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ZABRISKIE'S REPORTS.

VOLUME II.

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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

AND THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

A. O. ZABRISKIE,

REPORTER.

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" THOMAS P. CARPENTER,
" JOSEPH F. RANDOLPH,
" ELIAS B. D. OGDEN,
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JUDGES SPECIALLY APPOINTED.

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" JAMES SPEER.
" JOSEPH PORTER.
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" ROBERT H. MCCARTER.
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" GARRET D. WALL, *from Jan. term*, 1849.
" JOSEPH RISLEY, *from Jan. term*, 1850.

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CASES DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW JERSEY,

AT JANUARY TERM, 1849.

BERRIAN v. THE STATE.

1. It is correct, in the caption of an indictment, to style the Court of Oyer and Terminer "The Court of Oyer and Terminer and General Jail Delivery in and for the county of M.," without saying "of the state of New Jersey."

2. It is not necessary, in the caption of an indictment, to state that the grand jury were summoned, or by what authority they were summoned.

3. It is not error to join issue by adding the *similiter* in the name of *the state*, instead of in the name of the attorney general; and *semble*, any error in adding the *similiter*, or by not adding it at all, is amendable.

4. The justice of the Supreme Court and judges of the Common Pleas, who hold the Oyer and Terminer, are properly styled "*the judges* of the Court of Oyer and Terminer and General Jail Delivery."

5. When it appears by the record that a trial was held in a certain term, but on a day subsequent to the first day of the term, it is not error that the record does not show how the cause was *continued* from the first day of the term to the day of the trial.

6. It is error in an indictment to express numbers or dates by Arabic figures or Roman numerals; they must be written in *words at length*, except when the indictment, as in forgery, professes to set forth the exact tenor or a *fac-simile* of any instrument.

This cause was removed into this court, from the Middlesex Oyer and Terminer, by writ of error. The record sent up with the writ of error is as follows:

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STATE OF NEW JERSEY, Middlesex county, *to wit:*—Be it remembered, that at a session of the Court of Oyer and Terminer and General Jail Delivery, holden at New Brunswick, in and for the said county of Middlesex, on Tuesday the seventeenth day of November, in the year of our Lord one thousand eight hundred and forty-six, (it being the third Tuesday of November in the year aforesaid) before the Honorable James S. Nevius, associate justice of the Supreme Court of Judicature of the state of New Jersey, and P. P. R., M. B., and D. F. R., esq'rs, and others, their fellows, judges of the Inferior Court of Common Pleas in and for the said county of Middlesex, constituted a Court of Oyer and Terminer and General Jail Delivery in and for the said county, according to the form of the statute in that case made and provided, by the oath of James C. Zabriskie, &c., good and lawful men of the county of Middlesex, being then and there empannelled, sworn, and charged diligently to inquire in behalf of the state of New Jersey, and for the body of the county of Middlesex, it is presented in the manner and form following, *to wit:*

MIDDLESEX COUNTY, *ss.*—The grand inquest for the state of New Jersey, and for the body of the county of Middlesex, upon their oath present, that John B. Berrian, late of the township of North Brunswick, in the said county of Middlesex, wickedly and maliciously contriving and intending unjustly to aggrieve one John N. Johnson, and him, the said John N. Johnson, to subject to the punishment, pains, and penalties by the laws of this state provided for the persons guilty of felony and larceny, on the third day of August, in the year of our Lord eighteen hundred and forty-six, at the township aforesaid, in the county aforesaid, came in his proper person before Peter P. Mesuroll, esq., then and yet being one of the justices of the peace in and for the said county of Middlesex, and then and there, before the said Peter P. Mesuroll, esq., in due form of law, was sworn and took his corporal oath upon the holy gospel of God, he, the said Peter P. Mesuroll, then and there having a lawful and competent authority and power to administer the said oath to the said John B. Berrian in that behalf; and that the said John B. Berrian, being so sworn as aforesaid,

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not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, before the said Peter P. Mesuroll, esq., (the said Peter P. Mesuroll then and there having a lawful and competent power and authority to administer the said oath to the said John B. Berrian, in that behalf as aforesaid,) falsely, wickedly, wilfully, and corruptly did say, depose, swear, and make affidavit in writing, among other things, in substance and to the effect following, that is to say:

State of New Jersey, Middlesex county, *ss.*—Be it remembered, that on this *3d day of August*, 1846, John B. Berrian (the said John B. Berrian meaning), of the township of South Brunswick, in the county of Middlesex, in his proper person, comes before me, Peter P. Mesuroll (the said Peter P. Mesuroll, esq., meaning), one of the justices of the peace in and for said county (the said county of Middlesex meaning), and upon his oath maketh complaint, that on the 3d day of August, A. D. 1846, (the said third day of August, in the year of our Lord eighteen hundred and forty-six meaning) he, this deponent (the said John B. Berrian meaning), had one fanning mill stolen from his barn (the barn of the said John B. Berrian meaning), at the Sand Hills, of the value of ten dollars, and that the said fanning mill had been taken, stolen, and carried away from out of the barn of him, the said John B. Berrian; and that he, the said John B. Berrian, had just and reasonable cause to suspect, and did suspect, that the said fanning mill was then concealed in the barn or carriage house of the said John N. Johnson, in the township of South Brunswick, as by the same affidavit, now filed with the said Peter P. Mesuroll, esq., justice of the peace as aforesaid, more fully appears; whereas, in truth and in fact, the said John B. Berrian had not, on the said third day of August, in the year eighteen hundred and forty-six, nor on any other day, had a fanning mill or any other mill stolen from his barn or from any other place; and whereas, in truth and in fact, the said John B. Berrian had not, on the said third day of August, nor at any other time, any reason to suspect, and did not suspect, that the said fanning mill, nor any other mill of him, the said John B. Berrian,

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or of any other person, was concealed in either the barn or carriage house of the said John N. Johnson: and so the grand inquest aforesaid, upon their oath aforesaid, do say, that the said John B. Berrian, on the said third day of August, in the year eighteen hundred and forty six, aforesaid, at the township of North Brunswick aforesaid, before the said Peter P. Mesuroll, esq., (he, the said Peter P. Mesuroll, esq., then and there having such power and authority as aforesaid,) by his own act and consent, and of his most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil example of all others in the like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same. And afterwards, *to wit*, at a session of the said Court of Oyer and Terminer and General Jail Delivery of the said state, and of the county of Middlesex aforesaid, holden at New Brunswick, in and for the said county of Middlesex, on the fourth Tuesday of February, it being the twenty-third day of February, in the year of our Lord one thousand eight hundred and forty-seven, before the said James S. Nevius, associate justice of the Supreme Court of Judicature of the said state, and the said Peter P. Runyon, Matthew Brown, and David Fitz Randolph, esq'rs, and others, judges of the Inferior Court of Common Pleas for the county of Middlesex, constituted a Court of Oyer and Terminer and General Jail Delivery in and for said county, according to the form of the statute in that case made and provided, cometh the said John B. Berrian, in his own proper person; and having heard the said indictment read, and forthwith being demanded of and concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith he is not guilty thereof, and concerning thereof he puts himself upon the country.

And the state of New Jersey, by John C. Elmendorf, esq., who prosecutes for the state, doth the like. Therefore let a jury come before the judges of our said Court of Oyer and Terminer and General Jail Delivery, at the next session thereof, to be

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holden at New Brunswick aforesaid, in the county aforesaid, on the second Tuesday of June next, by whom the truth of the matter may be the better known, and who have no affinity to the said John B. Berrian, to recognise, upon their oath, if the said John B. Berrian be guilty of the premises aforesaid or not, because, as well the said John C. Elmendorf, esq., who prosecutes for the state in this behalf, as the said John B. Berrian, have put themselves upon the said jury; and the same day is given, as well to the said John C. Elmendorf, esq., who prosecutes for the state in this behalf, as to the said John B. Berrian. At which said next session of Oyer and Terminer and General Jail Delivery of the said state of New Jersey, of the county of Middlesex aforesaid, *to wit*, at New Brunswick aforesaid, in the county aforesaid, on Tuesday, the fifteenth day of June, in the year of our Lord eighteen hundred and forty-seven, in the term of June, in the year aforesaid, before the Honorable Ira C. Whitehead, associate justice of the Supreme Court of Judicature of the state of New Jersey, and Peter P. Runyon, Matthew Brown, and David F. Randolph, esq'rs, and others their fellows, judges of the Inferior Court of Common Pleas in and for the said county of Middlesex, constituted a Court of Oyer and Terminer and General Jail Delivery in and for the said county of Middlesex, according to the form of the statute in that case made and provided, here cometh, as well the said John C. Elmendorf, esq., who prosecutes for the state in this behalf, and the said John B. Berrian, in his own proper person, and the jurors of that jury, by James C. Stout, esq., sheriff of the said county of Middlesex, to this matter empannelled and returned, *to wit*, Isaac Manning, &c., being called, came; who being chosen, tried, and sworn to speak the truth of and concerning the premises in the indictment above specified, do say, upon their oath, that the said John B. Berrian is guilty of the premises in the said indictment on him above charged, in manner and form as in and by the indictment aforesaid is within alleged against him.

Whereupon all and singular the premises being seen, and by the said court here fully understood, it is considered, by the court here, that the said John B. Berrian be convicted of the

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offence in the said indictment charged; and it is further adjudged, by the court here, that the said John B. Berrian, for his offence aforesaid, do pay a fine of eight hundred dollars to the state of New Jersey, and the fees of prosecution, and the said John B. Berrian, here in court, is committed to the sheriff of the said county of Middlesex, safely to be kept until the fine aforesaid and the costs of prosecution are paid, or until he be discharged by due course of law.

IRA C. WHITEHEAD.

And thereupon the following errors were assigned:

1. That it does not appear, from the record and proceedings aforesaid, that the indictment in the record contained was presented by any lawful grand jury, thereto lawfully summoned, empannelled, sworn, and charged to inquire, &c.

2. That it does appear that, by the law of the land, no offence against the said law is set forth and charged in the said indictment, as having been committed by the said John B. Berrian.

3. That it was adjudged by the said court that the said John B. Berrian, for his supposed offence aforesaid, should pay a fine of eight hundred dollars to the state of New Jersey and the fees of prosecution.

4. That the said John B. Berrian, was thereupon, by the judgment of the said court, immediately committed to the custody of the sheriff of the county of Middlesex, until the fine aforesaid and the costs of prosecution should be paid.

5. That the indictment, and the matters therein contained, are not sufficient to warrant the judgment, or to convict him of the supposed perjury.

6. That the judgment and sentence are irregular, unlawful, and contrary to the statute.

7. That issue was joined on the said indictment between the state and John B. Berrian on the fourth Tuesday of February, in the year of our Lord one thousand eight hundred and forty-seven; and thereupon it was immediately awarded by the said court, that a jury should come before said court on the second Tuesday of June, then next. And that the trial of the said issue was not had on the said second Tuesday of June

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aforesaid; but that the said trial of the aforesaid issue was had on the third Tuesday of June, in the year aforesaid, and without any continuance unto that day, whereby and by means whereof a discontinuance was effected.

8. That the indictment does not contain, set forth, or charge any offence, whereof, by the laws of this state, the said Court of Oyer and Terminer and General Jail Delivery had cognizance, or which they had any right, jurisdiction, power, or authority to hear and determine.

To this, on part of the state, was filed the general joinder.

This cause was argued at October Term, 1849, before the CHIEF JUSTICE, and NEVIUS and CARPENTER, Justices, by *J. Warren Scott*, for the plaintiff in error, and by the *Attorney General* and *Elmendorf*, for the state.

J. W. Scott, for plaintiff in error.

I. The first error to which I call the attention of the court, is a defect in the source of accusation. I mean this to apply, as well to the tribunal who received the accusation, as to that supposed body, or voluntary assemblage of men, who presented it. There can be no doubt, among lawyers or judges, of this fundamental proposition, *viz: that the record of a judgment of conviction of crime must show in distinct terms that a proper and lawful indictment was presented, by a lawful grand jury, to a competent and lawful court, at a lawful time and place.*

The record must support itself; no extrinsic aid is to be allowed. It is of such high and supereminent authority, that it imports also absolute verity. Nothing shall be supplied; nothing shall be intended, other than is set forth; nothing shall contradict it. It is to be proved only by its sacred self.

These are aphorisms in the law familiar to every scholar, cherished by every judge. I make use of no reasoning to prove them; I cite no authority in their support; that would be superfluous.

1. To what court, then, was the indictment against Berrian presented? Let the record answer: "at a session of the Court of Oyer and Terminer and General Jail Delivery, holden at

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New Brunswick, in and for the county of Middlesex, on," &c., "it is presented," &c. What court is that? Has the county of Middlesex a Court of Oyer and Terminer? This is not so. The state of New Jersey has, indeed, a Court of Oyer and Terminer, &c., which is held in the county of Middlesex, and in every other county in the state, at appointed times. This cannot be understood as the session of the Oyer and Terminer of the state of New Jersey, for *the record does not say so.*

This exception has often been adjudged fatal, even on motion to quash, at times when motions to quash were much more discouraged than they are at present. More decidedly is the exception fatal on demurrer, motion in arrest, or upon writ of error. 1 *Lev.* 175; 1 *Vent.* 39, 242, 422; 1 *Shaw's J., Tit. Indictment;* 1 *Nelson's J.*, same title.

In England, the public courts of record are the king's courts. The peace is the king's peace, &c., and therefore the entry is "at the sessions of the peace of our sovereign lord the king," "at the session of Oyer and Terminer of our sovereign lord the king." In other words, these courts are the courts of sovereignty. In New Jersey the substance is the same; the style is varied to express the truth. It is commanded, in express words, in the constitution of the state, that all indictments shall conclude "against the peace of this state, the government and dignity of the same." Hence it is manifest that they should be presented at a court of the state, and not of a county merely.

2. It does not appear, from the record, that there was a lawful grand jury.

No man, says the constitution of New Jersey, shall be held to answer, unless upon the presentment or indictment of a grand jury. *Art.* 1, § 9. The grand jury shall be summoned and empannelled by the sheriff of the county, says the statute. *Rev. Stat.* 220, 221, 966.

The record of conviction must contain all things necessary and essential; nothing can be intended either in aid or impeachment of it; it imports absolute verity. The record under examination does not show that the sheriff summoned the grand jury, or that they were summoned at all, *non constat* but that they were a voluntary grand jury.

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It is no answer to this objection to say, that, in many instances, records are made up in this way in the English courts. It is to be remembered that the courts of Oyer and Terminer of that country are held by virtue of a commission, which is recited in every judgment roll. That commission contains the authority, in express terms, to "inquire by the oath of good and lawful men *and otherwise.*" The obedience to this mandate appears upon the record. In England there is no constitutional principle, that no man shall be held to answer, except upon indictment by a grand jury. They have *no statute* that the sheriff shall summon and empannel the grand jury.

II. This record is defective and erroneous, in the following particulars:

1. The issue, if there be an issue, is improperly joined. The replication is in these words: "and the state, by J. C. E., esquire, who prosecutes for the state, doth the like."

Sovereignty does not plead, sovereignty does not accuse: it tries, it condemns, it executes, it pardons, but it never pleads. Sovereignty does not say that any man is guilty until after his trial and conviction by a jury, or until he has acknowledged his guilt.

2. The award of *venire* upon the record is, that the jury shall come, for the trial of *the said issue*, before the *judges* of the said court.

The Court of Oyer and Terminer, &c., is composed of the justices of the Supreme Court and the judges of the Court of Common Pleas of the proper county, or any three or more of them, of whom one of the justices of the Supreme Court shall always be one. And the statute further enacts, that the justices of the Supreme Court and the judges of the courts of Common Pleas, *by virtue of that act, and without further commission*, shall constitute the courts of Oyer and Terminer and General Jail Delivery in and for, &c. Thus, by the statute, the two courts of Oyer and Terminer and General Jail Delivery were made one. These courts were not newly created; they had existed time out of mind. They were coeval with the first settlement of the country. No new name was given to them by the statute. The award of *venire* is to the judges

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aforesaid. The judges aforesaid, without the justice aforesaid, had no jurisdiction.

3. The award of *venire* is to the next session or term of the same court, as it is called. This is absurd. The Court of Oyer and Terminer is not a court of sessions or terms. It can have but one session, from its very nature. There may be a next or following *court*, but there cannot be a next *session* of the same court. It most certainly was so when the court was held by commission. The statute now stands in place of that commission, and nothing more. That an error in the award of *venire* is proper ground of reversal, appears abundantly from *Cro. Car.* 164, *Adams & Hicks;* same book, 261, *Ellis & Johnson.* So in *Arundel's case*, 6 *Co.* 14; 2 *Co.* 102; 2 *Keb.* 387; 3 *Keb.* 624.

4. It does not appear from the record that the indictment was tried at a court held for the county of Middlesex. The record is entirely silent *for* what county the court was held. For this very cause the judgment was reversed in *Rex* v. *Wilkes*, 4 *Burr.* 2563–4–5, &c.

5. The record shows that the cause was continued from the fourth Tuesday of February to the second Tuesday of June; and it appears from the record that the trial took place on the fifteenth day of June, which must have necessarily been later than the second Tuesday, and that there was no intervening continuance of the cause to that time.

6. It appears from the record that the indictment was presented at the Court of Oyer and Terminer of November, 1846; that the defendant, John B. Berrian, afterwards, at a session of the same court in February, 1847, being required to plead to the said indictment, pleaded the general issue; and that the said indictment was tried at the Court of Oyer and Terminer next following, on the fifteenth day of June then next following, and that there is no *placita* of any of the three courts. Nor does it appear how, or in what manner, the said indictment came into the hands, jurisdiction, or power of the second and third courts above named.

III. A part of this indictment is in Arabic figures, and there is no innuendo to explain their meaning. In olden times, plead-

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ings, court rolls, and all proceedings in courts of law were engrossed in Norman French. The statute 36 *Edw.* 3, required all pleadings and law proceedings to be entered and enrolled in Latin. The statutes 4 *Geo.* 2, *c.* 26, and 6 *Geo.* 2, *c.* 14, directed that they should be in English. Our statute is a condensation of these two acts of parliament, and it is done by a master's hand. It enacts that all proceedings whatsoever, in every court of law in this state, shall be written in words at length in the English language, *and in no other tongue or language,* and not abbreviated, except by such abbreviations as are commonly used in the English language; *provided nevertheless,* that it shall be lawful to express numbers by figures in like manner as hath heretofore, or is now commonly used in the said courts respectively.

During the time in which the statute 36 *Edw.* 3, was in force, a period of nearly three hundred and seventy years, there is not one case to be found justifying the use of Arabic figures in law proceedings. All the old reports repudiate them in most decisive terms. I do not find either authority or *dictum* allowing their use. Nor can I find any such authority, or even *dictum,* from Westminster Hall since the statutes of *Geo.* 2; on the contrary, numerous decisions condemn them in peremptory terms.

All the elementary writers, modern as well as ancient, concur in laying it down as a principle, that indictments must be written out in words at length; that no abbreviations are admissible; that figures cannot be allowed in indictments, but that all numbers must be expressed in words at length. To this general rule there is an exception, and that exception embraces two cases: first the case of forgery, and the second the case of threatening letters. In these two cases a *fac-simile* of the instrument may be given. And they assign a reason for it. I refer the court to 2 *Hale* 170; *Andrews* 146; *Burns' J., Tit. Indictment; Ryland C. C. C.* 51; *Cro. Ch.* 33; *Hawk. P. C. B.* 2, *c.* 25, § 129; 1 *Ch. C. L.* 176, and many more.

In New Jersey it never was the use or custom to express numbers by figures in indictments. The courts of our state never did adopt a custom or practice so slovenly or insecure.

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Our earliest reports condemn the use of figures in law proceedings, even in civil cases. "No common usage or custom has sanctioned the use of figures in this state; no such custom has ever obtained. From the earliest times to the present it would have been *error*," says C. J. Kirkpatrick, in the case of *Cole & Petty*, 1 *Penn.* 60. In the case of *The State* v. *Burroughs*, 2 *Halst.* 426, C. J. Kinsey makes use of similar language. He expressed his disapprobation in pointed terms, censured the pleader for his negligence, and quashed the indictment.

The indictment under review professes to set forth the substance and effect of the oath. It says that Berrian swore, *among other things*, to the substance and effect following. The oath set forth is therefore not a copy, nor can it be immaterial, for it is charged to be the substance and effect. It is a contradiction in terms to say that the substance is immaterial.

IV. There is no perjury or other crime punishable by law charged in the indictment of which the Oyer and Terminer of Middlesex had jurisdiction. The oath in which it is supposed that the perjury was committed, was taken in the township of North Brunswick, in the county of Middlesex, before P. P. Mesuroll, one of the justices of the peace of Middlesex. The substance and effect of it is set forth in the indictment.

Perjury is defined to be the wilful false swearing, where a lawful oath is administered in some judicial proceeding, and in a matter material to the issue or point in question. 1 *Hawk. B.* 1, *c.* 69, § 6; 3 *Inst.* 163–4–5–6; 4 *Bac. Abr. Tit. Perjury; Rex* v. *Aylett*, 1 *D. & E.* 69; 7 *D. & E.* 315; 4 *Bl. Com.* 137.

