violation of it, procured the referees to notify a meeting, when the plaintiffs were absent, or under such circumstances that they could not have a fair trial, it might then be considered as a ground for setting aside the award. But in this case, it appears that actual notice was given to the plaintiffs; and it was in their power to have attended, and for any proper cause moved the referees to postpone the hearing. Instead of this, they only sent a message that they could not, and should not, attend; and that it would be useless to proceed to a hearing. If they sustained any damage or inconvenience, it is not imputable to the defendants, but to their own neglect in not making a proper application to the referees.

When a submission is made by rule of court, it is irrevocable; for the object is to place the parties in a situation that either may compel the other to make a final settlement of the dispute. If no provision is made to the contrary, it is incidental to the power of referees or arbitrators to appoint the time and place of trial, and to proceed therein according to their discretion. They may adjourn from time to time, as the case may require. It is the duty of the parties to appear before them, and proceed to trial; and if either should refuse, it then results from the nature of the submission, that the referees may proceed to an *ex parte* hearing; for otherwise either party might defeat the trial, and indirectly revoke the submission. In cases where the plaintiff only claims damages, if the defendant should refuse to appear, the referees might examine the witnesses for the plaintiff, and ascertain and award the sum due. If the plaintiff refuses to appear, there need be no enquiry; for on failure of proof, the referees must award in favour of the defendant. But if there are mutual claims, they may make proper enquiries to ascertain the claims, and award accordingly. In this way, the parties may be compelled to a final settlement of the controversy submitted. It is true, where a plaintiff is before a court of law, he can withdraw his suit at pleasure, and commence a new action; but by his submission by rule of court, he has waived this privilege, and has given an irrevocable power to the referees to decide the question. Such construction ought to be given to the statute as will enable courts to carry into effect this voluntary agreement of the parties. By giving the referees the power of an *ex parte* hearing, they are enabled to compel the parties to proceed to a final hearing; but if no such power is given, then the parties may indirectly revoke the submission, or some other

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measure must be taken by the court before whom the submission is made to compel the parties to proceed. This can be done only by process of contempt; a process never adopted in this state, and which would be much less effectual and convenient than to give the referees the power to proceed *ex parte*. If the court should order a nonsuit when the plaintiff refused to proceed, then he might bring another action; the controversy would not be settled; and the submission would not be irrevocable.

In order, then, to give full effect to the statute authorising submissions by rule of court, it is to be construed to give the arbitrators the power to proceed to an *ex parte* hearing and trial, in all cases where either party refuses to appear upon due notice being given; and there can be no more impropriety in subjecting the plaintiff upon an *ex parte* trial before arbitrators, that there is a defendant upon default of appearance in court.

I am of opinion that the judgment of the superior court is erroneous, and that it be reversed.

In this opinion the other Judges concurred.

Judgment reversed.

MYERS *against* THE STATE OF CONNECTICUT:

IN ERROR.

The letting of a carriage for the conveyance of persons on *Sunday*, from a belief that it is to be used in a case of necessity or charity, though no such case in fact exists, is not an offence within the prohibition of the statute *October Session*, 1814, *c.* 17.

THIS was information, brought before the county court, on the statute,(*a*) for suffering and allowing *A. M.* and

(*a*) *October Session*, 1814, *c.* 17. This act contains the following provisions: "That no proprietor or proprietors, or driver of any coach, waggon, sleigh or other carriage, belonging to or employed in any line of stages or extra carriage, or proprietor or driver of any hackney coach, coachee, chaise, sleigh, or other pleas re carriage, shall suffer or allow any person or persons to travel, except from necessity or charity, in such carriage, within this state, on the *Sabbath* or *Lord's* day, on penalty that such proprietor or driver shall, on conviction thereof, pay a fine of twenty dollars for every such offence."

others to travel in a hackney coach owned by the defendant, from *New-Haven* to *Middletown* on the *Sabbath-day*. The information averred, "that neither necessity nor charity was the cause of said *A. M.* and others travelling on said day, nor did the defendant suffer and allow said *A. M.* and others to travel and be conveyed in said carriage from necessity or charity, but did in fact suffer and allow of the same for the sole purpose of making gain to himself."

On the trial of the cause, on the plea of *not guilty*, the defendant offered evidence to prove, that his carriage, on the day stated in the information, was let by his driver to one Capt. *Smith*, who told the driver at the time, that he had just arrived from *Liverpool*, and hearing that his wife was sick at *Middletown*, wished to be transported home immediately; that this statement was communicated by the driver to the defendant, who consented, under the circumstances, that his carriage might go; that neither the defendant nor his driver, at that time, knew, or supposed that any other person than Capt. *Smith* was to go in the carriage; that after the defendant so gave his consent, he did not, on that day, see the carriage or driver; and that *A. M.* and others were invited to go in the carriage by Capt. *Smith* without the defendant's knowledge, and never paid the defendant or his driver any thing for their passage. The defendant thereupon contended, that Capt. *Smith* was the only one whom he suffered and allowed to go in his carriage, within the meaning of the statute; and as to him, the defendant was excused on the ground that it was, and that he believed it to be, a case of necessity and charity. The court charged the jury, that so far as regarded *A. M.* and the other passengers, they would not be warranted in finding the defendant guilty, unless they should find from the evidence that they went in the carriage by the defendant's consent; and that in regard to Capt. *Smith*, as it was admitted by the defendant that he suffered and allowed him to travel in his carriage, from *New-Haven* to *Middletown*, on the day stated in the information, it was incumbent on the defendant, if he justified such act as a case of necessity or charity, to prove by evidence on the trial, that a case of necessity or charity existed; and that the representation of Capt. *Smith* to the driver did not in law amount to a justification, unless the same was proved to have been true when made.

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The jury having returned a verdict of *guilty*, the defendant filed his bill of exceptions to the charge of the court, and thereupon brought a writ of error in the superior court; which was continued to the next term, for the purpose of taking advice of the nine Judges, in the mean time, on the question of law.

The case was now submitted without argument.

SWIFT, Ch. J. The letting of a carriage on *Sunday*, on the ground of necessity or charity, is not prohibited by the statute. If then a man acts honestly on such principle, and really believes that the case of necessity or charity exists, he is not criminal. It is true, a man may be deceived and imposed upon by falsehood, and misrepresentation; yet if he verily believes that the case exists, and acts on that ground, it is as much a deed of charity in him, if the fact does not exist, as if it does. It is a letting of the carriage as a matter of charity. Unless this construction be adopted, a man may be convicted of a crime, when he had no intent to violate the law, and when his object was to perform a deed of charity conformable to law. This would oppugn the maxim that a criminal intent is essential to constitute a crime.

It is true, on this construction, attempts may be made to evade the statute; but in all cases it will be a question of fact to the jury whether the party acted under a serious impression of the truth of the representation made to him. If there be any appearance of collusion, any management to elude the statute, then the excuse ought not to avail; and by the exercise of a proper discretion, the violation of this law may commonly be prevented. But on a different construction, all works of charity would be prevented. If a man is bound to prove not only that he believed it to be an act of charity, but that the facts existed, otherwise he should be liable to be punished; there would be very great danger in performing the charity which the statute does not prohibit.

The court, then, in charging the jury that the facts constituting the act of charity must be proved to have existed, committed an error. They should have directed the jury, if they found that the defendant had reasonable ground to

believe from the representation made to him that the case of charity existed, and that he honestly acted under the impression of that belief, they ought to find him not guilty.

I am of opinion there is error in the judgment of the county court.

In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, GODDARD and HOSMER, Js. concurred.

GOULD, J. In expounding penal statutes, it is an established rule, that the construction must be strict, as *against* the defendant, but liberal, in his *favour*. Recourse may, therefore, be had to the spirit, or reason, of the law, for the purpose of exempting from its operation, one, who is within the letter of it; but this, generally speaking, cannot be done, in order to bring within the penalty, one, who is not within the letter. Hence it results, as a general proposition, to which there have been but very few exceptions, that no man can be subjected to the penalty of a statute, unless he is within both the letter and spirit of it.

Now, that the defendant would not have been within the spirit, or reason, of the statute, upon the supposition, that he actually *believed* a case of necessity, or charity, to exist, seems obviously to follow, from that fundamental principle, as well of criminal law, as of natural justice, that, to render any act criminal, the *intention* with which it is done, must be so; or, in other words, the *will* must concur with the act. (4 *Blac. Com.* 20—4.) Upon this principle, it is, that idiots, lunatics, and infants under a certain age, are, in judgment of law, incapable of any offence whatever. Hence, also, *ignorance*, or *mistake*, in point of *fact*, (for ignorance of *law*, I admit, cannot be averred,) is, in all cases of supposed offence, a sufficient excuse. Thus, to use the words of Sir *W. Blackstone*, "If a man, intending to kill a thief, or house-breaker, in his own house, by mistake, kills one of his own family; this is no criminal action." (4 *Com.* 27.)

When, indeed, a *civil* remedy is sought, for a forcible injury, the intention of the defendant is not regarded, except for the purpose of enhancing, or mitigating, damages. For, in this case, the end, proposed by the law, is not the *punishment* of an *offender;* but the mere reparation of a private loss, or injury, to which the plaintiff has been subjected by

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the act of the defendant: And it is deemed just and reasonable, independently of any question of intent, that he by whose act a civil injury has been occasioned, should ultimately sustain the loss, which has accrued, rather than another. *Raym.* 468. If, therefore, in attempting to defend myself against an unlawful assault, in front, I *accidentally* strike, and injure an innocent person, behind me; I am clearly answerable for the injury, in a civil action of trespass. *Raym.* 468. 2 *Black. Rep.* 896. But it is equally clear, that I cannot be subjected *criminaliter:* For, *actus non facit reum, nisi mens sit rea. Raym.* ub. sup.

From this well known principle of criminal law, viewed in connection with the rule for construing penal statutes, already mentioned, it seems impossible to maintain, that the direction of the county court to the jury was correct. The legislature has not, even by the rule of literal construction, made it penal, of course, for an owner, or driver, of a carriage, to let or lend it, to be used on *Sunday*. The offence, created by the statute, consists in his allowing any person to travel in his carriage, on that day, "*except from necessity, or charity;*" that is, except for the *purpose*, or with a *view*, of contributing to the relief of necessity, or to some office of charity. If, then, the defendant let his carriage, with this *view*, as must have been the case, if he did it, (as he claims that he did,) in consequence of his *believing* the representations made to him; he appears to me to be clearly within the reason of the exception. The instances in which a man, with the most innocent intentions, might, by a contrary construction, be punished under a law, which he wished most scrupulously to obey, are so numerous and obvious, that it is wholly unnecessary to suppose cases, by way of example. If those, who travelled in the carriage, deceived the defendant, and had no such excuse, as the law allows; they are, doubtless, guilty of an offence, and punishable for it. But, upon this supposition, the defendant, so far as he contributed to the crime, was but an *involuntary instrument.*

The objection, that this construction will facilitate evasions of the statute, is not, I think, very well founded, even in point of fact. The danger of collusion will always be known to the triers; and the probability of it, in any supposable instance, will be open to discussion. But, at any

rate, considerations of this kind ought never to influence a court where, as in the present case, a construction, dictated by them, would manifestly contravene the spirit of the law, as well as the universal, immutable principles of justice. (*a*)

I am of opinion, that the judgment of the county court ought to be reversed.

Judgment to be reversed.

STURGES *against* BEACH and others, Executors of *Norton*.

On a bill in chancery by *C.*, claiming to be a creditor of the late partnership of *A.* and *B.*, dissolved bythe death of *A.*, against the executors of *A.*, stating the insolvency of *B.* the surviving partner, and seeking satisfaction of his claims out of *A.*'s estate, the plaintiff offered in evidence a judgment in his favour in an action at law against *B.* as surviving partner: Held that such judgment, though admissible to prove the simple fact of a recovery against *B.*, was no evidence of the existence of a debt against the partnership so as to charge the defendants.

THIS was a bill in chancery, stating, that *Birdsey Norton*, Esq. and *John C. Bush* were, from the first of *July*, 1808 to the 27th of *May* 1810, and long afterwards, merchants in company, under the firm of *Norton & Bush*, and during that time, the plaintiff transacted business for them in the *United States*, and in foreign countries; that in the course of such business, the plaintiff purchased for said *Norton & Bush*, and sent to them, diverse vessels, goods, wares and merchandize, and remitted to them large sums in bills of exchange, bank checks, and cash, which were received and disposed of by them, to account for the same to the plaintiff; that said *Norton & Bush*, being greatly in arrear, and refusing to render their account, the plaintiff, in *April* 1812, after the death of *Norton*, commenced his action of account at law against *Bush*, as surviving partner, and after an appearance on the part of *Bush*, and a hearing before auditors, recovered final judgment against him, in the superior court, for the sum of 3996 dollars 66 cents, and costs of suit; that before such judgment was rendered, *Bush* became an utter bankrupt, and absconded; that *Norton* at his decease, owned a large estate, which has since gone into the hands of the defendants, his executors, and is liable in equity to the payment of said judgment; that besides this, *Bush*, before he

(*a*) But in a civil action for a libel, it was held, that a party charged with unfair, partial and unjust conduct in the exaction of commissions not authorized by law, could not repel that charge by showing that they were taken honestly, through a mistaken construction of the law. *Stow* v. *Converse*, 3 *C. R.* 326.

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absconded, made over to the defendants all the property in his possession, and all the books, papers and credits of the firm, for the benefit of *Norton's* estate, and to discharge the debts of the firm; and that the defendants, as executors of *Norton*, had notice of said action against *Bush*, during the [*508] *pendency thereof, and employed counsel to defend, and have since had notice of the judgment.

The plaintiff therefore prayed, that as he was remediless at law, chancery would compel the defendants to make payment.

On a hearing before the court, the plaintiff offered in evidence an exemplification of the judgment stated in the bill; to the admission of which the defendants objected. By agreement of parties, the cause was thereupon continued to the next term, that the question of law as to the admissibility of this evidence, might be argued, in the meantime, before the nine Judges.

Sherman and *T. S. Williams*, for the plaintiffs, contended, that *Bush* being the representative of the firm, a judgment against him, in that capacity, must be, in effect, a judgment against the firm. It is absurd to say, that the estate of a deceased partner, which is admitted to be subject to the liabilities of the partnership, is not bound by a judgment against the legal representative of the partnership. If *Bush* had satisfied the judgment in this case, the executors of *Norton* would be liable to him; and the judgment thus satisfied would be a sufficient voucher for him against them. If the plaintiffs had failed of a recovery against *Bush*, it is clear that they could not come against the executors of *Norton*. Why? Manifestly, because the executors of *Norton* could plead the judgment in the suit against *Bush* in bar. They stand in the light of privies to that judgment.

Daggett and *N. Smith*, for the defendants, relied upon the established rule of law, that a judgment is evidence only against the parties to the suit, or others standing in the relation of privies. *Peake's Ev.* 38. 68, (3d edit.) The present defendants are in no sense parties to the judgment against *Bush*. They have had no day in court; no opportunity to examine witnesses, or to defend themselves, or to review the judgment. Nor are they privies in relation to it. They are not privies in estate, or in blood, or in tenure.

Are they privies in representation? They are the personal representatives of *Norton*, but are strangers to the partnership. These are the only privities known in law. *Beverley's* case, 4 *Co.* 123. *b.* 124. *a.* *Co. Litt.* 271. *a.* If the judgment against *Bush* is binding upon the representatives of *Norton*, why does not the plaintiff, instead of setting forth the [*509] original cause of action, and giving a history of the proceedings, bring an action on the judgment in the simplest manner? The principle contended for by the plaintiffs is also opposed to sound policy; for it would open a door for collusion between the creditors of the partnership (or those claiming to be such) and the surviving partner, to the prejudice of the estate of the deceased partner.

SWIFT, Ch. J. The judgment in the case of the plaintiff against *Bush* is proper evidence to prove the fact that a recovery was had against him; but it is no proof of the existence of the debt, so as to charge the executors of *Norton*, the deceased partner.

It is a well known principle, that judgments are binding only between parties and privies; privies in blood, as heirs; and privies in law, as executors and administrators; and that no man is to be concluded by a judgment when he was not a party, or privy, and had no opportunity to be heard. In the present case, there is no privity between *Bush* and the executors of *Norton*. By the death of *Norton*, the partnership was dissolved; *Bush* constituted the company; but he could do no act by which he could create any obligation or liability on the executors of *Norton* after his death. The copartnership was to be settled according to the contracts existing at that time. *Bush* was liable at law for all the debts; and the creditors, if he was able to pay, could not call on the representatives of *Norton*. It is only on the failure of *Bush*, that the estate of *Norton* can be rendered liable in equity. It is like a new claim originating against the representatives of *Norton*, and it must be supported like any other claim. Should a contrary principle be adopted, it might be productive of great inconvenience and injustice. There can be no occasion to resort to the estate of the deceased partner, unless the surviving partner is insolvent;(1) and if a judg-

(1) In *Lawrence* v. *The Trustees of the Leake & Watts Orphan House*, 2 *Denio R.* 577, the Court of Errors held, that no relief can be had against the representatives of a deceased partner, until the remedy at law has been exhausted against the survivor, unless the latter is insolvent.

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ment against him is sufficient evidence of a debt against the representatives of the deceased partner, then this mode of making out the claim would be usually adopted, and many frauds and collusions might be practised, which it would be very difficult to detect and expose. It may be in the power of a bankrupt to admit and establish an unfounded claim against a man of property.(1)

[*510] *I think this judgment is no evidence of a debt against the defendants.(*a*)

In this opinion the other Judges concurred, except GOULD, J. who gave no opinion, having been of counsel in the cause.

(1) In *Crane* v. *French*, 1 *Wend. R.* 311, a partner endorsed an appearance on a *Capias* against himself and his co-partner, and after the return day gave a *Cognovit*, on which judgment was entered against the form, upon which an execution was issued and levied upon the partner-ship property. Subsequently, the partners united in confessing a judgment to other creditors, on which another execution was issued. A sale having been made under the first, the proceeds were ordered to be applied to the second execution, on the ground, that one partner cannot confess a voluntary judgment which will be obligatory upon his co-partner, unless actually brought into Court by a regular service of process against both. And see *St. John* v. *Holmes*, 20 *Wend. R.* 609. And as to the power of partners to bind each other after dissolution, see *Baker* v. *Stackpole*, 9 *Cowen R.* 420 ; *Hopkins* v. *Banks*, 7 *Cowen R.* 650 ; and *Mercer* v. *Sayre*, *Anthon's N. P. R.* 119.

(*a*) See *Cowles* v. *Harts* & al. 3 *C. R.* 516. *Coit* v. *Tracy* & al. 8 *C. R.* 268. *Fairman* v. *Bacon*, 8 *C. R.* 418. *Denison* v. *Hyde* & al. 6 *C. R.* 508. *Betts* v. *Starr*, 5 *C. R.* 550. *Ryer* v. *Atwater*, 4 *Day*, 431. *Canaan* v. *Greenwood Turnpike Company*, 1 *C. R.* 1. *De Forest* & al v. *Strong*, 8 *C. R.* 513. *Belden* v. *Seymour* & al. *Id.* 304. *Kennedy* & al. *v. Scovil* & al. 14 *C. R.* 61. *Pinney* & al. v. *Barnes*, 17 *C. R.* 420.

CHALKER and others *against* DICKINSON and others.

The General Assembly, by a public act, in 1788, prohibited all persons, under a penalty, from fishing with seines within certain limits in *Connecticut* river, between the 15th day of *March* and the 15th day of *June*, except the proprietors of certain lands, who, as the act declared, should have exclusive right to use two seines of a certain length within those limits, in the waters adjoining their own lands, from *Monday* morning at sun-rise until sun-set on *Friday* evening in each week. In 1789, *A. K.* being the proprietor of land adjoining the river, within the specified limits, preferred his memorial to the General Assembly, in which he claimed the fishery as a right appurtenant to his soil ; complained of the impediment which the prohibitory act had interposed ; alleged that none of the evils intended to be remedied by that act would be occasioned by a limited exercise of his right ; and concluded with praying the General Assembly to grant him an exclusive right to use one seine, in the river adjoining his land, under certain regulations, or in some other way to restore him to his just rights

incident to his freehold. A resolve was thereupon passed, which recapitulated these representations by way of recital, without finding any fact, and then granted liberty and licence to the memorialist, his heirs and assigns, during the pleasure of the legislature, to use a seine at the place described, under the same restrictions and regulations as were imposed upon the proprietors exempted from the operation of the act of 1783. In 1808, that act was repealed. Held, that the operation of the resolve of 1789, was not to grant a several fishery to *A. K.*, but only to suspend the act of 1783 as to him; and the rights of *A. K.*, and of all others regarding the fishery in question, were left, by the repeal of that act in 1808, as they were before it was passed.

A new trial having been granted pursuant to the advice of the nine Judges, (*ante* 382. 385.) the cause was accordingly tried again at *Haddam*, *December* term 1815, before *Trumbull*, *Baldwin* and *Ingersoll*, Js.

On the trial it was admitted, that the fishery in question was a common fishery, used by all the citizens of the state, until *May* 1783, when by an act of the legislature, being the 13th section of the act for regulating fisheries,(*a*) the use *thereof was wholly prohibited from the 15th day of *March* [*511] to the 15th day of *June* in every succeeding year. At that time, and long afterwards, one *Ambrose Kirkland* was the proprietor of a piece of land fronting the west side of *Connecticut* river, and extending on the river about twenty-five rods, the southern line being about fifty rods below *Fort-Point*, and about fifty-five rods above *Pipestave-Point*. In *October* 1788, *Kirkland* preferred a memorial to the General Assembly, in which he stated, that he was seised in fee of said piece of land, and had, for a long time, enjoyed a right and privilege appurte-

(*a*) *Tit.* 70. *c.* 1. *s.* 13. The section referred to was as follows: "And whereas the obstructing of the passage of the fish into *Connecticut* river, is a public damage: *Be it further enacted*, That no person shall set or draw any seine for the purpose of catching fish, between the fifteenth day of *March* and the fifteenth day of *June*, in any year, south of an east and west line from *Saybrook-fort*, so called, within one mile and an half east and west, on each side of the mouth of said river, except in the coves called and known by the name of *Lynde's* cove and *Griswold's* cove, and except the proprietors of the lands on each side of said river known by the names of *Eastern-point* and *Lynde's-point*, who shall have exclusive right to draw or use two seines, at discretion, within the aforesaid limits, in the waters adjoining their own lands, from *Monday* morning at sun-rise until sun-set on *Friday* evening in each week, and no more; and neither of said seines shall be of greater length than twenty-five rods. And every person that shall be convicted of any breach of this paragraph of this act, shall pay a fine of thirty-four dollars; one half to the prosecutor, and the other half to the treasury of the county; and shall also forfeit the seine, ropes, and other utensils used for catching fish, contrary to this paragraph of this act."

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nant to his soil, of drawing seines and taking fish, in the season thereof, to his profit and advantage; that by force of said act he was deprived of the principal advantage which the God of nature and the laws of the land attached to his freehold; that as a free citizen, and enjoying rights in common with his fellow citizens, invested with a freehold purchased for a valuable consideration, he conceived, by the laws of the land, and by the laws of nature, he was justly entitled to take all the profits and advantages naturally arising therefrom; that it appeared from the preamble to said act, that the mischief to be remedied, was the obstruction to the passage of the fish up the river, occasioned by the drawing of a number of seines at the mouth; that the memorialist's land lies at the distance of about one mile and a quarter north of the mouth; that the channel of the river is half a mile wide against his said land; and that the drawing of one short seine of about twenty-five rods length, at this place, would not, under proper regulations, in the least impede or obstruct the course of the fish up the river, any more than what the seine would actually take, while the using of one seine there would be annually attended with public advantage. The memorialist, therefore, prayed the General Assembly to grant him an exclusive right of drawing and using one seine of twenty-five rods length, in the river
[*512] adjoining his said land, under such regulations as should *appear fit, or in some other way restore to him his just rights incident to his freehold. At an adjourned session of the General Assembly in *January* 1789, the following resolve, or private act, was passed. "Upon the memorial of *Ambrose Kirkland* of *Saybrook* in the county of *Middlesex*, shewing to this Assembly, that he is seised in fee of a piece of land situate in *Saybrook*, about twenty-five rods south of *The Fort*, so called, adjoining the river on the east; and that he long enjoyed the privilege of drawing a seine for catching fish, in the season of fishing, at said place, until by an act of this Assembly passed in a late session, entitled *An Act for encouraging and regulating Fisheries*, all persons are prohibited from setting or drawing any seine for the purpose of catching fish between the 15th day of *March* and the 15th day of *June* in any year, south of the east and west line from *Saybrook-fort*, so called; and that he, by said act, is totally prevented from using his said privilege of fishing at his fishing-place, aforesaid; and that by his using his fishing-place none of the mischiefs will accrue to the community or individuals, which said statute was made to prevent; praying for relief, &c. as per memorial.