In 1 *D. & E.*, above quoted, Lord Mansfield takes occasion to say: I take the circumstances necessary to be, the oath must be taken in a judicial proceeding; it must be taken before a competent authority; it must be material to the question depending.

Let us for a moment examine the oath by these tests. We are not favored with a *fac-simile* or a copy; we have the substance and effect of it, in the shape of a certificate from the justice. It purports to be the act of Mesuroll. It is not signed by Berrian, nor does it appear that he ever saw it. Was it a lawful oath? Had Mesuroll any authority to administer that

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oath? Taken in its most enlarged sense, and without subjecting it to rigid criticism, it is either the substance of a complaint on oath, or it is the substance and effect of evidence upon a complaint there depending; but no mortal can tell which it is. It cannot possibly mean more than to complain, or to give evidence, that a larceny had been committed at the Sand Hills; but by whom committed, is not charged, stated, or even hinted. Who were participant in the offence, or privy to it, is not suggested. It is the mere naked fact, that a larceny had been committed at the Sand Hills. This is its utmost extent.

Had, then, Mr. Justice Mesuroll any jurisdiction of that larceny? Had he any right or authority to inquire of that crime? Mr. Justice Mesuroll is a justice of the peace of the county of Middlesex. His jurisdiction is local, it is confined to his proper county. Does it extend to the Sand Hills? Where are they? Are they in Middlesex? in Monmouth? in Burlington? or even in the state of New Jersey? Mr. Justice Mesuroll had no more authority to administer that oath, from all that appears in this indictment, than the constable or the town clerk.

An act done before a local officer, exceeding his jurisdiction, either territorial or in respect to the subject matter, is *coram non judice*, and altogether void. 2 *Lilly P. Reg.* 291. Perjury cannot be committed, unless the court before whom the oath was taken have entire jurisdiction. *Yelv.* 111, *Paine's case.* This case was decided on conference of all the judges. To the same effect, 3 *Inst.* 166; 3 *Leon.* 170; 1 *John.* 498; 2 *Nels. J., Tit.* "*Indictment*". These all concur in the same result. In 3 *Wheeler's Crim. Cas.* 180, the same point is again decided.

It cannot be intended, in the absence of all charge to that effect, that the Sand Hills are in Middlesex, or in New Jersey. *Burr.* 1127; 1 *South.* 51.

Criminal tribunals have a jurisdiction strictly local. It is *strictissimi juris*, says Sir Edward Coke. The locality must appear upon the record, responds the very learned and venerable Foster. Local jurisdiction shall not be intended nor inferred. 3 *Dall.* 382. It must appear upon the record, or it is error. 1 *H. Blac.* 136.

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There was a decision of the Supreme Court of this state involving the very question.

In June, 1804, J. S. went before the grand jury of Middlesex, and swore that R. B. stole his umbrella, at Vernon's tavern. The grand jury disbelieved him, and of their own motion indicted him for perjury in that oath. He was tried at the September General Jail Delivery of the same year, convicted, and sent to the state prison.

A writ of error was brought. This very error was assigned, *to wit*, that J. N., the foreman of the grand jury, had no lawful right to administer that oath; that the right and duty of the grand jury were alike local, and that they were confined to the county of M.; and that it was not charged in the indictment that Vernon's tavern was in the county of Middlesex. The cause was elaborately argued; and for that cause the judgment was reversed.

The attorney general removed the record into the Court of Errors, by writ of error. It was again argued with great labor and attention; and the judgment of the Supreme Court, reversing the conviction in Middlesex General Jail Delivery, was *una voce* affirmed, and the record remitted. J. S. was, by *habeas corpus*, brought to the bar of the Supreme Court, and discharged.

V. A part, and a very important part, of the definition of the crime of perjury is, that the matter sworn to shall be material to the question depending.

The question arises, what was the question depending? The indictment charges that Berrian, "wickedly and maliciously intending to subject John N. Johnson to the pains, penalties, and punishment by law provided against persons guilty of felony and larceny," made the oath.

Was there any complaint against Johnson for larceny? Did Berrian complain of Johnson in any shape? Every word that is here set down as being sworn to by Berrian, may have been true consistently with the entire innocence of Johnson. Does it charge Johnson with the larceny? No! Does it charge that Johnson knew any thing about the larceny? No! Does it charge that Johnson concealed the stolen article? No! Does it charge

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that Johnson knew of the concealment? No! not a word like it! *In the absence, then, of all averment*, that the matter sworn to was material; in the absence of all finding by the jury of that important and all operative fact, can this court, upon a writ of error, adjudge the materiality?

There is no rule or principle in criminal pleading more familiar to our minds, none more peremptory, none more consonant with sound reasoning, than this, that the materiality must be apparent and certain, not probable or guessed. *Comb.* 461; *Cro. Eliz.* 428; *Com. Rep.* 43; 2 *Ld. Raym.* 889; 5 *D. & E.* 318; *Rex* v. *Dunstan, R. & M.* 109; 1 *Stark.* 416, and many more.

VI. The judgment, as it is entered on this record, is erroneous in several respects, in form as well as substance. It consists of three parts:

1. *It is considered* that J. B. B. be convicted, &c.

2. *It is adjudged* that he, for his offence, do pay to the state of New Jersey a fine of eight hundred dollars and the fees of prosecution.

3. He is here committed to the custody of the sheriff until, &c. It is *ideo consideratum est* with regard to a thing utterly senseless and unmeaning; but with respect to the punishment, it is *judicatum est.* On this subject the law is very sensitive. The judgment is not to be the judgment of the court, it is to be the judgment of the law; it is to be a consequence flowing out of the antecedent premises. *Law of Errors* 90; *Lex. Int.* 141; 3 *Bl. Com.* 4.

4. The defendant was not allowed to move in arrest. Judgment ought not to be in cases of high crime without a demand. "*Si quid dicere habeat, quare judicium non,*" &c. 4 *Mod.* 407; 4 *Com. Dig.* 407; 3 *Mod.* 265; *R. Sho.* 132.

5. There is no *quod capiatur.* Many judgments have been reversed for this cause, and for improperly substituting it for the *misericordia et e converso.* All good pleading and entry require it. *Marquis of Winchester's case, Cro. Car.* 505. Upon every indictment the judgment is, and ought to be, *quod capiatur*, and for this omission the judgment was reversed.

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6. The defendant, J. B. B., is adjudged to pay to the state of New Jersey a fine of eight hundred dollars.

In the act for the punishment of crimes, we read that a person convicted of perjury may be sentenced to pay a fine of $800; but we do not find in that act, nor any other, that that fine shall be paid to the state of New Jersey. On the contrary, we read, in that very statute, that all fines imposed by the Oyer and Terminer, with a single exception, are to be paid to the proper county, and for their own use, and not to the state, for its use. *Rev. Stat.* 454, 261, 262, 301.

By the old law of New Jersey, fines were paid to the state; and then it was right to enter the judgment in that manner. There was an exception even then. A conviction for fornication then was, and still is, punished by a fine of fourteen dollars, to be paid to the overseers of the poor of the township. The judgments in such cases always were, and still are, entered and made up according to the truth of the matter, and to the plain command of the statute.

So in England, when the fine by law is appropriated to any use or person, the record of the judgment, which is absolute verity, and tells the whole truth, and nothing but the truth, designates to whom that fine shall be paid, or to what purpose it shall be applied. 3 *B. & P.* 354, *Cumberland* v. *The King, in error.* So also 4 *Ch. C. L.* 376.

VII. The judgment in this record, whether merited or not merited, is not the judgment which the statute prescribes in cases of conviction of perjury.

This is not an indictment at common law, but is altogether under the statute. The judgment in perjury is precisely pointed out by the statute. *Rev. Stat.* 262.

It is an essential part of the judgment, on conviction of perjury, that the convict *be thereafter incapable of giving testimony in any of the courts of this state, until such time as the judgment so given against the offender shall be reversed.*

The incapacity is to be a part of the judgment; it is not to be a derivative incapacity, it is to be direct, immediate, and indestructible, until the judgment be reversed. *Rev. Stat.* 262.

The language of our statute is very explicit: "If any person

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shall commit wilful and corrupt perjury on his or her oath or affirmation, &c., such person so offending, and being thereof convicted, shall be punished by fine, not exceeding $800, or by imprisonment at hard labor, not exceeding seven years, or both, at the discretion of the court, and be thereafter rendered incapable of giving testimony in any of the courts of this state, until such time as the judgment so given against the said offender shall be reversed."

It is plain, from this reading, that the statute requires that the infamy and incapacity to give testimony shall be a part of the judgment; and such construction of it is necessary and properly required. The first English statute having direct bearing upon this subject, and to which it is important to refer, is 5 *Eliz. c.* 9.

The sixth section enacts, that if any person shall commit any manner of wilful perjury, and be thereof convicted or attainted, he shall, for his said offence, forfeit twenty pounds, and have imprisonment by the space of six months, without bail or mainprise; and the oath of such person from thenceforth not to be received in any court of record within this realm of England or Wales, or the marches of the same, until such time as the judgment given against the said person shall be reversed, by attaint or otherwise.

Section seven provides, that if the offender shall not have goods and chattels to the value of twenty pounds, then he shall be set on the pillory of some market-place, and there have both his ears nailed, and from thenceforth be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time as the judgment given against him be reversed.

Many prosecutions took place under this statute. It was well considered by able judges and skilful pleaders. The result of their examination, so far as it respects the judgment roll, we have in the entries of Sir Edward Coke. *Co. Ent.* 368–9. After adjudging the forfeiture and the six months imprisonment, it adds: "Et si R. P. non habeat bona seu catalla ad valentiam viginti librorum, tunc idem R. P. imponatur super pilloriam apud Chelmsford predictam in cometatu predicto in loco mercatorum ibidem, et ibidem habeat ambas aures suas, cum clausu

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fixas, et quod predictus R. P. imposterum non sit receptus ut testis ad deponendum vel jurandum in aliqua curia de recordo intra dominia regni Angliæ vel Walliæ seu merchias eundem, quousque judicium predictum reversatum fuerit per attendum vel aliter, juxta formam statuti et quod capiatur," &c.

The statute 2 *Geo.* 2, adds the power of transportation; and the statute 18 *Geo.* 2, extends the penalties of both statutes to perjuries at elections. On these statutes, the judgment is *inter alia*, that your oath be not henceforth received in any court of record of England or Wales, or the marches thereof, until this judgment be reversed. So are all the precedents; I have not found one exception. *Co. Ent.* 368; *Rast.* 86; 4 *Ch.* 369.

That it is required to be so, and that it ought always to be so, is asserted by Holt, C. J., 2 *Salk.* 514. He says, "it is part of the judgment to be disabled." So in same book, 690, he says, "It is not a consequence, but part of the judgment, *viz:* Quod imposterum non sit receptus ut testis;" and he cites *Co. Ent.* 368, above quoted.

In 6 *East.* 327, Price, the defendant, was found guilty of perjury at an election. Judgment was passed against him, without incorporating within it the judgment of disability. During the same term the court discovered their error, set aside the erroneous judgment, and rendered a new one, according to this important provision of the statute.

No correct reader or judge can fail to perceive the exact conformity of our act of Assembly to the statute of *Elizabeth*, on the subject of the incapacity. The fine, imprisonment, and incapacity are in the same section in both alike, and both are subject to the same construction.

We have seen that Lord C. J. Holt, in the two cases cited from *Salkeld*, in express words, rules that the incapacity to testify, was and ought to be a part of the judgment; and the reason that he assigns for it, is because it is part of the punishment prescribed. I might cite many more cases, but it is surely unnecessary; no authority can be higher than Sir Edward Coke, Sir John Holt, and Lord Ellenborough, and they are entirely uncontradicted. A strong line of distinction is very apparent between that incapacity which is part of the punishment, and

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that which is merely derivative. In the latter case pardon restores the competency; in the former it does not. Perpetual infamy is adjudged; and it is indelible, except by that power which reverses the entire judgment.

If it be admitted, as I think it must, that the incapacity in cases of conviction of perjury under the statute ought to be a part of the judgment, it seems to be the work of supererogation to prove that its omission is error.

In 2 *Salk.* 632, *Rex* v. *Walcott*, a writ of error was brought to reverse a judgment of high treason. The judgment was "Quod interiora extra ventrem trahentur," but these words, "*in conspectu ejus et ipso vivente comburentur*," were omitted. Upon solemn argument the whole court, *una voce*, reversed the judgment, for want of the words *ipso vivente et in ejus conspectu*. In *Gilbert's Cases* 48, this is cited by the very learned and able chief baron with high approbation. The chief baron is himself high authority. In *Lilly's Ent.* 241, judgment was reversed on a writ of error by the heir, for want of the same words in a judgment against his ancestor. The current of decisions in Westminster has been uniform.

If the principles and the settled law of entry required such decisions in that forum, we are compelled to say, that the same principles and the same law command the same decisions in the courts of New Jersey. Surely the great rights of personal security ought not to be less vigilantly guarded in such a republic as we have, than in the monarchy which governs the British isles. It follows, then, that the judgment against Berrian is faulty in this respect.

But it may be urged, that Berrian has no right to assign this matter for error. We may be told that it is laid down in our books, as a general rule, that no man has a right, or shall be allowed to reverse a judgment for error, unless he can show, also, that the error complained of is to his injury. This is the objection in its full strength.

This general rule, as it is called, is to be understood with many exceptions:

1. It never was the rule in criminal pleadings. It never, in any one case, has been adjudged to extend to criminal law:

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numerous decisions evince the contrary. *Rex* v. *Walcott*, above quoted, is decisive of this. So in *Beecher's case*, 8 *Co.* 115; 4 *Mod.* 162; *Ins. Leg.* 341; *Doc. Plac.* 423, and very many others.

2. In civil cases, also, where the error is the default of the court, it may be assigned, if it appear upon the record. 2 *Saund.* 258. The error of the court may always be assigned. *Cro. Car.* 211, *Beecher* v. *Shirley*. "There is no judgment the plaintiff to be *in misericordia*, and the plaintiff himself, in whose advantage it was omitted, may assign it for error." And the judgment was reversed. The same principle is asserted and maintained in 2 *Cranch.* 126.

The result is, that Berrian has an indisputable right to assign for error the omission of the judgment of incapacity; and if the statute is to be obeyed, the judgment of the Oyer and Terminer of Middlesex must continue to remain reversed, as by the judgment of the Supreme Court it now is reversed, and Berrian must be restored.

Green, C. J. The writ of error in this cause removes into this court, from the Court of Oyer and Terminer and General Jail Delivery of the county of Middlesex, the record of conviction of the plaintiff in error upon an indictment for perjury. The importance of the cause, and the learning and research which characterized the argument, demands at the hands of the court a careful examination of the numerous objections assigned for error, and discussed upon the argument. In performing this duty, I shall consider the several objections, in the order in which they were presented upon the argument by the counsel for the defendant.

The first error assigned is, that it does not appear by the record that the indictment was presented by any grand jury, thereto lawfully summoned, empannelled, sworn, and charged, &c.

And it is first insisted, that the court before whom the jury is empannelled is not a tribunal known to the law. The jury were empannelled at a session of "the Court of Oyer and Terminer and General Jail Delivery," holden at New Brunswick, in and for the said county of Middlesex.

It is contended that the Oyer and Terminer is a state, not a

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county court, and that it should have been styled "The Court of Oyer and Terminer and General Jail Delivery of the state of New Jersey."

It is a sufficient answer to this objection to say, that the designation given to the court in the record, is the precise designation given to it by law. *Rev. Stat.* 220.

It is moreover, in very terms, the designation given to the court in all the approved precedents to be found in our reports. 2 *South.* 539, 746; 4 *Halst.* 357; 6 *Halst.* 204.

It is further objected, that it does not appear that the grand jury were *summoned*, nor by what authority they were summoned. The record sets forth that the presentment was made by A. B., &c., good and lawful men of the county of M., "being then and there empannelled, sworn, and charged diligently to inquire." This language is in strict conformity with the most approved precedents. 4 *Bl. Com.*, *Appendix*, § 1.

It will be found to be more formal in its language than captions usually are. It is not usual to set forth that the jurors were summoned, nor by *whom*, nor even that they were *empannelled.* The formality of the present record is sanctioned in this state, not only by precedent, but by express adjudication. *State* v. *Jones*, 4 *Halst.* 371; *Nicholls* v. *State*, 2 *South.* 539; *State* v. *Gustin*, 2 *South.* 746.

It is worthy of notice that in the case of *Nicholls* v. *State* the objection was raised, that the indictment was not presented by a grand jury summoned by the sheriff by lawful authority. The objection was not founded upon a defect of the caption, nor upon any inference against the validity of the summons derived from the record, but upon a special return made by the court below, in obedience to a rule of this court, that "no writ, precept, or other process was issued or given to the said sheriff, commanding or authorizing him to summon or empannel any grand jury at said term; and that no such writ or process was returned by the sheriff, nor is any now on file there."

2. It is objected that the issue is not properly joined. The objection is to the form of the *similiter*, which is in these words: "and the state of New Jersey, by J. C. E., esq., who prosecutes for the state, doth the like."

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In substance, the issue is between the state and the party arraigned; in form the *similiter*, in our practice, is usually in the name of the prosecuting attorney. In England, it is in the name of the clerk of the peace, the clerk of arraigns, the attorney general, or other officer who prosecutes for the crown, and is either in the proper name of the officer or in his name of office. 2 *Hawk.* 399, *B.* 2, *c.* 38; 2 *Hale's P. C.* 258; 3 *Cro.* 315; *Arch. Cr. Pl.* 48, 49; 4 *Blac. Com., Appendix*, § 1.

In point of fact the *similiter* is not added; it only appears when the record is made up. At common law, when the prisoner hath pleaded not guilty, the clerk of the assize or clerk of the arraigns, on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables, "*cul prit.*" By this replication the king and the prisoner are at issue. 4 *Blac. Com.* 339.

In capital cases, the issue is altogether immaterial. A mistake, therefore, in the joinder of issue will not be material, and even the total omission of the *similiter* will not be sufficient to vitiate the proceedings. 4 *Burr.* 2085; 1 *Leach's Cr. Law* 276; 1 *Chit. Crim. Law* 481.

And in cases of misdemeanor, where the issue should be made up, if the *similiter* is omitted, the court will order it to be interlined. In *Harris' case* (2 *Cro.* 502), upon an indictment for nuisance the record was removed, after conviction, into the King's Bench by *certiorari:* on examination of the record, it appeared that no issue was joined, and so the verdict was without issue. The court, upon motion, ordered it to be amended, by the insertion of the *similiter;* for it was but matter of course, and by intendment was omitted in the entry by default of the clerk.

3. It is objected that the award of the *venire* is, that the jury should come before the *judges* of the said court. It is insisted that it should have been before the *justice and the judges* of the said court. The Court of Oyer and Terminer is composed of justices of the Supreme Court and the judges of the Court of Common Pleas, or any three or more of them, of whom one of the justices of the Supreme Court shall always be one. I am not aware of any technical or legal designation

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of their office, as members of the Court of Oyer and Terminer. They are neither styled by the statute justices nor judges of the Court of Oyer and Terminer; though it appears, from the phraseology of the fifteenth section of the act, that the term judges, as there used, was understood to include as well the justices of the Supreme Court as the judges of the Common Pleas. The justices of the Supreme Court are frequently, in the statute book, styled judges. By the phrase, "the judges of the Oyer and Terminer," therefore, as well in common parlance as in legal acceptation, are included all the judges composing the court, and essential to its organization. It includes as well the justice or justices of the Supreme Court as the judges of the Common Pleas.

4. It is objected that the cause was continued from the fourth Tuesday of February to the second Tuesday of June, then next; and by the record it appears that the trial took place on the fifteenth of June (which of necessity must have been later than the second Tuesday), without any intervening continuance. It appears, however, affirmatively by the record, that the cause was continued from the February Term of the court, until the *next* session thereof, to be holden on the second Tuesday of June: and further, that the cause was tried at the said next session of the said court, though not upon the first day of the term. There is no necessity of a continuance from day to day in the same term, the whole term being in contemplation of law but one day.

5. It is objected that a part of the indictment is in figures, and not in words at length. By an inspection of the record, it appears that the day of the month and the year, in which the affidavit upon which the perjury is assigned, is therein recited to have been taken, and the day of the month and year upon which, in that affidavit, the larceny is charged to have been committed are in figures.

It is laid down by Sir Matthew Hale, that figures to express numbers are not allowable in indictments, though sometimes literal numbers be allowable in returns; but in indictments, the numbers, whether cardinal or ordinal, must be expressed in Latin. 1 *Hale's P. C.* 170.