"*Resolved by this Assembly*, that said memorialist have liberty, and liberty and licence are hereby granted to him, and his heirs and assigns, to use, occupy and improve the said fishing-place for the purpose of setting a net or seine, and for drawing a seine for the purpose of catching fish, in the season of fishing, at the times, and under the same restrictions and regulations that are in said act provided respecting the fishing-places at *Lynde's* cove and at *Griswold's* cove, any thing in said act notwithstanding, during the pleasure of the General Assembly." The plaintiffs contended, and produced evidence to shew, that *Kirkland*, at the time of obtaining this grant, was in the exclusive occupation of the whole ground from *Fort-Point* to *Pipestave-Point*, as a fishing-place; and that he, together with the plaintiffs, who claimed under him, had ever since continued in such occupation, and had the possession of and title to said fishing-place when the trespasses complained of were committed. It appeared, that the plaintiffs used a seine twenty-five rods long only, immediately after their grant; but continued gradually to lengthen it from year to year; and that in the year 1813, and occasionally for more than five years before, they had fished with two seines, each about sixty rods in length. The [*513] plaintiffs contended, that they had proved to the jury, that the defendants committed trespasses in all parts of said fishing-place; particularly, that they run their seine above the south line of the plaintiffs' land, and up against the middle thereof, and obstructed the plaintiffs in their fishing, as alleged in the declaration. The plaintiffs also contended, that they had proved that the front of their land was not of sufficient extent to allow them a fishery of any use or advantage, without going both above and below their land, as the current or tide should require. They now waived all claim of title from the length of time during which they had possessed the fishery. The act of *May* 1783, (*tit.* 70. *c.* 1. *s.* 13.) was repealed in *May* 1808 (*tit.* 70. *c.* 9. *s.* 2.) previous to the alleged trespasses. The defendants contended, 1. That said private act of the General Assembly was void on the ground of misrepresentation in the memorial, and was forfeited by misuser: 2. That said act, if valid, did not confer on *Kirkland* any right to the fishery, but merely *suspended* the penal law of *May* 1783, *as to him*; and had no continuing effect at all after the repeal in *May* 1808: 3. That, at any rate, said private act had no operation south of the front of *Kirkland's* land; and that in point of fact the defendants did not draw any part of their seine or tackle

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in front of said land, nor so as to interfere with or disturb the plaintiffs in the act of drawing their seine. And the defendants prayed the court to charge the jury on the points of law accordingly. The charge was as follows: "The court are of opinion, that the act of the General Assembly amounts to a grant of the fishery in question, during the pleasure of the Assembly, which, it is agreed, has never been revoked; that it is not void on the ground of any false representations on the face of it, or of the memorial on which it was granted; and that although you should find that the mode of fishing has been varied, and that a much longer seine has been used than the grant gave a right to use, this does not render the grant forfeited. The question then arises, what is the extent, and what are the limits of the fishing-place thus granted? This depends chiefly on the construction of the grant. And the court are of opinion, that the fishing-place granted is not confined merely to the front of the plaintiffs' land, but will of course extend so far above and below in the river as [*514] may *be necessary to sweep over the ground with a seine of twenty-five rods in length, in order to the fair beneficial enjoyment of the grant." The jury found a verdict for the plaintiffs; and the defendants moved a new trial on the ground of a misdirection. The questions of law arising on this motion were reserved for the consideration and advice of the nine Judges.

N. Smith and *Sherman* in support of the motion.

Daggett and *Staples*, contra.

SWIFT, Ch. J. The question is as to the effect of the resolve of the General Assembly passed on the memorial of *Ambrose Kirkland*.

To determine the nature and effect of the grant, we must consider the object of the party, and the intent of the legislature. Though some words may be used which might be proper in the grant of exclusive rights, yet these may be explained by the allegations in the memorial; and we must take into view all that is said to ascertain the intent.

The memorial alleged a right of fishery in the memorialist, and complained that this right had been infringed and destroyed by a public act prohibiting him to exercise his right. His object was not to obtain a new right; he supposed that to be complete. It was to obtain a suspension of the general law as it respected himself, for the purpose of exercising an existing right. The legisla-

ture unquestionably supposed, according to the common opinion prevalent at that time, that the memorialist had a right to fish in front of his land adjoining *Connecticut* river. They could have had no idea of giving him a new right; their intent was to suspend the operation of the law of which he complained, so far as it respected the exercise of an existing right. For this purpose, they have made use of proper and appropriate words. They *grant liberty and licence to him, and his heirs and assigns, to use and occupy the fishing-place, any thing in the act prohibiting it to the contrary notwithstanding.* These expressions are precisely proper; admitting it to be their intent to repeal that law so far as it respected the memorialist; but if they had intended to confer a new right, to have made a grant of an exclusive fishery, a very different language would have been proper.

*The extension of the licence to *heirs and assigns* does not [*515] vary the construction. It was considered that the right of fishery was appurtenant to the adjoining land; and the intent was, that the privilege should descend to heirs and be transferred to assigns. This was proper, admitting nothing was intended but an exemption from the penalties of the law.

The reference to *Lynde's* cove and *Griswold's* cove was not to define the nature or extent of the grant, but merely the limitation of it. It authorises him to fish at the same times, and under the same restrictions and regulations, as at these places. It no where says, that he shall have the same right; and it would be strange to say, that a *limitation* should *extend* a grant.

It appears to me, on a full view of the subject, that the resolve of the Assembly only repealed the operation of a general law so as to give the memorialist a licence to fish in the same manner as though that law had never been made; and that when the general law was afterwards repealed, it placed all those who lived on this part of the river in the same situation as they were before the law was passed; and of course, that the resolve amounted to a grant of a right of fishery was incorrect.

I would advise to grant a new trial.

Edmond, Smith and Brainard, Js. concurred in the opinion delivered by the Chief Justice.

Baldwin, J. The correctness of the charge given in this case depends principally on the validity of the grant to *Ambrose Kirkland.* It is claimed, that it is void, because the representa-

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tion of facts on which it was grounded was fraudulent, and the legislature thereby deceived.

It is not necessary in this case to enquire how far the doctrine of misrepresentation may be carried to avoid a grant, by collateral attack; for it does not appear to me, that any fraudulent statement or misrepresentation of facts has been made. *Ambrose Kirkland* in his memorial states, that his land abutted on the river; that he had long enjoyed the right of drawing seines and taking fish upon it, till prohibited by an act of the legislature; that this act deprives him of the natural advantages appertaining to his freehold, [*516] *and of course of much of its value; that the mischief intended to be prevented by that act, can be avoided by suitable regulations consistent with the enjoyment of his right; and he therefore prays the General Assembly to grant to him an exclusive right of fishing in the river adjoining his land, under such regulations as the legislature may prescribe. The memorialist no where states an exclusive right in himself to the fishery. He does indeed claim the right of fishing in the waters adjoining his own land as a right appurtenant. This, though not acknowledged in the extent claimed by some, is undoubtedly correct, and is exclusive as to the right of the shore for drawing. If, then, the right of sweeping the river is common to all mankind, the memorialist having that right, and the exclusive right of the shore, might fairly make the representation he did.

Although the prohibiting act was the cause which led him to address the legislature, yet the scope of his memorial evidently goes further than a dispensation of the penalty. He prays for an exclusive grant: knowing that others so circumstanced had it. The language of the legislature is that of a grant: "Licence and liberty is hereby *granted to him, and his heirs and assigns*, to use, occupy and improve the said fishing-place, &c. for the purpose of catching fish in the season of fishing, at the times, and under the same restrictions and regulations that are in said act provided, respecting the fishing-places at *Lynde's* cove and *Griswold's* cove, any thing in said act notwithstanding, *during the pleasure of the General Assembly*." This language admits of no construction. It is not a mere dispensation of the penalties. It is a *grant*, under specified restrictions and regulations, during the pleasure of the General Assembly.

But it is further claimed, that if the resolve is considered as a grant, it has ceased by the repeal of the act to which it

refers for its regulations. This principle, if correct, would introduce a limitation not contained in the grant. That is neither limited by the existence of that act, nor is that the basis of it. The reference to the act is merely for regulations, which, when adopted, do not depend at all on the continuance of that act. They continue the same, whether the act remains in force or is repealed. The only limitation in the grant, is, the pleasure of the General Assembly. It may by them be revoked, but remains in force until, in *express terms, they shall manifest their pleasure that it cease. [*517]

If the grant claimed exists, it is admitted it cannot be defeated collaterally, by third persons, on the ground of misuser. But

It is claimed the court erred in the construction they gave the grant; and that they ought to have limited its extent to the waters in front of the plaintiffs' land. I am of opinion, that the subject matter of the grant ought to be taken into consideration, and that construction given which will ensure the beneficial effect intended. A fishing-place is necessarily undefinable by metes and bounds. The ebb and flow of the tides, the strength of the current, and other circumstances, will require, at different times, a different direction and extent of sweep to the same length of seine, and yet the fishing-place will remain the same. I think the court gave a reasonable and fair construction of the grant when they said, it was not confined to the front of the plaintiffs' land, but will extend so far above and below in the river as may be necessary to sweep the ground with a seine twenty-five rods in length, in order to the fair and beneficial enjoyment of the grant.

As I cannot say that the grant is void from misrepresentation, or forfeited by misuser, and am persuaded the court gave a fair construction of its extent, I find no cause for a new trial.

TRUMBULL and GODDARD, Js. were of the same opinion.

GOULD, J. I am of opinion, that the direction to the jury, upon the construction of the resolve of the legislature, in 1789, was wrong. It is clear, according to a rule heretofore established, that the fishery in question did not belong to *A. Kirkland*, in severalty, *before* that resolve was passed; and the inquiry now is, whether the resolve conferred it upon him.

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By the general prohibitory law of 1783, *all* persons were forbidden, under a penalty, to fish, with seines, at the place in question. The resolve of 1789, granted to *Kirkland*, his heirs, &c. permission to use a seine there, the general prohibition notwithstanding. The statute of 1808, has now repealed the prohibitory act, and thus extended or restored

[*518] the same permission, (the fishery having been originally a *common* one), to *all* persons, unless the resolve amounted to a grant of a several fishery to *Kirkland*, under whom the plaintiffs claim. Does the resolve, then, contain such a grant? Or is it a mere *exemption* to *Kirkland*, his heirs and assigns from the operation of the prohibitory act?

In construing the resolve, we have, doubtless, a right to recur to the recital, which precedes it, and the memorial, upon which it is founded, precisely as we might, in any case, consult the preamble of a statute. Now *Kirkland* in his memorial does not even ask for the grant of an original right, or, one which he did not, *before*, claim, as his *own*. He represents the fishery as *his;* complains of the impediment which the statute of 1783, had interposed, to the exercise of *his* privilege; alleges, that "none of the mischiefs," intended to be prevented by that statute, would be occasioned by the limited exercise of his right; and concludes with praying for the "exclusive right," or—which he represented as the same thing—to be "restored" to his original right. The recital, introductory to the resolve, without finding any fact, merely recapitulates these several representations; and the resolve then grants to him, his heirs, &c. "liberty and licence," to use a seine at the place described, under certain restrictions, during the pleasure of the legislature. It does not import to grant to him, what was not before his own,—as a several fishery clearly was not; or to establish a right already vested in him. It does not even contain the word, *right*, *title*, *interest*, *franchise*, or any term of similar import; but grants "*liberty and licence*," (terms almost appropriate to denote a matter of mere *favour*, or *indulgence*,) during the pleasure of the legislature. From this review of the proceedings, which terminated in the resolve of 1789, the result appears to be, that the utmost amount of *Kirkland's* claim, or request, was, that he might be restored to a supposed right, (which, however, never existed,) *by an exemption from the penalty of the statute* of 1783: and that the

legislature granted the exemption, during its own pleasure, without deciding, or intending to decide, the question of right. This, I think, appears from the whole scope of the proceedings. If so, it follows, that, by the subsequent repeal of the statute of 1783, the rights of *Kirkland*, and of all others, in relation to this fishery, are left, precisely as they were, before that act was passed; [*519] upon which supposition *Kirkland* never owned the several fishery, now claimed by the plaintiffs; and the plaintiffs, of course, do not own it.

The words, in the resolve, "under the same restrictions and regulations," as are prescribed for "*Lynde's* cove and *Griswold's* cove," obviously relate only to the *mode of exercising* the right or privilege, intended to be granted; not to the *character*, or *nature*, of that right or privilege.

I am of opinion, that a new trial ought to be granted.

HOSMER, J. gave no opinion, having been of counsel in the cause.

New trial to be granted.

STOCKING *against* SAGE and others.

Where an agent, acting in the service and for the benefit of his principal, is subjected, without any fault of his own, to a loss, by means of a groundless suit brought against him by a third person, such loss will constitute a sufficient consideration to support a promise by the principal to indemnify the agent.

A promise made by a principal to his agent to indemnify the latter for a loss sustained by him in the principal's service, occasioned by the wrongful act of a third person, is not a promise *to answer for the debt, default or miscarriage of another person*, within the statute of frauds and perjuries.

Where one of several facts stated in an action of *assumpsit* as the ground of the defendant's liability, is an express promise, it may be proved by parol, like any other fact, though made more than three years before action brought.

Where a deposition was taken by commission in a foreign country, and the commissioner certified, that the witness was *duly sworn*, without shewing by whom, or in what manner; it was held to be admissible.

THIS was an action of *assumpsit*. The declaration, consisting of two counts substantially alike, stated, that in 1799, the defendant owned the schooner *Fox*, fitted her out for a voyage, constituted the plaintiff master, and directed him to make as good a voyage as he could for the owners; that the plaintiff proceeded to *Martinique*, sold his outward cargo, and remitted part of the proceeds to the owners; that

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while in *Martinique*, the plaintiff agreed with Messrs. *Kiquandon* & Co. of that island, to proceed to *North-Carolina*, there to purchase for them a deck load of cattle, and to return therewith to *Martinique*, the cattle to be at their risk, and the freight to be paid for by them; that *Kiquandon* & Co. advanced to the plaintiff 1030 dollars to purchase this cargo; that the plaintiff proceeded to *North-Carolina*, bought the cattle, and set sail for *Martinique;* that on his return to that [*520] island, the vesel was captured by a *French* privateer; that the plaintiff retook her, but owing to the perils of the sea, was obliged to go to *Antigua*, and there sell the cattle for about sufficient to pay the freight and charges; that the plaintiff returned to *Middletown*, informed the defendants of these facts, and claimed a right to retain the sum of 1500 dollars, being the avails of the cattle, until he could settle with *Kiquandon* & Co., but the defendants claimed the money as belonging to them; that the plaintiff thereupon paid over said sum to the defendants, and the defendants, in consideration of the premises, then and there promised to indemnify him against all cost, charges and damages, which he might sustain on account of his said contract; that in 1810, the plaintiff was attached in *Martinque* by *Kiquandon* & Co. on said contract, but obtained final judgment in his favour aginst them; that in defending that suit, he expended the sum of 500 dollars for fees of counsel, interpreters and notaries, and the sum of 300 dollars in obtaining testimony, and devoted two months of his own time to the preparation of the cause; that *Kiquandon* & Co. were, and continue to be, bankrupts; and that by reason of the premises, the defendants became liable, and in consideration thereof assumed and promised, &c. The action was commenced in *September*, 1814.

The cause was tried at *Haddam*, *December* term 1815, before *Trumbull*, *Baldwin*, and *Ingersoll*, Js.

On the trial, the plaintiff offered parol evidence in support of a promise alleged to have been made by the defendants to indemnify him against such damages and expences as he might sustain on account of his contract with *Kiquandon* & Co., as set forth in the declaration; to which the defendants objected, on the ground that such promise could not be proved by parol; but the court over-ruled the objection, and admitted the evidence. The plaintiff also offered in evidence the depositions of *Silas Marceau* and *Clavery Grard* of *Martinique*, taken there by *Timothy Savage*, under a commis-

mission from the superior court of this state; to the admission of which the defendants objected, because the only evidence that these depositions were legally taken was *Savage's* certificate to the following effect: "By virtue of the commission to me given, I have taken the depositions of *Silas Marceau* and *Clavery Grard*, and I hereby certify, that said witnesses *were duly sworn*, and that their answers have been reduced to writing as they were given before me, and the same, as reduced to writing, are enclosed herein, and according to the directions of my commission." This objection was over-ruled by the court, and the depositions were read to the jury.

A verdict being found for the plaintiff, the defendants moved for a new trial, on the ground that the evidence objected to ought not to have been received. This motion was reserved for the consideration and advice of the nine Judges.

The defendants also brought a writ of error on the judgment of the superior court, assigning for error, that the plaintiff's declaration was insufficient.

T. S. Williams and *Clarke*, in support of the motion and writ of error, contended, 1. That the promise set forth in the declaration was within our statute of frauds and perjuries;(*a*) and could not, therefore, be proved by parol. First, it was a promise to answer for the debt, default or miscarriage of another person.(*b*) Secondly, the plaintiff's action was not brought within three years after the agreement was entered into.(*c*)

2. That the depositions of *Marceau* and *Grard* were not properly taken. The certificate of the commissioner only shewed that *in his opinion* the witnesses "were duly sworn." It did not state *what oath* was administered to them, nor *by whom* it was administered, nor *under what solemnities* it was taken. Enough should be shewn to enable *the court* to judge whether the witnesses were duly sworn. *Welles & al.* v. *Battelle & al.* 11 *Mass. Rep.* 481.

3. That the declaration was insufficient for want of a legal conside ration to support the promise of indemnity therein stated. A contract of indemnity requires a consideration as well as any

(*a*) *Tit.* 75.

(*b*) *Sect.* 1. corresponding to the *English* stat. 29 *Car.* 2. *c.* 3. *s.* 4.

(*c*) *Sect.* 2. This section provides, "That no suit in law or equity, shall be brought or maintained upon any contract or agreement, that shall hereafter be made, and not reduced to writing as aforesaid, (*i. e.* as in the first section) but within three years next after entering into or making the same."

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other contract. The payment of money by an agent to his principal, which he could not retain without a *breach of trust, and which the principal could by suit compel him to pay, forms no consideration for a promise of indemnity. Nor were the defendants under a moral obligation to indemnify the plaintiff against the unjust suit of *Kiquandon* & Co. Suppose they had beaten the plaintiff; would any rule of morality require the defendants to remunerate him for his sufferings?

Sherman and *C. Whittelsey*, contra, were proceeding to shew that the declaration was good, when they were interrupted by the Court, and informed, that the only point in the case on which the Court wished to hear further argument was, whether the action was barred by the limiting clause (*sect.* 2.) in the statute of frauds and perjuries. They then contended, that the promise of indemnity alleged to have been made by the defendants in 1799, was only a part of the *res gesta*, from which the law implied the subsequent promise to pay; or, as a latter promise must now be taken to be an express one, the former, in connexion with the facts stated, may be considered as forming the consideration of the latter, on which the action is brought. The statute is inapplicable to the former, because the action is not brought upon it; and the latter, because it was made within three years.

SWIFT, Ch. J. I am of opinion there is no error in the judgment complained of; and no reason for granting a new trial.

Where an agent, acting faithfully, without fault, in the proper service of his principal, is subjected to expense, he ought to be reimbursed. If sued on a contract made in the course of his agency pursuant to his authority, though the suit be without cause, and he eventually succeeds, the law implies that the principal will indemnify him, and refund the expense. For this he can maintain an action of *iadebitatus assumpsit;* and the proof of these facts will be sufficient to warrant the jury to find the promise.

Such implied agreement is not within the statute of frauds and perjuries. In the writ of error, it cannot be known by the court, but that the plaintiff relied upon, and proved, an express, written contract.

On the motion for the new trial, the admission of parol proof to an express contract was immaterial; because it was not necessary to prove an express contract; for the plaintiff could rely on the implied promise, which was not affected by the statute of frauds and perjuries. If the testimony, though improperly admitted, was immaterial, it can be no ground for a new trial.

The deposition was taken in a legal manner.(*a*)

TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, and GODDARD, Js. were of the same opinion.

GOULD, J. On the writ of error, the promises, laid in the two counts, must be taken as express: and the only question is, whether a sufficient consideration appears upon the face of the declaration. Upon this point, I cannot discover how a doubt can be raised. That a loss incurred by the plaintiff without any fault of his own, in consequence of his acting as an agent of the defendants, and for their benefit, will constitute a consideration, to support an express promise of reimbursement, on their part, seems to me not to admit of question. The old rule as to the insufficiency of a consideration, *past and executed*, has been somewhat relaxed by modern decisions. 3 *Burr.* 1671, 2. 2 *Stra.* 933. *notis;* but even according to the utmost rigour of that rule, the consideration, in this case, appears to me above all exception: for the promises here are *coupled*, if not with the previous retainer of the plaintiff, as master of the schooner, yet certainly, as I conceive, with a subsequent adoption and ratification, by the defendants, of his acts, as their agent. Because, by claiming, and receiving the 1500 dollars, (the avails of the voyage to *North-Carolina*,) as *theirs*, they, of course, recognized and sanctioned the adventure, by which those avails were acquired. Indeed, the payment of this money to the defendants, upon their demanding it, was, upon any possible supposition, a sufficient consideration. Before it was paid over, it was their property, or it was not. If it was theirs, it could have been so, only upon the supposition, that the voyage to *North-Carolina* was undertaken by their authority, and of course, at their special *instance and request:* for they could not recognize the

(*a*) *Thompson* v. *Stewart*, 3 *C. R.* 171.

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adventure as their own, for the purpose of asserting a *right*, and, at the same time, disclaim it, to avoid a *duty*, or *liability*. And a *subsequent* promise, coupled with a *previous* instance and request, is undoubtedly good. *Cro. Eliz.* 42. 282. *Cro. Jac.* 18. 3 *Salk.* 96. 3 *Burr.* 1671. If, on the other hand, the money was not theirs; there could never be a doubt, that the payment of it to them, was a sufficient consideration to support a promise of indemnity.

Under the motion, the exceptions, taken by the defendants, are resolvable into two: 1. That the depositions of *Marceau* and *Grard* were not taken in legal form: 2. That parol evidence was admitted to prove a promise, made more than three years before action brought. I confine myself to these two exceptions, because that clause of the statute of frauds, which relates to agreements, to answer for the "debt, default, or miscarriage of another," has clearly no concern with the case. The agreement stated was a mere promise of *indemnity*, made, not to any third person, claiming *against* the plaintiff, for any supposed "debt, default, or miscarriage," but to *himself*.

As to the first exception; it may be observed, that objections of this kind are never favoured, where, to every substantial purpose, a deposition appears to have been *fairly* taken. But in the present case, I can discover no defect, even in form. The caption is agreeable to well established usage, and as precise as any rule of practice requires.

With regard to the admission of the parol evidence, it is sufficient to say, that the action, (as the case is presented upon the *motion*,) was not founded upon any express promise. The promise was only a part of the *res gesta*, and proveable, of course, like any other *fact*, from which an implied promise might arise.

HOSMER, J. gave no opinion, having been of counsel in the cause.

Judgment affirmed. New trial not to be granted.

SALMON *against* BENNETT.

Where a conveyance was made to a child in consideration of natural affection, without any fraudulent intent, at a time when the grantor was free from embarrassment, the gift constituting but a small part of his estate, and being a reasonable provision for the child; it was held, that such conveyance was valid against a creditor of the grantor, whose claim existed when the conveyance was made.

Qu. Whether a *bona fide* purchaser, for a valuable consideration, may derive a valid title from a voluntary grantee, in whose hands the conveyance is, by concession, void, as against the creditors of the voluntary grantor?

THIS was an action of ejectment for three pieces of land in *Weston*. The general issue was pleaded, and closed to the court by agreement of the parties. The cause was heard at *Fairfield*, *December* term, 1815, by *Edmond*, *Smith*, and *Hosmer*, Js.

It was admitted, by both parties, that *Stephen Sherwood* was formerly the owner of the demanded premises. The plaintiff claimed title thereto, by virtue of the levy of an execution in his favour against *Stephen Sherwood* in 1814. The defendant claimed title by virtue of a deed from *Stephen Sherwood* to his son *Salmon Sherwood*, dated the 17th of *December* 1798; and a deed from *Salmon Sherwood* to the defendant, dated the 6th of *March*, 1802. The deed from *Stephen Sherwood* to his son was given for the consideration of natural affection only; and this fact was well known to the defendant when he made the purchase and took the conveyance from *Salmon Sherwood*. The plaintiff contended, that his demand against *Stephen Sherwood*, on which said execution was afterwards obtained, arose long before and subsisted at the execution of the first mentioned deed; and in proof of this, the plaintiff introduced the record of a suit in chancery before the superior court, in *December* 1809, brought by him against *Stephen Sherwood*, complaining of false and fraudulent representations, in the sale of *Virginia* lands in *December* 1794, respecting their situation and value, together with certain defects in the title, and praying for a reimbursement of the purchase money with interest, which was accordingly decreed.(*a*) The defendant

(*a*) The bill in chancery stated the same facts as were alleged in the action at law for damages between the same parties, reported 2 *Day's Ca.* 128. and concluded with praying the court "to set aside and annul the contract and sale therein mentioned, and to order and decree that said *Sherwood* should pay back to said *Salmon* the money paid by said *Salmon* to said *Sherwood*." At the term of the superior court held at *Fairfield* in *December* 1809, a decree was passed, annulling and setting aside said contract and sale, and ordering, that "if said *Salmon*, his

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proved, that *Stephen Sherwood*, when he executed the deed of gift to his son, was not indebted to any person, except to the plaintiff, in the manner stated; and that the land thus conveyed did not contain more than one eighth part of his real estate. But it was admitted, that long before the levy of said execution, he had conveyed, by several deeds, all his real estate, and was, at that time, entirely destitute of property. Upon these facts the plaintiff contended, that the deed from *Stephen Sherwood* to *Salmon Sherwood* was fraudulent as against the plaintiff; and even if there was no actual fraud, yet being voluntary, it was void. The defendant, on the other hand, insisted that the deed was not made to defraud creditors, and was not void. The court reserved the case for the consideration and advice of the nine Judges.