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The modern elementary writers state the rule to be, that no part of the indictment must be in figures, and therefore numbers and dates must be expressed in words at length. The only exception to this rule is where a *fac-simile* of a written instrument is to be set out, as in the case of forgery, in which case it must be set out in the indictment in words and figures, as in the original itself. *Arch. Cr. Pl.* 25; 1 *Chitty's Cr. Law* 176; 2 *Burns' Just.* 500, "*Indictment*" *VII.*

By the statute 13 *Edw.* 3, *c.* 15 (1390), it is enacted, "That all pleas which shall be pleaded in any courts whatever shall be entered and enrolled in Latin. This statute was in force when Hale wrote his treatise, and continued in operation down to the fourth year of *Geo.* 2, (1731). 3 *Bl. Com.* 322.

The earliest case touching the use of figures in legal proceedings, which I find reported while this statute remained in force, was a civil suit in the 13 *Car.* 2. The action was assumpsit. Upon writ of error, after verdict, it was assigned for error, that the year (1642), in which the promise was alleged in the declaration, was in figures. Jones, J., was of opinion that, being in an inferior court, it was helped by the statute of *jeofails.* But the court said, the time is necessary, and ought to be in Latin, according to the statute, and being in figures is *insensible.* And judgment was reversed. *Bushel* v. *Bland,* 1 *Keb.* 19, *pl.* 55. The same case is reported as *Ducket* v. *Bland,* 1 *Sid.* 40, *pl.* 6; 13 *Vin. Abr.* 210, "*Figures.*"

In the 22 *Car.* 2, it was moved, in the King's Bench, to quash an indictment, because the year in the caption was in figures; but the objection was avoided by the year of the reign being also stated: Hale, C. J., said *that* was enough. 1 *Mod.* 78, *pl.* 40. In *Hobson* v. *Heywood,* 23 *Car.* 2, *Style* 88, the plaintiff in error, in an action of debt for rent, assigned for error, that the sum demanded for rent was in figures, and not in words. The court held that the error was material, and reversed the judgment.

In *Hawkins* v. *Mills,* 26 *Car.* 2, in an action of debt, the error assigned was, that, in the award of the *venire facias,* the sheriff was commanded to summon "XII men," the number twelve being in *Roman letters.* The objection was not al-

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lowed, being in text as used in King's Bench, and not in figures, but if it had been 12 *in figures* it would have been error. 2 *Levinz* 102; 3 *Keb.* 301, *S. C.; Anonymous*, 1 *Vent.* 256; 13 *Viner* 210, "*Figures*" 4.

It is worthy of notice that this error was assigned upon the defect of the record touching the number of jurors, in regard to which there could have been no mistake, the number being fixed by law, and in the modern practice being entirely omitted in the award of the *venire*. 3 *Blac. Com., Appendix*, § 4; 2 *Lilly's Ent.* 350, 397.

In *Hebbert* v. *Corsthorp*, 5 *W. & M.*, (*Skinner* 409), in assumpsit for work and labor, the exception was, that the sum in the writ of inquiry was in figures. *Sed non allocatur*, for they were (XII), Latin figures, which is well enough: otherwise if they had been (12), English figures.

In *Rex* v. *Phillips*, 1 *Stran.* 261 (6 *Geo.* 1), a coroner's inquisition was quashed because the year in the caption was in common figures, whereas it ought to have been in words at length, or at least in Roman numerals.

If the caption of an indictment set forth the style of the day or year in any figures but Roman, it is insufficient. *Hawk. P. C., B.* 2, *c.* 125, § 129; 2 *Keb.* 128, *pl.* 83; *Bac. Abr., Title* "*Indictment*" *I.*

In the *Law of Errors* (*Ed.* 1703) there is an assignment of error in a civil suit, because in the record the sums are written in figures, when they ought to have been written at large.

In 1 *Instructor Clericalis* (*Ed.* 1714), 14, it is said, "T'is reckoned more clerklike to write all sums and figures till past five at length, but after five in numeral figures;" but this is meant as to precedents, tests of writs, and such things as are not of record, for *there all sums ought to be at length in words.*

The authorities which have been cited are all drawn from the period when the statute of Edward remained in force. That statute, it will be recollected, simply required the proceedings of courts to be entered and recorded in Latin; and it has been suggested, as a ground for the distinction between the Roman numerals and the Arabic figures, that the former are Latin, which the latter are not. It will be recollected,

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however, that during this period legal proceedings were all entered in court-hand, with numerous abbreviations, quite as unintelligible to the uninitiated as the Roman numerals themselves.

The statute 4 *Geo.* 2, *c.* 26, enacts, that from and after the 25th of March, 1733, all writs, pleadings, records, and proceedings in courts of justice shall be in the English tongue, and shall be written in a common legible hand and character, and not in court-hand and in words at length, and not abbreviated.

The statute 6 *Geo.* 2, *c.* 14, enacts that all writs, pleadings, records, and proceedings in courts of justice may be written or printed in a common legible hand and character, and with the like way of writing or printing, and with the like manner of expressing numbers by figures, as have been heretofore, or are now commonly used in the said courts respectively, and with such abbreviations as are now commonly used in the English language. 6 *Statutes at Large* 65, 120.

In the *King* v. *Haddock* (11 *Geo.* 2), the indictment was for a nuisance, by putting and placing on the soil of the river Thames, on the first day of August, 1732, 200 loads of brick. To this indictment there was a demurrer on several grounds, one of which was, that the year when the offence was committed, and also the quantities of brick, were expressed in figures. Lee, C. J., said, there was great weight in the objection, and relied especially upon the authority of Lord Hale, that figures ought not to be used in indictments.

Page, J., said, that in civil actions figures are now good, because literal ones were therein used before the late acts; but that *in indictments* they ought not to be inserted, because it was not usual before these acts, therein to express numbers in figures.

Chapple, J., said, the objection is a very strong one, and the cases are express for the purpose. It is very difficult to maintain, upon the late acts, that figures may be used in indictments, it not being usual to use them in such cases before.

Probyn, J., said, no other figures but such as are capital were ever used in the bodies of indictments, and these were never allowed but only in immaterial parts; but in this case a

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very material part is expressed in figures: now these are not aided by the English acts, because they leave the matter as it was before.

The court took time to advise, and no final opinion was ever given, there being a new indictment brought by the prosecutor. *Andrews* 137; 2 *Sessions Cas.* 315, *S. C.*

Upon a careful examination of the English cases, except the language of Probyn, in *King* v. *Haddock*, I find no adjudication, nor even a *dictum*, either before or after the statute of *Geo.* 2, which countenances the idea that figures, either Roman or Arabic, may be used in an *indictment*. The more recent elementary writers (as we have seen) adopt the doctrine of Lord Hale, and lay down the rule explicitly, that figures cannot be used in an indictment, except when the *fac-simile* of a written instrument is to be set out.

The courts at Westminster, indeed, have carried the principle of requiring the proceedings in courts of law to be in words at length, so far as to hold it a fatal objection to *civil process* that the year in the *notice to appear* was in figures, and not in words at length. *Pinero* v. *Hudson*, 1 *M. & S.* 119; *Sutherland* v. *Tubbs*, 1 *Chitty* 319, *note a; Grojan* v. *Lee*, 5 *Taunt.* 651; *Williams* v. *Jay*, 5 *Taunt.* 652, *note.*

It was, however, subsequently resolved that such notice was good, though the year were in figures. *Eyre* v. *Walsh*, 6 *Taunt.* 333.

Process had previously been held good even when the year was erroneously stated, or altogether omitted in the notice. 1 *Taunt.* 424; 2 *Stran.* 1232; *Barnes* 425.

I have been led to this review of the authorities, from the fact that, in two or three recent American cases, it has been held that Arabic characters will not vitiate an indictment. *State* v. *Raiford*, 7 *Porter* 101; *State* v. *Hodgeden*, 3 *Verm.* 481; *Peck* 165, cited in 2 *Hale's P. C.* (*Ed.* 1847) 170, *note* 2; 2 *Bouvier's Law Dict.*, "*Figures.*" In the *State* v. *Raiford*, the court said, that it was more proper to write the day, year, &c., than to insert Arabic characters; but that the contrary practice has prevailed so long that it would be unwise to disturb it. The decision of the court is based upon established

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practice. Such, doubtless, is the practice of the state where that decision was made, but I have been unable to ascertain the existence of any such practice in the courts at Westminster; and in this state both practice and authority are the other way.

Our statute respecting amendments and jeofails adopts the material provisions of the statutes of *Geo.* 2, in respect to civil suits, but provides that no part of the act, except that which directs proceedings to be in English, shall extend to indictments or criminal proceedings. *Rev. Stat.* 991, § 17, 19.

In *Cole* v. *Petty*, 1 *Penn.* 61, Kirkpatrick, C. J., said, it is certain that in courts of record we do not enter judgments in figures. No such custom has ever obtained from the earliest times to the present: it would have been error. And, indeed, as the sum for which judgment is entered, is the very essence of the whole, it would seem to be absurd that all the rest of the proceedings should, of necessity, be entered in words written at length, and that this only should be entered in figures.

Judgments, even in the courts for the trial of small causes, cannot be entered in figures. *Penn. Rep.* 61, 86, 110, 413.

In *Ross* v. *Ward*, 1 *Harr.* 23, Hornblower, C. J., manifested a strong disposition to extend the principle even to the process of the justices' courts. He said, "The process of a court requiring the personal appearance of a party, ought to be in words at length, especially as to the time he is requested to appear, and the sum demanded of him."

These opinions exhibit clearly the view which our courts have taken against the principle and practice of using figures in civil proceedings.

In criminal proceedings, and especially in indictments, the objection to the use of figures is more obvious and cogent, and we believe they are universally (except where a *fac-simile* is necessary) written in words at length. To this cause, and to the general judgment of the profession, that the use of figures is fatal in an indictment, may be attributed the entire absence of all judicial authority directly upon the point.

Indeed, upon the argument, it seemed to be conceded that ordinarily the use of figures in an indictment is fatal, but it was insisted that the present case is not within the principle.

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It remains to be seen whether the use of figures in the indictment now under consideration can be justified.

It is said, in vindication of the present indictment, that perjury is assigned upon a written affidavit, and that that part of the indictment where the figures occur, is but a transcript of the affidavit upon which the perjury is assigned. When perjury is assigned upon a written instrument, the pleader may doubtless set out the tenor of the affidavit by words and figures in the indictment. But how does it appear that that was done in the present instance?

It does not purport, upon the face of the indictment, to be a copy. It is averred to be set out not in words and figures, or according to its tenor, but according to its substance and effect. This averment cannot be rejected as surplusage. And *the matter sworn to*, as stated in the indictment, is most manifestly not a literal copy of the affidavit, but a mere statement of its substance and effect. It cannot, therefore, be justified upon the ground that it is a *fac-simile* of a written instrument. The indictment charges that the defendant did say, depose, swear, and make affidavit in writing, among other things, in substance and to the effect following, that is to say:

"State of New Jersey, Middlesex county, *ss.*—Be it remembered, that on the 3d day of August, 1846, John B. Berrian (the said John B. Berrian meaning), of the township of South Brunswick, in the county of Middlesex, in his proper person, comes before me, Peter P. Mesuroll (the said Peter P. Mesuroll, esq., meaning), one of the justices of the peace in and for said county (the said county of Middlesex meaning), and upon his oath maketh complaint, that," &c.

Now it is very manifest that all this is no part of the matter sworn to by the defendant. It is but the mere title of the affidavit, a statement of the name and residence of the deponent, the name and office of the magistrate, and of the time of taking the oath. Though composing technically a part of the written affidavit, it is no part of the matter upon which the perjury is assigned. It might all have been very properly and very advantageously omitted by the pleader. But having been incorporated in the indictment, as a part of *the descrip-*

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tion of the offence, it becomes material, and must be supported by proof.

Nor is the objection obviated by the fact, that, in a previous part of the indictment, the day upon which the affidavit was taken is stated in words at length. The precise day upon which the crime is charged to have been committed, is not material; and had the title of the affidavit been entirely omitted, the indictment would have been supported by the production of the affidavit, though it had borne date upon another day. But, as the indictment is now drawn, if the affidavit had borne date upon any other day than the third of September, it would have been inadmissible in evidence, and solely on the ground of the misdescription of the affidavit. It cannot, therefore, be rejected as surplusage. Upon this point, I am of opinion that the judgment below must be reversed.

This conclusion renders it unnecessary that any opinion should be expressed upon the other errors assigned.

Carpenter, Justice, concurred.

Nevius, J. I concur in the opinion expressed by the Chief Justice on all the errors assigned, except that which relates to the use of figures in the indictment; and whilst I assent to the principle maintained by him on this point, I cannot agree with him in its application in this case.

By the seventeenth section of the act respecting amendments and jeofails, passed in 1794, all proceedings in every court of law and equity in this state are "required to be in the English tongue and language, and in no other tongue or language, and written or printed in good legible hand, and not abbreviated, except such abreviations as are commonly used in the English language; *provided*, that it shall be lawful to express numbers by figures, in like manner as it hath been heretofore, and is now commonly used in said courts."

This provision, by the nineteenth section of the same act, is expressly extended to indictments. The first inquiry then is, were figures commonly used to express numbers and dates in indictments before and at the time of the passing of this statute? Before the Revolution, and the adoption of our con-

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stitution in 1776, the practice was to express dates and numbers in words at length, and not in figures, and this practice seems confirmed by numerous judicial decisions, whether by regulation of the common law, or by usage or custom, or statutory provision, is not essential now to determine. In *Hale's Pleas of the Crown*, 2 *vol.*, 170, it is asserted, "that figures to express numbers are not allowable in indictments;" and in a case reported by *Andrews*, page 146, the same doctrine is held, and on which the court cite *Styles* 88, 1 *Sid.* 40, and 1 *Keb.* 19; and this doctrine is held both by *Chitty* and *Archbold*, in their elaborate and valuable works on criminal law, with the qualification, however, that figures in an immaterial part of an indictment will not vitiate it, and that they may be used where a copy of an instrument is attempted to be set forth. This was the law and practice in New Jersey when the constitution was adopted, which declared that so much of the common and statute law of England as had been in use here should remain in force; and it continued in force till the passing of the act above mentioned. The statute, therefore, made no change, and it was so held in *Cole* v. *Petty*, 1 *Penn.* 60, and in other cases after that time. In some of the states this rule has been relaxed without the aid of a statute. In *State* v. *Hodgeden*, *Ver. Rep.* 431, the court say, that figures are a part of the English language, and are admissible in indictments; and this is approved by the court in *Kelsy and Little* v. *State of Mississippi*, 5 *Smede's and Marshall's Rep.* 518. In a late case in Connecticut, *Rawson* v. *State*, reported in the *Law Reporter*, *vol.* 1, *No.* 3, it is said, that the use of figures there is conformable to common practice, and is sufficiently precise and certain; and the chief justice in that case remarks, that in England, where most felonies were punished with death, the strictness of their practice in this respect was *in favorem vitæ*, whilst in prosecutions for misdemeanors here it would be in *favorem criminis*. A like decision may be found in 7 *Porter's Rep.* 101.

Whatever force there may be in the reasons assigned for the decisions in the cases above cited, and in the states where they were first made, and under the circumstances under which

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they were rendered, I am unwilling to change the practice made by judicial decision. The old rule has been well known and understood by public prosecutors in this state, and has been uniformly practised; and I deem it safest and best to adhere to it, with the exceptions above named, until the legislature, in their profound wisdom, shall see fit to alter it. It has been very often decided by this court, that judgments of inferior courts entered in figures are erroneous and in violation of the act, and for that cause have been reversed; and it would be grossly inconsistent to require a less particularity in criminal prosecutions. I think the rule a safe one, and am unwilling to depart from it.

But it still remains to inquire, whether the rule contended for is applicable to this case, or whether the case is within the exceptions above mentioned.

The indictment charges that the defendant, wickedly, &c., contriving and unjustly intending to aggrieve one J. N. J., &c., on the third day of August, in the year of our Lord one thousand eight hundred and forty-six, came before one M., then and yet being one of the justices, &c., then and there, and before the said justice, was sworn and took his corporate oath, &c., and then and there falsely, &c., did say, depose, swear, and make affidavit in writing, among other things, in substance and to the effect following, that is to say: "State of New Jersey, Middlesex county, *ss.*—Be it remembered, that on the 3d day of August, 1846, the said J. B. B. (the said J. B. B. meaning), of, &c., in his proper person comes before me, M. (the said M. meaning), one of the justices, &c., in and for the said county (the said county of M. meaning), and upon his oath maketh complaint, that on the 3d day of August, A. D. 1846, (the said third day of August, in the year of our Lord eighteen hundred and forty-six meaning,) he, this deponent (the said J. B. B. meaning) had one fanning mill stolen from his barn (the barn of the said J. B. B. meaning), at, &c., of the value, &c., and that the said fanning mill had been taken, stolen, and carried away from out the barn of him, the said J. B. B.; and that he, the said J. B. B., had just cause to suspect, and did suspect, that the said mill was then concealed in

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the barn of the said J. N. J., as by the said affidavit, now filed, &c., more fully appears."

This is as much of the indictment as is necessary to recite, in order to exhibit fairly the objection urged. The objection is, that in the caption, or introductory part of the affidavit, which shows where and when, and by what authority it was taken; the day of the month and the year is expressed in figures. I think two answers may be given to this objection: 1st. That these figures are used in an immaterial part of the indictment; and, 2d, that the pleader manifestly intended to insert a copy of the affidavit in the bill.

As to the first of these answers, if, as is intended, the pleader meant to set forth only the substance of the affidavit, that part of it usually termed the caption is immaterial and unimportant, and may be rejected as surplusage. The time when the defendant went before the magistrate and made the affidavit, had already been set forth in words at length, and the time when the mill is alleged to have been stolen is also, by innuendo, expressed in words at length. The offence, therefore, is sufficiently charged without any reference to this caption at all, and if upon the trial there was found a variance in the date of the justice's memorandum, I apprehend it would not have been fatal. Time here is not the essence of the offence, and if untruly stated in any part of the indictment, it will not vitiate it. If the affidavit set forth in the indictment be the same upon which the perjury is assigned, it matters not whether the time when it was taken be truly stated in the caption or not; nor does it matter whether, in reciting the substance and effect of the caption, a different time should be mentioned from that which is expressed in such caption.

But the other answer, I think, is equally conclusive, that this affidavit and caption was intended to be set forth literally as written down by the magistrate, although the pleader professes to set it out in substance and effect only. If the affidavit is recited in its very words, *ex vi termini*, it must be in its very substance and effect. We have a right to judge, from the language of the indictment, whether the affidavit is literally or only substantially set forth, or intended to be set forth.

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The language here is in the present tense, and precisely adapted to a recital inthe very words: "Be it remembered, that on this 3d day of August, 1846, comes the said J. B. B., and upon his oath makes complaint." Now although there are words in the subsequent part of the affidavit in the past tense, as "that he had a mill stolen," "that it had been stolen out of his barn," that he had reason to suspect, and did suspect," it by no means appears that this is not the precise language in which the justice wrote the affidavit. And after trial, where this written paper must have been produced, and, for aught that appears, without exception, I think it will be going too far to say that it is not literally set forth in the indictment; and if so, then it is substantially set forth, and the use of figures does not vitiate the indictment. I cannot, for this cause, concur in the reversal of this judgment.

Judgment reversed. *(a)*

(a) This judgment of the Supreme Court was affirmed in the Court of Errors at the term of July, 1850.

THE INHABITANTS OF WASHINGTON v. APPLEGATE.

1. If sheep are destroyed or wounded by dogs within any township in this state, the owner of the sheep, although he resides out of that township, is entitled to remuneration out of the dog tax of that township, the fund provided for relief in such cases.

2. If the town committee improperly refuse relief out of such fund, to any person entitled to it, he has no remedy by an action against the township: the town committee, in the distribution of this fund, are not the agents of the township, but trustees of this fund, with certain judicial powers.

This cause was brought into this court by *certiorari*, removing from the Morris county Common Pleas the judgment of that court, on an appeal from the court for the trial of small causes. On the appeal, the Court of Common Pleas had given judgment in favor of Moses Applegate, the plaintiff below, against the in-

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habitants of the township of Washington, in the county of Morris, for the value of certain sheep destroyed within the said township by dogs, which sheep belonged to Applegate, who was not an inhabitant of said township.

The cause was argued before NEVIUS and OGDEN, Justices, by *Hagar* and *Vroom*, for plaintiffs, *J. J. Scofield*, for defendant.

NEVIUS, J. This action was brought in a justice's court, against the plaintiffs in *certiorari*, to recover damages, which the plaintiff below alleged he had sustained by the loss or destruction of his sheep, within the township of Washington. The Court of Common Pleas, on appeal, rendered judgment in favor of the plaintiff, which is sought now to be reversed, on these grounds:

1st. Because the plaintiff below, not being a resident in that township, has no claim under the statute for the loss of his sheep destroyed there.

2d. If he has any such claim, his remedy for it is not by action against the township—and,

3d. Even if such an action will lie, the judgment rendered in this case is erroneous, being for too great an amount.