Daggett and *N. Smith*, for the plaintiff, contended, 1. That a deed of gift is void against any creditor who is one at the time of the conveyance. In *Westminster-Hall* this proposition would not admit af a doubt. The case of *Doe* d. *Otley* v. *Manning*, 9 *East* 59. goes further, and decides that a conveyance made in consideration of natural affection only, the grantor not being then indebted, and there being no fraud in the transaction, is void against a *subsequent* purchaser for a valuable consideration. In the principal case, the grantor was indebted at the time of the conveyance. He then had the plaintiff's money in his hands, which he was liable to refund. The plaintiff's claim existed as soon as he bought and paid for *Virginia* lands, under false and fraudulent representations, and with a defective title. The decree in chancery afterwards enforced that claim, but did not create it. The plaintiff was an *equitable creditor* before the decree. Can then a father, being indebted in equity, make a gift

heirs or assigns, should execute a good and authentic deed of release, therein and thereby reconveying to said *Sherwood*, his heirs and assigns, all such right, title and interest as he the said *Salmon* acquired in and to said lands in said petition described, by virtue of the deed executed to him the said *Salmon*, and deliver the same to the said *Sherwood*, or lodge the same with the clerk of the superior court for the county of *Fairfield*, by the 11th day of *January* 1811; then he the said *Sherwood* should pay to him the said *Salmon*, in eight months from the delivery of said deed to him the said *Sherwood*, or the clerk of said superior court, the sum of 3570 dollars 25 cents, being the amount of the purchase money paid by the said *Salmon* to the said *Sherwood* after deducting the sum of 450 dollars, with the lawful interest thereof from the 1st of *October* 1795 to the time said payment should be made, together with costs, &c. and in default of such payment, the said *Sherwood* should forfeit and pay to the said *Salmon* the sum of 10,000 dollars."

of land to his son, in consideration of natural affection only, which shall be valid against such equitable creditor? There is the same reason why such conveyance should be void against a claim in equity as at law. If the conveyance in question be not void, all voluntary conveyances, without actual fraud, must be valid. In *Parker* v. *Proctor*, 9 *Mass. Rep.* 390. the conveyance was held good; but there the creditor became such after the conveyance, and with notice of it.

2. That the defendant having purchased the premises of the voluntary grantee, knowing that the conveyance to him was voluntary, had no better title than he had. This point is established by the case of *Preston* v. *Crofut*, decided in this Court, *November* term, 1811. (*b*) That case, indeed, went

(*b*) PRESTON *against* CROFUT.

A *bona fide* purchaser, for a valuable consideration, from the grantee of a fraudulent conveyance, acquires no title against the creditors of the fraudulent grantor.

THIS was an action of ejectment for a piece of land in *Newton* at a place called *Palestine*. The cause was tried at *Danbury*, *September* term, 1811.

On the trial, the plaintiff claimed title to the land in question, by virtue of a deed from the administrators of *Richard Nichols*, deceased. The defendant derived his title, through several conveyances, from the same person. The facts were these. *Richard Nichols* was originally the undisputed owner of the land. In *November* 1798, *Philo Norton* recovered a judgment against him and two others: and on the 4th of *January*, 1800, said land was set off in due form on an execution issued on that judgment. On the 22d of *February* 1800, *Norton* gave a deed of said land to *John Peck;* on the 9th of *March* 1801, *Peck* gave a deed of it to *Oliver Tousey;* and a few days afterwards, *Tousey* gave a deed of it to the defendant, who had ever since been in possession. *Nichols* died, administration was regularly taken out, and his estate represented insolvent; and on the 24th of *August* 1809, said land was sold to the plaintiff, by order of the court of probate, for the payment of *Nichols'* debts. The plaintiff claimed, that the judgment recovered in *November* 1798, was fraudulent. The defendant denied that it was fraudulent; and contended, that the deeds from *Norton* to *Peck*, from *Peck* to *Tousey*, and from *Tousey* to the defendant, were *bona fide*, and for valuable considerations. He also contended, that if said judgment was fraudulent, it was not known to be such to the subsequent purchasers, nor had they any notice whatever of the fraud. Upon this state of the case, the court charged the jury, that if they should find said judgment to have been a fraudulent judgment, no subsequent *bona fide* purchaser, for a valuable consideration without notice of the fraud, could hold the demanded premises against the creditors of *Nichols*.

The jury found a verdict for the plaintiff; and the defendant moved for a new trial on the ground of a misdirection. The question of law arising on this motion was reserved for the consideration and advice of the nine Judges.

Gould in support of the motion. The only question is, whether the direction

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much further; for there it was determined, that a *bona fide* parchaser, under a fraudulent grantee, *without notice of the fraud*, could not hold against the creditors of the fraudulent grantor. In the present case, the conveyance was construc-

to the jury was right in point of law. The defendant claims, that it was not: and the proposition, to be supported by him, is, that a conveyance, by a fraudulent grantee, or fraudulent judgment creditor, to a *bona fide* purchaser, is valid against the creditors of the prior fradulent grantor or judgment debtor.

The statute provides, that a conveyance, made to defeat creditors, shall, as to them, and their representatives and assigns, be utterly *void;*" upon which last words much stress was laid, by the plaintiff's counsel, at the trial. But with regard to the mere *construction* of this clause, there seems to be no room for any diversity of opinion. The import of it, (which is perfectly clear upon the face of the act) is, merely that the "*fraudulent* and *deceitful* conveyance," (*i. e.* the conveyance from the fraudulent *debtor*, *to his fraudulent grantee*,) shall as against the creditors of the former, be void. But the provision extends no further. It is limited to those creditors, their representatives, and assigns on the one hand, and the *debtor's* fraudulent grantee on the other. The conveyance is void, then, so far as the question depends upon the construction of the statute, as between *those* parties only. The statute, most manifestly, does not contemplate a sale by the fraudulent *grantee*, to an innocent purchaser: for upon no plausible construction, can the clause be extended to the latter. The question, then, is, whether a conveyance, between the parties, last supposed, is void by *consequence*? *i. e.* whether, *because* a fraudulent conveyance is void, as between the grantor's creditors and the grantee, *any* subsequent conveyance, which the latter may make of the same subject is, *of course*, and *necessarily*, so? A question depending not upon any supposable construction of the statute, but upon the general principles and analogies of law.

Upon this question the objection arises, that he, who, as against his grantor's creditors, has no title, can convey none, as against them, to another. For how, it is asked can a title be derivedfrom one who has none?

1. Titles are certainly thus acquired, in very many cases, and upon a principle plainly applicable to the present, *viz.* that a fair purchaser, relying upon *authentic* and *regular* evidence of title, ought to be protected against private claims, of which he had no *notice*, actual or constructive. "For it is expedient," says *Blackstone*, "that the buyer, by taking *proper precautions*, may, at all events, be secure of his purchase; otherwise, all commerce between man and man must soon be at an and." 2 *Com.* 449.

Upon this principle it is, that a sale in market overt to a *bona fide* purchaser, will confer a good title against the true owner, though the vendor had none. If the trustee of an estate conveys it to one having no notice of the trust, the latter will hold, even in equity, to the exclusion of the *cestuy que trust;* though, as between the trustee and the *cestuy que trust*, the equitable title is in the latter. A sale of goods by a bailee, having, with the consent of the bailor, the *aparant* ownership, in many cases, binding the latter; though, as against him, the bailee had no title. And the whole doctrine of *tacking* incumbrances is built upon the same principle. For the first incumbrancer has no priority to the second, except for the amount of his own debt: And yet by a conveyance of his title to a third mortgagee, who had no *notice* of the intermediate incumbrance, the latter acquires a priority for *his* debt also. All these cases are stronger than the present: For, in each of them, the seller transfers the *interest*

tively fraudulent, because it was *voluntary;* of which *the defendant had full knowledge.* This was at least sufficient to put him upon his guard; which is all the notice that chancery requires. With such notice, he must stand on the same ground as the grantee in the voluntary deed.

of another, without his consent. Whereas, in this case, the plaintiff, upon his own principles, had no kind of interest in the land, or claim to it, till after the title, under which the defendant holds, was acquired.

This last consideration, so far as rules of equity may be allowed to operate, (and upon a question, to be determined on original principles, those rules are surely to be regarded) presents the case in another important aspect. The *bona fide* assignee of a fraudulent purchaser has, plainly, a *higher equity* than the creditors of the first grantor. They, as creditors, have no *lien*, specific or general, upon the land. They rely upon the personal credit of the debtor, and voluntarily leave it in his power to transfer to another the highest, and the only ordinary, evidence of title, known to the law. The assignee, who, relying upon such evidence, advances his money, not upon the personal credit of the debtor or fraudulent grantee, but as the consideration of a conveyance of the land itself, has the higher equity, on the same principle, on which a mortgagee's equity is higher than that of a bond-creditor of the mortgagor. The case of *George* v. *Milbank*, 9 *Ves.* jun. 190. is very strong to this purpose. *Sugd. Law of Vend.* &c. 437. and cases there cited. Indeed, in this view of the case, it falls within the broad principle of the common law, that when one of two innocent persons must suffer, by the act of a third, he, by whose act or neglect, the third person has been enabled to occasion the loss, must sustain it. 2 *Term Rep.* 70.

2. The argument, that because the fraudulent grantee acquires no title as against creditors, his *bona fide* assignee can acquire none, leads necessarily to a conclusion, which, the plaintiff's counsel will concede, is not law, *viz.* that a grant to an honest purchaser, by the original debtor *himself*, would be void, as against his creditors. This conclusion is inevitable, if the proposition is maintainable, that a fraudulent purchaser has the *same* right in the subject, and the *same* power over it, as his grantor had before the conveyance. And that this proposition is correct, is demonstrable upon principle, and by authority; and if it is so, it not only answers the objection, now immediately under discussion, but, in its necessary results, obviates every other that has yet been raised against the defendant's title.

The sole object of the statute is to protect creditors against a *fraudulent* sale by their debtor. And though, as against *them*, such a sale is void; yet, as between the *parties*, it is confessedly valid. The fraudulent purchaser, then, acquires the same title to all the interest, which the deed imports to convey, as the grantor had before the conveyance—subject, indeed, to the claims of the grantor's creditors, *as it was* in his hands, but *not otherwise.* The grantee, of course, has the *same* power over the subject, as the grantor had before the conveyance, and *no more.* It follows, then, that as a *fraudulent* conveyance by the original debtor would be void as to his creditors; *such* a conveyance by his fraudulent grantee, must be so. But, as a *fraudulent* sale is the only thing, against which the statute protects the creditors of the first grantor; a sale by *him*, to a *bona fide* purchaser, would have been valid, their claims notwithstanding. Of course, a sale by the fraudulent *grantee*, to *such* a purchaser, is good against them.

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Sherman and *T. S. Williams*, contra. 1. The plaintiff claims as a *creditor* of *Stephen Sherwood*, and not as a *purchaser*. The whole class of decisions upon the 27 *Eliz. c.* 4. which relates to *purchasers*, may, therefore, be laid out of

Precisely conformable to this view of the question have been the decisions upon the statute 27 *Eliz. c.* 4. against conveyances in fraud of *purchasers*. Thus, in *Prodgers* v. *Langham*, 1 *Sid.* 133. it was resolved, that "if one makes a fraudulent feoffment, and the feoffee makes a feoffment to another for valuable consideration, and afterwards the first feoffor also, for valuable consideration, makes a second feoffment; the feoffee of the feoffee shall hold against the second feoffment of the first feoffor." This precise doctrine prevailed also in *Smartie* v. *Williams*, 3 *Lev.* 387. in *Andrew Newport's* case, *Ca. Temp. Holt*, 477. and in *Porter* v. *Clinton*, *Comb.* 222. In the last case, Lord *Holt* says, "if a conveyance be made by fraud, and afterwards the land is conveyed over, upon valuable consideration, *bona fide*; the fraud is *purged*." The same rule governed the case of *Doe* v. *Martyr*, 1 *New Rep.* 332.; and had been before recognized and approved by Lord *Kenyon*, in *Parr* v. *Eliason*, 1 *East*, 95.

In all these cases, the governing principle has been, that a fraudulent grantee has the *same* rights and power over the subject, as his grantor originally had; and that, *therefore*, a conveyance, by the former, to an honest purchaser, is valid. The language of Lord *Holt* in *Newport's* case, is very strong and explicit on this point. "The first mortgage," he observes, "is good between the *parties*, and being so, when the first mortgagee assigns for valuable consideration, this is *all one*, as if the *first mortgage* had been upon a valuable consideration: for now the second mortgagee stands in *his place*." Now, unless it can be shewn that a fraudulent purchaser has higher rights and powers under the statute 27, than under the 13 *Eliz.* (and this, one would suppose, would hardly be attempted) these authorities are decisive.

It has been said, however, that a conveyance to a *bona fide* purchaser, by the original debtor, is, in its effect as to creditors, very different from a similar conveyance by the fraudulent grantee: Because, in the former case, the consideration paid is supposed to constitute a fund, in the debtor's hands, out of which the creditors may, probably, or possibly, at least, obtain satisfaction of their debts; whereas, in the latter, the purchase-money, being received by the fraudulent grantee, will be out of their reach. Now, it is very obvious, that to render this argument applicable to the question, it must extend, as well to cases, in which the intention of the debtor, in making the conveyance, is *fraudulent*, as to those, in which his views are honest. For if the *purchaser* is not privy to any fraudulent design, the conveyance is not covinous, whatever may have been the intention of his grantor. What, then, in common presumption, is the probability of a creditor's obtaining satisfaction out of an invisible fund, substituted by the debtor, for a visible one, for the very purpose of avoiding his debts? But not to dwell upon this consideration—can a court of justice, in deciding questions of title, upon principles of law and *strict right*, be influenced by loose speculations of this sort? Are rights, strictly legal, to be determined by a calculation upon consequences, not only remote, but altogether casual? But farther—the argument proceeds entirely upon the supposition, that a fraudulent conveyance, is, of course, *voluntary*, and that a *bona fide* one is, in all cases, upon *adequate consideration*: An assumption wholly groundless, in both its branches. For a *bona fide* sale by the debtor, may be for a consideration, far below the value of the property; and on the other hand, he may make a *fraudulent* sale, for the full value. The very foundation of the argument, therefore, fails.

the case. The strong case of *Doe* d *Otley* v. *Manning*, so much relied on by the plaintiff's counsel, is one of these. The question then is, whether a voluntary conveyance, is, under all circumstances, void, within the 13 *Eliz. c.* 5., or

It was urged, at the trial, that if the defendant's doctrine is to prevail, creditors may be defeated by *collusion :* because nothing more is necessary, than for a debtor to make a covinous sale, and for the fraudulent grantee afterwards to convey over to a *bona fide* purchaser, and the fraud is effected. It cannot have escaped observation, that this topic of argument would be equally applicable to cases arising under the statute 27 *Eliz. ;* and yet, in all the cases, before cited, arising under that statute, this objection has been disregarded. It was pressed, by counsel, in the case of *Doe* v. *Martyr ;* but without success. And, surely, there can be no soundness in an argument, founded upon the supposed danger of mischief from *collusion*, when, the same mischief may be as easily, and more easily, effected *without* it. The debtor himself may, confessedly, defraud his creditors, by conveying to a purchaser, who has no knowledge of his fraudulent purpose. And is it more difficult for him to do this, directly, than to convey to one, who is privy to the fraud, and procure him to do the same thing ? The objection would prove, if any thing, that a *bona fide* purchaser from the debtor *himself*, ought not to hold against the latter's creditors, because they might thus be defrauded.

The answer given to the cases under the statute 27 *Eliz.* that they are inapplicable, *because* the claim of a subsequent purchaser from the original grantor, under that statute, does not accrue, till *after* the fraudulent conveyance, cannot bear a moment's examination. For, in the first place, the objection would be equally strong, against subsequent *creditors*, under the statute 13 *Eliz.:* and yet, it is admitted, that in cases of actual fraud, at least, the rights of prior and subsequent creditors, under the latter statute, are precisely the same. But further : the claim of a prior *creditor* to the *land*, or *subject* conveyed, (and this is the only claim of his that can be regarded,) is always subsequent to that of the fraudulent purchaser ; otherwise the question of fraud could never arise. The *debt's* being prior, is nothing to the purpose. Besides : so far as there is any discrimination between the rights of creditors, under the statute 13 *Eliz.* and those of subsequent purchasers, under the 27th, the distinction is uniformly in favour of the latter. They have always been more favoured than general creditors, under the 13th ; because, not having trusted, like the latter, to the personal credit of the grantor, but having advanced money, only upon a *conveyance* of the specific property in dispute ; they have, according to all principle and analogy, a higher equity—precisely as a mortgagee has a higher equity to claim the land mortgaged, than the mortgagor's general creditors ; and precisely, (I may add,) as the present defendant has a more equitable claim than the plaintiff.

If it is still to be insisted, that the cases cited upon the statute 27 *Eliz.* are not applicable to the case of *creditors ;* the objection can be repelled by authority. For the doctrine, for which I am contending, was applied directly to the statute 13 *Eliz.* by Lord *Eldon*, in the case of *George* v. *Milbank*, 9 *Ves.* jun. 190. In that case, though the property in question was holden to be *assets*, as between the creditors of the appointor, and the *fraudulent appointee ;* yet the claim of a *bona fide* purchaser from the latter was supported against the *creditors*. Here, then, at any rate, is a judicial decision in point.

The plaintiff's counsel, however, contend, that none of the cases under the statute 27 or 13 *Eliz.* can apply : because each of those acts contains a *proviso*, (which is omitted in ours,) in favour of *bona fide* purchasers ; and that all the cases cited fall within one of those *provisos*.

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our statute against fraudulent conveyances (*a*) derived from it? There is no case to be found in support of the affirmative of this question. In *Sagitary* v. *Hyde*, 2 *Vern.* 44. it is said by the court, "that every voluntary conveyance is not

(*a*) *Tit.* 76. *s.* 1.

1. It is very manifest that the *proviso* in each of the *English* statutes, was inserted, as is frequently done, *ex abundanti cautela;* and that the construction and effect of both the acts are the same, as they would have been, if the *provisos* had been omitted. The object of inserting them was to protect the *original* or *first* conveyance, if made to one, who was not privy to any fraudulent design in the grantor. Thus, in the statute 13 *Eliz.* the *proviso* was introduced, to guard against a possible construction, to the prejudice of an honest purchaser from a *fraudulent* debtor. The case of a sale, by a fraudulent *grantee* of the debtor, is not provided for by the statute; but left, to be governed by general principles. A conveyance, by the debtor *himself*, is the only one contemplated by the act. It seems clear, that no other is in contemplation, in the enacting clause; and the *proviso* manifestly relates only to conveyances between the *same* parties. Lord *Holt's* argument in *Newport's* case, is direct and full to this point. He says, indeed, that the *second* mortgagee, (meaning the assignee of the first,) is within the *proviso;* but taking this expression in the connexion, in which it stands, it establishes the precise position, which I am endeavouring to support. His words are these: "for now the second mortgagee stands in *his*," (the first mortgagee's) "*place*," (*i. e.* in the same predicament as if he had derived his title, *immediately*, from the mortgagor;) "and, THEREFORE, is in the *proviso*." The amount of Lord *Holt's* argument, then, is precisely this: the assignee of the fraudulent mortgagee is within the *proviso*; but he is within it by *consequence* only. For as the *mortgagee*, if he had purchased *bona fide*, would have been within it; *therefore*, his assignee, having *so* purchased, must be within it. In other words: as the *proviso* is intended for the benefit of the *original* purchaser, if the conveyance to him is *bona fide;* his *bona fide* assignee, having the same rights, as if he had been the original purchaser, shall also be protected.

2. But if the *English* cases have been governed by the *provisos* in the statutes 13 and 27 *Eliz.*; they are still not the less applicable here. For as those statutes, as well as our own, are in *affirmance of the common law:* (*Cowp.* 434.) the rule of decision must, of course, be the same in our courts, as in *Westminster-Hall.* And if it should be objected, as it was at the trial, that they are declaratory only to the purpose of *invalidating* the covinous conveyance, and not so as to the *extent* and *effect* of its invalidity; or, in other words, that the *enacting* clauses only, and not the *English provisos*, are in affirmance of the common law; it may safely be answered, that such a distinction is not merely arbitrary, but directly opposed to plain and acknowledged principles. For it necessarily presupposes, that a sale by a debtor, with a secret fraudulent intent, though made to a *bona fide* purchaser, (who is confessedly within the *proviso* of the statute 13 *Eliz.*,) would, at *common* law, be void as to creditors: a proposition, to which the plaintiff's counsel themselves will not assent. But, (what is decisive,) in *Dy.* 12. where a conveyance by the fraudulent grantee to a *bona fide* purchaser was holden to be valid, the determination could not have been founded upon the *proviso* of the statute; for the statute itself was *posterior* to the decision.

If authorities and principles, like those, already submitted for the defendant, can require to be *vindicated;* it may be added, that the argument *ab inconveni-*

therefore fraudulent; but a voluntary conveyance, if there was a reasonable cause for the making of it, may be good and valid against a creditor." The circumstance that the conveyance was a *voluntary* one, affords a presumption of

enti, is strong in his favour. The mischievous tendency of the doctrine he opposes, is too obvious to require much illustration. When it is considered, that no length of possession by a fraudulent purchaser, confers a title; (*Beach* v. *Catlin*, 4 *Day* 284.) that not only conveyances, *actually* covinous, but such as are merely voluntary, are void within the statute; (*Doe* v. *Manning*, 9 *East*, 59.) and void, as well against subsequent, as prior, creditors; (3 *Co.* 82. *b. Com. Dig. Covin*, B. 2.) it is manifest, that upon the plaintiff's principles, there is hardly a conceivable case, in which a purchaser can be secure. The statute is thus converted into an act to enable creditors to *defraud* honest purchasers. Indeed, it may reasonably be doubted, whether any rule, ever before contended for in *any* case, in our courts of justice, would be as pernicious in its results, as that on which the plaintiff's claim is founded.

Daggett and *R. M. Sherman*, contra. It is admitted, on the part of the plaintiff, that the conveyance declared by the statute to be "utterly void," is that, and that only, which is "made to avoid any debt or duty of others;" and that no *bona fide* conveyance, made by the fraudulent grantee, or by any assignee of his, is within the provisions of the statute. It is, however, contended, that no construction is admissible, which may, in any event, give validity to the *same* conveyance which the statute has declared to be void. So long as no inference is made, from the validity of the subsequent conveyances, inconsistent with that entire nullity of the first, expressed by the words "utterly void," the statute itself stands unimpugned. But it is contended, that the subsequent conveyances, because they have no inhibited ingredient, but are *bona fide*, and not within the letter or spirit of the statute, become endowed with a retroactive efficacy, and gives force to the conveyance originally void. So that the question is not whether the statute operates on subsequent *bona fide* conveyances; for it is admitted, that it has no effect on them. Every remote grantee, in tracing back his chain of title, will find each part sound, until he arrives at a fraudulent deed. Even that is good against all but the creditor. And if so as to him, the grantee can maintain his claim without it, the statute is not in his way. But if he sets that up against the creditor, the latter may reply, in the language of the statute, that *quoad* him, it is "*utterly* void."

The counsel for the defendant, however, contends, that the fraudulent grantee has all the power of the grantor over his property; and, it being admitted, as it certainly is, that the first grantor could have made a valid title against creditors, *therefore*, it is said, the grantee may do the same.

This inference is unquestionably correct, if the premises are sound; but the position, that, under our statute, the grantee has all the power over the property which the grantor had, is unsupported by reason or authority. This, however, being a cardinal proposition, on which the argument for the defendant chiefly turns, it deserves examination.

To support it, the three following positions are advanced:

First, That the protection of the creditor against a *fraudulent* sale *by the debtor*, is the object of the statute.

Secondly, that the fraudulent sale is good as between the grantor and grantee.

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fraud. So does the circumstance that the grantor was *indebted* at the time. But in either case, the presumption may be repelled. *Newland on Contr.* 384. to 388. *Russel* v. *Hammond*, 1 *Atk.* 15. *Walker* v. *Burrows*, 1 *Atk.* 93. *Ste-*

Now, these two positions are admitted. The *third* is claimed as an inference from them, and is not admitted, because not a just inference.

Thirdly, that the purchaser acquires the *same title* which the fraudulent grantor had, liable to the claims of creditors precisely *as it was* in the hands of the grantor. This inference either assumes the point in question, or does not flow from the premises. The very question is, whether the fraudulent grantee acquires the *same title* which his grantor had, as against creditors. If, as against creditors, the conveyance is *void*, in the strict sense of that word, then he does not acquire the same title. If it be not void in any sense but what will admit of such an acquisition, then he may acquire the same title. The argument, therefore, amounts to nothing, since it merely assumes the controverted import of the word "void."

But it will appear manifest, on careful attention, that the title of the grantor, as against creditors, previous to the grant, is wholly different from that of the grantee subsequent to the grant. Before the grant, the title of the grantor is good against creditors, and when the property is taken by them, it is in affirmance of that same title. Suppose the debtor's title is by a deed from *A.*; the creditor, after levy, will admit the validity of that title, and will himself claim under *A.* But the creditors denies the title of the fraudulent grantee, and claims not *under* it, but against it. So there is this very material difference between the title of the grantor and that of the grantee, *viz.* that of the levy of the creditor is in *affirmance* of the one, and in *avoidance* of the other. Now, if there be no conveyance *by* the fraudulent grantee, but the property remains in his hands, till taken by the creditor; it is conceded, that the title of the grantor is *good*, and *transferred* to the creditor by the levy; and the title of the grantee *bad*, and *avoided* by the levy. How, then, can it be contended, that a conveyance by the grantee, which, on the face of it, does not purport to fortify the title under which he claims, can possibly have that effect? If done, in any form, with an express view to validate his fraudulent title; the intent, to say the least, would not aid it; for *quoad* the creditor, it would be matter *inter alios*.

Much erroneous reasoning on this subject has resulted from the *partial* inefficacy of the fraudulent deed. Had the statute declared it "utterly void" as to *all* the world, so that the grantee would have had no title even as against the grantor, or any one else, it would not, it is presumed, have been contended, that the grantee could have made a title to another. The nullity of a deed given contrary to the statute of 1727, (*Tit.* 97. *c.* 17.) by one disseised, would probably be admitted to be so entire, as to give no title to the most cautious subsequent purchaser without notice, notwithstanding, as a *general* position, it is "*expedient* that the buyer, by taking proper precautions, may, at all events, be secure of his purchase." It cannot be perceived why the strong, unqualified, and unequivocal language of the statute, should not make the deed in question void as "utterly" *quoad* the plaintiff, as it would be, if the same language included every one else. If, indeed, the argument for the defendant derives any weight from the fact, that the fraudulent grantee did obtain a good title to some purposes; let it be applied to the fraudulent deed itself. It cannot yield more support to any other part of the defendant's title than to that. *Quod ab initio non valet, in tractu temporis non convalescit.* Where the fraudulent deed is left, by that circumstance, at the time of its creation, it will be found at every subsequent period of time.

phen v. *Olive*, 2 *Bro. Ch. Ca.* 90. *Lush* v. *Wilkenson*, 5 *Ves.* jun. 384. 387. *Parker* v. *Proctor*, 9 *Mass. Rep.* 390. *Bennett* v. *Bedford Bank*, 11 *Mass. Rep.* 421. *Verplank* v. *Sterry* 12 *Johns. Rep.* 558.

The fraudulent grantee, therefore, has not, as against the creditor, the *same title* which his grantor had, and might have conveyed to a *bona fide* purchaser.

It is moreover contended, that one having *apparently* a legal title, may make a valid conveyance to a purchaser without notice. It is not, however, understood to be claimed, that this may be done generally. The cases put, are all manifest exceptions to the general rule, and, we believe, are founded on particular grounds of exception inapplicable to the case in debate. Possession is *prima facie* evidence of title to personal estate; but *mere* possession will not enable a stranger to give a title, except in market overt. That exception is well known to be grounded on rules of policy applicable to that kind of sale only; and the very exception shews the general rule to be otherwise, according to the familiar maxim *exceptio probat regulam.* However *bona fide*, such a sale, in the ordinary course of dealing would be void. The title of the really legal proprietor would remain unimpaired. Where one purchases of a trustee, without notice of the trust, he acquires, in fact, a good *legal* title; but the *cestui que trust* has no title except in equity. Now, when application is made to equity to *take away* a legal title from the lawful holder, the court will not interfere, if the equity of the parties be equal; but leave them as they stand at law. The special ground of denying relief in that case is inapplicable here; for we claim by a *legal* title only. Suppose, (as the defendant is a *bona fide* purchaser, and in possession) that there was a formal defect in the title of *Richard Nichols*, the debtor, in consequence of which, admitting our title to be in other respects good, we could not maintain ejectment. The defendant, having discovered that, and also our claim, obtains a conveyance from *Nichols'* grantor, in order to protect his illegal, though equitable, possession. We then apply to equity, against the defendant and the grantor of *Nichols*, praying that the formal defect may be remedied, that we may be enabled to eject the defendant at law. The court do not interfere, because the defendant's equity is as good as ours. Could it be inferred from that *only*, that we must have failed at law, even if the defect in the debtor's title had not existed? Certainly not, and for this obvious reason, that equity may refuse its aid to the very claim, which, if clothed with legal form, would prevail in a court of law. It is on this principle, admitted in equity, but never acknowledged in a court of law, that the whole doctrine of tacking incumbrances is founded. On a similar principle the case of *George* v. *Milbank* must have been decided for the *bona fide* purchaser, had there been no *proviso* to the *English* statute, and however fully our construction of the enacting clause might have been acknowledged. But the case of *Hartop* v. *Hoar*, with others of the same class, prove strongly that the rights of a *bona fide* purchaser, where the vendor, even with the owner's consent, had the apparent evidence of property, must yeild to those of the *legal* proprietor. No equitable right, however superior, can defeat the legal title in a court of law.

But it is said, that we extend the statute beyond its letter and intent. "The protection of the creditor against a *fraudulent* sale *by the debtor* is its object;" not against a *bona fide* sale by the *debtor's grantee.* Our argument demands neither more nor less than this. Not *more;* for it admits the intrinsic validity of every conveyance subsequent to the debtor's. Not *less;* for it insists, that, for

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2. The plaintiff had no *debt* against *Stephen Sherwood* at the time of the voluntary conveyance. He had at most only a claim for damages arising from a *tort*. This did not constitute him a *creditor*. *Lewkner* v. *Freeman*, *Prec. Chan.* 105.

the protection of the creditor, the debtor's alienation is utterly void, notwithstanding any subsequent *bona fide* conveyances of the property.

The *English* authorities can add no weight to the argument of the defendant. The *proviso* in the 13 *Eliz.* wholly excludes the question. It is this: "That this act, or any thing therein contained, shall not extend to any estate or interest in lands, &c. which estate or interest is, or shall be, upon good consideration and *bona fide*, lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid." If we be asked, whether the conveyance to the defendant be on *good consideration and bona fide*, without any manner of notice, &c. of the fraud, &c., we answer in the affirmative. If further asked, whether such an estate or interest would be affected by the *English* statute; we answer, that the *proviso* in the *English* statute *expressly* says it would not. That *proviso*, then, if annexed to our statute, would preclude all controversy on the question. To say that the decisions in *England*, under either of their statutes, would have been the same without the provisos, is to assume the point in question. It also ascribes the decisions to presumed grounds, when they could not but be as they are, on grounds which are known and imperative. It is a maxim in physics, the reason of which is applicable here, that to assign more causes for a given phenomenon than are necessary, is unphilosophical. It cannot be inferred, that the *proviso* has no efficacy, and was inserted merely *ex abundanti cautela*, from its embracing a case which would have stood clearly on the same ground without it. We admit, that a sale on good consideration, made with intent to defraud creditors, to one who is ignorant of the intent, is valid under *our* statute. Such a case, however, is embraced in the general words of the *proviso* in the 13 *Eliz.*—although, for that *only*, the proviso would have been unnecessary. As that case has the general nature of those for which we think the proviso expressly made, and must necessarily be embraced in the same *general* expressions, it would have been very inconvenient, as well as very useless, to have used any phraseology *merely* to shew, that the proviso was inserted for subsequent purchasers, and not for the immediate vendee of the debtor. It is, therefore, very evident, that if subsequent purchasers alone were intended to be protected by the *proviso*, it would have required no different form of words from that which is adopted. The reason of providing for a subsequent purchaser must have resulted from the very construction of the enacting clause for which we contend; and the same construction would render any provision for the immediate vendee of the debtor unnecessary. In the latter case, the vendee takes from one who has a title to convey; in the former, the title of the subsequent *bona fide* purchaser, being intercepted by the enacting clause, a proviso is *necessary* to give efficacy to the deed.

But it has been contended, that provision for subsequent purchasers, so far from being, as we contend, the principal, if not the only object of the legislature, was not within their contemplation at all. But the very language of the proviso supports our construction. The words "*notice of the collusion*," are inapplicable to the original parties, and must have been intended for subsequent purchasers exclusively. The word "*collusion*," *ex vi termini*, applies solely to

Fox v. *Hills*, 1 *Conn. Rep.* 295. 299. 300. 303. *et seq.* But in fact he had no *legal* claim whatever, as was decided in *Sherwood* v. *Salmon*, 2 *Day's Ca.* 128. If his case was such as would entitle him to relief in chancery, it was only a case where *both* parties are involved in the guilt. To such a case, most clearly, the proviso does not apply, for no sale is protected, except where one party, *viz.* the purchaser, is innocent. The only sale, then, protected by those expressions, must be that of a *subsequent* purchaser, who has *no notice* of the *collusion* between the debtor and his fraudulent vendee.

It is very obvious, from the language of our statute, and the great respect with which our ancestors constantly consulted the *English* law, that the 13 *Eliz.* was its model. The variations, from the original must, of course, all have been designed. Whether the exposure of purchasers to the loss of property fairly bought of a fraudulent vendee, was a greater evil, than forever to deprive the creditor of his claim after a *bona fide* sale, was a question proper for the consideration of the legislature, and one, we presume, which did not escape their attention. Whatever ingenious objections may be made to the *policy* of the statute, we trust that experience, the touchstone of political expediency, has tested and proved its wisdom. The legislature have thought fit to make the acquisition of a valid title under a fraudulent conveyance *impossible;* and, of course, it is rarely attempted. They have wisely deemed it better to demolish, at once, the labyrinths of fraud, than to leave the unfortunate creditor to explore them. The vendee being a *bona fide*, and not a *fraudulent*, purchaser, his case will not fall within the principles of *Beach* v. *Catlin*, applicable only to a *fraudulent trustee;* and will not, consequently be aggravated, by exclusion from the common privileges of the statute of limitations.

Baldwin, J. The question in this case is, whether under the statute entitled "an act against fraudulent conveyances" a *bona fide* purchaser, from one claiming under a fraudulent judgment and execution, acquires title against the creditors of the fraudulent grantor.

As it can make no difference in principle, whether the title of the *bona fide* purchaser is through a fraudulent judgment, or a fraudulent grant, I shall, as more simple, consider this case as resting on a fraudulent grant.

It is agreed, that the law is the same, whether the fraudulent grant was prior or subsequent to the debt of the creditor. It is also admitted, that the title of the defendant's grantor was opposed to the statute and fraudulent, but that the defendant was a *bona fide* purchaser for a valuable consideration; and it does not appear that he had knowledge of the fraud.

The question, then, depends wholly on the operation of the statute.

It is obviously the intention of this statute to prevent fraud, and to protect creditors. It ought, therefore, to have a liberal construction, in suppression of the mischief, and in extending the relief.

By the first section of the act, all fraudulent conveyances or judgments designed to defeat the recovery of debts, are, as to creditors, utterly void. By the second, heavy penalties are inflicted on the parties to such fraudulent conveyances, &c. who claim them to be fair, or alien, with an exception of the purchaser who bought *bona fide*, on good consideration, and without design of fraud.

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on certain conditions. He had no debt, even after the decree, until he had re-conveyed the land; and it was optional with him to re-convey or not. He might have sold the land for more than he gave for it; and it might cost him more to get it

By the express terms of the statute, then, all such fraudulent conveyances, are, as to creditors, utterly void, unless made valid, or saved from its operation, by the terms of the exception. It is important, therefore, to consider the extent and effect of that.

To determine the extent of the exception, it is necessary to determine, first, the extent of the act. This, in terms, embraces all fraudulent conveyances: and while all will admit that conveyances made designedly, by both the contracting parties, with a view to defeat creditors, are fraudulent; it is contended that a conveyance made with that design by the grantor, to a grantee ignorant of the fraud intended, cannot be fraudulent, because, it is said, that every fraudulent contract necessarily requires the fraudulent assent of the contracting parties. This distinction, as applicable to this question, is merely plausible. Every conveyance designed by the grantor only, to defeat the creditor of his due, is, as to the creditor, a fraudulent conveyance, and as such is included in the act, and declared void; but the ignorance and fair conduct of the honest purchaser may, under certain restrictions, afford good ground for an exception in his favor. For this purpose the exception was made, and seems, at the first view, only to intimate, that though by the body of the act, a conveyance to a *bona fide* purchaser, on good consideration, if made by the grantor, with a view to defeat creditors, shall, as to them, be void; yet if such purchaser aliene, or claim his purchase to be fair, he, by the exception, is saved from the penalties. I presume, however, that the legislature meant to extend the exception to the conveyance, as well as to the penalties; and that it would be too limited a construction to confine its operation to the last clause; for the statute, though now divided into two paragraphs, with the exception annexed to the last, was originally penned, and in the early editions printed, without a division. And it appears to me evident, from the nature of the exception and its object, that it extends equally to the whole act. A debtor may intend, by the sale of his estate and secreting the avails, to defeat his creditors; yet if the purchaser contract *bona fide*, on good consideration, before any attachment of the estate, and without knowledge or fraudulent design of defeating creditors, it seems unreasonable, to make such purchaser responsible for the secret intentions of the grantor, and the more so, as by the consideration received, he is furnished with other funds to meet his creditors. Yet as such a sale is evidently within the letter of the act, the exception, with great propriety, saves such conveyance from its operation, as well as he purchaser from the penalties, but will not save a conveyance, on a consideration paid to the full value of the estate, if the purchaser had knowledge of the fraud, and designed by the purchase to defeat creditors.

It is further contended, that the exception will extend to the honest purchaser from the fraudulent grantee. If such were the intention of the legislature, it is to be lamented, that the fair import of the expressions used does not convey it. As it was obviously their intention to protect the rights of creditors, it is not to be presumed, that a provision would be inserted which would defeat the object intended, by saving rights of no higher equity, and growing out of the very fraud intended to be suppressed. Such a presumption cannot

back than the decree was worth. He might not elect to become a creditor at all.

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3. The defendant being a purchaser for a valuable consideration, with notice only of the simple fact that his grantor held under a voluntary conveyance, is to be protected in his

be permitted to aid a construction in the least doubtful. No person, on reading this statute, would conceive that the exception extended to a subsequent purchaser. On the contrary, the purchaser mentioned in it, is evidently a party to the original contract, and, as such, *prima facie* exposed to the penalties. But a fair purchaser from a fraudulent grantee, cannot, in any sense, be considered a party to such contract, unless he became a subsequent grantee with knowledge and in aid of the fraud, in which case he would not be saved by the exception.

Again, the statute, in express terms, makes utterly void, as to creditors, all fraudulent conveyances designed by the parties to defeat creditors of a recovery of their debts. The obvious inference from this, is, that as nothing passes, as to creditors, out of the grantor, by such conveyance, no subsequent transfer can by possibility be good against them. There is no basis on which it can rest. The chain of title is interrupted. The exception merely cannot, therefore, give validity to a conveyance, where no title existed in the grantor. This consideration shews, that the exception is confined solely to the first transfer, and can never extend to a subsequent sale. In whatever view, therefore, we consider the exception, it will afford no relief to this defendant. But

It is contended, that a defective title may be cured by a regular and authentic chain of conveyance. I admit, that this may often be done, when, by the rules of the common law, the title is defective ; but whenever a statute makes void an instrument, or a contract, they are void past redemption. Thus, a note or a bill of exchange made void by the statute of usury, though negotiable in their nature, and fairly transferred for valuable consideration, will always remain void.

It seems to me there would be no doubt on this question, were it not for the decisions in *England* on their statute of 27 *Eliz. c.* 4. and an attempt to apply the principle of those decisions to the case before us. Our statute is derived from 13 *Eliz. c.* 5. and is very similar in its provisions. It is singular that under the operation of that statute, for more than two centuries, no decision on this question to be found in the *English* reports. The question remains unsettled in this state also, although our statute was passed more than a century ago.

It is contended, that the principle guiding the numerous decisions on similar questions arising under the 27 *Eliz.* will lead to the same result on that of the 13th, and on our statute. There is, however, an apparent difference, not only in the object of the two statutes, but in the extent of their provisions. The object of the 13 *Eliz.* and of our statute, is solely the protection of the *creditor.* To effect this, all fraudulent conveyances to defeat the recovery of his debts, are, as to him, utterly void, and to all other purposes are good. Nothing is left in the grantor, unless it is the power to convey to a creditor. He can never make any other second conveyance, even to a *bona fide* purchaser. The fraudulent purchaser receives the estate subject to the lien of the creditor ; and having no title as against him, of course has no power to do any act that

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title. *Andrew Newport's* case, *Skin.* 423. S. C. by the name of *Smartle* v. *Williams*, 3 *Lev.* 387. S. C. by the name of *Smart* v. *Williams*, *Comb.* 247. *Prodgers* v. *Langham*, 1 *Sid.* 133. *Porter* v. *Clinton*, *Comb.* 222. *Kirk* v.

will defeat the lien. This statute provision as to any fraudulent attempt to defeat a recovery, is as operative in favour of the creditor, as an attachment of the land, which cannot be effected by any subsequent *bona fide* transfers.

The proviso to the 13 *Eliz.* is, "that the act shall not extend to lands conveyed on good consideration and *bona fide*, to a purchaser without notice or knowledge of the fraud."

The exception in our statute is, "except the purchaser made it appear, that the contract was made *bona fide*, and on good consideration, before seizure by the creditor, and that it was without design of fraud to defeat creditors."

Both the proviso and the exception are, from their nature, limited to the first conveyance. That being fraudulent, will of course be void, unless saved by these conditions, *viz.* that it was on good consideration, *bona fide*, and to a purchaser ignorant of the fraud intended. A failure in either of these conditions would still leave the conveyance void.

The object of the 27 *Eliz.* is to protect the *bona fide purchaser.* It therefore makes void, in favour of such purchaser, all prior fraudulent grants, intended to defeat his title. The grantor, therefore, has still the power to alienate again to a *bona fide* purchaser, notwithstanding his fraudulent grant, a power which the fraudulent grantor under the 13 *Eliz.* has not. But the power is not expressly or exclusively reserved to the grantor. As the object is to defeat the fraud intended, and to protect the fair purchaser, the provision is general, that the fraudulent conveyance shall be void, as to its operation, against a fair purchaser. If then the fraudulent grantee conveys to a *bona fide* purchaser, the object is obtained by giving that validity to the fraudulent conveyance, which, by the statute, it always has, when no fraud is done to an honest purchaser. A fraudulent conveyance is good between the parties, until it becomes injurious to a *bona fide* purchaser. In this sense, it may indeed be said, *whatever the fraudulent grantor may do, his grantee may also do.* If there were any doubt with respect to this construction of the act, the proviso, which is peculiar, and different essentially in its effects from that of the 13th, removes it. By this proviso, "the act shall not extend to, or be construed to make void, any conveyance made upon good consideration and *bona fide*." The grantee of such a conveyance may have full knowledge of the fraud intended; he may so purchase from either of the fraudulent parties; still his conveyance is within the proviso, and not void. This proviso cannot be confined to the first conveyance; for it is impossible that should be fraudulent as to purchasers, and yet be made on good consideration, and *bona fide.* The proviso, then, can only apply to subsequent conveyances.

The obvious meaning of this proviso, viewed in connexion with the object of the act, is, that the fraud intended shall never defeat an honest purchase. The act, therefore, shall not extend to make void any such conveyance, though *prima facie* resting on a fraudulent basis.

Either of the parties to the fraudulent conveyance, may, therefore, under that statute, make a valid *bona fide* conveyance. If made by both, the first in time will of course be preferred.

Clark, Prec. Chan. 275. *Doe* d. *Bothel v. Martyr*, 1 *New Rep.* 332. *George* v. *Milbanke*, 9 *Ves.* jun. 190. *Jackson* d. *Bartlett* v. *Henry*, 10 *Johns. Rep.* 185. 197. *Fletcher* v. *Peck*, 6 *Cranch* 87. 133. 135. *Hamilton & al* v. *Greenwood & al.* 1 *Bay* 171.

While I admit, that such has long been the course of decisions under the 27 *Eliz.* I can by no means admit, that they are applicable to the case before us. To make the cases arising under the two statutes parallel, so that a common principle shall apply, the second conveyance under the 13 *Eliz.* or our statute, ought to be to a *creditor;* for as the fraudulent grant as to him, was void, a conveyance to him as a creditor, in consideration of his debt, or as a security for it, would probably be considered valid even from a fraudulent grantor; and if so, on the analogy claimed, the fraudulent grantee might have made a similar valid conveyance to such creditor. But this is not such a conveyance. Indeed, the principle claimed, would, if adopted, wholly defeat the operation of our statute, as a protection to creditors, and make it like the 27 *Eliz.* a protection to *bona fide* purchasers, to the exclusion of creditors, the sole object for which it was enacted.

On the whole, I am of opinion, that an original conveyance, confessedly fraudulent, being utterly void as to creditors, can afford no basis for valid conveyances to defeat their lien, even by a *bona fide* purchaser from either of the parties. Of course the defendant in this case has no title against the plaintiff.

The charge was, therefore, correct, and I do not advise a new trial.

In this opinion MITCHELL, Ch. J. and SWIFT, TRUMBULL, and BRAINARD, Js. concurred.

SMITH, J. The only question involved in the decision of this case is, whether a *bona fide* purchaser for a valuable consideration, from a fraudulent grantee, can hold the land against the creditors of the first grantor.

I have formed an opinion that the purchaser under such circumstances ought to be protected, notwithstanding the claims of creditors.

In examining the question, I will, in the first place, consider it as a new one, and attempt to support my opinion from principles of the common law, and the construction of our statute against fraudulent conveyances.

I shall then, in the second place, attempt to shew that those principles have been fully adopted by the courts in *Great-Britain.*

The plaintiff's counsel rely on the first paragraph of the statute against fraudulent conveyances, which is in the following words: "That all fraudulent and deceitful conveyances of lands, tenements, hereditaments, goods or chattels, and all such bonds, suits, judgments, executions or contracts, made to avoid any debt or duty of others, shall, (as against the party or parties only whose debt or duty is so endeavoured to be avoided, their heirs, executors or assigns) be utterly void, any pretence or feigned consideration notwithstanding." This statute, it is insisted, making the conveyance void as to creditors, is to have the same effect, whenever a question arises regarding their interest, as though the statute made the conveyance void to every purpose whatever; and hence the grantee, having no title as against them, could convey none, which should be valid in opposition to their claims. This argument

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SWIFT, Ch. J. Fraudulent and voluntary conveyances are void as to creditors; but in the case of a voluntary conveyance, a distinction is made between the children of the grantor and strangers. Mere indebtedness at the time

takes for its basis that part of the statute which renders the conveyance void as to creditors, regardless of that which virtually declares it good between the parties, as though we were not bound to observe the whole law. But we are as much bound to give one part of the statute its full force and effect as we are the other; and it appears to be as much the object of the legislature to validate the conveyance between the parties, as it was to nullify it as to creditors. I would then give both parts of the statute an equal operation, and consider myself as being no more at liberty to reject one than the other. Whenever a fraudulent conveyance is made, therefore, and any question arises relative to the rights and powers of the various parties in interest, we are bound to consider it as being both void in regard to creditors, and valid as between the parties. And the rights and powers secured to the grantee, are as sacred as those secured to creditors.

What then is the amount of the statute in rendering the conveyance void as to creditors? It is to remove the conveyance out of the way, and place them in the same situation as though it had not been made. What is to be the effect of that part of the statute rendering the conveyance valid between the parties? I answer, it gives the grantee all the rights of the grantor, subject to such rights as the creditors had before the conveyance was made, and such as they would continue to have, had the conveyance not been made. The creditors have lost none of their rights by the fraudulent conveyance; neither have they acquired any new ones. Their condition is the same regarding the land as before. So, on the other hand, the fraudulent grantee steps into the shoes of the grantor, and takes all his rights, subject to the same rights of the creditors as his were, and no other.

I would then inquire what are the relative rights and powers of creditors and their debtor, who is attempting to convey his estate out of their reach? The answer is perfectly obvious, that the creditors may levy on the land at any time, if they please, and thereby secure an interest in it. But their debtor has an equal right, at any time, to convey the land to a *bona fide* purchaser, and thereby secure a good and complete title in opposition to all their claims. I would also remark, that priority in exercising these rights is the only criterion to determine which shall prevail.

Precisely the same thing is true, after a fraudulent conveyance. The creditors have the same right to levy as they had before; and the grantee has the same right to convey as the grantor had. Neither can make a fraudulent conveyance to affect creditors; both can make a *bona fide* one.

In this way, perfect harmony is preserved; we give every part of the statute its full effect; the rights of the creditors are secured, without sacrificing those of the grantee. In this way, we render the conveyance void as to creditors, by continuing all their former rights unimpaired by the conveyance, and, at the same time, give to the grantee all the rights of the grantor.

This view of the subject must be correct, unless it can be shewn, either that creditors are placed in a more favoured situation in consequence of a fraudulent conveyance than they are without it; or, that the grantee has not all the

will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child in consideration of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circum-

rights of the grantor subject to their claims. Neither of these positions will be seriously contended for.