The first of these objections cannot prevail. The fund provided by law in each township for that purpose, the statute declares "shall be appropriated to make good any loss which may be sustained by any person by the destruction or wounding of his sheep within the township wherein said fund or tax shall be collected." No distinction is made between a resident and non-resident owner of sheep. If the destruction takes place *within* the township, the owner, whoever he may be, or wherever he may reside, is entitled to compensation for his loss out of the fund there collected. Why the legislature made no such distinction, is unnecessary to inquire; it is sufficient to know that they have made none.

The second reason assigned for reversal is more serious, and I apprehend fatal to the judgment below. The fund out of which the plaintiff claimed payment for his loss, and out of which he was entitled to receive payment in whole or in part,

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if entitled to compensation at all, is a fund raised by a tax on dogs, pursuant to the provisions of the act for the preservation of sheep. *Rev. Stat.* 9. By the fifth section of this act, it is declared that this fund shall be kept by the town committee for the purpose of making good losses occasioned by the detruction of sheep, and that the committee shall pay all damages that may be sustained in this way within the year, in case the fund shall be sufficient for that purpose; and if not, then in equitable proportions to the persons who have sustained such damage, according to their respective losses, as far as the fund will go. If there should be a balance in the hands of the committee at the end of the year, after paying all such losses, the statute further provides, that the inhabitants of the township, at their annual town meeting, may, by vote, appropriate such balance to any other township purposes, or leave it in the hands of the committee to meet like losses sustained the next ensuing year. It will be perceived that this fund, out of which the plaintiff below claimed remuneration for his loss, is not raised by a general tax on the inhabitants of the township, but only on the owners of dogs within the township. And it is further seen, that it is a fund over which the inhabitants, as a corporation, have no other control by their vote at town-meeting, than to increase it by raising the tax beyond the amount specified in the statute, and appropriating the balance at the end of the year to such purposes as they may see fit, consistent with their general powers. If this fund, therefore, should be misappropriated by the committee, or if the committee should neglect or refuse to apply it to the purpose expressed in and assigned by the statute, the township will not be liable for such mal or misfeasance; for the committee are not the agents of the corporation in the management or distribution of the fund, but the agents of the law. They are by law constituted trustees of this fund, invested to a certain extent with judicial powers, and subjected to certain well defined duties; and if they neglect or refuse to perform them, they, and they only, are responsible, and not the township. This principle seems to me so clear and indisputable, that it would be a waste of time to refer to authorities. The cases cited by

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the defendant's counsel are not applicable to the one under consideration. The remedy of the plaintiff below is not by suit against the township; but whether by *mandamus* or original suit against the town committee, we are not called on to determine.

This action cannot be sustained, and the judgment must be reversed. It is manifestly unnecessary to advert to the last objection urged against the judgment.

OGDEN, Justice, concurred.

Judgment reversed.

CORTLEYOU v. TEN EYCK.

1. Since the act of 1846, (*Rev. Stat.* 229) constituting courts for the trial of small causes, the Court of Common Pleas, in cases of appeal from these courts, cannot grant a new trial.

2. The fifty-second section of that act is a *restraining*, not a *repealing* clause, and is not affected by the second section of the general repealing act, which provides that the *repeal* of any statutes should not affect any action then pending: it took away the power of granting new trials in causes then pending.

3. A *mandamus* is the proper remedy to compel an inferior court to give judgment on a verdict when it cannot grant a new trial; or, in general, to compel the performance of any act which the inferior court has no discretion to refuse.

This cause was tried on appeal before the Court of Common Pleas of Somerset, and a verdict rendered in favor of the plaintiff. That court refused to render judgment on the verdict, but, on motion of the defendant, set it aside, and ordered a new trial. At the last term of this court a rule to show cause why a *mandamus* should not issue commanding the Court of Common Pleas to render judgment on the verdict, was granted on motion of the plaintiff's counsel, which is now sought to be made absolute.

Argued before NEVIUS and OGDEN, Justices. *Ransom*, in support of rule, *G. H. Brown*, contra.

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NEVIUS, J. Two questions are presented by this case for our decision:

1st. Had the Court of Common Pleas any lawful right or authority to order the verdict to be set aside, and award a new trial.

2d. If they had not, is a *mandamus* the proper remedy.

As to the first of these, it was long since decided by this court, that the courts of Common Pleas, by the constitution of said courts, as well as by the principles of the ancient common law, had the right to set aside verdicts, and grant new trials, and as well in cases of appeal as in other cases. *Squier et al.* v. *Gale*, 1 *Halst.* 157. Since that decision, I am not aware that this right has been questioned in this court, until the passage of the late act "constituting courts for the trial of small causes," in 1846. *Rev. Stat.* 229. By the fifty-second section of that act, it is expressly declared, "that after the trial of an appeal in the Court of Common Pleas, no new trial shall be granted by that court." The order made by the court below in this case is directly in violation of this statutory provision, unless, as the defendant contends, this power was by another statute reserved to these courts in all cases of appeal pending when the foregoing statute was passed. Let us inquire if this is so. By the second section of the "general repealing act," passed and approved the same year, (*Rev. Stat.* 709) it is enacted, "That the repeal of any statutory provision by *this act* shall not affect any act done, or right accrued or established, or any proceeding, suit, or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect," &c. Now the fifty-second section of the small cause act is no repeal of any statutory provision whatever. The courts of Common Pleas did not derive their power to grant new trials from any statutory provision, for there was no such provision in any statute, but, as remarked by the court in the case cited, from their constitution and the principles of the common law. The second section, therefore, of the repealing act in no wise affects the operation of the fifty-second section of the small cause act, which was restraint of a common law power, and applied as

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well to appeals then pending, as to those afterwards brought. It will follow, then, that the Court of Common Pleas had no legal right or authority to set aside the verdict in this case, and grant a new trial.

For this error in the court below, is a *mandamus* the proper remedy? I think it is. A *mandamus* is a prerogative writ to an inferior judicature, commanding it to do some particular thing appertaining to its office and duty, and which the higher court has previously determined or supposes to be consonant to justice. 3 *Blac.* 110. But if the thing sought to be accomplished, is a thing which the inferior court has a discretionary power to do or to refuse to do, and has exercised its discretion in doing or refusing to do it, the remedy is not by *mandamus*. 12 *J. R.* 414. A *mandamus* lies to the sessions, to compel them to give judgment on a verdict which they have set aside on the merits. 1 *J. C.* 179. It lies to the Common Pleas to compel them to sign a bill of exceptions. 6 *J. R.* 279. So it lies to the same court to compel them to give judgment on a verdict, in order that a writ of error may be brought. 19 *J. R.* 247; 1 *Cow.* 143. It lies to a justice of the peace to compel him to render judgment on a verdict which he had no power to set aside, (*Penn.* 1024) or to compel him to issue an execution on a judgment. 6 *Halst.* 38; 3 *Green* 22. All these cases show that where the act required to be done, is one which the inferior court has no discretion to refuse, the *mandamus* is the proper remedy. In the case before us the Common Pleas had no right to set aside the verdict, and grant a new trial, and consequently no discretionary power to refuse to enter judgment on the verdict rendered in the case. Let the rule be made absolute.

OGDEN, J., concurred. *(a)*

(a) In a note (or rather treatise, of 112 pages,) to *Fish* v. *Weatherwax*, 2 *Johns. Cases* 215 (2 *Ed.* 1848), the reader will find the law relating to *mandamus* fully discussed, and the authorities collected.

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CASES DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW JERSEY,

AT APRIL TERM, 1849.

HALSTED, ORDINARY, v. FOWLER ET AL.

1. In a suit on a bond given to the ordinary by a guardian or administrator, it is not error to insert the name of the person who is ordinary as plaintiff, before the words "The ordinary," &c.: the name is mere surplusage, if correctly given, but it may in some cases embarrass the suit.

2. The most correct and safe mode, however, is to bring the suit in such case in the name of office alone, *i. e.* "The ordinary of the state of New Jersey."

In debt on demurrer to declaration.

The declaration in this case was in the usual form of declarations upon bonds where the breaches are not assigned. It commenced, after the recital of *venue* in the margin, as follows: "Oliver S. Halsted, the ordinary of the state of New Jersey, which said ordinary is the plaintiff in this suit," and demands the sum of $12,000, the penalty on the bond "which to him they owe, and from him unjustly detain." It states that the defendants acknowledged themselves to be bound "unto the said the ordinary of said state of New Jersey" in the said sum, "to be paid to the said ordinary." The breach recites the non-payment of the said sum "to the said ordinary," "to the damage of the said plaintiff," &c.

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The defendants, having craved oyer of the bond, have put in a special demurrer to the declaration, reciting therein the bond and its condition, from which it appears that the defendants bound themselves "unto the ordinary of said state" in the sum aforesaid, "to be paid to the said ordinary, or to his successor in office," dated February 3, 1846. The condition is as follows: "Whereas, at an Orphans' Court held this day in and for the county of Sussex aforesaid, the above bounden Samuel Fowler was by the said court appointed guardian of the person and estate of Rebecca Fowler, a minor over the age of fourteen years, one of the children of Doct. Samuel Fowler, deceased, until she attains the age of twenty-one years, as appears by the order of appointment of said court, entered upon record. Now the condition of the above obligation is such, that if the said Samuel Fowler shall faithfully execute the said office of guardian as aforesaid, then the above obligation to be void, else to remain in full force and virtue."

The causes of demurrer are in these words: "That the said defendants are called upon to answer unto Oliver S. Halsted, ordinary of the state of New Jersey, when, by their bond, they are held and firmly bound unto the ordinary of the state of New Jersey. And as the said bond upon which the action is brought is given to the ordinary of the state of New Jersey, therefore the said plaintiff has no legal right to commence an action thereon, but that the same should be brought in the name of the said "ordinary of the state of New Jersey;" and also, that the said declaration is in other respects uncertain, unusual, and insufficient."

Argued before the Chief Justice, and Carpenter and Randolph, Justices. *McDonald*, for plaintiff.

Green, C. J., delivered the opinion of the court.

This action is brought upon a guardianship bond given to the ordinary of the state, by his official title, and payable "to the said ordinary, or to his sucessors in office." The bond is dated on the 3d of February, 1846, after the adoption of the present constitution and before the revised statutes of 1846 went into operation. The statute in force at the date of the bond directed that guardians should enter into bond "to the

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governor, or ordinary of the state," the governor at the time the law was enacted being *ex officio* ordinary. The present constitution having separated the two offices, the bond was properly given to the ordinary, in whom, and in his surrogate, the appointment of guardians is vested by the statute.

The only ground of demurrer is, that the bond was given to the ordinary by his official title, and that the action upon it is brought in the name of O. S. H., ordinary, &c., both in his individual name and in his name of office. The declaration avers that the bond was given to the ordinary, and that O. S. H. is the ordinary. There is, therefore, no pretence of variance between the pleading and the instrument declared upon, as by possibility there might have been, had the declaration averred that the bond was made to O. S. H., ordinary, when in fact it was made simply to the ordinary. Nor is it denied, that in point of fact O. S. H. is the ordinary, nor even that he was ordinary at the time the bond was given. The whole objection consists simply in this, that the action is brought in the individual name of the ordinary as well as in his name of office; and the principle contended for is, that an action upon such bond must be brought in the official name, alone, of the officer, and that it is vitiated by the use of his individual name.

The only authority cited in support of this position is the case of *The Ordinary* v. *Updike*, 2 *Green* 270. In that case the action was upon an administration bond, given to I. H. W., ordinary or surrogate general, to be paid to the said I. H. W., late ordinary. The ground of demurrer was, that it should have been in the name of the ordinary for the time being. The court held that the bond should have been drawn to the ordinary or surrogate general, by his name of office, pursuant to the terms of the statute; but that the individual name and the words "successors or assigns" were mere surplusage, and the bond a valid bond to the ordinary. They also held that the right of action upon the bond was in the officer by his official title, and, as a necessary consequence, that the action was erroneously brought in the name of I. H. W., late ordinary. The pleader had treated the bond as given to the individual, regarding the official title as mere *descriptio personæ*, and had

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therefore brought the suit in *his* name, though out of office. The court held that the bond appertained to the office, and that therefore the suit must be in the name of the incumbent. It is true that they directed the individual name of the officer to be stricken out as superfluous, holding that the action might be brought by the officer by his official title alone, but they did not decide that the proceeding would have been vitiated by adding the individual name of the officer to his name of office: nor am I aware of any principle upon which such decision could be sustained.

Prior to the decision in the case of *The Ordinary* v. *Updike*, it was supposed that the individual name of the ordinary *must* be used, and that the action could not be sustained in the name of the ordinary alone. It is worthy of remark, notwithstanding what was said by the court in *The Ordinary* v. *Updike*, that both administrators' and guardians' bonds, from a period nearly coeval with the settlement of the state, had been given to the officer almost uniformly in his individual name, as well as by his name of office. Our reports show that actions upon such bonds had been as uniformly brought in the same form. *Coxe* 42; 1 *South.* 314; 1 *Halst.* 195; 5 *Halst.* 35, 65; 1 *Green* 3; 2 *Green* 270, 479.

In *Livingston* v. *Combs*, *Coxe* 42, the bond was made to William Franklin, governor. The suit was brought in the name of William Livingston, governor, &c., and the objection was taken, that being made to Franklin, governor, no suit could be maintained upon it in the name of Livingston, governor. The court held that the bond was taken by the governor in his official capacity, payable to his successors, and overruled the objection. There was no suggestion, even, that the use of the individual name in the suit vitiated the proceedings.

In the case of *The Bishop of Carlisle et al.* v. *Wells*, 2 *Lev.* 162, the action was upon a guardian's bond, given to the bishop and his commissary. It was objected that the bond should have been to the king, or to the bishop alone, and of that opinion was Hale, but the court inclined to hold the bond good. It does not appear by the report in what names the bond was given or the action brought. If given to the bishop by his of-

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ficial title, and the action brought in that form, as seems to have been the case, it could scarcely have been given to his commissary in that form, and it would seem must have been in his individual name.

Since the decision of this court in *The Ordinary* v. *Updike*, settling the propriety of suing in the name of the ordinary alone, the practice of using the individual name of the officer is perhaps not to be commended. It may expose the pleader to the hazard of some of the embarrassments pointed out by the court in that case. Yet if the pleader chooses to encounter those hazards, he does not therefore incur the penalties of vicious pleading. The use of the individual name may be treated as surplusage. The demurrer must be overruled, with costs.

CARPENTER and RANDOLPH, Justices, concurred.

Demurrer overruled.

THE STATE v. ELIAKIM COOPER.

1. An attempt to do a wrongful act is not a crime or misdemeanor, if the act attempted is not a criminal offence.

2. To cause or procure abortion before the child is quick, is not a criminal offence at common law, and has never been made so by statute in New Jersey.

3. An attempt made to cause an abortion when the woman is not quick with child, if made with her consent, is not an indictable assault upon her: the consent of the party takes away the criminal character of the assault.

4. To cause abortion when the child is quick, is not murder or manslaughter at common law, but a great misdemeanor.

5. Although the law, for many civil purposes, recognises the existence of a child from its conception, it does not, for the purpose of punishing its destruction, recognise it as a living being until it quickens or stirs in the womb.

6. It is not an assault to cause abortion upon a woman not yet quick with child, if done with her consent. It is only in cases of high crimes that the person assaulted is incapable of assenting.

This case was upon an indictment found in the Oyer and Terminer of Morris county. On a motion to quash the indict-

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ment, that court had reserved the question of the sufficiency of the indictment for the advisory opinion of this court, and the argument was had upon a case stated and certified to this court.

The offences charged in the indictment appear in the opinion of the court.

Argued before the CHIEF JUSTICE, and RANDOLPH and OGDEN, Justices, by *Scofield* and *Attorney General*, for the state, *Whelpley*, for defendant.

The CHIEF JUSTICE delivered the opinion of the court.

The only point reserved, and submitted for the opinion of this court, is whether *an attempt* to procure an abortion, the mother not being quick with child, is an indictable offence at the common law. It may simplify the inquiry to consider whether the procuring an abortion under such circumstances constitutes a crime. If the character of the act itself, when accomplished, be clearly *ascertained*, we shall be enabled with more certainty to decide upon the character of a mere *attempt* to commit the act.

Is, then, the procuring of an abortion, either by means of potions or of an operation used by the mother herself, or by another with her consent, an indictable offence at the common law, unless the mother be quick with child?

Undoubtedly the commission of such an act without the consent of the mother is indictable, as an assault upon the mother. The indictment in this case, charging, as it does in one count, that the defendant assaulted the mother and administered the potions, and in the other, that he made the assault and used violence to procure an abortion, is clearly good, and the court were right in refusing to quash. The indictment charges an assault with circumstances of aggravation. The offence charged is against the person of the mother, and is presumed to be, as in all other cases of assault, without her consent.

But when no assault is alleged or proved, where the act is done by the mother herself or with her assent, a very different question is presented. It was insisted indeed, upon the argu-

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ment, that the assent of the mother was null; that the offence was of so high a nature that no assent of hers could purge its criminality. But this, it is obvious, is begging the question. The charge of assault, of an offence against the person of the mother, is clearly purged of criminality by her assent. The ingredient which, according to the argument, gives character to the offence, and takes away the power of the mother to consent, is the attempt to procure abortion, which it is alleged is an offence against the person of the child. But the very point of inquiry is, whether that be at all an offence or not, and whether the child be *in esse*, so that any crime can be committed against its person.

In regard to offences against the person of the child, a distinction is well settled between its condition before and after its birth. Thus, it is not murder to kill a child before it be born, even though it be killed in the very process of delivery. *Hale's P. C.* 433.

There appears to be at the common law a distinction equally well settled between the condition of the child before and after the mother is quick. "Life," says Blackstone, "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 *Bl. Com.* 129.

It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. *In contemplation of law* life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it.

The offence of procuring an abortion seems, by the ancient common law writers, to be treated only as an offence against life. Thus Coke says, "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her whereby the child dieth in her body, and she is delivered, this is a great misprision, but no murder." 3 *Inst.* 50. It was anciently holden that the causing of an abortion by giving a potion to, or striking a woman big with child, was murder; but at this day it is said to be a great misprision only,

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and not murder, unless the child be born alive, and die thereof. 1 *Hawk. B.* 1, *c.* 31, § 16.

If a woman be *quick* or *great* with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in *rerum naturæ*, though it be a great crime. 1 *Hale's P. C.* 433. If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if any one beat her whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. 1 *Bl. Com.* 129.

In two of these authorities (*Hale* and *Hawkins*) the term "*big*" or "*great*" is obviously used as tantamount to "*quick.*" In all of them, the authors are treating of the crime of murder, of the offence against human life; and they distinguish between the destruction of the life of the infant before and after birth. There is in none of them a reference to the mere procuring of an abortion by the destruction of a *fœtus* unquickened, as a crime against the person or against God and religion. *Abortion*, as a crime, is to be found only in modern treatises and in modern statutes. No trace of it is to be found in the ancient common law writers. Bracton, indeed, uses language which at first view might seem to favor a different conclusion. He says, "*Si aliquis, mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortionem, si puerperiem jam formatum fuerit, et maxime si animatum, facit homicidum. Bracton, L.* 3, *c.* 21.

He is treating, however, of the crime of homicide, and it is perfectly certain, by the unanimous concurrence of all the authorities, that that offence could not be committed unless the child had quickened.

So far as my researches have gone, I have found no precedent, no authority, nor even a *dictum* (prior to Lord Ellenborough's act, 43 *Geo.* 3, *c.* 58,) which recognises the mere procuring of an abortion as a crime known to the law.

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There is a precedent in 3 *Chitty's Crim. Law* 557, which has been frequently referred to in support of the principle, that an attempt to procure an abortion was a crime at the common law. Properly considered, however, it is rather an authority the other way. It charges, in each of its counts, an assault by the defendant upon the mother; it is, indeed, a mere indictment for an assault with circumstances of aggravation. It contains no count for the mere procuring of an abortion, or for an attempt to commit the offence; thus affording a strong indication that the pleader deemed some other ingredient necessary to constitute a crime. It has been well observed, moreover, that the indictment contains averments, which if not directly, yet by necessary or fair implication, show that the child had quickened. It is remarkable, too, that this indictment was drawn at Trinity term, 42 *Geo.* 3. The next year Lord Ellenborough's act was passed, declaring the procuring of an abortion, though the mother be not quick with child, a felony. It seems not improbable that a supposed defect in the law, in the very particular now under consideration, led to the passing of the act.

The distinction, thus clearly recognised in the ancient law, between the condition of the child, and the consequent criminality of an act tending to its destruction, before and after quickening, has been fully recognised by the earlier legislation upon the subject. Thus the statute 43 *Geo.* 3, makes it a capital offence to cause the miscarriage of a woman quick with child, and a felony of a mitigated character to cause a miscarriage before the quickening.

The earlier legislation in this country upon the subject recognises the same distinction. 2 *Rev. Stat. New York* (1829) 661, 38, 9; 694 § 21; *Rev. Stat. Ohio* (1804) 252; *Rev. Stat. Conn.* (1838) 145, § 15. It is only in very recent statutes that the distinction has been abolished.