I am also strongly inclined to the opinion, that unless the grantee under a fraudulent conveyance can transmit the title to a *bona fide* purchaser, there is no person whatever who can; and the estate becomes completely locked up in his hands. The creditors certainly cannot; for they have strictly no interest in the land, until they have proceeded agreeably to law in making an application of it to discharge their debts. Can the fraudulent grantor, who has made a conveyance to defeat the claims of his creditors, afterwards convey to a *bona fide* purchaser? I think he cannot. The statute 27 *Eliz.* declares the conveyance void as to any *bona fide* purchaser, whether prior or subsequent to the fraudulent conveyance. And this is the case, whether the parties had it in view to defeat the particular conveyance in question or not. Indeed, the words of that statute are general, applying to all persons who have purchased, or shall purchase, for money, or other good consideration. It is therefore evident, that this statute gives the fraudulent grantor power to vest a title in a *bona fide* purchaser. But the statute of the 13 *Eliz.* was never supposed to have any such effect. Indeed, if it had, I see not but the 27 *Eliz.* was altogether unnecessary. Our statute seems to be nearly a copy of the statute of 13 *Eliz.* with some variation of expression, which consists principally in this, that the words "*debt and duty*" are introduced into our statute to supply the place of the words "*actions, suits, debts accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs,*" which are used in 13 *Eliz.* If our statute can be construed to affect *bona fide* purchasers at all it must be from the word "*duty*" which is introduced into it; and whether this can be construed to comprehend any of them or not, it is unnecessary for me to determine, because if it should be admitted that it can, yet I think, that the legislature have altogether omitted the general provision of 27 *Eliz.* rendering the conveyance void as to all *bona fide* conveyances whatever, and have confined it to such conveyance, or in the language of the statute (applying it to a case of this kind,) *such duty as is so endeavoured to be avoided* by the fraudulent conveyance. And this is as far as is necessary to attain all the ends of justice in this state where all deeds must be recorded at length in the town where the land lies; to which records, purchasers may, at all times, resort, with the utmost facility, and see the exact state of titles. The only possible danger of defrauding a purchaser by a covinous, deceitful conveyance, arises from the possibility, either that a fraudulent conveyance may be made with a view to immediately sell the land for a valuable consideration, and then get the fraudulent deed first recorded, and thereby defeat the *bona fide* conveyance; or knowing that the land has already been sold *bona fide*, but that the purchaser neglects to record his deed, a fraudulent deed is made with a view of getting it first recorded. And both these evils are sufficiently guarded against, by rendering the fraudulent conveyance void as to those purchasers whose conveyance was endeavoured to be avoided, and in confining it to those who were in view at the time of the fraudulent sale. I feel, however, very doubtful whether the

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stances, were to be rendered void upon a reverse of fortune, it would involve children in the ruin of their parents, and in many cases might produce a greater evil than that intended to be remedied. Nor will all such conveyances be valid;

legislature intended to legislate on the subject of *bona fide* purchasers; and while a disposition to attain all the purposes of justice, which seem necessary, would incline me to this opinion, it seems difficult, on the other hand, to give the word "*duty*" so extensive a meaning. But if it is admitted, that they intended to affect this subject; yet, I think, neither the ends of justice require, nor the words of the statute permit, us, to extend it to *bona fide* purchasers generally. And such a total departure from the provisions of 27 *Eliz.* as we find in our statute, sufficiently shows, that the legislature did not intend to introduce the provisions of that statute in their fullest extent.

If, then, I admit, that the fraudulent grantor has power to create a valid title in the purchaser, who was the particular object of the fraud; and if I admit, that he may also convey to creditors, as to whom the conveyance is void; yet I may conclude, that he has no general power to convey; and if the grantee has it not, no person has, and the property is locked up in his hands. And will it be seriously claimed, that creditors may stand by, and neither take the property themselves, nor suffer it to be sold? Shall they be suffered to neglect taking it, while the property remains in the fraudulent grantee's hands, and then defeat the claim of an innocent purchaser for valuable consideration? I feel no hesitation in saying, that if the grantor has not the power to sell to a *bona fide* purchaser, the grantee must have it. The law will not place property in such a situation that no person has the power to transfer it.

But if the grantor has the power to convey to a *bona fide* purchaser, it by no means follows, that the grantee has not the same power as fully as the grantor. Both may have it, and the first *bona fide* conveyance for value may stand, let which will make it. This is clearly the case in *England* under the statute 27 *Eliz.*, as I shall show more fully hereafter. Indeed, the great and manifest object of the legislature is to destroy the titles of covinous and fraudulent grantees, not *bona fide* ones, for a valuable consideration; and for this distinction there is the strongest reason. Creditors, indeed, ought not to be interrupted in collecting their debts, by the mere deceitful contrivances of others. But purchasers who have paid a full consideration, relying on regular and authentic evidence of title, stand on higher ground than creditors. The former have certainly equal equity with the latter: and having obtained a regular conveyance, together with possession of the land, this gives them a decided preference. So far as it respects the debtor himself, it seems to be admitted, that the innocent grantee for valuable consideration is to be protected, notwithstanding the claims of creditors, even though the object of the grantor should be to defraud his creditors; but it is denied as relative to a conveyance from a fraudulent grantee to a *bona fide* purchaser. I am, however, unable to see any difference in their situation. Both grantees equally rely on regular and authentic evidence of title; both equally pay a full consideration; both are equally innocent of any fraud, or even neglect; and both are supposed to have obtained actual possession of the land.

I am aware, that it was said in argument, that where the debtor sold the land himself, his funds would be increased by the consideration received;

for then it would be in the power of parents to provide for their children at the expense of their creditors. Nor is it necessary that an actual or express intent to defraud creditors should be proved; for this would be impracticable in

whereas by a sale from the fraudulent grantee, they would not. This argument might have some weight, if the sole object of the statute was to secure the interest of creditors, without any regard to innocent purchasers; but I think it perfectly clear, as I have already shewn, that the latter stand on the first and highest ground.

But again; where the fraudulent grantee sells the land, it must be supposed to be done in pursuance of an understanding with the grantor, and for his benefit. Besides, where the debtor himself sells for the purpose of defrauding his creditors, but conceals his object from the purchaser, the consideration received will of course be put out of the reach of his creditors.

It is not, then, the consideration received by the grantor, which affords protection and security to the *bona fide* grantee; but it is his own favoured situation. I consider it of the utmost importance to have the titles to our lands as stable and certain as possible. Possession in this case does not carry with it the same evidence of ownership as it does in the case of mere personal chattels; and as the property is more durable and permanent, so questions may arise regarding the title to it, at a much more distant period of time, than is ordinarily the case in regard to personal property. Few men in society, comparatively, could sell land, if they could afford no better security of title to their purchaser than what would be derived from their own responsibility; and few would dare to purchase, if their security was merely the warranty of the grantor. Such a state of things would reduce the titles of land to a level with mere choses in action, without giving the grantee power to secure himself by action, as a creditor may in ordinary cases; for the grantor may not be rendered liable upon his warranty until a distant period, when he may have parted with all the property he possessed at the time of the conveyance, and yet the grantee may have lost the land. Besides, it frequently happens that people, without either personal responsibility, or friends to become responsible for them, are under the greatest necessity of selling their lands. Our ancestors appear to have been fully impressed with these ideas, and have accordingly made ample provision, that whether a man obtains a title under a deed of conveyance, or the levy of an execution, or by descent; the evidences of his title shall appear on some public record in the neighbourhood of the land.

I would not say, that no evidence of title is to be admitted, except what appears of record; because there may be other evidence which affords more certainty than even this; particularly, a fifteen years quiet and uninterrupted possession, is, in my opinion, more to be relied on than any record evidence whatever. But I mean to say, that I would admit with great caution any principles which appear to me calculated to unsettle and render precarious, the titles to our lands. Of this nature, in an eminent degree, are the principles I oppose; and when taken in connexion with other principles recently settled by this Court, they appear to me to go very far towards destroying that security which every purchaser ought to have, who pays a valuable consideration for lands.

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many instances, where the conveyance ought not to be established. It may be collected from the circumstances of the case. But in all cases where such intent can be shewn, the conveyance would be void, whether the grantor was indebted or not.

Let us see, for a moment, what may be the situation of a purchaser, if these principles are adopted. It is now considered as settled law, that any debt contracted after a fraudulent conveyance stands on the same ground with those contracted before. And this is the case, though the creditor knows of the fraudulent conveyance; because he is supposed to know also that it is void in point of law, and contracts with that view. It was also decided by this Court in the case of *Beach* v. *Catlin*, 4 *Day's Ca.* 284. and must therefore now be considered as law, that no length of possession in the grantee under a fraudulent conveyance, will secure to him a title against the creditors of the grantor. It will then come to this, if a *bona fide* grantee is not to be protected, that a man about to purchase lands may examine the records, and find the title apparently regular. He may examine further, and find that the possession has followed the record title for thirty or forty years. He may, out of abundant caution, knowing that his grantor is not responsible, and therefore that he cannot rely on his warranty, still wish to search further. He proceeds to enquire into the debts which his grantor owes, and finds that the consideration he pays, discharges them all. He also finds, on enquiry, that all the grantors through whose hands the estate has at any time passed, are entirely free from debt. And after all this, he may pay the full value of the land, and yet his title may be defeated by a new debt, contracted with some one of the intermediate grantors, who may have made a fraudulent conveyance, perhaps forty years before, but whose debts then existing were all immediately discharged. This would be too monstrous to be admitted for a moment; yet it is the natural consequence of the principles contended for in this case, when taken in connexion with other principles which have been settled by this Court.

I think I may safely conclude, that on principle only, although I should derive no support from adjudged cases in the courts of *Great-Britain*, the *bona fide* grantee must be protected. And let it be remembered, that there has not been a pretence, even in argument, of deriving support to the principles I oppose from *English* authorities. It seems to be admitted, that those principles are entirely novel, both in that country and this. And I must be allowed to say, that they appear to my mind, as unfounded and dangerous to society, as they are novel.

I will now proceed to show, secondly, as was proposed, that my opinion is fully supported by adjudged cases in *England.*

I shall begin with citing *Andrew Newport's* case, reported in *Skin. Rep.* 423.

This case has been a leading one, though not the first in point of time. The question in this case arose upon the assignment of a mortgage, which appeared to be fraudulent in its creation, but the assignment was made on good consideration and *bona fide;* and it was objected, that this would not purge the fraud and make it good against the defendant, who was a purchaser *bona fide,* and for a valuable consideration. But *Holt,* Ch. J. said, "The first mortgage was good between the parties, and being so, when the first mortgagee assigns for a valuable consideration, this is all one as if the first mortgage had been

In order to enable parents to make a suitable provision for their children, and to prevent them from defrauding creditors, these principles have been adopted, which appear to be founded in good policy. Where there is no actual fraudulent

upon valuable consideration; for now the second mortgagee stands in his place, and therefore is within the proviso of 27 *Eliz.*"

It ought here to be remarked, that the statute of 27 *Eliz.* makes fraudulent conveyances void as to *bona fide* purchasers, as fully as the 13 *Eliz.*, or the statute of this state, does as to creditors. And yet we do not find Chief Justice *Holt* seizing hold of that part of the statute, rejecting every other, which serves to explain or qualify it. We do not find him pressing the rights of those in whose favour the fraudulent conveyance was declared void, regardless of the situation of the fraudulent grantee. But in determining the rights and powers of the *fraudulent grantee* to convey, he rather attends to *his* situation, and first declares the conveyance *good between the parties;* and on this basis founds his whole argument; for *this being so*, he says, *when the first mortgagee assigns for valuable consideration, this is all one as if the first mortgage had been upon valuable consideration.* But if Lord *Holt* had adopted the principles contended for by the counsel for the plaintiff in this case, he would have said, that the purchaser for valuable consideration under the fraudulent grantor is within the very letter and spirit of the statute, and that the fraudulent mortgage was as to him a mere nullity; and as the mortgagee had no title as to him, he could convey none which would affect his rights.

The doctrine I contend for is laid down substantially in *Comb.* 222. 249. where Lord *Holt* places the grantee under a fraudulent conveyance in the same situation with the grantor, by remarking, that *what Muddiford doth for valuable consideration, Kendal doth.*

In *Prodgers* v. *Langham*, 1 *Sid.* 133. the principle is laid down generally, that if a fraudulent grantee convey to a *bona fide* purchaser for a valuable consideration, it is good, and is purged of the fraud by matter *ex post facto.*

The same principles are fully adopted in the case of *Doe* on the demise of *Bothell* v. *Martyr*, 1 *New Rep.* 332. In that case, it seems, the grantor having made a voluntary settlement, attempted to defeat it, by fraudulently pretending to convey for valuable consideration, when no value was received, and the fraudulent grantee having made a conveyance *bona fide*, for a valuable consideration, the question arose which should be preferred. It was fully admitted, that the fraudulent conveyance was void as against the voluntary settlement, which was attempted to be avoided by it under 27 *Eliz.* And it was asked by counsel with an air of triumph, *How can a person convey a good title to a purchaser, when in his own hands the estate is a perfect nullity.* Yet Sir *James Mansfield*, Ch. J. thought that they could not, without overturning the settled and decided law, hold that the prior conveyance should defeat the one from the fraudulent grantee, made *bona fide*, for a valuable consideration.

Other cases might be cited in which the same principles have been recognized; but this seems to me unnecessary, as no opposing authorities have been adduced, nor have any come within my knowledge. All the decisions agree in this, that the *bona fide* purchaser is to be protected, and substantially assign the same reason for it, though different writers and judges present their ideas in somewhat different language. Some say, the fraud is *purged by matter ex post*

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intent, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child

facto; others say, that what the grantee doth for *valuable consideration*, *the grantor doth*; others say, that if the grantee assigns for valuable consideration, this *is all one as though the grantor did it*: and *Roberts* in his treatise on *Fraudulent Conveyances*, page 495. calls it *that sort of consideration which springs out of a transaction subsequent to a voluntary and fraudulent conveyance, and restores such conveyance to its leyal validity under the statute* 27 *Eliz as an authentic channel through which a title may be conveyed.* All agree, that the first fraud cannot be imputed to the last *bona fide* grantee; and when they go farther back, and give a reason for this, it is because the conveyance was good between the parties.

But it has been said, that all these decisions were had under the statute of 27 *Eliz.* and are to be accounted for by a proviso in favour of purchasers for good consideration, and *bona fide*. But this proviso does not apply to purchasers under a fraudulent grantee, directly, or in terms. Both the enacting part of the statute and the proviso, apply wholly to the first fraudulent conveyance. The former declares the fraudulent conveyance void; the latter, out of abundant caution, declares that it shall not extend to *bona fide* purchasers for valuable consideration.

If either the enacting part, or the proviso, extend to a purchaser under a fraudulent conveyance, it is by consequence merely. In this point of view did Lord *Holt* consider it, in bringing *Andrew Newport's* case within the proviso. And for this purpose, let us again attend to his words, and I think it will appear, that although Lord *Holt* said that case came within the proviso, he drew it as a mere conclusion from the principles on which I insist. After having stated that the first mortgage was good between the parties, and contending from thence, that when the mortgagee assigns for valuable consideration, this is all one as if the first mortgage had been on good consideration, he adds, *for now the second mortgagee stands in his place, and therefore is within the proviso of* 27 *Eliz*;—or in other words, the proviso would have saved the mortgagee, had his mortgagee been *bona fide*, and therefore it will protect a *bona fide* purchaser under him, who stands in his place. This I take to be the only case in which the proviso has been mentioned; and the use here made of it places the statute of 27 *Eliz.* on the same ground on which every body will agree that our statute stands without one, and the same as that statute also would have stood without one.

It is not unusual to insert in statutes, provisos, from abundant caution, to prevent false construction. When this is the case, they do not vary the statute in the least; they only inform courts what the statute, in the view of the legislature, ought to be. Of this nature is the proviso in question; and of this nature also is a proviso to the 13 *Eliz.* which is nearly in the same words.

But when the legislature enacted the statute of this state, the construction of those statutes had become so well understood, that no such proviso was thought necessary; and none was introduced into the first paragraph of the act, though in the second there is an exception of similar import with the provisos in the statutes of *Eliz.* But this I do not wish to insist on; because all agree, that

according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts; then such conveyance will be valid against conveyances existing at the

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our statute does not affect a *bona fide* conveyance for valuable consideration; and this places every conveyance of that description on the same ground precisely as they stand under the 13 or 27 *Eliz.*

Again, if the proviso was considered in *England* as affecting a purchaser under a fraudulent grantee directly; why did not Lord *Holt* mention it as decisive of the case? Why go through a course of reasoning to bring the case within it; and this by placing the second conveyance on the same ground as though it had been made *bona fide*, and on good consideration in the first instance? And why has the proviso now been referred to, or even named, in any of the other cases, except *Andrew Newport's*? These questions, I leave for gentlemen who think differently from me to answer.

I shall now conclude my remarks, by shewing that Lord *Kenyon*, in deciding the case of *Parr* v. *Eliason* and others, reported in 1 *East* 92. adopted the principles I contend for, and appears to have had no idea that they depended at all on the proviso of any statute. This was an action of trover for a bill of exchange. The plaintiff had endorsed the bill on an usurious consideration; but the defendant had received it on a *bona fide* consideration, without knowledge of the usury. Judgment was for the defendant; and Lord *Kenyon* remarked, "that where the bill itself, in its original formation, is given for an usurious consideration, the words of the statute of *Ann.* are peremptory that the assurance shall be void; and the construction put upon the statute has gone far enough in saying that it may be avoided in the hands of an innocent indorsee without notice. But no case has gone the length contended for." He cited the case of *Prodgers* v. *Langham.* 1 *Sid.* 133. and relies on the general doctrine that a conveyance voluntary in its creation may be rendered valid by an after purchase for valuable consideration. Here we find the principles adopted in the other cases extended to the subject of usury; but if they were to be accounted for entirely by the proviso in the statute of 27 *Eliz.* no such use of them could with propriety be made. It is perfectly evident, therefore, that he did not so consider them.

Edmond, J. was of the same opinion.

Reeve, J. The question in this case is this; where one man makes a conveyance to another, with an intent to defraud his creditors, and the grantee of this conveyance conveys to a *bona fide* purchaser, is the conveyance in the hands of the *bona fide* purchaser void against creditors?

I would observe, before I consider the point in controversy directly, that one may purchase of another without any intention to aid him in any fraudulent purpose; and yet the seller, when he conveys, may intend thereby to defraud his creditors. In such case, the conveyance is not void in the hands of the purchaser; for there was no secret trust that can be presumed between the grantor and grantee. The question then is this: where there is a fraudulent design in the grantor so to dispose of his property as to defraud his creditors, and the grantee receives it with a view to aid in the design, is such conveyance

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time. But though there be no fraudulent intent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of a bankruptcy; or if the value of the gift be unreasonable, considering the condition

void against creditors in the hands of a *bona fide* grantee of the fraudulent grantee?

Before I proceed to maintain the affirmative of this question, I would observe, that no argument can be drawn from the cases under 27 *Eliz.* in favour of the *bona fide* purchaser, who purchases from the *voluntary* grantee, in favour of a *bona fide* purchaser of a *fraudulent* grantee. A careful attention to the different objects of the two statutes must afford the most satisfactory conviction to the mind, that because the voluntary grantee under the 27 *Eliz.* can convey to his grantee for a valuable consideration a perfect title, which cannot be defeated by any subsequent grant of the voluntary grantor to another for a valuable consideration, this furnishes no authority to conclude that the fraudulent grantee under 13 *Eliz.* can, for a valuable consideration, convey a perfect title to his grantee. All the cases adduced in support of such a position arise under the statute 22 *Eliz.* And here we must keep in view, that where there is a voluntary grant, and the grantor has creditors, it is fraudulent, and within the purview of the 13 *Eliz.*: and where there is a voluntary conveyance, and there are no creditors, it is within the purview of 27 *Eliz.*

The objects to be attained by these statutes are *toto coelo* different.

The object of 22 *Eliz.* is to secure the purchaser for a valuable consideration from being defeated of his title by a mere voluntary grant. This is the sole object. It therefore was immaterial whether the sale for a valuable consideration was made to *C.*, by *A.* the grantor, or by *B.* his voluntary grantee. In both cases, the object of the statute was attained; and *C.*'s title, in both cases, would be a perfect title. And lest the words in the statute should be mistaken, the statute expressly provides, that in the case put, *C.* shall hold the estate, although *A.* should convey it after *B.*'s conveyance to *C.* for a valuable consideration to *D.* In this case, as the object of the statute was to prefer the purchaser with consideration to the purchaser without, it might well be said, that what *A.* could do, *B.* could do. As *A.* in this case could, notwithstanding his voluntary grant to *B.*, convey a perfect title to *C.* for a valuable consideration; so could *B.* And although *A.* should, for a valuable consideration, convey to *D.*; yet *C.* would hold it, since his was the older title.

The object of 13 *Eliz.* was to secure creditors from being defrauded of the debts due to them, by a fraudulent conveyance, by their debtors, of their property, to some fraudulent grantee. If *A.* had, with a view to defeat his creditors, run away with his money, having sold his property to a *bona fide* purchaser, who knew nothing of *A.*'s views, the conveyance would have been good in the hands of such purchaser. The precise danger intended to be guarded against is *A.*'s fraudulently conveying to *B.* who is conusant of the fraud, and who accepted the conveyance to give aid to his fraudulent views. In this case, the object of the statute will be defeated by validating the conveyance of the fraudulent grantee to a *bona fide* purchaser. For that security, such as it was, which the statute intended to protect for creditors, is, by this means, lost, and the object of the statute is not attained.

in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as to creditors. In the case under consideration, it is manifest there was no fraudulent intent; the

Under the statute 27 *Eliz.* the object of the legislature was to give a preference to the purchaser with consideration over the volunteer; which object was as effectually attained in the case put by a conveyance by *B.* to *C.*, as by a conveyance by *A.* to *C.* The rule, therefore, that what the grantor can do, the voluntary grantee can do, accomplishes the intent of the 27 *Eliz.* But the rule that what the fraudulent grantor can do, the fraudulent grantee can do, defeats the object of the 13 *Eliz.*

There is no doubt but the fraudulent grantor might have conveyed to *C.* a *bona fide* purchaser, and it would have been good. The creditor's rights are here secured: for *A.*, by the sale to *C.*, is enabled to pay his debts, and there is no presumption that he will not. But if *A.* conveys to *B.* fraudulently, and *B.* the fraudulent grantee conveys to *C.* a *bona fide* purchaser; *A.* by this is disenabled to pay his debts. He is not, as in the former case of his own conveyance, as able to pay as before; and the whole property is withdrawn from the creditors, either to increase the estate of *B.*, or the avails of the estate upon a secret trust between *A.* and *B.* are to be applied to the benefit of *A.* at the expense of his creditors.

I apprehend, it is the confounding of the different objects of the two statutes, that has ever occasioned any difference of opinion respecting this interesting question. The obvious meaning of the words of the statute, which declares all such conveyances to be utterly void against creditors, is, that as against creditors the grantee has no title, but the estate remains in the grantor, liable to his debts: and so has ever been the understanding of all men. If the grantee has no title against creditors, it would be natural to conclude that he could convey none against creditors. It must be admitted, that in ordinary cases, it is so that a person having no title cannot convey any. The maxim *quod non habet non dabit*, is a maxim of general applicability. I am fully aware, that there are cases where a title may be conveyed by one who has none, which I will presently notice; but they all stand on grounds very distinct from this question, and the reason of those cases bears no analogy to this.

When we give a construction to a statute, if we find that such construction will probably defeat the object which the legislature had in view, we ought to be very jealous of it: nay, I lay it down as a sound rule, that it is not the true construction. No facility to evade the object which the statute had in view to accomplish, ought ever to be admitted. The object which the law had in view cannot be mistaken. It doubtless was to prevent persons conveying their property into the hands of others, between whom and the grantor there was a secret trust that the grantor should have the benefit of it at the expense of creditors, by which means it was designedly withdrawn from being a fund to satisfy creditors, and converted into a fund to support the debtor.

According to the rule laid down, the construction that the fraudulent grantee can convey a good title to the *bona fide* purchaser, will tend to defeat this object of the law; and of course, such conveyance will not be good.

That it will defeat the object of the statute, I think, is clear. When the grantor and grantee are combining to defraud the creditors of the grantor, and

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gift constituted but a small part of his estate; was a reasonable provision by the father for the son, according to their condition and circumstances; and much more than sufficient for the payment of the debt due to the plaintiff remained in the hands of the grantor. I am, therefore, of opinion that

knowing that whilst the property remains in the hands of the grantee, their dishonest purposes will be frustrated, if the fraud is discovered, there will be, in many cases, no difficulty in finding a real *bona fide* purchaser, and in many others, one apparently so. And all this is a part of the plan entered into to accomplish the fraud, and defeat the law. The law, it seems to me, is made in vain, if such an evasion of it is to be sanctioned by the adjudications of courts.

Again, I apprehend, it will not be found, that where the words *utterly void*, or *void to all intents and purposes*, are used in a statute, such a construction has ever been given as to validate grants, conveyances or sales, in the hands of a *bona fide* purchaser, provided there exists a claim of any person against such grant or sale in the hands of the first grantee, obligee, or promisee.