By the laws of most countries, this crime is punished with more severity if committed after the quickening, than before. The Roman penal code made the same distinction. *Male's Jur. Med.* 113.

It is true that, for certain civil purposes, the law regards an infant as *in being* from the time of conception, yet it seems no

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where to regard it as *in life*, or to have respect to its preservation as a living being. So if the mother be convicted of a capital offence, the mere fact of pregnancy is of no avail to stay execution of the sentence of death. It is only when the mother is found "quick with child" that the sentence is respited till after delivery. 4 *B. C.* 395.

In a modern case, a distinction was taken, by a learned judge upon the circuit, between the terms "*quick with child*" and "*with quick child*," and it was said that the former term means simply having conceived. *Regina* v. *Wycherley*, 8 *Car. and P.* 262. There is no foundation whatever in law for this distinction. The ancient authorities show clearly that the terms are synonymous, both importing that the child had quickened in the womb, and that the period had arrived when the life of the infant, in contemplation of law, had commenced. *Sarah Baynton's case*, 14 *State Trials* 634; 1 *Hale's P. C.* 368; 4 *B. C.* 395.

In England there does not appear to have been any adjudication upon the point now under consideration. But the Supreme Court of Massachusetts have decided that the procuring of an abortion, unless the mother be quick with child, is not an indictable offence at the common law. *Commonwealth* v. *Parker*, 9 *Metc.* 263; *Commonwealth* v. *Banks*, 9 *Mass.* 388.

Two modern elementary writers upon criminal law, of acknowledged reputation, have given some countenance to the idea, that the mere attempt to procure an abortion is an indictable offence at the common law. 1 *Russell on Cr.* 540; *Roscoe's Crim. Ev.* 190. Neither of them, however, states the principle with confidence, or distinguishes between the condition of the child before and after quickening. Both refer to the precedent in *Chitty's Crim. Law* as the only authority for the proposition. That precedent, as has been seen, does not support the doctrine. See, also, 1 *Lewis's Crim. Law* 1, *note b.*

In a recent American treatise upon criminal law, the proposition, that the procuring of an abortion was indictable at the common law, had been stated, and advocated with much learning. *Wharton's Crim. Law* 308; *Wharton's Prec.* 108. The only direct authority cited in support of the doctrine, is

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the case of *The Commonwealth* v. *Demain*, decided by the Supreme Court of Pennsylvania, at January term, 1846, and reported in 6 *Penn. Law Journal* 29. Although in that case the point appears to have been elaborately argued by counsel, it does not appear to have been decided by the court. On the contrary, the court are reported as declaring that the indictment before them sufficiently averred that the party injured was pregnant and *quick* with child, which was destroyed and killed. The obvious inference would seem to be, that the court regarded the fact, that the child was quick (either by direct averment or necessary implication), as essential to the validity of the indictment. It is difficult to perceive how the court could, in any aspect of that case, have sustained the demurrer. The indictment (like the precedent in *Chitty*) charged that the defendant committed an assault upon the woman, and was clearly a good indictment at common law.

We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable. There is neither precedent nor authority to support it. If the good of society requires that the evil should be suppressed by penal inflictions, it is far better that it should be done by legislative enactments than that courts should, by judicial construction, extend the penal code or multiply the objects of criminal punishment. We deem it unwise upon this subject to occupy debatable ground. A reasonable doubt should be resolved in favor of the accused.

The indictment is valid; but if upon the trial it appears that the means used to procure the abortion were used with the consent of the mother, the defendant must be acquitted. *(a)*

RANDOLPH and OGDEN, Justices, concurred.

(a) This decision induced the legislature to amend the criminal code, so as to make the offence in question a crime. *Vide* act of March 1, 1849, *Pam.* 266.

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COLE v. TAYLOR.

1. A receipt is never conclusive, but can always be explained by parol, and fraud or mistake shown and corrected.

2. It is not assignable for error, that the court omitted or neglected to charge on a particular point of law in question in the cause, if no charge was requested on that point.

3. A jury may infer fraud from the circumstances attending a transaction, without any direct or positive proof; and when a jury infer fraud against the weight of evidence, or from insufficient evidence, the remedy is by motion for new trial, and not by writ of error.

This cause came into this court by writ of error to the Camden county Circuit Court. It was an action of assumpsit, commenced in the court below by Taylor against Cole, for the recovery of a sum alleged to be due for work and labor done. The plaintiff having proved, and offered in evidence his books of account, the defendant gave in evidence a receipt, in the following words: "Rec'd, Nov. 17th, 1840, of Isaac Cole, his due bill for fifty dollars in full of all debts dues and demands whatever for work, and all other accounts on book, &c., to this date, except my note of hand given him for one hundred dollars.

his
JOEL † TAYLOR."
mark.

"I certify this to be Joel Taylor's mark.
$50.00. *Jacob W. Sharp.*"

The plaintiff's account commenced in 1829, and continued till 1845, with an interval of three years during that period. Upon the face of the plaintiff's books, it appeared that the balance due him at the date of the receipt exceeded six hundred dollars. The jury rendered a verdict for the plaintiff, including his account prior to the date of the receipt. The defendant excepted to the charge of the judge.

Argued before the CHIEF JUSTICE and CARPENTER, Justice. *Jeffers*, for plaintiff in error, *Browning*, for defendant.

The CHIEF JUSTICE delivered the opinion of the court.

The first ground of exception to the charge of the judge is, that the jury ought to have been charged that the receipt for

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fifty dollars was proved by Sharp, the subscribing witness, to be *an agreement* by Taylor to accept the sum of fifty dollars in full of all accounts and demands, and that, as *an agreement*, it was conclusive.

It was properly admitted by counsel, upon the argument, that a mere receipt is never conclusive, but is always open to explanation. But it was insisted that the receipt, in connection with the evidence of the subscribing witness, showed an agreement, independent of the mere receipt, to accept the fifty dollars in full of all demands; and that such agreement is conclusive and cannot be contradicted. But it is obvious that the instrument, upon its face, is a mere receipt. It contains no contract or agreement to do, or to abstain from doing, any act independent of the receipt. And if there were such contract, it is not perceived how the case would be thereby altered; for although the agreement would be binding, the receipt would still remain open to explanation or contradiction. *Greenleaf's Ev.* § 305.

The evidence of Sharp, the subscribing witness, proves no more than appears upon the face of the receipt. The one or the other may be *persuasive evidence* of the settlement of the whole account prior to that time; but certainly neither the one or the other, nor both conjoined, are *conclusive evidence* of that fact. There was no error in the judge's refusal to charge upon this point, as requested by the plaintiff in error.

The second ground of exception is, that the jury ought to have been charged that there was not any evidence of fraud. It is clearly the duty of the court, when required, to declare the law upon any and every point fairly involved in the consideration of a cause, and its refusal is a ground of error. *Broadwell* v. *Nixon*, 1 *South.* 362; *Mills* v. *Sleght*, 2 *South.* 565; *Todd* v. *Collins*, 1 *Halst.* 127; *Marshall* v. *Hann*, 2 *Harr.* 425.

But when no instructions are requested by either party, the charge to the jury, and the particular points to which the charge shall be directed, rest in the sound discretion of the court. The omission to state any legal principle which may be pertinent or applicable to the case, or the omission to give

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any charge whatever, when no charge is requested, affords in itself no ground for a new trial, much less for reversal upon writ of error. *Folly* v. *Vantuyl*, 4 *Halst.* 153; *Calbreath* v. *Gracy*, 1 *Wash. C. C. R.* 198; *Pennock* v. *Dialogue*, 2 *Peters* 15.

Nor would there have been error in the judge's refusal to charge that there was no evidence of fraud, even had he been requested so to do. It was in evidence that the plaintiff below could neither read nor write; that his accounts were kept by others; that the settlement was made by himself alone with the defendant; that there was a large balance apparent on the face of his books, at the date of the receipt, far exceeding the sum received; that the defendant denied owing the plaintiff any thing, but offered to make him a present of fifty dollars, and no book, voucher, or other evidence of payment whatever, other than the receipt, were offered in evidence by the defendant. These circumstances may afford very slight evidence of fraud or imposition in procuring the receipt; the weight of the testimony may have been very decidedly the other way; and the finding of the jury against the weight of the evidence may have afforded a very proper ground of relief on motion for a new trial. But it was not the duty of the court to usurp the province of the jury, nor to withdraw the facts from their consideration.

The judgment must be affirmed.

DEN *d.* HARING v. VAN HOUTEN.

1. Where a deed bounds the property conveyed on a public highway, on a question of boundary the return of the surveyors laying out such highway is competent evidence without showing their appointment, or if the proceedings of their appointment are void; the only question is, where is the highway, not whether it is legally laid out.

2. If the language of a deed leaves it doubtful which of two boundaries it calls for, the practical construction given to it by the parties themselves in taking possession is competent evidence to show where the line is.

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3. Where a line is not settled, acquiescence by the parties concerned, without a positive agreement and for a less period than twenty years, will fix the boundary.

4. Where no doubt would arise as to the true location of a lot from the construction of the grant, yet if the grantee, by his acts in locating his lot, has fixed his lines differently, and induced others to act upon such erroneous location, he will be bound by such location, and will by his *acquiescence* be prevented from disputing the boundaries thus fixed, although such acquiescence be only for a year.

5. If a deed calls for only one monument, and that is the corner of two streets as its beginning point, and these streets are laid out, but not opened and fenced off, then the beginning point called for is the mathematical point designated in the surveys; but if the streets had been opened, and the corner built upon, and thus ascertained, it would properly and more naturally refer to such actual corner.

Rule to show cause.

This was an action of ejectment tried before Mr. Justice Whitehead, at the Passaic circuit, in March, 1847, when a verdict was found for the plaintiff. The land sought to be recovered was a strip in dispute between the owners of two adjoining lots, in the township of Paterson, in said county: the lessor of the plaintiff claimed that his lot went to a line ten feet east of that claimed and occupied by the defendant.

On the trial it appeared in evidence that both parties held adjoining lots under the same title. In 1831, Messieurs Collet and Pennington, having purchased certain land in or adjoining to the town of Paterson, divided it into lots, for the purpose of sale, and caused a map to be made of the same, which map was given in evidence. The lot of the lessor of the plaintiff, beginning at the northeast corner of High and Willis streets, being sixty-nine on Willis, and running north one hundred feet on the easterly side of High street, was sold by Collet and Pennington to one Weight, by deed dated 17th December, 1835, under whom the plaintiff held by subsequent conveyance. The defendant's lot adjoined the easterly side of the lot of the plaintiff, being 25 feet on Willis, and 100 feet in depth. These lots, with others, were sold in conformity with the map so made by Collet and Pennington, and there was evidence to show that they were located according to the present occupation, and on the supposition that a fence on the westerly side of the plaintiff's lot was the boundary, or easterly side of High street. The case of the plaintiff proceeded on the ground that the true easterly line of that street was ten feet farther east than that

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fence, and that his lot should be located accordingly, to which he insisted the lots adjoining should conform. Under this view, the plaintiff claimed ten feet off of the lot of the defendant, as now occupied by him, and, as the defendant alleged, it had been occupied since the sale by Collet and Pennington.

The plaintiff offered and read in evidence the return of High street, as laid out in 1821, which was objected to by the defendant, upon grounds not now necessary to notice. The road in the return called for a course of south 3° east (but which appeared to be a mistake for south 3° west), and was laid three rods wide. There was evidence to show that if run, according to the return, in a straight line, and of the width called for, the easterly side of the street would be ten feet within the fence on the westerly side of the plaintiff's lot, which true line of the street the plaintiff insisted showed the commencement of his lot.

The defendant, on the contrary, insisted on the trial, that the line had been fixed for twenty-six years, the lots sold built upon according to a location then made, and that the line could not now be altered, even if the true line of the street should be shown to be otherwise than then supposed.

The judge in substance charged the jury, that the fence, being on the same line as when the location of these lots was first made by Collet and Pennington, and having been recognised as the line of the street and the westerly side of plaintiff's lot, must now be held as the line; that the public had acquiesced; that parties had bought and sold on the supposition that the fence was the line, and that it must be so held in the present controversy.

Notwithstanding the charge of the judge, the jury rendered a verdict for the plaintiff. A rule was taken to show cause why that verdict should not be set aside, and a new trial granted.

Argued before the Chief Justice, and Randolph and Carpenter, Justices, by *Vandervoort* and *A. S. Pennington*, for the rule, and *Hopper*, for the plaintiff, contra.

Green, C. J. This action was brought to recover a strip of land, ten feet in width by one hundred feet deep, in the town

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of Paterson. Upon the trial, the whole question resolved itself into a mere question of boundary. The plaintiff and defendant were the owners of adjoining lots in the town of Paterson, both fronting south upon Willis street. Both titles had a common origin; the plaintiff's title was the older. The plaintiff's lot was situated at the northeast corner of Willis and High streets, being bounded on the West by High street. The plaintiff's lot, in the original deed and in all the subsequent conveyances, was described as follows: "Beginning at the northeast corner of High or Strait street and Willis street; thence running easterly along Willis street sixty-nine feet; thence northerly, at right angles to Willis street, one hundred feet; thence westerly, parallel with Willis street, about seventy-four feet, to High street; thence southerly along said street to the place of beginning." The defendant's lot adjoined the plaintiff's on the east, and was described as "beginning at a point 69 feet from the corner of High and Willis streets; thence running north, 6 degrees east, 100 feet; thence south, 82 degrees east, 25 feet; thence, parallel with the first course 100 feet, to Willis street; thence westerly, along Willis street 25 feet, to the place of beginning."

The controversy related entirely to the boundary line between the two lots, and that depended upon the true location of the lot of the plaintiff.

The plaintiff, in support of his title, showed a conveyance from Mark W. Collet and A. S. Pennington to Peter D. Weight, on the 17th December, 1835; and through Weight, a title vesting in himself, on the 1st of June, 1842. He also gave in evidence a certified copy of the return of six surveyors of the highways, bearing date on 16th June, 1821, laying out High street as a public highway, three rods wide and twenty-one chains in length. He further proved the precise location of the western line of the street as laid out by the surveyors, and that, allowing the full width of three rods to High street, at its intersection with Willis street, and fixing the plaintiff's beginning corner at that point, his length of chain (69 feet) on Willis street would carry his line ten feet beyond the line, as claimed by the defendant, and include the premises in dis-

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pute. That High street was opened soon after it was laid out, in 1821, to its full width of three chains from its beginning point, on Broadway, to the north line of the Collet and Pennington lot, which was about 350 feet north of Willis street. From that point to Willis street the fence on the east side of the street encroached upon the highway, gradually increasing in width, until at the intersection of Willis street, at the corner of plaintiff's lot, the encroachment was ten feet one inch. The plaintiff also offered in evidence a deed from George Van Ryper to Collet and Pennington, dated 11th July, 1831, for a lot (including the plaintiff's lot) extending 4 chains 67 links on Willis street, and 5 chains 68 links at right angles thereto; also a map of the said premises, made by Collet and Pennington, on which the land was divided into lots for sale, and on which High street was represented as three rods wide by measurement.

It further appeared in evidence, that High street along the Collet and Pennington lot, had never been open to its full width; that the fence, from the time the street was opened, had always stood where it now does; that the successive owners of the plaintiff's lot, Van Ryper, Collet and Pennington, and Haring himself, had claimed and possessed the land to the extent of the alleged encroachment; that some years prior to the commencement of the suit, the plaintiff had built a house on the rear of his lot, fronting on High street, which projected about five feet beyond the true line of the street, having a court yard in front, which encroached eleven feet five inches on the street.

The dwelling house of the plaintiff, at the corner of High and Willis streets, was built by Francis Van Blarcom, about the year 1823, and the fence on High street set by him about where it now stands. The house itself is not within the line of the street. At the time of the conveyance to Collet and Pennington, in 1831, this was the only house on the lot east of High street. A large number of lots have since been sold, making the fence, as it stood, the line of High street. The lots on Willis street have all been sold, as far as the title of Collet and Pennington extended, and several of them built upon.

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Some four or five years previous to the trial, Haring, the plaintiff, moved the division fence between himself and the defendant farther east. After the defendant purchased, in 1835, his lot was surveyed at his request. The surveyor fixed the division line between the parties ten feet four inches east of where it now stands, so as to give the whole of the disputed premises to the plaintiff, and the defendant built his house just clear of the line, as the surveyor located it.

The judge charged the jury, that if the fence on High street had been standing in the same place twenty-five years, the public having acquiesced during that period, and the parties having bought in reference to that as the line, the fence should now be considered the easterly line of the street, and that both the public and the owners of the land were concluded by it. The jury rendered a verdict for the plaintiff. The defendant asks a new trial, upon the grounds, among others, that the verdict is against the law, against the evidence, and against the charge of the court.

Upon the trial the plaintiff showed an undoubted title to a lot of land at the corner of High and Willis streets, and extending from the corner sixty-nine feet, easterly, upon Willis street. The defendant showed title to the lot on Willis street, adjoining the plaintiff on the east. The only question between them related to the true location of the boundary line between them. The plaintiff has within his enclosure sixty-nine feet, his length of line upon Willis street. But it was insisted, and attempted to be proved upon the trial, that the lot is located ten feet too far west, encroaching that distance upon High street, and if the street is opened to its proper width, it will take ten feet from his front. He sought, therefore, to fix the location of his land ten feet farther east, and to encroach thus far upon the possession of the defendant. The only question then was, what was the true location of the plaintiff's lot? The only monument referred to, to ascertain the location, is the beginning corner, which is described as "the northeast corner of High or Strait street and Willis street. That language may refer either to the point of intersection of the lines of the street, as laid out, or to the actual corner of the street, as actually

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opened, and improved or occupied. If the streets had not been opened, or, if opened, if no fences or buildings had been erected to designate the position of the sides of the street, the language must of necessity have referred to the mathematical corner, and the beginning must have been ascertained by running the lines of the street as laid out to the point of intersection. On the other hand, if the streets had been opened and improved, if the corner had been built upon, and thus clearly ascertained, the language of the deed might with propriety and more naturally refer to the actual corner as it existed, than to any imaginary corner to be ascertained by running the streets according to the actual survey. In common parlance, in speaking of the corner of a street, reference is had to the actual corner as it exists, and as it has been defined by buildings or improvements. On the part of the plaintiff, it was insisted that the language of the deed had reference to the true corner of the streets, to be ascertained by running the lines of the streets, as laid out. And, for the purpose of establishing this point, he offered in evidence the return of the street as a public highway, and proved by parol its location. This evidence was objected to by the defendant, but admitted by the judge, and its admission is one of the grounds assigned for a new trial. The evidence was clearly competent, even though the proceeding of the surveyors and the return of the road were illegal and void. The question was not, whether the road was a legal highway, but where it *was*, and what was the intent of the parties to the deed in referring to the corner. The parol evidence was introduced not to contradict or vary the instrument, but to determine its application, to fix the locality, and to remove a latent ambiguity, for which purposes parol testimony is always competent. 1 *Greenl. Ev.* § 286. The question is a pure question of intent. To what corner did the parties to the deed refer in making the conveyance? What land did they intend to convey? Where did they intend to locate the lot? That this intent must govern in fixing the location, admits of no dispute; it is too clear to require authority in its support.

The language of the deed being doubtful as to the begin-

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ning corner, and the consequent location of the plaintiff's premises, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown; and parol evidence of the acts and admissions of the parties is always admissible to show the practical construction given to the deed by the parties themselves. When the language of the deed is doubtful, a practical location by a grantee, and his recognition of a line, even though that location be erroneous, and give him less land than the actual courses and distances in his deed, may bind the party, and conclude his rights. The authorities upon these points are numerous. *Stone* v. *Clark*, 1 *Metc.* 378; *Adams* v. *Frothingham*, 3 *Mass.* 362; *Codman* v. *Winslow*, 10 *Mass.* 149; *Rockwell* v. *Adams*, 7 *Cowen* 761; *Jackson* v. *Smith*, 9 *John.* 100; *Jackson* v. *Ogden*, 7 *John.* 238.

To conclude the parties' rights, it is not necessary that there should have been an actual agreement between the adverse claimants, or that the practical location should have existed over twenty years. It does not rest either upon agreement or upon the doctrine of prescription or legal limitation. In *Jackson* v. *Ogden*, 7 *John.* 246, Vanness, J., said, "The extent to which we have hitherto gone is, that when two persons, already having a title, have settled the line of division between them, or when one having title has made an actual location, according to what he supposed to be his true line, and his neighbors have acquiesced in such location for a considerable length of time, that the boundary thus established shall remain undisturbed." This was a dissenting opinion, because he supposed the majority of the court went beyond the rule thus laid down; but the doctrine thus declared was subsequently approved in *Rockwell* v. *Adams*, 7 *Cowen* 761; 6 *Wend.* 467. In the latter case the court said, "Reasons of propriety and policy forbid that a party having located his premises, and thereby induced others to purchase and improve accordingly, should afterwards be permitted to allege mistake, and extend his possessions so as, perhaps, to take away those very improvements which were made upon the faith of his previous act." *Rockwell* v. *Adams*, 6 *Wend.* 469.