Hence it is, that promissory notes infected with usury or gambling, although negotiable in the hands of a *bona fide* holder, are of no avail against the claims of the maker. It is impossible to conceive of a stronger case than this; for here is not interposed the claim of a third person, who had in no way contributed to the conveyance; but the maker himself, who was party to the wrong act, who had put the note into market, and contributed to its negotiability. This was a determination in a commercial country, where every nerve is strained to give effect to a note in the hands of a *bona fide* holder. Why then was not such a note holden good against the maker? Surely, it would have been, if it had been possible: for the claims of equity, and still superior claims of policy, seemed to require that it should have been held good against the maker. But the truth is, and so it appears from the declarations of Lord *Mansfield*, it was impossible; the words of the statute were too strong; it was made *void to all intents and purposes*. A policy greater than the opposing policy of commercial regulations required that no such construction should be given as would defeat the object of the law; for in this case, as in the case before the court, if the maker of the note and promisee combine to evade the law of usury, it is but for the maker to execute a negotiable note to the promisee, and then the promisee to negotiate the note; if this note becomes valid, the usury is purged, and the statute ceases to have the least effect. The policy of the law, which was to prevent such transaction from being a valid transaction, will never suffer such an evasion to defeat its provisions; and this, although there seems to be no equity on the part of the maker, and great equity on the part of the holder; but all this must yield to the superior equity of general justice. It is a much stronger case than the one before the court, to induce the court to give effect to the transaction. For this case resembles the other in this, that it is declared *to be utterly void as against creditors*, which is surely as strongly expressed as in the statute of usury, which is *void to all intents and purposes*. Nothing can be more void than to be *utterly so;* for in that case, it is void *to all intents and purposes*. To give effect, then, to the grant of the fraudulent grantee in the hands of the *bona fide* purchaser, would have the same effect to defeat the provisions of this statute, as it would to defeat the provisions of the statute of usury, to give effect to a usurious note in the hands

the indebtedness of the grantor at the time of the conveyance, the only circumstance that can operate against it, is not such as ought to set it aside, especially as a great length of time has elapsed, and the estate has passed into the hands of a *bona fide* purchaser, for a valuable consideration.(*a*)

(*a*) Where the conveyance was voluntary and *fraudulent*, it was held to be void, as against a subsequent *bona fide* purchaser for a valuable consideration. *Kimball* & al. v. *Hutchins*, 3 *C. R.* 450.

of a *bona fide* holder. Lord *Mansfield* found it impossible to give effect to such note, by reason of that statute. For the same reason, he would have found it impossible to have given effect to a conveyance from a fraudulent grantee to a *bona fide* purchaser. Then there is in point of equity this marked difference in favour of the present decision, that the person attempted to be injured by the fraudulent grant had in no measure contributed to the fraud, and had no hand in promoting the conveyance. In both cases, the equity of the *bona fide* purchaser is equal: but in that of the promissory note, the maker has no equity, whereas in the case of the fraudulent conveyance the equity of the creditor is equal at least to that of the purchaser; for he had trusted the grantor on the credit of his estate, which is, by the conveyance, attempted to be withdrawn out of his reach; and this was the equity which the statute meant to protect. If therefore, in a case governed by similar principles, and where the claim of the party that the *bona fide* holder shall not be protected against his claim, is less equitable than the claimant's in the present case, we find the law distinctly laid down that the *bona fide* holder must yield to the superior force of the positive declarations of the statute; surely, in this case, *a fortiori* it must be a successful analogical argument, that the claims of the *bona fide* grantee of the fraudulent grantee must yield to the superior force of the regulations of the statute against fraudulent conveyances.

I have heard it said, that on every principle the equity of the *bona fide* purchaser is as great as the equity of the creditor, so that even on the hypothesis that such purchaser has no title, neither has the creditor any; and being in equal equity, and the purchaser being in possession, such possession shall not be disturbed. The answer to this is, admitting the equity to be equal, and one in possession, yet that possession against the claim of the other avails nothing. If the other's claim is elder in point of time, no maxim of law stands on firmer ground than this, *qui prior est in tempore, potior est in jure;* and this maxim always, without any exception from its universal influence, settles at once the opposing claims of all, who, without legal title, have equal equity. The claim of the purchaser was unknown long after that of the creditor existed. By claim, I do not mean a specific lien on the thing conveyed, but only that equitable right which every creditor has to the property of his debtor, that it shall not be taken from him by a fraudulent contrivance between grantor and grantee. This the law considered as a right of sufficient magnitude to protect against a fraudulent conveyance; and this right must have existed prior to the purchaser's claim; for if it had not, there could not have been a fraudulent conveyance.

The advocates for the purchaser's claim contend, that the creditor has no specific lien on the property conveyed, so that the debtor might convey his whole estate to a *bona fide* purchaser; and such conveyance, it is not pretended, can be impeached; that the fraudulent grantee stands in the place of a grantor; and that whatever the grantor might do, the grantee, having all the rights of the grantor, (for the conveyance is good against the grantor) may also do; and as the

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In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, GODDARD, and HOSMER, JS. concurred.

GOULD, J. There is no case, I trust, in which a conveyance to a child, founded upon natural affection, has been adjudged void, as to *creditors*, for the mere want of a valua-

grantor may convey to a *bona fide* purchaser, and the conveyance be valid, although the property conveyed is withdrawn from the reach of the creditor; so the grantee may convey to a *bona fide* purchaser, and it will be valid, although the property is withdrawn from the reach of the creditor; and by this means, no greater injury is done to the creditor than when the debtor himself conveys.

I apprehend, that a fallacy lurks beneath this reasoning. When the debtor conveys his property to a *bona fide* purchaser, he is not by this means disabled from paying his debts. It probably will be the means of enabling him to pay his debts with greater facility. There is no presumption that he has the least intention of fraud, or that his creditors will be injured thereby. As the creditors had not secured any lien on the property, the law never intended to prevent the debtor from selling his property, always presuming that he meant to deal fairly with them. All that can be said in the case is, that it is possible for the debtor with more ease to defraud his creditor, when his property is sold and converted into cash, than when exposed to view. But the law does not calculate upon any such possible case of fraudulent intention, but always presumes the contrary. Upon the supposition that the debtor is unwilling to pay his honest debts, after having conveyed away his property for a valuable consideration, he is not on that account the less able to pay; and the law is always open to the creditor to enforce his claims; and the remedies provided by law must be presumed to be abundantly sufficient to enforce them. If the property is not liable to be taken, being sold, the body is liable to be taken on a *ca. sa.*, and holden until payment is made, which the law presumes will be made to procure the release of the body.

How different is the case when the fraudulent grantee conveys to the *bona fide* purchaser! The debtor is, by his fraudulent conveyance, utterly disabled to pay his debts; for he can have no demands upon his grantee for the purchase money. No fund is created to pay his debts. The fund of the fraudulent grantee is indeed increased; and all this at the expense of the creditors, without their having any possible chance of realizing any thing from their debtor's property. The object of the statute was to provide against the property of the debtor being conveyed away fraudulently out of the reach of the creditor. Of this there is no danger, when it is an honest conveyance, by the debtor himself. The law would not calculate against this. But when the property is fraudulently conveyed away, and then by the grantee conveyed to another, the very thing which the law meant to prevent is accomplished. The creditor is defeated of any effectual remedy; and therefore the law has calculated against such an event, and deemed such conveyance invalid.

The two cases are so far from resembling each other, that they are in direct opposition to each other. In the one case, no right of the creditor is affected, or endangered. There was, in presumption of law, no fraudulent intention to defeat creditors of their claims, but an honest intention to satisfy them. In the other, the object was to defeat the creditor's claims; and by the conveyance of the fraudulent grantee to a *bona fide* purchaser, this object is accomplished.

The very thing which the statute intended to prevent, takes place if a conveyance to a *bona fide* purchaser by the fraudulent grantee, is holden valid.

I have heard an argument suggested, to avoid the force of this reasoning which appears to me so wholly unfounded in principle, that I should not have

ble consideration; though there are several adjudications the other way. The question in *Doe* v. *Manning*, it should be recollected, arose under the statute 27 *Eliz.*: and it is familiar to the profession, that *purchasers*, for whose protec-

noticed it, as it was not urged by the counsel in the argument of this case, were it not that the seeming equity attending it may possibly induce some to believe it worthy of consideraiton. It is, that to secure the rights of the creditors, and also of the *bona fide* purchaser, the sale is to be regarded as valid, and the purchase money in the hands of the fraudulent grantee as belonging to the creditors, and that the same may be recovered by the creditors out of his hands; that, in fact, he is become debtor to the creditors for so much money received to their use. It is impossible to conceive how a creditor is to obtain his debt from the grantee in the event of the avails being insufficient to pay all the debts. Is he liable to the creditor who first sues for his whole debt? Or is the court to go into a settlement of the claims of all the creditors, and strike an average, and judgment to be rendered for this average sum? But it is decisive, that the grantor and grantee can never compel a creditor to change his debtor by any thing which they can do.

It is contended, that it is analogous to other well known cases to secure the *bona fide* purchaser. It is compared to sales in market overt; to sales at vendue by the sheriff; to the case of currency obtained by theft or fraud, and passed to others; for in none of these cases has the seller any title to the article sold, and yet the purchaser is protected.

All these cases and every other governed by the same principles, are exceptions to the rule *quod non habet non dabit*. But to an attentive observer, they will not seem to have any analogy to the case before the court. These are all cases in which the purchaser is protected, not on account of his superior equity; for the man who purchases a stolen horse in market has no greater equity against the original proprietor of the horse than the man who innocently purchases of a thief at private sale. The purchaser has paid his money in both cases; and if the horse is reclaimed by the original proprietor, he must lose his money in one case, and not in the other. We must then look to some other principle which governs in the excepted cases than a regard to the equity of the purchaser's case; for that is as strong in the one case as in the other, and yet in one it is wholly inoperative. The truth is, these cases are governed wholly by principles of policy. They are so determined, not from a regard to any private right, but from a regard to public good. The laws of the land, which are always deemed salutary, will be defeated of their intended operation, if the decisions were against the purchaser. No man would venture to purchase of strangers at a fair, or at a sheriff's sale, if he was liable to lose the property purchased. It would discourage all dealing among men, if a man's right to currency was called in question after having been fairly received. To prevent, therefore, the salutary laws of society from being frustrated in their operations, the superior equity of him who is *prior in tempore*, yields to an inferior claim. But where no such reason of policy exists, I trust, no case will be found where a purchase from one who has no title has been protected from the claims of others.

B. sells to *C.*, and he to *D.* The article sold passes through a variety of hands. This furnishes no argument in the mouth of the last purchaser against the claim of *A.*, if he has title, and *B.* has none, however inconvenient it may be to disturb the possession of the last purchaser, and all the intermediate sales; and

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tion that statute was made, have always been more favoured in the construction of it, than *creditors*, under that of the 13 *Eliz.* The former not having trusted to the personal responsibility of the grantor, but having advanced money,

surely, in point of policy, there is as much reason to protect the last purchaser as in the case before the court.

What law will be defeated of its operation, if the *bona fide* purchaser of a fraudulent grantee cannot hold his land against a creditor when the title of the grantee was utterly void as against such creditor? Surely none But on the other hand, the intention of the statute against fraudulent conveyances would be often defeated, and very great facility would be afforded to evade it, if such conveyances should be held valid. This view of the subject I apprehend, must convince every person that the cases argued from are in no respect analogous to the case before the court.

But, it is said, there are cases to be found where a conveyance, fraudulent in its creation, may become valid by matter *ex post facto;* as where *A.* conveys to *B.* without valuable consideration, and *B* to *C.* for valuable consideration, *C.* can hold this estate. The truth is, that such a conveyance is not fraudulent, unless there were creditors; but in the case alluded to, where *A.* conveys to *B.* without consideration, and *B.* to *C.* for one, and then *A* conveys to *D.* for a valuable consideration, it is held that *C.* will hold against *D.* But these are cases under 27 *Eliz.* rendering conveyances fraudulent as to purchasers void. But these cases are governed by totally distinct principles from those under the statute 13 *Eliz.;* and these are the cases where it is said what the grantor *A.* can do, the grantee *B.* can do, so that if *A.* had conveyed to *C.* upon valuable consideration, and then to *D.*, *C.* would hold against *D.* So if *B.* had done the same by conveying to *C.*, it would be good, and he would hold against *D.*, as much as if *A.* had conveyed to *C.* and then to *D.* In such case, no right of any person is affected; for *B.* had, when he conveyed, the whole title. It was void as to no person then in being; for there were no creditors. If there had been, it would have been void as against the creditors in the hands of *B.* But it is necessarily a case where there are are no creditors. *B.*'s title, at the time he conveyed to *C.*, for a for a valuable consideration, was good against all the world. Nothing, then, can be more reasonable, than to say, what *A.* could have done, *B.* might do; for no person's right could be affected by his conveyance, and when *C.* had obtained it for a valuable consideration, he ought to hold it against *D.* And here the maxim applies *qui prior est in tempore, potior est in jure.* But it is said, that the statute makes *A.*'s conveyance to *B.* void as against a future purchaser of *A.* for a valuable consideration. Here it will be observed, that it was not void until *D.* purchased; for until a purchaser appears, it is good. But where there are creditors, it is void, in its creation against them. If this conveyance ever became void, it was when *D.* purchased; but before that time, *C.* had purchased of *B.* for a valuable consideration, and *B.* will be considered as standing in *A.*'s place, and what was done by *B.* as done by *A.* But when there are creditors, *B.* is a fraudulent grantee, and has no power to convey to *C.* so as to affect creditors. But under 27 *Eliz. B.* is not a fraudulent grantee when he conveys to *C.* for a valuable consideration. The cases bear no analogy to each other.

But what is decisive of the question is, that the statute, by its proviso, has provided that the conveyance of *B.* the voluntary grantee of *A.* for a valuable consideration, shall be valid; as in the statute 13 *Eliz.* provision is made, if the grantor

only upon a conveyance of the *specific* property in controversy, and in confidence of acquiring an immediate title to it, are regarded as having a higher equity than general creditors. This diversity of construction is agreeable to all analogy.

conveys for a valuable consideration to a *bona fide* purchaser, the conveyance is good; and it is no matter if his motives were, that he might thereby withdraw his property from the view of his creditors; the grantee not being fraudulent, he shall hold the property. So too the 27 *Eliz.* after enacting that a conveyance without a valuable consideration, shall be void as to a purchaser with a valuable consideration, then provides, that no conveyance where there has been a valuable consideration paid by a *bona fide* purchaser, shall, notwithstanding this act, be impeached. This proviso can relate to no conveyance but one made by the voluntary grantee. It cannot relate to the conveyance made *to* the voluntary grantee; for that is not made with consideration. It cannot relate to a second conveyance with consideration by the grantor; for in the body of the act it is provided, that such conveyance shall be good against the voluntary grantee; and it would be perfectly ridiculous to provide in the proviso, that such conveyance should not be impeached, any thing in the act notwithstanding, since the whole object of the act was to validate it. It cannot then relate to any thing but the conveyance by the voluntary grantee, providing that in case he conveyed for a valuable consideration, that conveyance should not be impeached, notwithstanding the conveyance to him was voluntary.

The obvious meaning of the statute and the proviso was this—if a grantor conveys to a grantee without consideration, and then conveys to a grantee with consideration the first shall be void in that event, and the last prevail. But in case the first grantee conveys to another for a valuable consideration, it shall never be impeached by any subsequent conveyance by the first grantor. And nothing can be more reasonable than this; for the clear intention was, that a *bona fide* purchaser, who had paid a valuable consideration, should be preferred to a voluntary grantee; and this intention is as completely fulfilled when the voluntary grantee conveys for a valuable consideration, as when the original grantee does. It may well be said, that what the grantor can do, the grantee can do. In both cases, the purchaser for a valuable consideration holds, and when the voluntary grantee conveys, the right of no person is affected by it.

There is, then, no analogy between the cases of conveyance by the grantee under the 13 *Eliz.* and the 27 *Eliz.;* for under the 13th, the conveyance, by the grantor is in its creation void as to creditors; under the 27th, it is not void in its creation as to any person. Under the 13th, when the grantee conveyed, he had no title against creditors, and therefore conveyed none; under the 27th, the grantee's title, when he conveyed, was good against every person, and therefore, he could, and did, convey a title; and the statute expressly provides, that such title shall not be impeached. Under the 13th, the object of the statute was to prevent the debtor's property being withdrawn by collusion from the creditor. To sanction such conveyance would afford a facility to defeat that object. The object of the 27th was, that the grantee who paid a valuable consideration, should hold the land. To sanction the conveyance by the grantee for a valuable consideration, would completely attain that object.

As to the argument that the construction now given to the statute is fraught with mischief, because many titles will be destroyed by it, and that there will be no safety in purchasing, I cannot feel the force of it. This is always the case where a man purchases property to which the seller has no title. He is in danger of losing it. An elder and better title will always prevail against a void one, whatever

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hence, the construction of the statute 27 *Eliz.* has always been more rigorous, as against conveyances not founded on valuable consideration, than that of the statute 13 *Eliz.*

As to *creditors*, the want of a valuable consideration may be, under circumstances, a *badge* of fraud: but does not, *per se*, render the conveyance fraudulent. whether an actual fraudulent *intent* is necessary, to render it so, is a distinct question. it is sufficient, for the present purpose, that *something more* than the mere absence of a valuable consideration, must appear, in order to invalidate such a grant. Evidence of indebtedness, at the time, at least, and, as I conceive, of indebtedness, amounting, or approximating, to embarrassment, must be shown. For if any degree of inbebtedness, however small, would defeat such conveyances; they would, virtually, be *per se* fraudulent: since no individual, perhaps, or, at least, hardly any one, in the community, is at any time, *absolutely* free from debt. And as I discover, in this case, no such evidence, as I suppose, the rule requires; I cannot pronounce the conveyance to *Salmon Sherwood*, fraudulent. Holding this opinion, it is, of course, unnecessary for me to consider, whether the deed to the defendant would be void, as against credi ors, supposing the first conveyance to have been so.

Judgment to be given for the defendant.

the cause may be. And this is the reason why the purchaser, when he buys land, takes covenants of seisin and warranty. In this case, the purchaser is in the same situation with all others who have been evicted of their title. He must resort to his covenants. If the seller is a bankrupt, he is in the same situation as all others are, who purchased under a defective title, and the seller is a bankrupt.

INGERSOLL, J. gave no opinion, having been of counsel in the cause.

New trial not to be granted(*a*).

(*a*) Chancellor *Kent* says of this case, that it is "eminently distinguished for accuracy of research and closeness of reasoning;" that it "was discussed at the bar and upon the bench in an elaborate manner, and with very great ability;" and that he entirely subscribes to the opinions of the majority of the court. *Roberts* v. *Anderson*, 3 *Johns.* Ch. R. 379, 380. Though the decision of Chancellor *Kent* was reversed, by the court of errors, (18 *Johns. R.* 515. 543.) yet Ch. J. *Spencer*, who gives the opinion of the latter court, says, the case of *Preston* v. *Crofut* "was very ably discussed," on the part of the minority. *Burr*, of counsel in *Anderson* v. *Roberts*, characterizes the argument of *Gould*, as luminous, cogent, and perfectly conclusive." As to the *American* doctrine, as now settled, see 4 *Kent's Com.* 464.

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Fish v. Fish.

FISH and another, administrators of *Miller Fish*, deceased, *against* CATHARINE FISH.

The widow of a deceased mortgagor is entitled to dower in the equity of redemption.

THIS was an appeal, by the administrators of *Miller Fish*, deceased, from a decree of the court of probate for the district of *Hartford*, assigning dower, and appointing distributors to set out the same, to the widow.

The case was shortly this. *Miller Fish*, in his life time, being seised of several pieces of real estate, mortgaged them to several persons, some for as much as, and others for much less than, their value. These mortgages had all become forfeited at law, before the mortgagor's death; and no part of the mortgage money had been paid. Neither of the mortgagees had entered; nor had the equity of redemption in either pieces of land been foreclosed. The estate of the deceased was deeply insolvent; and there were no personal assets to raise the mortgages.

The question of law arising in this case was reserved for the consideration and advice of the nine Judges.

Perkins and *S. Terry*, for the appellants, cited *Dixon* v. *Saville*, *Pow. Mort.* 720, *& seq.* S. C. 2 *Cruise's Dig tit.* 15. *c.* 3. *s.* 10. S. C. 1 *Bro. Ch. Ca.* 326. *Nash* v. *Preston*, *Cro. Car.* 190. *Litt.* sect. 357. *Stat. Conn. tit.* 51. *c.* 1. *s.* 1.

Edwards, for the appellee, referred to *Hitchcock & al.* v. *Harrington*, 6 *Johns. Rep.* 290. *Collins* v. *Torry*, 7 *Johns. Rep.* 278. *Reeve's Domes. Relat.* 53., and was proceeding to discuss the question on principle, when he was stopped by the Court.

SWIFT, Ch. J. The question whether a widow can be endowed of an equity of redemption comes before this Court, the first time, for a decision; and we are at liberty to decide it on principle.

It is provided by statute, that the wife shall have dower in one third part of the real estate of her husband, which he stood possessed of, in his own right, at his decease(*a*). The

(*a*) *Tit.* 51. *c.* 1. *s.* 1.

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expression "in his own right," is intended to exclude dower in lands holden in the right of another, and does not require that the estate should be in fee-simple.

The enquiry then is, whether the mortgagor is not possessed of lands under a mortgage, in contemplation of law, so that the wife shall be endowed?

It is true, upon strict technical principles, the fee of the land vests in the mortgagee; yet to every practical purpose, it has always been considered, that he held the land only as a pledge for the security of his debt, and that he has the legal title only for the purpose of availing himself of the possession of the land that he may procure a satisfaction of the debt. *Reeves's Domes. Relat.* 53. The mortgage is a charge upon the land; it will go to the executors; and the assignment of the debt will draw the land after it as a consequence. 2 *Burr.* 978. In the settlement of an estate, a mortgage is always deemed to be personal assets. By a devise of all lands, a mortgage in fee will not pass, unless the equity of redemption has been foreclosed; and if, after the devise, a foreclosure is had, such estate will not pass by general words, because a foreclosure is considered as a new purchase of the lands. *Casborne* v. *Scarfe*, 1 *Atk.* 603.

But the equity of redemption is considered as an estate in the land; it may be devised; it will descend to the heirs; and may be levied upon by execution; so that whatever may be the technical consequence of the form of conveyance, he who is entitled to the equity of redemption, is considered to be the owner of the land, while the mortgage is personal estate. This is undoubtedly the proper light in which to view a mortgaged estate; because it is always in the power of the mortgagor, before foreclosure, to defeat the estate of the mortgagee, by payment of the money, and thereby regain a complete title; while the mortgagee can acquire an absolute title only by foreclosure, which is in the nature of a new purchase.

It would then seem clear on principle, that a mortgagor having a right to redeem, has such title and possession of the mortgaged land, as would, by force of the statute, subject it to the dower of his wife.

But in *England*, it has been decided, that a widow cannot have dower in an equity of redemption. It seems, however, that this decision was adopted without due consideration, in analogy to trust estates, in which there can be no dower

for in cases precisely similar in point of principle, they have not adopted the same rule. They have decided, that the husband is entitled to curtesy in the equity of redemption of the wife; and the reasons given by Lord *Hardwicke* for the decision would in all respects be applicable to the case of dower, and equally warrant it. When an objection was made because the wife was refused dower, he very properly observed, if any innovations are to be made, the nearest way to right would be to let in the wife to dower in a trust estate, and not to exclude the husband from being tenant by the curtesy of it. I apprehend, if the *English* courts were not bound by the unbending authority of a long course of precedents, they would discard this illiberal doctrine. At any rate, we ought not to regard decisions opposed to the principle of analogous cases; but we ought to furnish widows that reasonable provision from the estate of their husbands, which the law manifestly contemplates.

I am of opinion that the judgment of the court of probate ought to be affirmed.

In this opinion TRUMBULL, EDMOND, SMITH, BRAINARD, BALDWIN, GODDARD and HOSMER, Js. concurred.

GOULD, J. If an equity of redemption is subject to dower, either in a court of law, or in chancery; it is the duty of the judge of probate, who can act upon the principles that govern either of those jurisdictions, to assign it.

It is admitted, that by the rule established in *England*, the claim of the widow cannot be maintained; though the reasonableness of that rule has been questioned in the *English* courts themselves, by very high authority. And since the adoption of the modern and more liberal views, not entertained, of the nature and properties of an equity of redemption, the rule has been upheld, I think, by the strength of precedent, in opposition to principle. 1 *Black. Rep.* 160. At any rate, as it is confessedly a rigorous rule, and as the reasons, upon which it was founded, have ceased to operate in all analogous cases; I can discover no sufficient motive for adopting it here.

The original and principal ground of objection to the allowance of dower in this species of estate, is entirely artificial, *viz* that of a *pure trust*, since the statute of uses,

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(as of a mere *use* before,) there can be no *seisin;* and therefore, that the husband, in a case like the present, could not have been *seised;* his estate having been a mere equity, and in nature of a *trust.* And yet, it is remarkable, that *curtesy* has always been allowed in such an estate, upon the wife's mortgage in fee, this objection notwithstanding. A virtual seisin of an equity of redemption has also been recognized in various other cases. Thus, upon a forfeited mortgage in fee, the interest of the mortgagor is descendible and devisable; though the strict rule of law requires a seisin by the ancestor, in the one case, and by the testator, in the other, as indispensable to the transmission of the title. It appears, also, to be an established rule, in *England*, that the mortgagor in possession may acquire a settlement, as *tenant of a freehold.* And by the better opinion, as I conceive, this species of estate admits of a *possessio fratris*, so as to alter the line of descent. It is material to observe further, that, at the time when the rule denying dower to the *mortgagor's* widow, was established, the widow of the *mortgagee* was supposed to be entitled to it—at least, it was doubted whether she was not, (2 *Black. Com.* 158.) and if the question were to be governed by analogy to the doctrine of uses, (the very analogy on which the rule excluding dower in an equity of redemption is founded,) she certainly was. Now, so far as the *English* rule depended upon this last consideration, the reason of it has long since, and entirely, ceased.

But what is still more decisive, in this state, upon the point of seisin, is, that our own decisions have dispensed with it in cases much stronger than the present. For in the case of *Hillhouse* v. *Chester*, 3 *Day's Ca.* 166. it was determined by this Court, that a seisin by the ancestor was unnecessary to the transmission of title by descent; and in that of *Bush* v. *Bradley*, 4 *Day's Ca.* 294. that a surviving husband might take as tenant by the curtesy, where the wife had been disseised, during the whole period of coverture. Both these determinations, it should be remarked, related to *legal* estates: a circumstance, which renders them vastly stronger than that now before the court.

It is objected, indeed, that the estate of the mortgagor is too *slender* to support a right of dower; the mortgagor in possession being only *quasi* tenant *at will.* He is so, however, to every practical purpose, only *quoad* the mere right of *possession.*

In point of *interest*, he is regarded as the real owner of the lands; and the mortgagee, if he recovers possession, must account with him for the *whole* of the issues and profits: they being considered as the mortgagor's because the *estate* is so. His interest will pass in a devise, under the description of "lands," or "real estate." In *England*, it is assets in equity, and in this state, at law; and it may, here, be taken in execution, and set off to a judgment-creditor, in *fee simple*. Indeed, it has long been treated as an estate in fee simple, capable of a virtual seisin, not only for the purpose of letting in mere *volunteers*, (as heirs and devisees,) but, perhaps, for *every* substantial purpose, excepting only that of supporting a claim of dower: a claim of the first order, upon principles of natural justice, and more highly favoured by all the analogies of the law, than any other whatever; not excepting even that of a judgment-creditor.

It may be worthy of remark, also, that the practical hardship of the rule established in *England*, is, in that country, comparatively small: whereas, in this state, it would be very severe. In *England*, a mortgage in *fee* is rarely made; security upon lands being usually effected, by creating a large term for *years*, by way of mortgage, and thus leave the right of dower unimpaired; a consideration, which may have prevented the interposition of Parliament, to alter the rule. Our mortgages, on the other hand, are almost universally in fee.

The reasons, which will justify a departure from well considered *English* precedents, must, I admit, be very plain and cogent. Such, I think, exist in the present case; and in this opinion I am confirmed by two determinations, entitled to great respect, in the supreme court of the state of *New-York*, (6 *Johns. Rep.* 290. 7 *Johns. Rep.* 278.) as well as by a former decision of the superior court, which has been acquiesced in for many years.

The particular phraseology of our statute concerning dower, though somewhat relied upon at the bar, presents to my mind no difficulty whatever. It clearly furnishes no objection, which would not exist without it. A critical examination of it appears to me wholly unnecessary. Upon every ground, I think the present claim well founded. (1)(*a*)

Decree of probate to be affirmed.

(1) *See Bell* v. *Corporation of N. Y.*, 10 *Paige R.* 49.

(*a*) As to various points on the subject of dower, see *Whiting* v. *Whiting*, 4

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HUNTINGTON *against* EDWARDS.

The original purchasers of the Western Reserve, associated under the name of the *Connecticut Land Company*, preferred a memorial to the General Assembly, stating that they had sustained many inconveniences and embarrassments from the want of civil government in the Western Reserve, and from other causes, and praying for the remission of two years interest on their bonds to the state; which was granted on certain conditions, with a *proviso*, that the interest thus remitted to the obligors should, where a transfer had been made, enure to the benefit of the assign, in case he could make out a just claim thereto in law or equity. It was held, that the assign of one of the original purchasers could not recover the amount of his proportion of the interest remitted, in *assumpsit* against his grantor, without shewing that he purchased and held the land under such circumstances that he participated in the inconveniences and embarrassments for which the remission of interest was allowed.

THIS was an action of *assumpsit*. The declaration stated the following case. In *May* 1795, *John Treadwell*, Esq. and others, were appointed, by the General Assembly of this state, a committee, with authority to sell and convey, for and in behalf of the state, the lands claimed by the state lying west of the state of *Pennsylvania*, commonly called the Western Reserve. On the 2nd of *September* following, this committee gave and executed deeds of such lands to sundry persons respectively, and in divers proportions, to hold, as tenants in common, to them and their respective heirs. Of these grantees the defendant was one, and received a deed of 60,000 twelve hundred thousandths of the Western Reserve, to hold to him, and his heirs, as tenants in common with the other purchasers; in considerstion whereof, the defendant, at the same time, executed and delivered his bond to the treasuer of the state, to and for the use and benefit of the state, for the payment of the sum of 60,000 dollars, with interest. On the 5th of *September*, 1795, the defendant and the other purchasers voluntarily associated together, and formed themselves into a company, by the name of *The Connecticut Land Company*. For the more convenient and beneficial management of their common interest, they formed a constitution, in which they provided that there should be a board of trustees, and a board of directors, for the company. *John Caldwell*, *John Morgan* and *Jonathan Brace*, Esqrs. were, by deed, appointed trustees; and the lands were conveyed, by the pur-

C. R. 179. *Calder & ux.* v. *Bull*, 2 *Root*, 50. *Stedman & al.* v. *Fortune*, 5 *C. R.* 462. *Adams* v. *Butts*, 9 *C. R.* 79. *Goddard & al.* v. *Prentice*, 17 *C. R.* 546.

chasers, to them, and the survivors and survivor of them, to hold in trust to and for the sole use and benefit of the company, and each proprietor therein, according to his right and proportion. The legal title thereby became vested in the trustees; and all the beneficial interest of the purchasers remained in them respectively. This beneficial interest was commonly called "*trust and benefit;*" and in all the sales and alienations afterwards made, by the defendant and the other purchasers, the right to themselves respectively belonging, and to be conveyed, was specified and described as "*trust and benefit.*" [*565]

On the 13th of *July* 1797, the defendant applied to the plaintiff, and requested him to purchase of the defendant, a part of his interest in the Western Reserve, equal to 4,000 twelve hundred thousandths of the whole, to which the plaintiff agreed; and the defendant, in consideration of 9,000 dollars, received by him of the plaintiff, conveyed to the plaintiff 4,000 twelve hundred thousandths of the "*trust and benefit*" of the Western Reserve, to hold to the plaintiff, his heirs and assigns; whereby the plaintiff, as assignee of the defendant, became vested with four sixtieths of all the defendant's right and title, and continues to be the owner thereof. And the plaintiff, by virtue of such conveyance, became, and has ever since remained, a member of the company.

In *October* 1800, the trustees and directors of the company preferred their petition, in behalf of the company, to the General Assembly, shewing that the company had sustained many inconveniences and embarrassments from the want of civil government in the Western Reserve, and from other causes; and praying that two years' interest on the bonds given to the trustees of the state for the purchase money, should be remitted to the several obligors, or, where transfers had been made, to their assigns equitably entitled thereto, and that the payment of the principal of the bonds might be postponed. The General Assembly resolved, that on condition the respective obligors, on or before the 1st of *May* then next, should give, or should have given, good and sufficient security in lands or other property, to the satisfaction of the managers of the school fund, or such other persons as should be appointed to take care of the same, and should have paid and satisfied the treasurer of the state, by the 1st of *March* then next, the one half of the year's interest which would fall due on the 2d of *September* then next fol-

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lowing, and the other half thereof, when due; then the two years' interest which became due on the 2d of *September* next preceding, or the amount thereof, where the whole or part thereof had been paid, should be remitted, and discounted from, or indorsed on said bonds respectively, or deducted from the interest which should thereafter accrue, where the [*566] *whole or part of said two years' interest had been paid; so that the obligors of the respective bonds might have equal benefit. To this resolve the following *proviso* was annexed: "Provided also, that it is the intent and design hereof, that the interest hereby remitted to the said obligors, shall, where a transfer has been made, enure to the benefit of the assign, in case he can make out a just claim thereto in any court of law or equity."

At the time of passing this resolve, the defendant stood bound on his bond of 60,000 dollars aforesaid, and, within the time limited by the resolve, as well for the benefit of the plaintiff as of himself, complied with said terms and conditions; and thereupon, pursuant to the provisions of the resolve, the committee of the school fund, being thereunto fully authorized, on the 27th of *April*, 1801, discounted and allowed to the defendant on his bond, two years' interest, *viz.* the sum of 7,200 dollars; which discount and allowance was made by the committee, and obtained by the defendant, as well for the use, benefit and advantage of the plaintiff, as of the defendant himself, in the proportions in which they were respectively interested in the Western Reserve.

The declaration also averred, that all the embarrassments and inconveniences sustained by the company, which were the consideration of the grant made by the General Assembly, were sustained and suffered during the time the plaintiff, by virtue of his purchase, was a member of the company; and were sustained and suffered by him in his full proportion.

The defendant pleaded *non-assumpsit*, on which issue was joined to the court. On the trial, the plaintiff proved the formation and constitution of the *Connecticut Land Company;* their petition to the general assembly, and the resolve passed thereon; the allowance under that resolve of two years' interest to the defendant; and the transfer from the defendant to the plaintiff; all as stated in the declaration. The consideration paid by the plaintiff was agreed to be 4,679 dollars, 44 cents. There was no evidence that the plaintiff participated in the embarrassments and inconveniences sustained by the company, except what resulted, by im-

plication, from the evidence specified. The defendant, on his part, read a deposition, the contents of which it is unnecessary to *state. By consent of parties the case was reserved, with the evidence on both sides, for the consideration and advice of the nine Judges.

Sherman for the plaintiff.

Daggett and *N. Smith* for the defendant.

SWIFT, Ch. J. The plaintiff, as "assign" of the defendant, is within the proviso of the act of Assembly, and would be entitled to recover, if he could make out an equitable claim to the two years' interest that was remitted, or any part of it.

It appears, that the defendant conveyed the land in question, with a warranty of title. There was no conveyance of juridical right; there was no fraud, or misrepresentation by the defendant; and the plaintiff had full knowledge of the state and condition of the land, The sale was made after the embarassments respecting the title were well known. To entitle the plaintiff to recover, by making out an equitable claim, he must prove, that he purchased the land and gave for it a full price, admitting no embarrassment or inconvenience existed with respect to the title or juridical right, and that he has sustained the injury arising therefrom. Yet there is no such averment in the declaration, and it does not appear from the proof but that, at the time of the purchase, the parties contemplated all the inconveniences and embarrassments respecting the land for which the remission of interest was allowed, and that the plaintiff gave no more than what would have been a fair price on a calculation of the injury that might arise from the inconveniences and embarrassments; so that the defendant, by the depression of the value of the land, sustained this injury, instead of the plaintiff. Admitting, then, that the inconveniences and embarrassments continued after the purchase of the land; yet if they were taken into consideration in the price of it, the plaintiff cannot be entitled to the allowance. As it does not appear but that this was the case, I am of opinion, that this action cannot be sustained.

In this opinion, TRUMBULL, EDMOND, SMITH, BRAINARD, and BALDWIN, Js. concurred.

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HOSMER, J. If the Court were empowered to adjudge this case, on the principles of natural justice merely, I should unhesitatingly concur with the Chief Judge, for the reasons he has assigned. But I am of opinion, that the jurisdiction of the Court is more limited. The result will be precisely the same. Notwithstanding this, I consider it expedient to express my views of the subject before the Court.

The General Assembly, by their resolve, have, on certain conditions, remitted to the obligors, two years' interest on their bonds executed for the Western Reserve. They have subjoined a proviso, "That the interest remitted to the obligors, where a transfer has been made, enure to the benefit of the assign, in case he can make out *a just claim thereto, in any court of law or equity.*" How is this claim to be established? In the same manner, and on *the same foundation*, that all other demands are to be made out before the abovementioned courts; that is, *by the acknowledged principles of law or chancery.* It was for this reason, in my opinion, that the legislature omitted to specify some rule or principle, as a directory to the parties interested. By referring to the claims of assigns to courts, *guided by established principles*, they made all the provision which was necessary. The tribunals appointed to take cognizance of the controverted demands, were not vested with unlimited discretion. They were governed by principles well established, to the operation of which the legislature subjected every claim. Had the proviso referred the assigns to courts of law only, it would be the natural construction, that none but principles of law were to govern. If the reference had been to the chancery tribunals, the principles peculiar to those courts must have been the rule of decision. But as both courts are embraced, the extent of the relief intended appears to have been, all that law or equity, *on the rules which govern in these courts*, could possibly give. This construction I prefer, because it naturally expresses the full meaning of the proviso, and imparts settled rules and principles of decision, without confiding to the court that boundless discretion, which, except in cases of absolute necessity, ought never to be given.

To this construction of the resolve has been opposed the supposition, that it would render the proviso of no effect. The objection assumes the principle, that nothing can be

efficacious, which is not of strict necessity. This is clearly unfounded, and not conformable to common experience. By imparting correct rules of decision *explicitly*, there was sufficient of utility to render the proviso desirable; and on this ground, the legislature frequently qualify their acts in a similar manner.

It is not pretended, that there are any established principles of law or equity, which sanction the plaintiff's demand.

GOULD, J. I assent to the opinion, that the plaintiff cannot recover; but wish to be understood, as concurring in that opinion, upon the sole ground that he has not satisfactorily made out his case in evidence. As the views, which I entertain of the legal questions, arising out of the case, cannot influence the decision; it is unnecessary for me to explain them. I would just observe, however, that if the plaintiff had supported his declaration, by sufficient proof of his having participated in the embarrassments, expenses and losses, specified in the memorial of the land-company to the General Assembly; I should consider him as within the *proviso* of the resolve of *October* 1800; and, upon the equitable principles, which govern this action, entitled to a recovery.

GODDARD, J. gave no opinion.

Judgment to be given for the defendant.

ALLEN *against* RANNEY:

IN ERROR.

A court of equity may set aside an award, for corruption or partiality in the arbitrators for mistakes on their own principles, and for fraud and misbehavior in the parties; but not because new evidence has been discovered which would put the case upon a different footing, nor because the adoption of a different rule would effect more complete justice between the parties.

THIS was a bill in chancery, to set aside an award, and to examine and adjust the accounts of the parties.

The bill stated the following facts. In *April* 1814, *Ranney* conveyed, by bill of sale, to *Allen*, a sloop called *The Opposition*, as security for debts due from *Ranney* to *Allen*, and for indorsements made by *Allen* for *Ranney's* accomodation. In *December* 1814, *Allen* sent the sloop to *New-*

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York for sale, by *Ranney's* consent; but as *Ranney* directed him not to sell her for less than a specified sum, which could not be obtained, she was not sold. In the month of *March* 1815, *Allen* employed the sloop as he thought best for the concern, and so continued to employ her, until the 15th of *June* following. *Allen* had paid divers sums of money on the notes which he had endorsed for *Ranney*; and various controversies arose between them respecting their accounts, and their relative rights in the sloop. These controversies, and all others between them, were, on the 10th of *August* 1815, submitted to the arbitrament of *Stephen T. Hosmer*, *Thomas Mather* and *Samuel Wetmore*, Esquires, who awarded in favor of *Allen* the sum of 1615 dollars. *Allen* claimed, that a much larger sum was due to him. His principal grounds of complaint were, that the arbitrators in adjusting the accounts, charged him with the charter of the sloop from the time he took possession of her for the purpose of sending her to *New-York* until she returned to *Middletown*, at the rate of 2 dollars 50 cents per ton, on the supposition that she was so sent to *New-York* without *Ranney's* consent, whereas it can now be proved that this was done with his consent; and that the arbitrators did not allow against *Ranney* a bill of disbursements amounting to 120 dollars, made by the captain of the sloop while she was in *Allen's* possession, which bill of disbursements was not brought directly before them, but which they declared they would have allowed, or such portion thereof as was properly expended for the sloop, had they understood that such disbursements had been made.

There was a general demurrer to the bill; on which judgment was given for the defendant. The plaintiff then brought the present writ of error, assigning the general error.

C. Whittelsey, for the plaintiff in error, contended that where the submission is by the act of the parties, or by reference at *Nisi Prius*, a court of equity, on a bill against the party only, will set aside an award, if in any respect it appear to be unjust. *Ives* v. *Medcalf*, 1 *Atk.* 64. *South Sea Company* v. *Bumstead*, 1 *Eq. Ca. Abr.* 80. *pl.* 8. *Ridout* v. *Pain*, 3 *Atk.* 494, 5. *Anon.* 3 *Atk.* 644. *Champion* v. *Wenham*, *Anbl.* 245. *Newland* v. *Douglass*, 2 *Johns. Rep.* 62. *Kyd* 354. *& seq.* 1 *Bac. Abr. tit.* Arbitrament. (K).

Clarke, for the defendant in error, insisted that this award having been regularly made, could be set aside only for corruption or misbehavior in the arbitrators, or for a clear mistake of law. *Tittenson* v. *Peat*, 3 *Atk.* 529. *Parker* v. *Avery*, *Kirb.* 353.

SWIFT, Ch. J. Courts of equity can set aside awards for corruption and partiality in the arbitrators; for mistakes on their own principles; and for fraud and misbehaviour in the parties. Here there is no pretence of corruption in the arbitrators; there is no allegation of any mistake by them, or any fraud in the party, which will warrant the interposition of the court of equity. On the principle contended for, every award might be re-examined; and arbitrations, instead of being an expeditious mode of settling controversies, would only be calculated to lengthen and perplex them. The discovery of new evidence; or that the case might be put on a different footing by new evidence; or that a more perfect rule might have been adopted; are no grounds for an application to a court of chancery.(*a*) (1)

In this opinion the other Judges severally concurred.

Judgment affirmed.

(*a*) See *Brown* v. *Green & al.* 7 *C. R.* 536. *Lewes* v. *Wildman*, 1 *Day*, 153. *Bulkley* v. *Starr*, 2 *Day*, 553. *Fisher* v. *Towner & al.* 14 *C. R.* 26. *Ranney* v. *Edwards*, 17 *C. R.* 309. *Shelton* v. *Alcox & al.* 11 *C. R.* 240.

(1) In *Butler* v. *The Mayor of New-York*. 1 *Hill R.* 489, the Supreme Court held, that in a court of law, an award, good, by intendment, cannot be impeached collaterally, on the ground that the arbitrators exceeded or stopped short of the limits of the submission; for the intendment being *presumptio juris et de jure*, can no more be contradicted than the legal effect of any other written instrument; but the Court of Errors reversed that judgment, (7 *Hill R.* 329,) holding, that evidence may be given to invalidate an award by showing that the arbitrators exceeded their powers, though the submission and award are in writing and under seal; and that, in this respect, the rule is the same in law and in equity. An award cannot be impeached for an alleged mistake of law; *Jackson* v. *Ambler*, 14 *Johns. R.* 96; nor can it be reviewed on the merits, unless the arbitrators have acted corruptly or with gross partiality. *M'Kenney* v. *Newcomb*, 5 *Cowen R.* 425; *Courtlandt* v. *Underhill*, 17 *John. R.* 405; or except to modify it, where there has been an evident miscalculation of figures, or a mistake in the description of the person, &c. *Smith* v. *Cutler*, 10 *Wend. R.* 589.

BULKLEY and others *against* THE DERBY FISHING COMPANY.

Where two of several plaintiffs in an action on a policy of insurance on a vessel, were owners of the vessel insured, and all were in co-partnership, and joint

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owners of the cargo; it was held, that a sufficient interest in the plaintiffs was shewn to enable them to sustain the action.

A vessel was insured from *New-York* to *St. Bartholomews*, during the late war between the *United States* and *Great-Britain*, with a warranty that she should be furnished with a license from Admiral *Sawyer* in the usual form. The supercargo testified, that he saw a license from Admiral *Sawyer* on board; that he had seen a number of them; and this was in the usual form. Held, that this was sufficient evidence, that the vessel insured had on board a license from Admiral *Sawyer*.

It appeared, that in such license was a copy of a letter from Admiral *Sawyer* to the *Spanish* minister resident in the *United States*, in these words: "I will give directions to the commanders of His Majesty's squadron on this station, not to molest *American* vessels, or others, under neutral flags, unarmed, and laden with flour, and other dry provisions, *bona fide* bound to *Portuguese* or *Spanish* ports, whose papers shall be accompanied with a certified copy of this letter from your Excellency, with your seal affixed or imprinted thereon; which, I doubt not, will be respected by all." This was certified by the *Spanish* minister as follows: "I certify that the preceding letter is an exact copy of the letter addressed to me by His Britannic Majesty's Vice-Admiral *H. Sawyer*, the original remaining in my possession; and that it may so appear when convenient, I have granted this document to *George E. Avery*, captain of the *American* ship *Charles*, of 232 tons, which sails from the port of *New-York* for *Porto Rico*, with a cargo of stores and provisions: and I solicit the Admiral of His Britannic Majesty on that station, and other marine officers, that taking into consideration the necessity of encouraging and protecting these expeditions, to encourage the merchants to continue them, will be pleased to enclose this document, and permit the aforesaid vessel to return safe to this country. Given under my hand and seal, in *Philadelphia*, this 13th *November*, 1812. [*L. S.*] *Luis de Onis.*" The cargo of the vessel insured consisted principally of flour, but there was also on board some beef, pork and candles. Held, 1st, that the acceptance of such a license, by the insured, for the voyage in question, was not illegal, and did not vacate the policy. But, secondly, that the fair construction of such warranty being that such a license from Admiral *Sawyer* should be furnished as should purport to protect the vessel and cargo for the voyage, the license furnished will not be deemed a compliance with the warranty, unless it be further shewn, that there was no other form of license from Admiral *Sawyer*, and that according to the usage of merchants, such license was the only one required, whatever might be the cargo; or that the insurers had knowledge of the cargo put on board.

THIS was an action on a policy of insurance, effected, during the late war between the *United States* and *Great-Britain*, on the ship *Charles*, from *New-York* to *St. Bartholomews*, with a warranty that she should be furnished with a passport from Admiral *Sawyer* in the usual form. The declaration averred, that the plaintiffs had an interest in the ship to more than the amount covered by the policy; and alleged a loss on the high seas from capture, by the enemies of our country.

On the trial, the plaintiffs read in evidence the policy,

which corresponded with the declaration; a copy of the ship's register, and two depositions, from which it appeared that two of the plaintiffs were owners of the ship, and that *they were all in co-partnership, and joint owners of the cargo; a copy of the sentence of condemnation, proving that the *Charles* was taken by His Britannic Majesty's ship *Tribune*, and carried in and condemned; and a copy of the notice of abandonment. The plaintiffs also offered *Stephen Miller*, as a witness, to prove that the ship was furnished with a licence according to the stipulations in the policy. The counsel for the defendants objected to the admission of the evidence offered. They contended, that *Miller* could not be permitted to testify as to the existence or form of the licence; but the plaintiffs were bound to produce a copy from the court of admiralty, or prove that they had attempted to get such copy, and had failed. The court overruled the objection, and and admitted the evidence. *Miller* testified, that he was on board as supercargo, when the ship was taken. She had a licence from Admiral *Sawyer*, issued by the *Spanish* minister, Don *Onis;* and it was, as he thought, in the usual form. He had seen several. The licence was under the seal of the *Spanish* minister. It was taken by the captain and carried into court, and has ever since been withheld. The captors, and the *British* court of admiralty, admitted that the licence was genuine, but denied Admiral *Sawyer's* authority to issue it. He had taken a copy of the licence, which he produced. It was as follows.

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*"Copy of a letter from His Excellency *H. Sawyer*, His Britannic Majesty's Vice-Admiral on the *Halifax* station, to His Excellency the *Chevalier de Onis*, His Catholic Majesty's Envoy Extraordinary and Minister Plenipotentiary near the *United States* of *America*.

"*His Majesty's ship* Centurion,
at Halifax, *the* 10*th of* August, 1812.

"Excellent Sir, I have the honour to acknowledge the receipt of Your Excellency's letter of the 26th *ultimo*, and have fully considered the subject of it, as being of the greatest importance to the best interests of *Great-Britain*, and those of His Catholic Majesty, *Ferdinand* the Seventh, and his faithful subjects; and in reply, I have great satisfaction in informing Your Excellency, that I will give directions to the commanders of His Majesty's squadron on this station,

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not to molest *American* vessels, or others under neutral flags, unarmed, and laden *with flour and other dry provisions*, *bona fide* bound to *Portuguese* or *Spanish* ports, whose papers shall be accompanied with a certified copy of this letter from Your Excellency, with your seal affixed or imprinted thereon; which, I doubt not, will be respected by all.

"I beg leave to assure Your Excellency of the high consideration, with which I have the honour to be

"Your Excellency's most obedient, humble servant,

"*H. Sawyer*, Vice-Admiral."

This writing was certified as follows.

"His Excellency, Don *Luis de Onis*, *Gonzalez Lopez y Vara*, His Most Catholic Majesty's Envoy Extraordinary and Minister Plenipotentiary to the *United States*, &c. &c. &c.

"*Philadelphia.*

"Don *Luis de Onis*, *Gonzalez Lopez y Vara*, Lord of the village of *Ryares*, that of *Macadina* and *Lagartina*, *Prussian* Knight of the royal and distinguished *Spanish* order of *Charles* the Third, Vocal Minister of the Supreme Assembly of the same royal order, Counsellor of His Catholic Majesty *Ferdinand* the Seventh, his Secretary to execute his decrees, his Envoy Extraordinary and Minister Plenipotentiary near the *United States* of *America*, &c. &c. &c.

"I certify, that the preceding letter is an exact copy of the letter addressed to me, by his Britannic Majesty's Vice-Admiral *H. Sawyer*, the original remaining in my possession; and that it may so appear when convenient, I have granted

[*574] *this document to *George E. Avery*, Captain of the *American* ship *Charles*, 232 tons, which sails from the port of *New-York* for *Porto-Rico*, with a cargo of stores and provisions; and I solicit the Admiral of His Britannic Majesty on that station, and other marine officers, that taking into consideration the necessity of encouraging and protecting these expeditions, to encourage the merchants to continue them, will be pleased to enclose this document, and permit the aforesaid vessel to return safe to this country. Given under my hand and seal, in *Philadelphia*, this 13th *November*, 1812.

[*L. S.*] *Luis de Onis.*"

Miller further testified, that the cargo was on freight, and consisted principally of flour, but that there was on board some beef, pork and candles.

By agreement of the parties, the cause was taken from the

jury, and continued to the next term, that the points of law arising in the case might be submitted, in the meantime, to the consideration of the nine Judges. It was also agreed, that if either party should wish, after such points had been considered and decided, to make further proof, on another trial to a jury, they should have right to do so; otherwise the superior court, at the next term, should settle the loss.

N. Smith and *Bristol*, for the defendants, urged the following objections to the plaintiff's recovery. 1. That some of the plaintiffs had no interest in the subject of insurance. If this action could be sustained, any person might recover on a *wagering* policy, by joining with one who had an insurable interest.