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There was evidence upon the trial to show that the fence along High street, on the west of the plaintiff's lot, was set by Francis Van Blarcom, who built the plaintiff's dwelling house, as early at least as 1823, and probably in 1821, soon after the street was laid out, many years before the defendant purchased, and more than twenty years before the commencement of the suit; that each successive owner of the premises claimed and occupied to the line thus established; that the fence thus erected constituted, in fact, the corner of High and Willis streets at the time of the conveyance by Collet and Pennington to Weight, and at the time of the conveyance by the sheriff to the plaintiff, in each of which the corner of the street is called for as the beginning corner of the plaintiff's premises; that from the time of the conveyance to the plaintiff, in 1842, down to the time of the trial, the plaintiff had held and occupied the land up to the line and corner thus designated, and had built upon it beyond the line, which it is now insisted is the boundary of his lot. The question, it must be remembered, is not, where is the true line of the street, but where is the land which was conveyed by Collet and Pennington to Weight, mortgaged by him, and by the sheriff conveyed to the plaintiff. Now when is it shown that the plaintiff, and those under whom he holds, have for more than twenty-three years claimed, and held to a given point, as the limit of their possession and the corner of the street, when he had himself built upon the land, and holds and enjoys it without molestation, shall he be permitted to say that his land is elsewhere? that the land which he has long quietly held and improved is not covered by his title, and thus attempt to shift his location upon the land of the defendant, and oust him of his possession? The conduct of all the proprietors and of all the parties to these conveyances, both grantors and grantees, show clearly, that by the corner of High and Willis streets, they meant not an imaginary corner, but the corner as it was actually laid out and as it existed at the time of the conveyance.

But if there were doubts upon the point, nay if it were clear that the plaintiff's lot was located erroneously and against the intention of the parties to the conveyance, I am of opinion

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that the acts of the plaintiff since he came into possession, and the influence of those acts upon the rights of others, conclude him as to the location. If the plaintiff, upon the purchase of his lot, had erected a building sixty-nine feet in length, covering his entire front, and if the entire block had subsequently been sold and built upon, all the lots conforming to the plaintiff's location, and depending upon it, it would not be pretended that the plaintiff could afterwards, upon discovering that his building encroached upon the street, oust the next adjoining proprietor, and he the next, thus unsettling the titles throughout the entire block. If the mistake were discovered within a year after it occurred, and after the buildings were erected, it would be too late to correct it. The party has fixed his own locality. He had not only knowingly permitted his neighbors to improve, but by his own act has induced them to improve upon lands, the title to which he now claims as his own. To what extent these objections apply to the plaintiff in the present case does not clearly appear by the evidence, but it does appear that a large number of lots have been sold in the same block since the sale and location of the plaintiff's lot; that these lots have been built upon and improved, and that if the line is altered, the titles of many of these lots will be disturbed, and in some instances buildings erected will be intersected by the lines of division.

Nor, in my judgment, is the case altered if the judge erred in his opinion, that the right of the public to open the street to its full width was barred by lapse of time and the adverse enjoyment of the plaintiff and of those under whom he claims. Admitting the right of the public to open the street, (upon which it is unnecessary here to express any opinion), nay, admitting that the street be actually opened to its entire width, and a part of the plaintiff's lot to be thereby appropriated to public use, it surely can confer upon the plaintiff no right to redress his own loss at the expense of his neighbor, or to attempt to change the location of his lot, which by his own act he had determined. In such case, indeed, his claim would have the semblance of justice, however destitute of law it might be to support it. But it is worthy of notice in the present case, that

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there is no pretence that the plaintiff has lost, or is in danger of losing, any part of his land by a mislocation. There is no evidence of any attempt to open the street to its full width or to encroach upon the possession of the plaintiff. He holds the entire quantity of land called for in his deed unmolested, and precisely where he, and those under whom he claims, fixed its location. To permit him, under such circumstances, to shift the location of his lot, and to eject the adjoining proprietor upon the pretext that his location is an encroachment upon the highway, has neither law nor justice to support it. I am of opinion that the verdict is against law and against the charge of the court, and must therefore be set aside upon the payment of costs.

It is proper to add, that the state of the case which has been furnished the court is quite imperfect. There are obviously chasms and imperfections in the testimony. It may, therefore, be that the facts as stated are not in entire consistency with the evidence, as it appeared upon the trial. Enough, however, appears to warrant the conclusion that the jury erred, and that the verdict must be set aside.

Randolph, Justice, concurred.

Carpenter, J. There was no question made but that the lots of the respective parties were sold, and intended to be located in conformity to the map of Collet and Pennington. The deeds of the lessor of the plaintiff and of the defendant, for their respective lots, refer to this map, or at least the descriptions in those deeds were made in conformity thereto. The map calls for the easterly side of High street, which it makes the westerly boundary of the lot now held by the plaintiff and the basis of the whole range of adjoining lots, including that of the defendant. Now, as I understand the testimony in the case, whatever may be the true line of High street, upon an extension of that street with mathematical exactness from its commencement to its termination, yet in locating these lots the fence was treated as the line of the street and as the westerly boundary of the plaintiff's lot. The lots were laid out by Collet and Pennington on this supposition, as appears from the

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testimony of Mr. Pennington, who was examined as a witness. The respective parties, or those under whom they claim, appear to have held according to such original location from the time of the sale by Collet and Pennington to the time of bringing this suit, a period of more than twenty years. A long acquiescence, even in an erroneous location, will conclude parties. Considerations of public policy forbid that such errors should be corrected after long acquiescence, where, as in the present instance, the consequence would be a corresponding change in the possessions of a whole neighborhood. The judge, therefore, was right in directing the jury that the fence must be considered, in this controversy and between these parties, as the line of the street. But in this case the location can scarcely be considered as erroneous in respect of these parties, who are bound by the action of the vendors under whom they both claim, however erroneous their action may have been in reference to the true line of the street.

The rights of the plaintiff and of the public respectively, in reference to the line of the street, are not drawn in question, and need not now be considered. The verdict, according to my judgment, was clearly against the weight of evidence as well as contrary to charge of the judge. I concur in the opinion that the rule should be made absolute.

New trial granted.

HALE v. LAWRENCE.

THE AMERICAN PRINT WORKS v. LAWRENCE.

1. After a decision upon a demurrer filed in good faith, the settled practice now is to permit the party against whom judgment is given to amend his pleading or to plead anew, so as to submit his substantial defence.

2. An agreement between attorneys, that after judgment on demurrer the defendant "should have leave to amend his plea, such leave not to embrace the right to put in a new plea," does not preclude the defendant from applying to the court for leave to put in a new plea: its fair construction is only a limitation on the leave granted by *the agreement.* But leave of the court must be obtained to put in a new plea.

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3. The court, in a proper case, will grant leave to plead the general issue after the overruling a special plea on demurrer, in a case where the general issue had been pleaded and withdrawn by consent.

4. The judgment on demurrer is final and concludes the right of action, unless it is set aside and leave given to withdraw the plea or demurrer and to plead anew. If for plaintiff, it is *quod recuperat*, for defendant, *quod eat sine die*.

5. When judgment on demurrer is reviewed in a court of error, the judgment given should be the same as they decide ought to have been given by the court below, that is, a judgment in the cause for the plaintiff or defendant; but the court of error, after reversing a judgment, may, instead of ordering such judgment as ought to be given, grant leave to amend.

6. If a court of error, after reversing a judgment on demurrer, order judgment to be entered for either party, and remit the record of that judgment to the court below, it is not in the power of the court below to open that judgment, and give leave to amend the pleadings or to plead anew: the judgment is conclusive in the cause.

7. If a court of error, in reversing a judgment given on demurrer, merely reverse the judgment below, and remit the record without giving any judgment for the plaintiff in error, the court below may give judgment, or may allow the parties to amend or withdraw their pleadings.

8. If in such case the remittitur is filed in the Supreme Court on the last day of their term, concurrent with that of the Court of Errors in which the judgment is given, without the knowledge of the attorney of the defendant in error, he will not be in *laches* in not applying at that term for leave to amend.

These were actions in trespass, brought in this court.

The defendant, in each of these causes, having pleaded specially in justification of the alleged trespass, the plaintiff demurred to the plea. The demurrer was overruled by this court, and judgment rendered for the defendant. *(a)* The cause having been removed into the Court of Errors and Appeals, the judgment below was there reversed, at October term, 1848, *(b)* and the record remitted to this court. The entry of the judgment and the remittitur is in the following words: "It is ordered and adjudged, that the said plea of the said defendant, in manner and form aforesaid by him above pleaded, and the matters therein contained, is not sufficient in law to bar or preclude the said plaintiffs from having or maintaining their aforesaid action against him, the said defendant. And it is further ordered and adjudged, that the record and proceedings therein be remitted to the said Supreme Court, to the end that the said court may proceed therein according to law. On

(a) See 1 *Zab.* 248. *(b)* See 1 *Zab.* 714.

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filing the remittitur in this court on the first day of November, in October term, 1848, the following rule was entered on the part of the plaintiffs: "On reading and filing remittiturs from the Court of Errors and Appeals in the above causes, respectively, it is ordered, that a writ of inquiry, to ascertain the plaintiff's damages, issue in the said causes, respectively, unless the defendant amend his plea within thirty days after notice of this rule." On the 30th of November, the defendant filed, in each case, the general issue and two special pleas in bar. The plaintiff, after the expiration of thirty days, sued out a writ of inquiry, treating the pleas filed by the defendant as a nullity. The defendant now moved that the pleas so filed do stand as pleas of record duly filed in the said suits, and that the order of this court for a writ of inquiry, and the proceedings thereon, be vacated and set aside.

Argued before the Chief Justice, and Nevius, Carpenter, Randolph, and Ogden, Justices, by *B. Williamson* and *Hornblower*, for defendant, and *W. Van Wagenen* and *Vroom*, for plaintiffs.

The Chief Justice delivered the opinion of the court.

The material question is, whether the defendant is entitled to plead anew, or is limited to an amendment of the plea originally filed. Upon the solution of this question may depend, at least to some extent, the regularity and validity of the order of this court. I shall consider the defendant's claim to this indulgence, and the power of this court to grant it, independent of the rule itself, and of all the extraneous circumstances which, upon the argument, were relied upon as affecting the rights of the parties.

Upon general principles, wherever a demurrer is filed in good faith or for the purpose of settling a question of law involved in the controversy, justice requires that, upon the decision of that point of law, either party should be permitted to amend his pleadings, in such mode as to present for determination the substantial cause of action, or the real ground of defence. The object of pleading is not to defeat, but to advance the ends of justice; not to destroy, but to protect the substan-

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tial rights of parties. In accordance with this clear and obvious principle, courts of justice have manifested great and increasing liberality in allowing amendments after demurrer. By the ancient practice, indeed, no amendment was permitted after demurrer without consent, upon the principle, that where a party had staked his rights upon a point of law, he was bound to abide by his election. In delivering the opinion of the court in *Bramah* v. *Roberts* (1 *Bing. N. C.* 481), Tindal, C. J., said, "The law of Westminster Hall, I believe ever since it stood in the place in which it now stands, has been, that if a party thinks proper to rest his defence or his case upon a point of law raised upon the record, he must either stand or fall upon the point so raised." And when the strictness of the ancient rule began to relax, it was gradually and with reluctant steps. It was *at first* required that the amendment should be made only while the pleadings were in paper, before the argument of the demurrer, *next* before the opinion of the court had been pronounced, and at length, before the judgment had been rendered. In modern practice, however, it is well settled, in accordance with sound principle, that amendments may be made even after judgment upon demurrer, whenever the substantial ends of justice require it. Such is the law of this court. The subject was fully and ably investigated by Chief Justice Hornblower on more than one occasion, and settled by the unanimous judgment of the court.

Leave to amend, it is true, is not a matter of right, but rests in the sound discretion of the court. Where, however, the demurrer appears to have been filed in good faith, and there has been no verdict upon an issue of fact, leave to amend is granted very much as a matter of course, wherever it is material to the cause of action or to a substantial defence.

In the present case the defendant justified under authority of a statute, which in its terms, at least, was a clear authority for the commission of the alleged trespass. The plea was filed in good faith. It was held by this court a valid bar to the action. There has been no affectation of delay on the part of the defendant; on the contrary, very unusual concessions have been made on his part to expedite the cause. Under

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these circumstances had the demurrer been sustained, and the plea adjudged insufficient by this court, the court by its well settled and uniform course of practice would have permitted the defendant to plead anew, either by amending the plea demurred to, or by adding such new pleas as might be deemed material to the defence.

It is insisted, however, that the privilege of amendment in this cause has been limited and qualified by the acts of the attorney of the defendant.

1. By an agreement, made by the counsel, and signed by the attorneys of the respective parties, bearing date on the 10th of January, 1848, after the judgment of this court had been pronounced, and prior to the issuing of the writ of error, it was agreed, among other things, "that the defendant should have leave to amend his plea, such leave not to embrace the right to put in a new plea." This clause, it is insisted by the plaintiff, is a stipulation on the part of the defendant not to file a new plea, and limits him to a mere amendment of the plea upon file. But is this inference warranted by the terms of the agreement? The clause purports to be, and in fact is, an assent by the attorney of the plaintiff, not a stipulation by the attorney of the defendant. It is in terms an assent, by the plaintiff's attorney, that the defendant may amend his plea filed, accompanied by a qualification that the leave should not embrace the right to put in a new plea. But did his declining to give such consent take away the right of the defendant to ask leave to amend? Did it limit the power of this court to grant it? There is no stipulation, by the attorney of the defendant, that he would not ask for leave to file new pleas: and granting he had made such stipulation by which his client would be stripped of a substantial defence, to which he would otherwise have been clearly entitled, it might become a material question whether the court would enforce such agreement. But there is no necessity for entering upon this inquiry. The fair construction of the agreement, the natural import of its language is, that the plaintiff's attorney consents that the plea be amended, but he does not consent that any new pleas be filed. If that advantage is sought, the

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order of the court must be obtained. The right of the defendant to amend by leave of the court, is in no wise affected by the agreement.

It is further objected, that the court will not grant the defendant leave to plead the general issue, because that plea has once been filed in the cause, and was voluntarily withdrawn by the defendant's attorney, by virtue of a written agreement between the attorneys of the respective parties. There is nothing in the mere fact of withdrawing a plea that should prevent the court from permitting it to be again pleaded, if the rights of the parties and the justice of the case require it. If the plea be withdrawn by the attorney for justifiable ends, or from misapprehension of the facts, or a mistaken view of his client's rights, the court would not permit the defendant to be thereby deprived of his defence. It becomes, then, material to inquire under what circumstances the plea was withdrawn. Thirty-three suits had been commenced against the defendant, involving claims for damages to a very large amount. In all of them the general issue had been pleaded, and also two special pleas in bar. In two of the causes replications had been filed to one of the special pleas, which led to an issue of fact. In all the cases there were important issues of law, the decision of which in favor of the defendant would conclude the rights of the parties. Upon those questions it was the design of both parties to take the opinion of the Court of Errors and Appeals. That could not be done until the issues of fact were disposed of and final judgment rendered. This would have involved the parties in the delay and expense of the trial of issues of fact, which in the event might have been rendered entirely unavailing by the decision of the Court of Errors upon the questions of law. By the trial of the issues of fact, moreover, all right of amendment under the demurrers would have been cut off.

It became, therefore, important to both parties, preëminently so to the plaintiff, whose right of action was seriously jeoparded by delay, being entirely contingent upon the defendant's life, to get rid of the issues of fact. Under these circumstances, it was agreed between the attorneys (by written direction of

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the counsel) of the respective parties that the general issue in all the cases, and the statute of limitations in two of them, (that is, all the pleas which involved issues of fact,) should be withdrawn; that the pleas should be held to be amended in the manner specified, and that either party should be at liberty to enter a rule for that purpose as by consent of parties. The amendments were made accordingly, and all the causes left to stand upon the issues of law. Now that these pleas were withdrawn for a justifiable, if not a laudable purpose, there can be no dispute. It facilitated the progress of the suits; it saved expense; it avoided delay; it compromitted directly no right of the defendant, however prejudicial it might eventually prove to his interests. If the defendant's attorney, of his own motion and without the consent of the plaintiff's attorney, had asked leave to withdraw these pleas, the application would have been granted of course, as tending to facilitate the administration of justice. Nor would the withdrawal of the pleas under such circumstances have been deemed a waiver of any right of the defendant to renew these issues, if from the disposition of the issues of law such renewal became necessary to his defence.

But it is insisted that this plea was withdrawn by virtue of a written agreement between the counsel by whom the cause was conducted, and that that agreement possesses the force of a binding contract, which cannot now be violated or avoided; that it was done at the instance of the defendant's counsel, and for his benefit; that by it the plaintiff gained an advantage, of which he cannot be divested, and that, in the emphatic language of the plaintiff's counsel, the defendant must now "abide the curse of a granted prayer." Admitting all the facts to be as stated (which, however, is denied by the affidavit of the defendant's counsel), the conclusion attempted to be drawn from them is entirely unwarranted by any principle of law. Suppose the application to withdraw these pleas had been made by the defendant's attorney in open court, and with the assent and by the agreement of the plaintiff's attorney, there expressed verbally or in writing, it surely would not be pretended that that transaction constituted a contract

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between the attorneys which could not be relieved against by the court, or that the arrangement partook of the nature of a binding contract between the parties? Now that the arrangement was made between the attorneys in vacation, and reduced to writing, cannot alter the nature of the transaction. It is simply the withdrawal of pleas by the defendant's attorney in vacation with the assent of the counsel of the plaintiff, an act which the court would have permitted in term, either with or without the consent of the plaintiff's attorney. The right of the defendant to an order of this court for leave to plead the general issue, or any other plea essential to his defence, is in no wise affected, either by the agreements of counsel or by the withdrawal of the pleas from the files of the court.

It remains to inquire whether this application has been made at the proper time and to the proper tribunal.

These causes were decided by the Court of Errors, at October term, 1848. The motion for judgment was made near the close of the term, on the eve of the adjournment of the court. The remittitur in this case (together with the remittiturs in thirty-two other causes) was filed in this court on the first day of November. This court was still open for the despatch of unlitigated common business, though the regular business of the term had closed, and no litigated matter could regularly have been heard, except by consent. The court actually dispersed on the very day the remittiturs were filed. The remittiturs were made in the absence of the defendant's attorney. Under such circumstances the defendant's attorney cannot be held guilty of *laches* in failing to make his motion for amendment in this court at that term. According to the general practice of the court, the remittiturs would not have been returned till the ensuing term. Conceding the plaintiff's right to expedite his causes to the utmost, the defendant's attorney could not reasonably have anticipated such unusual despatch. The plaintiff's attorney having, upon filing the remittiturs, ruled the defendant to amend his plea in thirty days, the pleas were actually filed within the time so limited. The defendant now stands before the court without prejudice from *laches* on his

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part, or from the action of the court taken at the instance of the adverse party.

But have the court the power, in the present position of the case, to order an amendment? The single issue between the parties was upon a general demurrer to the defendant's plea in bar. This court overruled the demurrer, and gave judgment for the defendant; upon writ of error that judgment was reversed, and the record remitted. The power of this court now to permit an amendment depends upon the character of the judgment rendered in the court above.

Upon a demurrer to a plea in law, or to any other pleading in chief, the judgment is *final;* final, I mean, not as contradistinguished from a judgment *interlocutory*, but final, as it is conclusive of the question at issue. And in this sense the judgment is equally final, whether it be for the plaintiff or for the defendant, or for or against the demurrant. Its conclusive effect cannot be avoided, except by opening or avoiding the judgment. The principle is thus clearly stated by Judge Gould: "When the demurrer is joined on any of the pleadings in chief, as on the declaration, plea in bar, or other pleading which goes to the action, the judgment is final, *i. e.* if for the plaintiff, it is *quod recuperat*, if for the defendant, it is *quod eat sine die.* So that on demurrer to any of the pleadings which go to *the action*, the judgment for either party is the same as it would have been on an issue *in fact* joined upon the same pleading, and found in favor of the same party. *Gould's Pl.* 477, § 42. See also *Ferrers* v. *Arden, Cro. Eliz.* 668; *S. C.* 6, *Coke* 7; *Hitchin* v. *Campbell*, 2 *Blac. R.* 831; *Bac. Ab., Pleas & Pleadings, I.* 13; 2 *Arch. Pr.* 36; *Arch. Prec.* 298–9.

And upon error brought from a judgment upon demurrer, regularly the judgment is in like manner final and conclusive. If error be brought by the plaintiff below, and the judgment be affirmed, it is simply a judgment of affirmance. If it be reversed, the court of error shall give such judgment as the court below ought to have given. The regular judgment of the Court of Errors in such case would be, that the judgment below be reversed; that the plaintiff recover his debt or damages,

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and that the record be remitted, to be proceeded in according to law. If the action were debt, the judgment would be technically a final judgment, not interlocutory; and no remittitur would be necessary, except for the purpose of having execution. But the judgment of the Court of Errors upon a demurrer, in an action sounding in damages, though interlocutory merely, is equally as conclusive upon this court and upon the rights of the parties as if the action were debt, the judgment final, and no writ of inquiry needed.

It is true that courts may and do permit pleadings to be amended after judgment upon demurrer. But this end is attained either by not permitting the rule for judgment to be entered, or if entered by vacating it, or by treating the pleading and the judgments upon it as a nullity, and in theory at least, if not in fact, striking it from the record. The court may thus deal with its own judgment, but by what authority shall it thus deal with the judgment of another tribunal? I am aware that in *The Utica Ins. Co.* v. *Scott* (6 *Cowen* 606), the Supreme Court of the state of New York held that an amendment might be made upon a remittitur after judgment in error upon a demurrer. With due submission to that learned tribunal, I am unable to assent to the conclusion of the court, or to the reasons upon which it is founded. The Court of Errors in that case had not only reversed the judgment below, but had rendered judgment for the plaintiff upon the demurrer (8 *Cowen* 727). It must be admitted, therefore, that the case is an authority directly in point in support of the broad position, that this court may amend, even after judgment on demurrer in the court above. But, so far as I am aware, the authority is a solitary one. "It will be seen (say the court), by consulting the authorities, that courts have of late not confined themselves to cases where proceedings may be said to be in paper, but they have been guided by the question, whether substantial justice requires the amendment, *at whatever stage of the proceedings it may be moved.*" The last proposition is certainly too broad. It admits, at least, of some qualifications, one of which, I apprehend, is the very case under consideration. It can only be predicated with truth of proceedings before the same court

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while they remain *sub potestate legis.* The authorities, at least so far as I have been able to consult them, do not show that an inferior tribunal has the power to vacate or avoid the judgment of a superior tribunal, in order to let in an amendment of pleadings.

Again it is said by the court, in the case referred to, that the plea is to be regarded now as if it had been overruled upon the demurrer in this court. From that proposition I respectfully dissent. That, in truth, is the very point in question. Can this court treat a plea upon which judgment has been rendered in a higher court, precisely as if it had been overruled in this court? I am of opinion that it cannot, and for the simple reason, that it cannot get rid of the judgment of another tribunal, pronounced upon the very plea which is sought to be amended. If the judgment of this court overruling the demurrer had been affirmed in error, there is no pretence that this court could have permitted the plaintiff to withdraw his demurrer and plead anew. The court, then, could not have treated the demurrer as if it had been overruled in this court. And why not? Simply because the judgment of another tribunal has intervened, and the proceeding *quoad hoc* is not under the power of this court.

But it may be asked, is the party to be placed in a worse position by having the judgment of this court in his favor, than he would have been had the judgment originally been against him, in which event he would clearly have been entitled to amend. Even if that were the necessary consequence, it would by no means follow that this court could grant relief. The defendant in error would then stand in no worse position than the plaintiff in error where the judgment below is affirmed. But I apprehend no such consequence follows. Upon a reversal of judgment upon demurrer, the Court of Errors may at their discretion, permit the pleadings to be amended, or they may remit the proceedings to be amended at the discretion of the court below. Of the power of the Court of Errors to permit such amendments after reversal upon error, there can be no doubt. The judgment below being reversed, there can be no objection in point of principle to the amendment, and there

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are authorities to support the practice. *Hall* v. *Snowhill*, 2 *Green* 21; *Pease* v. *Morgan*, 7 *John. R.* 468; *Stokes* v. *Campbell*, 5 *Cowen* 21.

These cases, it is true, were in the Supreme Court, on error to the Common Pleas, where there was no remittitur, and the amendment, consequently, must of necessity have been made, if at all, in the court of error. They show clearly, however, the power of a court of error to order an amendment upon the reversal of the judgment below, and are in accordance with obvious principle.

In *Bloodgood* v. *The Mohawk and Hudson River Railroad Company* (18 *Wendell* 78), the plaintiff brought a writ of error to the judgment of the Supreme Court, overruling the plaintiff's demurrer to a special plea in bar. The Court of Errors, having reversed the judgment of the Supreme Court, and adjudged the defendants' plea not to be sufficient in law to bar the plaintiff's action, further ordered that the defendants have leave to amend their plea within such time as the Supreme Court might direct. Had the Court of Errors proceeded to pronounce judgment for the plaintiff, the right of amendment by the court below, I apprehend, would have been gone. I am of opinion that where judgment is rendered upon demurrer to any pleading in chief, and that judgment is reversed upon writ of error, and a new judgment rendered in the court above, either for the plaintiff or for the defendant, or where the judgment below upon demurrer is affirmed in error, this court has no power either to permit an amendment to the pleadings or to permit the demurrer to be withdrawn and a new pleading filed. I have discussed this question more at length than its importance in this case may require, because I deem it important that the principle should be distinctly settled, that no court has the power to permit pleadings to be amended while the judgment of another court, either superior or inferior, stands in force unreversed, upon those pleadings; and also because I wish to be distinctly understood as neither claiming nor admitting the right of this court, in any way or upon any pretence, to evade or to defeat the solemn judgment of a superior tribunal. I deem it of the utmost importance to the due admi-

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nistration of justice, and to the harmonious action of legal tribunals, that each should confine itself within its allotted sphere; that due subordination should be strictly regarded, and the judgment of the superior tribunal faithfully enforced.

What, then, was the judgment of the Court of Errors? By the remittitur, it appears that the entry of the judgment in the minutes is as follows: "It is ordered and adjudged, that the said plea of the said defendant, in manner and form aforesaid by him above pleaded, and the matters therein contained, are not sufficient in law to bar or preclude the said plaintiffs from having or maintaining their aforesaid action against him, the said defendant: and it is further ordered and adjudged, that the record and proceedings therein be remitted to the said Supreme Court, to the end that the said Supreme Court may proceed therein according to law." The entry is certainly not in usual form, nor am I aware of any precedent or authority for such an entry. There is no reversal of the judgment below, no rendry of a new judgment in the court of errors; it is no fact, but a mere declaration of the opinion of the court upon the question of law involved in the demurrer. The judgment of the court cannot, however, be defeated by a mere clerical misentry; and so far as it can be ascertained, it must be enforced. There must have been, of necessity, a judgment of reversal. The omission to enter must be a clerical error. The omission to enter judgment for the plaintiff may or may not have been a clerical error. The Court of Errors, as we have seen, may, after reversal, either have rendered judgment upon the demurrer in favor of the plaintiff, thereby barring all amendments, or they may have simply remitted the record to this court, designedly leaving the judgment open, to permit this court to order an amendment or not, at their discretion. In the absence of any information to be derived from the entry, I cannot pronounce the omission a clerical error; but am bound to conclude that no final judgment was pronounced, or designed to be pronounced, by the court above, but that the matter was left open for the further action of this court. This view of the case is supported by the fact, that it is in accordance with a very usual, if not general practice of the Court of Errors of this

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state. It is strongly corroborated, moreover, by the fact, that the counsel of the plaintiff in error, upon the return of the remittitur, ruled the attorney of the defendant to amend his plea, which would not have been done if the court above had rendered judgment for the plaintiff.

Regarding the judgment of the Court of Errors in this light, it leaves this court at full liberty to grant the motion for leave to plead anew, without in anywise transcending its proper powers or contravening the opinion of the Court of Errors.

I am, therefore, of opinion that the defendant is entitled to leave to plead anew, and that the pleas already filed do stand as the pleas in this cause, without prejudice to any question that may be raised touching their validity. The motion is granted upon the payment by the defendant of the plaintiff's costs upon the demurrer in this court, and also in the Court of Errors. I am further of opinion that the rule entered in the minutes of this court, at the term of October, 1848, for a writ of inquiry, was improvidently entered, and must, together with the writ of inquiry, and all proceedings thereon, be vacated and set aside, with costs. Let rules be entered accordingly.

Carpenter and Ogden, Justices, concurred. Randolph, Justice, concurred in all the views expressed, except in regard to the construction to be given to the entry of the judgment in the Court of Appeals, and *quoad hoc deliberatur.*

Nevius, J. In these cases the defendant pleaded a statute of the state of New York, in justification of the trespass complained of, to which the plaintiffs filed a general demurrer. After argument in this court, the demurrer was overruled, and a writ of error was then brought to the Court of Errors and Appeals, and the judgment of this court reversed. The record having been remitted at the last term, a rule was entered, that the defendant amend his plea in thirty days, or in default thereof, that a writ of inquiry issue to assess the plaintiff's damages. Within the time limited, the defendant filed three pleas, *viz :* the general issue, a plea of justification as a resident citizen of New York city, and owner of valuable buildings and other property there, and a plea of necessity. The

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plaintiffs, without noticing these pleas, have issued their writs of inquiry, and the defendant now, on due notice, moves—

1st. To set aside these writs; and

2d. That the last mentioned pleas be ordered to stand, as pleas of record duly filed.

These motions are resisted, on the ground that these pleas were filed in violation of written stipulations between the counsel of the respective parties touching the mode of conducting these suits. These stipulations have been produced and read, and I will notice them, or so much of them as appertains to the above causes, in the order of their dates. The first bears date the 11th of August, 1847, and is signed by Mr. Van Wagenen and Mr. Hall, counsel of the respective parties, and therein it is agreed, that the plea of the general issue (which had been filed in the cases) should be stricken out, and that the causes stand on the special plea of justification, and the demurrer thereto, as the only pleas subsequent to the declarations. The second is dated on the 14th of September, 1847, and is signed by Mr. Williamson and Mr. Pennington, the attorneys on record of the respective parties, and thereby it is agreed, that the defendant be at liberty to withdraw the plea of the general issue, and the plaintiffs be at liberty to amend their demurrers, so as to conform to such withdrawal, and that the pleadings be held as so amended, and either party be at liberty to enter a rule accordingly, as by consent of parties. The third bears date on the 10th of January, 1848, and is signed by the attorneys on record, and therein it is stipulated, that writs of error shall be brought from the judgments of this court overruling the demurrers (which had then been rendered); and if those judgments were reversed, the defendant should have leave to amend his plea, but that such leave should not embrace the right to put in a new plea; and if the judgments should be affirmed, the plaintiffs might enter by consent a rule in this court, giving them leave to traverse and deny the plea of the defendant in an issue in fact.

These are the written agreements under which the plaintiffs claim the right to disregard the pleas filed by the defendant,

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and to issue their writs of inquiry; and if they are such as the counsel might and did justly make, and if they were made in good faith and without fraud, and with a full understanding of their nature and operation, I see no reason why they ought not to be enforced. If they are lawful and valid agreements, they authorized the entry of the rule at the last term by the plaintiffs and the issuing of the writs of inquiry.

1st. Then, is it lawful for counsel and attorneys in a cause, by virtue of their general authority, to enter into written stipulations touching the conduct and management of such suit, waiving irregularities and dispensing with strict rules of practice? It is hardly necessary to cite an authority, or offer an argument to prove so well established a principle, as, that such stipulations may be made, that the parties to a suit are bound by them, and that courts will enforce them. I will briefly refer to a few cases. In assumpsit, the defendant pleaded the statute of limitations; the plaintiff replied; defendant neglected to join issue, and plaintiff's attorney entered a default, but afterwards agreed to waive it, and accept the joinder in issue. This he subsequently refused to do, but the court compelled him to abide by his agreement, against the consent of his client, and although it was a hard plea. 1 *Salk.* 86. The attorney's consent to an arbitration will bind the client. 7 *Cranch* 449; 4 *Wash. C. C. R.* 511. An attorney may make stipulations, waive technical advantages, and generally assume the control of the action. 7 *Cow.* 744. I need not multiply cases, the books are full of them. Such has been the practice in this court. 3 *Green* 102.

2d. Do the written stipulations, above mentioned, contain any matter which it would be unlawful for this court to carry out? I think not. They show that the pleas originally filed in these cases were the general issue and a special plea of official justification. The counsel agreed in writing that the former should be withdrawn. This they had a right to do, and it matters not at whose instance or for whose benefit it was done, or what motives led to it. After the judgments in this court, and writs of error were about to be brought, the same parties enter into another stipulation, that in case the

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judgments should be affirmed, the plaintiffs might take an issue in fact upon the plea, or if they should be reversed, that the defendant might amend his plea, but not file a new plea. But it is said that this last stipulation gave to the defendant nothing more than he would have been entitled to under the law and practice of the court. Suppose it did not, it is not the less lawful and obligatory. But it may be said, with equal truth, that the plaintiffs got nothing more than they would have been entitled to by the same rule of practice. What, then, is the legal effect of this last stipulation? It is only to restrain the defendant from filing again the plea of the general issue, or any new plea, and permitting the plaintiffs to enter such a rule in vacation, in order to prevent delay. The rule entered, therefore, at the last term was in conformity with the agreement, and there is not in the agreement itself, I mean on the face of, or in the terms of the agreement, any thing unlawful, and which this court has the right to disregard or to refuse to enforce.

3d. The next question for consideration is, whether the plaintiffs (considering these stipulations) were bound to notice the new pleas filed by the defendant. They were not filed by the order of this court, and it was certainly not a matter of course and legal right to file them without such order; they were not filed pursuant to any agreement between the parties. How then, and by what authority do they get upon the files of this court? If they are new and distinct pleas, setting up new and distinct defences, then they are in violation of the agreement of the parties, made by their counsel, and the plaintiffs have a right to disregard them. Counsel should be held to their stipulations, unless they have been corruptly and fraudulently obtained. It would be unjust and oppressive to permit a departure from them, whenever counsel find their operation to be different from what they expected. The pleas filed in these cases are new pleas, setting up new defences, are contrary to the defendant's agreement, filed without the order of the court, and are such as, I apprehend, this court would have had very serious difficulty in allowing in this stage of the causes, even if there had been no stipulation to the contrary. Where a

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plaintiff has distinctly set forth his cause of action in his declaration, the defendant and his counsel are presumed to understand his defence before he pleads; and if he has several defences, he ought to plead them all, as he may, by leave of the court. To permit a defendant to set up a single defence, and after being defeated in that on a demurrer, to set up another, and then another, to meet the same fate, until all are exhausted, would be attended with serious delay and expense to an adversary, and ought not to be permitted by the court. I think this stipulation ought to be enforced by the court, unless it is found on examination to have been falsely, fraudulently, or improperly procured by the plaintiff's counsel. And this leads to the consideration of the

4th. Question presented and discussed by the defendant's counsel, *viz:* that the stipulations were not made understandingly, but through mistake and ignorance, without consideration on the part of the defendant, and by contrivance of the counsel of the plaintiffs. These allegations by the defendant's counsel claim the serious attention and examination of the court, and the more especially, as the oaths of counsel on both sides have been resorted to for the purpose of verifying or contradicting them.

Let us look at the several branches of this charge.

1st. It is said these stipulations were made through mistake.

2d. From ignorance of the practice of this court.

3d. Without consideration on the part of the defendant. And,

4th. By contrivance on the part of the plaintiff's counsel; and this embraces a charge of malpractice and fraud.

I will consider these in the order presented, and in connection with the depositions taken on these motions.

And first, were they signed by the parties through mistake? The question naturally occurs, in what particular, contained in either of these agreements, could there have been a mistake. Was it a mistake in the defendant's counsel, when, on the 11th of August, he withdrew the plea of the general issue? If so, how came he, on the 14th of September, a month after-

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wards, to renew the agreement, and either to ask the privilege, or yield, as he says, to the request of the opposite counsel to withdraw it? Or, we may ask again, how came he and his associate counsel, four months after the second agreement, to consent again not to file that plea, or any new plea? Here was time for deliberation, for inquiry, and consultation; and there was opportunity for such consultation, for the attorney in the cause was one of the practising lawyers of this court, and familiar with its practice. Did the counsel mistake the effect of withdrawing this plea, and suppose that he would be at liberty to plead it anew, whenever he found it expedient to do so? This would seem highly improbable, from the fact, that he afterwards restricted himself to an amended plea, and stipulated that he would not file a new plea. But if he was actually mistaken as to the effect of his stipulation, is it such a mistake as this court ought to correct? If we set aside this agreement on the ground of mistake, I can scarcely conceive a case of written consent between counsel that may not be set aside on the bare allegation of a mistake, by one or the other.

2d. The consent is sought to be set aside on the ground that the defendant's counsel was ignorant of the practice of this court. Of what practice of the court were they ignorant? It is the practice of this, and every other court, to permit counsel, by mutual consent, to enter into written stipulations touching the pleadings in a cause, if such stipulations do not contravene any principle in law, or encroach upon the jurisdiction or rights of the court. It is the practice of this, and all courts, to permit counsel, by mutual consent, to withdraw or substitute a plea, or file, or omit to file, a particular plea, under like limitations. These are the only rules of practice applicable to the cases, as far as I can see; and of these rules the counsel surely could not have been ignorant, for they acted upon them, both the counsel and the attorneys, to the latter of whom we would do great injustice were we to attribute ignorance of such practice in a court where they are in the habit of practising. The consents violate no rule of practice nor any principle of law,

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and they are too plain in their terms to warrant the conclusion that the learned counsel did not understand them.

3d. The agreement is said to be without consideration. By this, I suppose is meant that the defendant, for his own stipulation, got no equivalent from the plaintiffs. If it were so in fact, can this court set it aside for such cause? The agreement may be good and binding, though voluntary and without consideration. It is a matter of no moment whether there is or is not reciprocity in the agreement. But who can say there was no consideration or reciprocity here? Can we say there was no rational or lawful inducement that moved the counsel to make such a stipulation? Can we say it was not to prevent delay, or to save expense, or to secure the affirmative of an issue, or that it was of no benefit or advantage (at least in the estimation of the party) to enter into such a stipulation? Can we say that the defendant has any other or better defence than he set up in his first plea? Is not the presumption of law, that he made his best and only defence in that plea? These and other questions of like import, we should be able to answer before we can adjudge that there was no consideration or inducement for this stipulation by the defendant. But if it were worth our while, we might inquire whether the leave to amend the pleas, was not a fair equivalent for the leave to take an issue in fact on the plea, if sustained by the Court of Errors, for each of the parties had, in my opinion, an equal right to ask of this court the privilege which was secured to them by the last stipulations, and the court would be under the same obligations to each to grant it. The great and prominent object intended to be obtained by both parties, as is apparent from the face of the stipulation of January, 1848, as well as from the depositions in the cause, seems to have been to facilitate the final hearing of the cause. I dismiss this objection, as wholly insufficient to justify this court in disregarding or setting aside these consents or stipulations, and aproach the more important question.

4th. Were these consents procured by the contrivance of the plaintiff's counsel, or through any fraud practised by him on the counsel of the defendant? To determine this, let us

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look at the testimony in the cases. This testimony is of less importance here, than in other cases of like character arising out of the same supposed trespass, and between the same counsel, and which have at the same time been argued before us, and are hereafter to be considered. I will, therefore, advert only to that portion of it which is applicable to the cases now under consideration.

The defendant's counsel, Willis Hall, esq., has offered himself as a witness, and says, "he is an attorney and counsellor, of the state of New York, and is of counsel with the defendant in these cases, and that B. Williamson, esq., is the attorney, and has heretofore acted by his advice and direction; that Mr. Van Wagenen has acted as counsel of the plaintiffs, and had the management of the same; that the consents above mentioned were entered into at the request, and for the exclusive accommodation of Mr. Van Wagenen, and drawn by him, or his procurement; that the whole object of the consent of the 14th September, 1847, was (as he understood it) to withdraw all issues of fact, until an opinion of the court could be obtained on the demurrer, and that Mr. Van Wagenen appealed to him to withdraw the plea of the general issue, in order to expedite the causes, and that he might not be compelled to go before a jury, until the opinion of the court on the demurrer could be obtained; that he received the impression from Mr. Van Wagenen, that issues of fact were to be tried before issues in law, though he cannot say Mr. Van Wagenen told him so; that before he assented to the proposition to withdraw the plea of the general issue, he submitted it to J. L. White, esq., who had drawn the special plea, and he having acquiesced, Mr. Williamson, the attorney, was directed to sign the consent; that he believed it was the practice of this court, after a decision on demurrer, to allow a trial upon the merits of the case before a jury, and therefore he consented to withdraw the issues of fact; that the consent of the 10th of January, after the demurrer had been overruled, was drawn by Mr. Van Wagenen, and presented to him for his signature, and was for Mr. Van Wagenen's accommodation; that the objects of this consent were—1st, to set the causes down for hearing at the approach-

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ing January term of the Court of Errors; 2d, that in case of reversal, like judgments should be rendered in like causes, in which the same counsel were concerned; 3d, that if affirmed, the plaintiffs might be at liberty to traverse and deny the facts; that these objects were urged by plaintiff's counsel to save time and avoid delay; and for the same purpose, it was also urged, that the defendants should have leave to amend, but not to file a new plea, and that a rule to that effect should be entered by consent, because if the causes were remitted to this court, as it did not sit till near three months after the Court of Errors, there would be great delay without such consent. To obviate delay, therefore, and at Mr. Van Wagenen's request, he yielded to such written consent. That, as he understood it at the time, the consent was, that if the demurrer was sustained, the plea should be amended, so as to obviate the objections, could it be so done; but if not, and a new plea should be required, that it could be done by leave of the court, and that he did not believe, at the time, such consent would restrain him from filing such new pleas, as, in the opinion of the court, would develop the merits of the cases; that upon any other view, he would not have agreed to such stipulations."