2. That the warranty had not been complied with. First, there was no licence for such a *voyage* as this, *viz.* from *New-York* to *St. Bartholomews*, a *Swedish* port. Admiral *Sawyer's* letter gave no protection except to vessels "*bona fide* bound to *Portuguese* or *Spanish* ports." The *Spanish* minister could not enlarge, or vary, the licence. Secondly, the *cargo* of the *Charles* was not such as to come within the purview of the licence, and of course the vessel was not protected by it. The licence extended only to vessels "laden with flour, and other dry provisions." This vessel was laden with "beef, pork and candles," as well as with "flour." The case of the *Jonge Arend*, 5 Rob. 19. shews with what *strictness a licence must be pursued. Thirdly, in addition [*575] to these objections, the licence was not proved by *legal evidence*. The best evidence would have been an original passport from Admiral *Sawyer*. If a proper foundation were laid for admitting secondary evidence, the terms of such passport and its genuineness might be proved by witnesses. In this case, the original was not proved to be lost or destroyed. The only evidence of its contents, was a paper, certified by the *Spanish* minister to be a copy. This was not *an office copy*, and is entitled to no more credit in a court of justice, than the certificate of any private person. The witness who testified on the trial, had never seen an original passport of Admiral *Sawyer*, which he knew to be genuine. But admitting the paper on board the *Charles* to have been a genuine passport from Admiral *Sawyer*, the best evidence even of

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that was not given. It ought to have been produced, or its non-prodution sufficiently accounted for; which was not done.

3. That the voyage in question, under a licence from Admiral *Sawyer*, was illegal; and the policy, being a contract of indemnity against the risks of such a voyage, is also illegal, and void. The licence was granted, not merely with a view to protect this vessel and cargo from capture, but to promote the interests of the enemy. The trade which it authorized, was regarded by Admiral *Sawyer*, "as being of the greatest importance to the best interests of *Great-Britain*" as well as "those of his Catholic Majesty." There is no difference, in effect, between this licence and one to trade directly with the enemy. *The Julia*, 1 *Story's Dec.* 594. S. C. affirmed on appeal, the Supreme Court of the *United States*, *Wheaton on Captures*, 159. *The Hiram*, *Id.* 165. *The Aurora*, *Id.* 168. (*a*)

T. S. Williams and *Staples*, for the plaintiffs, contended, 1. That they had shewn a sufficient interest in themselves to prevent this being a wagering policy. The plaintiffs are the persons with whom the defendants contracted; they were jointly concerned in fitting out the ship; and were, at the time, in possession as owners. These facts are sufficient *prima facie* evidence of ownership. *Thomas & al.* v. *Foyle*, 5 *Esp. Rep.* 88. *Robertson & al.* v. *French*, 4 *East*, 130. 136, 7. At any rate, such of the plaintiffs as were indisputably *owners, may be considered as trustees for all. *Oliver* v. *Greene*, 3 *Mass. Rep.* 133. 137.

[*576]

2. That the plaintiffs have shewn a compliance with the warranty; which was, that "the ship should be furnished with a passport from Admiral *Sawyer* in the usual form." Both parties must be supposed to have known what such a passport was. The witness swore, that he saw a passport from Admiral *Sawyer* on board; he described it; shewed a copy of it; and then said, that he had seen several, and knew that this was in the usual form. The ship, then, had precisely what the plaintiffs contracted she should have. The kind of evidence, by which this instrument was proved, was the best, which, under the circumstances, could

(*a*) The cases here referred to were shortly afterwards reported at length, viz. *The Julia*, in 8 *Cranch*, 181. *The Hiram*, in 8 *Cranch*, 444, *and The Aurora*, in 8 *Cranch*, 203.

be had. Its genuineness was recognized by the *British* cruisers, to whom it was addressed.

3. That the acceptance of this licence did not render the voyage illegal. The doctrine that even a trading with the enemy is illegal, has not always been assented to without hesitation. Lord *Mansfield* said, he knew no cases that prohibit a subject trading with an enemy, except two; one of which was a short note in *Roll. Abr.* and the other a case in which it was held to be a misdemeanor to carry *corn* to the enemy. *Gist* v. *Mason*, 1 *Term Rep.* 85. But, at any rate, to render the voyage illegal, there must be *a trading with the enemy*. A belligerent may lawfully trade with the subjects of a *neutral* state; although the enemy may incidentially derive a benefit thereby. *The Liverpool Packet*, 1 *Story's Dec.* 513. 525. *The Vrow Elizabeth*, 5 *Rob.* 10. *Jenks & al.* v. *Hallet* and *Bowne*, 1 *Caines' Rep.* 60. 65. *Hallet* and *Bowne*, v. *Jenks & al.* in error, 1 *Caines' Ca.* 43. *S. C.* in Supreme Court of the *United States*, 3 *Cranch* 210. *The United States* v. *The Schooner Matilda*, 4 *Hall's Amer. Law Journ.* 478. The question on which the cases of trading with a neutral, under a licence from the enemy, turn, is, whether the voyage was designed, by the licenses, to aid the enemy.

SWIFT, Ch. J. It appears that two of the plaintiffs were owners of the vessel insured; and that the plaintiffs were all in a copartnership and owners of the cargo. This is a sufficient interest in them to enable them to maintain an action on the policy.

*In respect to Admiral *Sawyer's* licence, a witness testifies [*577] that he saw on board the vessel a licence purporting to be *Sawyer's* licence; that he had seen a number of them; and that this was in usual form. This writing need not be proved as a written instrument: it may be proved like any other matter of fact, or any other thing required to be on board the vessel. I am therefore of opinion, there is sufficient evidence that the vessel insured had on board a licence from Admiral *Sawyer*.

But the material question is, whether the licence from Admiral *Sawyer* did not render the voyage illegal, and vacate the policy.

It is indisputable, that all trading or private intercourse with the enemy is unlawful; and that all contracts founded thereon are void. If a licence had been obtained by the plaintiffs directly from the enemy, it would have rendered

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the voyage illegal. But here was no intercourse or contract with them: the voyage was fairly intended to a neutral port, and was lawful. There was no agreement to procure a licence from the enemy. It was obtained by a public minister of the neutral nation to whose territories the voyage was intended. It is opposed to no principle of policy to admit an application to a neutral power, to obtain a protection, for a neutral voyage, from a belligerent power. There is no rule of the law of nations prohibiting it, and there never has been a decision that a voyage thus protected was illegal: of course, the licence cannot render the policy void.

The fair construction of the warranty contained in the policy with respect to the licence, is, that a licence from Admiral *Sawyer* should be furnished of such form as should purport to be a protection of the vessel and cargo for the voyage. It would be unreasonable to say, that the plaintiffs might put on board a cargo which would defeat the effect of the licence. It appears that the licence was for a cargo of *dry provision;* and the cargo in the vessel insured consisted *both of wet and dry* provisions. This would be no compliance with the warranty, unless it could be further shewn, that there was no other form of licence from Admiral *Sawyer*, and that the usage of merchants, and the understanding of the parties, was, that such licence was the only one required, whatever might be the cargo, or that the insurers had knowledge of the cargo put on board the vessel. On this gronnd, [*578] the *plaintiffs are entitled to recover, without further proof.

In this opinon TRUMBULL, EDMOND, SMITH, BRAINARD and GODDARD, Js. concurred.

HOSMER, J. There is no controversy, at the present day, concerning what shall amount to an insurable interest. Not only the absolute owner may legally have the indemnity of a policy, but he who has merely a qualified property. The trustee may insure; and so may the *cestui que trust*. Even a reasonable expectation of profit will constitute that sort of interest which may be protected by an insurance. 1 *Marsh Ins.* 105. 107. (*Condy's edit.*)

What shall amount to the proof of an insurable interest, is equally well established.

Documents, evincing the property of the ship or cargo to be in the insured, undoubtedly constitute the best evidence.

If this species of proof is deficient, the deficiency may be supplied by parol testimony. The exercising acts of ownership in directing the loading, &c. of the ship and paying the people employed, is adequate evidence of property in the ship. In short, "*the mere fact of possession as owners* is *prima facie* evidence of ownership, without the aid of any documentary proof or title deeds on the subject, until such further evidence should be rendered necessary in support of the *prima facie* case of ownership made, in consequence of the adduction of some contrary proof on the other side." *Robertson & al.* v. *French*, 4 *East*, 136, 7. *Amery* v. *Rogers*, 1 *Esp.* 208. *M'Andrew* v. *Bell*, 1 *Esp.* 373. It is almost superfluous to add, that in this case, the plaintiffs have adduced sufficient proof of an insurable interest.

It has been objected by the defendants, that a passport, commonly called "Admiral *Sawyer's* licence," was on board the ship insured; and that this rendered the voyage illegal, and annulled the policy.

The proof by law required to establish the existence of the licence, admits of no question. In this, as in every other instance, the best evidence the nature of the case allows, is indispensable. A paper having been on board the ship, purporting to be a licence, infers no presumption of its own authenticity. Even as to the complete and genuine *papers with which every ship *must* be provided, the master [*579] should be acquainted with their truth, and capable of verifying them on oath. But, in respect of a document, not ordinarily found on board of ships, and making no part of their usual muniments, strict proof should be required. The established rules of evidence demand, that the seal of Don *Onis* should be verified by some witness who saw him affix it to the licence, or who knows it to be his seal. It is not judicially known. Even a judgment obtained in the island of *Grenada*, certified by the judge of the court, and whose hand-writing was proved, was held not to be established, because the seal of the island affixed to it, had not been verified by testimony. *Henry* v. *Adey*, 3 *East* 221. What is more to the purpose, the seal of Don *Onis*, like that of every other individual, must be established by the evidence of witnesses. If he is viewed as a public character, his seal must be proved, because it is not by law recognized, and can only be evinced like every other fact. The witness must be

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capable of testifying, not merely that he has seen many similar papers, which were called *Sawyer's* licences, but that he knows the seal by which the licence is authenticated.

The testimony of *Miller*, if believed, establishes the existence of the licence, as having been "under the seal of the *Spanish* minister," and that it was on board the ship, at the time of her capture. He further testifies, that it was taken, and has been withheld by the captors. This fact shows, that the paper is inaccessible, and that parol evidence is the best proof, of which it is susceptible.

If the licence rendered the voyage illegal, there exists no doubt, that the policy made to protect the insured, is void. The illegality of the transaction is the sole point, on which this part of the case depends.

It is incontestibly established, that all commercial intercourse with a public enemy is unlawful. *Potts* v. *Bell*, 8 *Term Rep.* 548. *The Brig Joseph*, 1 *Story's Dec.* 545. It is equally clear, that trade to a neutral port is not illegal, although the enemy may derive benefit from it, unless it be carried on in connexion with, or subservient to, her interests. *The Ship Liverpool Packet*, 1 *Story's Dec.* 513. An *American* ship, however, destined to *Spain* and *Portugal*, with provisions, *for the use of the allied armies in the peninsula*, sailing under a licence obtained from the public enemy, was [*580] *most justly condemned. *The Julia*, 1 *Story's Dec.* 594. The licence made no essential difference. The supplying the enemy with articles of necessary sustenance, was a high offence, and incapable of vindication.

I readily admit, that a licence obtained, through a neutral, from the public enemy, may either *per se*, or in connexion with the circumstances accompanying, furnish conclusive, or presumptive, evidence of an illegal transaction. I think it is equally apparent, that the voyage, the cargo, the place of destination, the passport, and every attendant fact, may convince the mind, that the only object of the merchant, was to obtain protection in the fair pursuit of neutral trade. Considerations of this nature are always open to the court, who will pronounce on the real intent of the transaction.

The great question yet remains, whether a licence obtained through a neutral, from the public enemy, *per se* renders the voyage illegal. I put out of the case, every thing which has

been said, relative to the sailing *under the flag* of the enemy. *The Vrow Elizabeth*, 1 *Rob.* 10. The flag is an essential characteristic of property, and equivalent to the most explicit declarations on that subject.

It never has been legally determined, that a voyage is made unlawful *merely and exclusively* from there being an enemy's licence on board a ship, destined for a neutral port. I am well aware of the *obiter* opinion, expressed by the learned Judge, in the case of the *Julia;* but as it was not called for in that action, it possesses no legal authority. At the same time, a respectful deference for sentiments emanating from so high a source, if unopposed, would impair the confidence I should otherwise have in my own. But in the case of the *Matilda*, 4 *Hall's Amer. Law Journal*, p. 478. 487. it was decided by the Chief Justice of the *U. S.* that the licence of a public enemy, did not, *of itself*, render the voyage illegal. The usage of merchants on this subject, the silence of courts, and the recent determination alluded to, require urgent arguments to evince, that a voyage is rendered illegal, merely from there being an enemy's licence on shipboard. Those which have been relied on, I will briefly examine.

It has been said, that licences being the subjects of purchase, increase the resources of the enemy. This remark, if it presented a full view of the case, would be among those *small things*, which rather tend to shew the weakness than force of [*581] *the argument. But, the truth is, it exhibits a small part of it only. The resources of our country, through the protection afforded by licenses, may be much enlarged; the commodities which the public exigencies demand, acquired; the produce perishing on hand, disposed of; and the national wealth augmented. By adding a trifle to the resources of the enemy, we, perhaps, quadruple our own. "The sound maxim of policy," (says a great Judge) "is this, *that a greater evil should be avoided for a less, and a less good should give way to a greater.* 1 *Cowp.* 6.

It has been argued, that the procurement of licences from the public enemy produces an intercourse with him, which may be abused to the worst purposes. Without stopping to examine by the balance this observation, the amount of which is not easily ascertained, it suffices to remark, that it is entirely inapplicable to the purchase of a licence from a friendly neutral. In the latter case, *there is no intercourse with an enemy.*

I has been contended, that if a licence is granted by an enemy,

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as a measure of policy, to obtain a supply of the necessaries of life, it would be exceptionable to sail under its protection. I admit the justice of the remark, if these facts are superadded; that an individual contracts to supply the enemy, and resorts to this mode of shelter from molestation. But, suppose the enemy, prompted by selfish views, were, by a general law, to sanction neutral trade, or by the hands of a neutral friend, were profusely to scatter their licences; would it be *within the jurisdiction of courts*, to balance the arguments of national policy for and against commerce, and to act in conformity with the result? I am of opinion it would not, and my reasons will be stated in a subsequent part of the argument.

It has been said, that a licence granted implies an agreement that it shall not be employed to the injury of the grantor, and that all hostility with him shall be avoided. Hence, that the *American* citizen must be *neutral* on the ocean, while his country is at war. The objection implied in this remark, lies against a general permission by the enemy to trade with neutrals. The neutrality of the merchant on the ocean is implied, and such will be the fact. The persons making the objection admit, that neutral commerce would not be affected, by the general permission above mentioned. But, why should
[*582] *importance be given to an argument of so little force? *The business of a merchant ship is commerce, and not battle.* The benefits derived from commerce, equally with those accruing from agriculture and manufactures, abundantly compensate the nation, for the few hands which are not permitted to wield the sword.

The subject, when stripped of all the covering, which plausible argument and specious eloquence may put upon it, rests on this narrow ground. *Commercial intercourse with an enemy, directly or indirectly, is unlawful.* An enemy's licence to trade, with accompanying circumstances, *may furnish satisfactory proof of illicit commerce, on the fairest presumption of a bona fide neutral trade.* Hence, a licence *of itself*, if nothing on the face of it tends to a different conclusion, *implies no demonstration of illegal views.* The enquiry always, from the very nature of the thing, must be, *a question of fact.* If the court is satisfied, that *a fair neutral intercourse* was intended, the transaction will be considered as legal; if a trading with the enemy, as unwarrantable.

Finally, the question whether a licence to trade shall render a

voyage illegal, embraces the highest political interests of the country. Prohibiting the use of it, pertains peculiarly to that legislature, with which such interests are specially confided. The wants of the country, may render the protection of licences of the highest importance; and the enlightened statesman may see, that from the "seeming evil" of them much good is educed. On the other hand, it may be equally apparent to him, that under the existing state of things, they are productive of little advantage, and much positive mischief. To the national legislature, then, it belongs, on principles of political expediency, to prohibit licences, when they are detrimental to the country. But, the judiciaries, in my judgment, have no jurisdiction to decide upon a question so peculiarly of legislative cognizance. The late act of Congress, 12th vol. p. 225. by forbidding the sailing under a licence from the public enemy *in future*, comports with the opinion I have expressed.

One enquiry yet remains. The policy of insurance, on the face of it, has a warranty by the insured, in these words; "Warranting her to be furnished with a passport from Admiral *Sawyer in the usual form.*" The cargo of the *ship *Charles*, consisted *of wet* and *dry provisions*. The licence alone purported to protect *American* vessels, loaded with *dry provisions only*. What, then, is the construction of the warranty, and what its effect? [*583]

A warranty, like every other part of a policy, must be construed according to the understanding of merchants, and does not bind beyond the commercial import of the terms. 1 *Marsh. Ins.* 347. *a.* (*Condy's* edit.) In this case, the warranty can mean no less than this; that a genuine *Sawyer's* licence, purporting to cover *the voyage and cargo* insured, shall be on board the ship. Security from capture by *British* cruisers, so far as that was attainable by a passport from Admiral *Sawyer*, was the undoubted object of the contracting parties. But, the licence proved imported no security, and conferred no protection. A comparison of the ship's cargo with the licence, by the commander of a cruiser, would furnish testimony infallible, that the property was unprotected. "If a ship, for want of a necessary document, merely subject herself to be carried into the port of a belligerent, she falsifies the warranty." 1 *Marshall*, 321. It was the stipulation of the insured, and nothing

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short of it could be intended, *that the ship should be protected* by the licence; and this necessarily implies a protection of every part of the cargo. The proof exhibited shows a non-compliance with the warranty.

It clearly results, that the policy never was obligatory on the insurers. 1 *Marsh. Ins.* 346. *a.* 347. *a.* 348. *Cowp.* 787. If the insured were prevented from obtaining a licence covering the cargo, by an *utter impossibility*, it is their misfortune, but imposes on the underwriters no additional obligation. *The contract is the standard*, by which the rights of the parties are to be estimated. *Co. Litt.* 206. 2 *Black. Comm.* 154. 157. 1 *Marsh. Ins.* ub. sup.

GOULD, J. As the case is presented to the court, there is one particular, in which I think the warranty has not been complied with. I refer to the cargo's not corresponding with the licence. Upon the other points, urged for the defendant, it is not necessary to decide; though, as at present advised, I do not perceive, that the case is embarrassed by any of them. It is true, that the intended cargo is not described, either in the warranty, or the policy. But,
[*584] *in my judgment, a warranty, that the ship shall be furnished with a pass, or licence, (the object of which is certainly the protection of a cargo of *some* kind,) implies *prima facie*, at least, that the document shall be such, as shall *import* to protect the cargo, that may be put on board. And this implication must, of course, prevail, unless it be rebutted, as perhaps, it might be, by some general usage of trade, or some special agreement, or understanding of the parties, to the contrary. In the present case, nothing of this kind appears; and the pass extends, in its terms, only to *flour and other dry provisions:* whereas the cargo actually consisted, not of those articles only, but of many others also, of an entirely different description. It is manifest, then, that the licence, supposing it to have been genuine, and authoritative, would not, according to the terms of it, have secured *this* cargo from capture; in which event the ship also would be liable, of course, to condemnation. But, whether, in any case, the risk is actually increased, or not, by a breach of warranty, is not material. The stipulation is in nature of a condition precedent, and must be strictly

complied with. And as this does not appear to me, from the facts before the court, to have been done, in the present instance; the plaintiffs have failed, in my opinion, to establish a right of recovery.

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BALDWIN, J. being interested in the cause, gave no opinion.

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IN THE

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1 To render the sentence of a district court of the *United States*, sitting as a court of admiralty, and deciding the question of prize, conclusive on the same point arising incidentally in the state courts, such district court must have had jurisdiction of the subject matter; and whether it had or not, the state courts are competent to examine and decide. *Slocum* v. *Wheeler* and others. 429

2 Where the president of the *United States*, under the authority of congress, issued a commission to the commander and crew of a private armed vessel *to seize any armed or unarmed British vessel, public or private, within the jurisdictional limits of the United States, or elsewhere, on the high seas, or within the waters of the British dominions, and to seize all vessels and effects to whomsoever belonging, which should be liable thereunto, according to the laws of nations, and the rights of the United States as a power at war, and to bring the same into some port of the United States, in order that due proceedings might be had thereon;* it was held that the goods of *British* subjects, seized by the officers and crew of such private armed vessel, *on land*, within the territorial limits of the *United States* and their peaceable possessions, could not be lawful prize of war, nor subject to the jurisdiction of a prize court. *ib.*

AGENT.

1 Though the acts of an agent, when acting for the principal, are binding on the principal, yet to let in proof of them, it is necessary to establish the agency by other evidence than such as may be derived from the acts proposed to be proved. *Scott* v. *Crane.* 255

2 *A.* and *B.* being jointly interested in certain notes executed by *C.*, *A.* appointed *D.* his agent and attorney, with power of substitution, to collect such notes, and to compound with *C.* respecting them. *D.* appointed *E.* his substitute, who received of *C.* in satisfaction of his notes, a note executed by *F.*, and gave up *C.*'s notes to be cancelled. *E.* afterwards collected about one half of *F.*'s note, and took a new note for the balance; and then failed, with the money collected of *F* in his hands. A small part of the last mentioned note was afterwards paid to *D.* who paid it over to *A.*; and this was all that *A.* received from *C.*'s notes. More than three years after these transactions, *B.* gave a note to *A.* for the amount of *B.*'s interest in *C.*'s notes, to which was annexed a condition that if the amount of *C.*'s notes were secured to *A.* or collected by *D.*, within one year from the date, *B.*'s note should be void. Nothing further having taken place in relation to this subject within the year; it was held, in an action on *B.*'s note, that the condition was not fulfilled, and that the plaintiff was entitled to recover. *Doan* v. *Smith.* 350

3 Where an agent, acting in the service, and for the benefit of his principal, is subjected, without any fault of his own, to a loss, by means of a groundless suit brought against him by a third person, such loss will constitute a sufficient consideration to support a promise by the principal to indemnify the agent. *Stocking* v. *Suge* and others. 519

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1 *B.* entered into a contract with *A.* to put a certain part of a turnpike road and causeway into full and complete repair, to the acceptance of commissioners, by the 1st of *July* 1810, and to pay damages in case of failure. This contract having been fulfilled in part only, *C.*, on the 19th of *October*, 1810, covenanted with *A.* that the road and causeway should be done, and completed according to *B.*'s contract, by the first day of *June* 1811; and that if any work done by *B.* should previously fail, and want repairs, it should be immediately repaired. In an action brought by *A.* against *C.* for damages, averring that the work done by *B.* failed and wanted repairs on the 20th of *October* 1810, the plaintiff offered evidence to prove that after the 1st of *June* 1811, the causeway in question fell down, through the insufficiency of the

CHANCERY.

A. owed a debt to *B.* which was secured by mortgage, and *B.* was indebted to *C.* to an equal amount. *C.* brought foreign attachment, obtained judgment, made demand of *A.* on the execution, which was returned unsatisfied, and brought a *scire facias* and recovered judgment against *A.*, who had no means of payment but the land mortgaged to *B.* Pending a bill for foreclosure brought by *B.*, *C.* made application in chancery to become party thereto, and to stand in *B.*'s place, and take the benefit of his security. Held, that *C.* was not entitled to the relief prayed for. *Judah* v. *Judd.* 309

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1 *A.* and *B.* being jointly interested in certain notes executed by *C.*, *A.* appointed *D.* his attorney, with power of substitution, to collect such notes, and to compound with *C.* respecting them. *D.* appointed *E.* his substitute, who received of *C.* in satisfaction of his notes, a note executed by *F.*, and gave up *C.*'s notes to be cancelled. *E.* afterwards collected about one half of *F.*'s note, and took a new note for the balance; and then failed, with the money collected of *F.* in his hands. A small part of the last mentioned note was afterwards paid to *D.* who paid it over to *A.*; and this was all that *A.* received from *C.*'s notes. More than three years after these transactions, *B.* gave a note to *A.* for the amount of *B.*'s interest in *C.*'s note, to which was annexed a condition, that if the amount of *C.*'s notes were secured to *A.*, or collected by *D.*, within one year from the date, *B.*'s note should be void. Nothing

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See SELECT-MEN.

TURNPIKE COMPANY.

1 A turnpike company are competent to bring a complaint on the stat. *tit.* 29. *s.* 7. against a town for the repair of bridges on the company's road. *Canaan* v. *The Greenwoods Turnpike Company.* 1

2 A turnpike company brought a complaint before the county court against the town of *C.* upon the stat. *tit.* 29. *s.* 7. for the repair of two bridges on the company's road in that town, and obtained a decree finding it to be the duty of the town to repair the bridges, and ordering the town to repair them accordingly, by a specified time, and thereafter to keep them in repair. In 1808, the company brought another similar complaint against the town for the same cause, and obtained a similar decree. A third complaint being afterwards pending between the same parties, it was held that the former decrees were conclusive evidence of the duty of the town to repair and maintain the bridges. *ib.*

3 The principal upon which the stat. *tit.* 166. *c.* 2. *s.* 3. proceeds, is, that the act of building and repairing bridges by a turnpike company, is a practical construction of their grant, thereby assuming them as their own, and waiving all claim against the town. If, therefore, a turnpike company originally built any bridges on their road claiming them to belong to the town, and afterwards kept up such claim against the town, the statute as to such bridges does not apply. *ib.*