This is the subtance of Mr. Hall's affidavit, so far as regards these two cases.

Mr. Van Wagenen has also presented his own affidavit, in which he says, "That shortly after Mr. Hall was charged with the management of these cases, on the part of the defendant, a verbal agreement was made between them, that each should furnish the other with copies of such pleadings as each might file in these and other cases between the same counsel, and arising out of the same alleged trespass; that, in pursuance of such agreement, Mr. Hall served upon him a copy of pleas filed in the case of *The Hamilton Company* v. *Lawrence*, which was one of the thirty-three cases to which the agreement extended, and stated to him that all the pleas were similar, and were about to be filed. These were the pleas of special justification and the statute of limitations, and these only. That a few days after, he (Mr. Van Wagenen) received from Mr. Pennington, the attorney of the plaintiffs, copies of pleas

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filed in all the cases which had been served upon him by Mr. Williamson, the attorney of the defendant; that these were like the copy served upon the deponent by Mr. Hall, except that the plea of the general issue had been added; that, on receiving these copies, he filed a demurrer to the plea of justification, treating and naming it as the plea *secondly* above pleaded; that in an interview with Mr. Hall, on the 11th of August, 1848, the latter asked, what he meant by the terms "secondly" and "thirdly" in his demurrer, which led to an explanation, that the plea of the general issue had been filed by the attorney as the first plea; that Mr. Hall then objected to this plea, and complained that the attorney had filed it not only without his consent, but against the deliberate conclusion of both himself and Mr. White, the other counsel in the causes, made in the presence of the attorney, and said that their object in omitting the plea of the general issue was to secure the affirmative of the issue, and then asked the deponent the privilege of striking out that plea, using as an argument, that he had the control of the cases; that this request was granted, and the first written agreement was then drawn and signed; that soon after the paper was signed, Mr. White, the other counsel, came in, and being informed that the attorney had added the plea of the general issue, said, that the pleas had been carefully prepared, and expressed his gratification that the deponent had consented that the general issue should be stricken out; that, on the 7th of September, it was agreed, by deponent and Mr. Hall, that the plea of the statute of limitations, filed in the two cases now under consideration, should be stricken out, on the ground that they were not applicable, as the plaintiffs in these cases resided in New Jersey; and, on the 14th of September, the two consents of the 11th of August and 7th of September were combined in one, embracing all the thirty-three cases, and signed by the respective counsel, with directions to the attorneys to interchange consents, and have them carried into effect; that this consent was so signed by the attorneys, and filed on the 15th of January, 1848, and in pursuance of it the general issue was stricken from the record in all the cases, and the plea of the statute of limitations was

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stricken out of these two cases, and the demurrer amended. Mr. Van Wagenen further testifies, that Mr. Hall repeatedly requested him, afterwards, to consent that the plea of the general issue might be again filed in case the demurrer should be sustained by the Court of Appeals, which he always refused to do; that both parties were, or professed to be, equally desirous to expedite the final hearing of these cases; that the written stipulation of the 10th of January was drawn up by this witness, pursuant to a verbal agreement previously had with Mr. Hall, and with a view, if possible, to argue the causes at the then approaching term of the Court of Appeals, and that part of it which gave the plaintiff liberty to take an issue in fact if the demurrer should be overruled, was inserted at the request of the plaintiff's counsel, and to obviate the delay of three months in applying to this court for leave to do so; that Mr. Hall declined signing this last stipulation, until he could consult with Mr. White, his associate counsel, which he did the next day, in the presence of this witness; and then, with the concurrence of both the counsel of the defendant, it was signed, and instructions given to the attorneys to execute it."

It is unnecessary to go further into the detail of the testimony of Mr. Van Wagenen. What I have cited already gives with sufficient particularity the history of these several stipulations, as understood by him. I will only add, that he denies, in the most explicit terms, that he requested the adverse counsel to withdraw the plea of the general issue, or that it was withdrawn for his accommodation, or that he ever supposed it was the practice of this court to try an issue in fact before an issue in law, or that he ever so informed Mr. Hall, or in any way intimated to him that such was the practice in this state. In a supplemental affidavit of Mr. Hall, he says, "that in omitting to file the plea of the general issue at the commencement of the suit, he did not suppose he would be required to go to trial without that plea under all circumstances and in any event, or that he precluded himself from an application to the court for leave; that he supposed the only consequence of not filing that plea, was the possibility of

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being compelled, after a decision on the demurrer, to apply to the court for leave to file such a plea, if necessary to a full and fair defence of the case, which would be granted on such terms as the court might think equitable. Upon a careful examination of this evidence, I can find nothing in it to warrant the charge, that these several written stipulations, signed both by the counsel and attorneys of the respective parties in the cases now under consideration, were brought about by the contrivance, or by the fraud or misrepresentation of the counsel of the plaintiffs. The defendant employed two counsel in the city of New York (whose professional reputation is too well known to need an encomium from this court) to conduct his defence in these important cases. They assumed the responsibility, and employed an attorney of this court, favorably known as a successful practitioner, to enter the defendant's appearance to these suits, and under their direction, but in his name, as an officer of this court, to file all necessary and proper pleadings in defence to the actions. Mr. Hall, in his affidavit, alleges that the attorney in New Jersey acted wholly under his direction, and that he himself is responsible for what has been done on the part of the defendant in the prosecution of these suits.

The first point upon which these two counsel, whose evidence has been taken, come in conflict is the withdrawal of the plea of the general issue. Mr. Hall says it was withdrawn at the request of Mr. Van Wagenen, and for his accommodation. Mr. Van Wagenen says he never made any such request; but, on the contrary, his consent to permit it to be withdrawn was earnestly solicited by Mr. Hall; and he goes into a detail of circumstances, connected with the withdrawal, that tend strongly to carry the conviction that Mr. Hall is mistaken in his recollection of the facts. These are, that the pleas were prepared by the counsel in New York without the general issue, and served on the plaintiffs' counsel, and sent to the attorney to be filed; that, before they were filed, the attorney added this plea; that, on the service of another copy, the plaintiffs' counsel prepared his replication to that plea; that both the defendant's counsel complained of an unwar-

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rantable interference on the part of their attorney; that they assigned a reason why they omitted that plea, and he gives the reason. These facts, which do not depend wholly on the statement of counsel, tend strongly to prove that the gentlemen who had the control of the defence did not mean to file this plea, and that it was filed without their knowledge or consent, and it is reasonable, therefore, to conclude that it was withdrawn at their instance and for their benefit. But I apprehend it is not very material to determine at whose instance the plea of the general issue was withdrawn, (unless it is to meet the charge of contrivance, which implies corruption and fraud,) for both parties agreed to it, and expressed their assent in writing, and that upon more than one occasion. If both counsel agreed to it, and neither was guilty of fraud or misrepresentation, it can make no difference from which of them the proposal proceeded.

The next point in controversy between the counsel, arises upon the stipulation of the 10th of January, 1848, which provides, that in case the judgment of this court in these cases should be reversed on the writs of error, the defendant should have leave to amend his plea, but such leave not to embrace the right to put in a new plea. And in case the judgments should be affirmed, the plaintiffs should have liberty to enter by consent a rule giving them leave to traverse or deny the plea of the defendant in an issue in fact. The defendant's allegation is, that this, too, was procured by the contrivance or unfair practice of the plaintiff's counsel. There is no evidence to support such imputation. Five months before, the defendant had deliberately refused to file the general issue, and after it was filed by the attorney as deliberately withdrawn it, and rested his defence on the plea of special justification. The opinion of this court had been obtained in support of that plea; there is nothing unreasonable or surprising, therefore, that the counsel of the defendant should have been willing to abide by the substance of that plea, claiming the right to amend it in form, if it became necessary. This stipulation, according to Mr. Van Wagenen's evidence, (and which is not contradicted) was drawn by himself, and submitted to Mr.

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Hall, who held it until the next day for the purpose of consulting his colleague, and after such consultation it was signed; that, at the time it was signed, one of the counsel remarked, that if the plaintiffs had leave to reply, the defendant should have leave to amend, and that this was agreed to, so far as regarded any technical matter, and after some question as to what might be esteemed technical matter, the counsel of the plaintiffs replied, that it did not extend to a new plea, when Mr. White rejoined, that they did not want to put in a new plea. But Mr. Hall says, he did not suppose the restriction against filing a new plea, would prevent him from applying to the court for leave to file such plea, if the development of the merits of the case required it, but thought that the only effect would be to prevent the delay incident to such application. Suppose this was Mr. Hall's impression, did he derive that impression from his adversary counsel? was it produced by his contrivance or his representations? This is not pretended, much less is it proved. No one who knows Mr. Hall will for a moment doubt the sincerity of his declaration; yet if it be true, as stated by Mr. Van Wagenen, that he made it a point in the presence of both the defendant's counsel, and had before insisted that no new plea should be filed, and that Mr. White at the same time declared he did not want to file a new plea, it is difficult to account for that impression on the mind of Mr. Hall, and more difficult to find the evidence of fraud and contrivance on the part of Mr. Van Wagenen.

I dismiss, therefore, this charge, as there is nothing in the nature of the stipulations themselves, or in the circumstances under which they were signed, or in the depositions which have been read, to sustain it. Ought this court, then, to set aside these stipulations, and declare that the pleas, which the defendant has filed in evident violation of them, should stand as pleas of record in the cases? I think not. I think the defendant should be held to an amended plea, if needful, and not be permitted to file a new plea, and that both the motions should be refused.

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HOWE v. LAWRENCE.

1. If a judgment on demurrer be removed by writ of error and affirmed, and the record after judgment of affirmance remitted, the court below are bound by the judgment, which concludes the rights of the parties, and cannot grant leave to amend or withdraw the pleadings, even by the consent of the opposite party.

2. Agreements made by attorneys and counsel, as to the manner of conducting a cause, will be respected and enforced by the court; but such agreements are not legal contracts, and are under the discretion and control of the court: and an agreement wanting in mutuality, and by which, without the consent of his client, an attorney has waived his client's substantial legal right, will not be enforced.

3. Any pleading which takes issue upon an immaterial allegation, will be overruled or stricken out as frivolous. A matter does not become material and issuable by the mere fact of its being averred in pleading.

At the term of April, 1847, thirty-three actions of trespass were instituted in this court, at the suit of different plaintiffs, against Cornelius W. Lawrence. The writs were all issued by the same attorney. The ground of complaint, in each case, was the destruction of the plaintiff's goods, by gunpowder, at the great fire in the city of New York, on the 17th December, 1835. The declaration, in each case, was in the usual form. The defendant appeared in all the suits by the same attorney, and on the 29th of July, 1847, he pleaded, in each case, three several pleas, *viz*: 1st, the general issue; 2d, a special justification under and by virtue of a statute of the state of New York; 3d, the statute of limitations. By an agreement, bearing date on the 11th of August, 1847, made between the counsel of the respective parties, (the causes being in fact under the control and direction of counsel resident in the city of New York) the plea of the general issue was stricken out in all the causes. To the special justification, there was a general demurrer and joinder in demurrer.

To the plea of the statute of limitations, the plaintiff replied, that at the time when the causes of action accrued the defendant was not resident in this state, but resident in the state of New York, and that the defendant has not been resident in this state for the term of six years, nor for so great a term as six years, since the term when the said several causes of action, or any of them, accrued, and before the commencement of the suit.

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The defendant rejoined, that the said several supposed trespasses, in the plaintiff's declaration mentioned, were committed in the state of New York, and out of and beyond the jurisdiction of this state, and that the several causes of action thereon, accrued in the state of New York, and not in this state; and that when the several supposed trespasses were committed, and the said several supposed causes of action accrued thereon, and during all the intervening time, and for a long time after, as well the said plaintiffs as the said defendant were not resident in this state, but resided in the state of New York, or some other of the states of the United States of America; and that the plaintiffs and defendant have ever since resided, and do still reside, out of and beyond the jurisdiction and limits of this state; and that, at the several times when the said supposed trespasses were committed, and the said causes of action accrued thereon, the defendant had not, nor has he since had, any rights or credits, moneys or effects, goods or chattels, lands or tenements, whatsoever, within the jurisdiction of this state. To this rejoinder the plaintiff demurred, and the defendant joined in demurrer.

By an agreement, entered into between the counsel, and signed by the attorneys of the respective parties, bearing date on the 14th of September, 1847, it was agreed, that in all the causes, the defendant should be at liberty to withdraw the plea of the general issue; and that in the two suits brought by the American Print Works and by Thomas Hale, respectively, the plea of the statute of limitations, and the replication and rejoinder consequent thereon, should be withdrawn (those plaintiffs having been in fact residents of the state of New Jersey), and that these two causes should stand upon the special justification, and the demurrer thereto. In the remaining thirty-one causes there were two issues, *viz:* 1st, upon the demurrer to the defendant's justification testing the validity of the defence under the statute of the state of New York, which was common to all the cases; 2d, upon the demurrer to the defendant's rejoinder to the replication to the plea of the statute of limitations, raising a question upon the construction of the statute of this state.

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The Supreme Court, at January term, 1848, overruled both the demurrers, and, no leave having been asked by the plaintiffs to plead over, rendered final judgment in all the causes in favor of the defendants.

Immediately after the opinion of the Supreme Court was announced, a written agreement, bearing date on the 10th day of January, 1848, was signed by the attorneys of the respective parties, of the tenor following:

SUPREME COURT.

Thomas Hale
v.
Cornelius W. Lawrence.

George Howe
v.
Cornelius W. Lawrence.

It is hereby stipulated and agreed between us, the respective attorneys for the parties, respectively, in the above causes, that a writ of error shall be brought forthwith in each of the said causes, returnable in the Court of Errors and Appeals, and that all necessary papers shall be filed out of time, so as to place the causes in condition to be placed on the calendar, and argued at the ensuing January term of the said court; and we hereby agree to waive, and hereby waive, all irregularities in the steps taken to effect such purpose; and if the judgment of the Supreme Court be reversed, we hereby agree that such judgment as shall be entered in the Court of Errors and Appeals in the case of Thomas Hale *v.* Cornelius W. Lawrence, shall also be entered in the case of the American Print Works against Cornelius W. Lawrence, and that such judgment as shall be entered in the said court in the case of George Howe against Cornelius W. Lawrence, shall also be entered in the thirty other cases brought at the same time, in the Supreme Court, against the said Cornelius W. Lawrence, and which were argued together, in the said Supreme Court, with the said above entitled causes; but that the said defendants, respectively, shall then have leave to amend their plea, such leave not to embrace the right to put in a new plea; and further, should the judgment of the Supreme Court be affirmed

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in either of the above entitled causes, it is herein stipulated and agreed, that in the cause in which judgment is so affirmed, and in all similar causes, as above mentioned, the plaintiffs, respectively, may enter by consent a rule in the Supreme Court on this stipulation, giving them leave to traverse and deny the plea of the defendant in an issue of fact.

At the term of October, 1848, *(a)* the court of Errors and Appeals pronounced their opinion, reversing the decision of this court upon the demurrer to the plea of justification, but affirming that decision of this court upon the demurrer to the rejoinder of the defendant under the plea of the statute of limitations.

The following order and remittitur were thereupon entered in this cause: "It is ordered and adjudged, that the said first plea of the said defendant, in manner and form aforesaid by him firstly above pleaded, with the matters therein contained, is not sufficient in law to bar or preclude the said plaintiff from having or maintaining his aforesaid action against him, the said defendant: but that the said rejoinder of the said defendant, in manner and form aforesaid by him above rejoined, with the matters therein contained, is sufficient in law to bar or preclude the said plaintiff from having or maintaining his aforesaid action against him, the said defendant; and it is further ordered and adjudged, that the record and proceedings therein be remitted to the said Supreme Court, to the end that the said court may proceed thereon according to law." Pursuant to the agreement, a like order and remittitur were made in thirty other cases, in which the same issues were joined.

Upon the return of the record and the filing of the remittitur in this court, on the first day of November, 1848, the following rules were entered in the minutes of this court, *viz:* "The above causes, respectively, being remitted from the Court of Errors and Appeals, it is ordered that remittiturs be filed, &c. On motion of B. W., attorney of defendant."

"On reading and filing remittiturs from the Court of Errors and Appeals in the above causes, respectively, and likewise a consent of the respective attorneys, it is ordered, that the

(a) See *Sup.*, vol. 1, 714.

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plaintiffs in all the said causes, respectively, have leave to surrejoin to the rejoinder of the defendants to the replication to the defendant's second plea within thirty days. On motion of A. C. M. P., attorney of plaintiffs."

It was admitted, upon the argument, that the entries, as well of the order and remittitur in the Court of Appeals as of the orders of this court, were made by and under the direction of the counsel of the plaintiffs, in the absence of the attorney of the defendant, and without any motion having been made by him or on his behalf in this court upon the return of the record.

In pursuance of the rule thus entered, the plaintiff, in each of the thirty-one cases in which the judgment was for the defendants, on the 25th of November, 1848, filed a surrejoinder, wherein it is averred, that at the several times when the said several trespasses in the said declaration were committed, and the said several causes of action accrued thereon, and during all the intervening time, and for a long time after, both the said plaintiff and the said defendant did not reside in the state of New York, nor did they both reside in any other and the same state of the United States of America, in manner and form, &c.

At the term of January, 1849, the defendant, upon notice previously given, applied to the Supreme Court to vacate the rule of October term, 1848, giving the defendant leave to surrejoin, and also to strike out the surrejoinder thereupon filed.

Argued before the whole court, by *B. Williamson* and *Hornblower*, for defendant, and *W. Van Wagenen* and *Vroom*, for plaintiffs.

The Chief Justice. The Court of Errors and Appeals having affirmed the judgment of this court upon the demurrer to the defendant's rejoinder, under the plea of the statute of limitations, that judgment is final, and concludes the rights of the parties, both in that court and this.

The parties do not now stand in the position they would have done, had the application to amend been made immediately upon the rendry of the judgment in this court. The

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judgment of the Court of Errors having intervened, this court has no power to permit an amendment of the pleadings, even with the consent of the attorney of the defendant.

The judgment of the Court of Appeals upon the affirmance was, and of necessity must have been, "that the defendant go thereof without day." The clerical error in the entry of the judgment must be disregarded. The judgment was final, and conclusive upon the rights of the parties. This court has no power to vacate that judgment, or to treat it as a nullity.

The right of the plaintiff to amend, was, upon the argument, based entirely upon the consent of the defendant's attorney contained in the written agreement of the 10th of January, 1848. That agreement, it is insisted, was a valid contract between the attorneys, founded upon good consideration, and made for the mutual benefit of the parties; that it is therefore a contract which is legally binding upon the parties, and which, at any rate, this court ought not to permit to be violated to the prejudice of either party.

Justice requires that agreements fairly made between attorneys or parties in the progress of a cause, relating to the conduct of the suit, should be fairly and faithfully enforced, not because they are technically contracts, and legally binding upon the parties, but because the administration of justice is thereby facilitated.

An agreement to waive an irregularity, to postpone or delay a trial, to take short notice of argument, to permit a cause to be brought to hearing summarily, these, and arrangements like them, do not partake of the essence of legal contracts. They are founded upon no consideration, they require no mutuality, if violated no action lies for their breach. The court may refuse to enforce them, unless reduced to writing and filed, or they may enforce them, in whole or in part, at their discretion. In short, they are regarded as a part of the machinery for the conduct of the cause entirely under the control of the court, and they will be enforced, or not, as the substantial rights of the parties and the ends of justice may require. And, undoubtedly, in the exercise of this discretion, courts will see that if a mutual agreement be made or a consent be

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given, or a waiver of right be made upon one side, in consideration of a consent or a waiver of right upon the other, that it shall not be partially enforced, to the prejudice of the rights of either. This, it is insisted, is the case with the contract between the counsel in this cause, that it has been partially performed, and must now be performed in full. But is this so?

What are the stipulations of this agreement? That writs of error shall be forthwith brought in two, of thirty-three cases, from the judgments of this court; that all necessary papers should be filed out of time; that the causes should be set down for argument at the ensuing term of the Court of Errors (within ten days from the date of the agreement); that all irregularities in the steps taken to effect this purpose should be waived; that the same judgment entered in the case of Thomas Hale should be entered in one other cause similarly circumstanced, and that the judgment in the case of Howe should be entered in thirty-one other cases similarly circumstanced to it. In case judgment be reversed, that the defendant have leave to amend his plea, but not to file a new plea, and if the judgments be affirmed, the plaintiff be at liberty to traverse the *defendant's* plea in an issue of fact.

At the time of signing this agreement, the defendant was in the possession of the final judgment of this court in thirty-three causes. The defendant's counsel thereupon agrees that writs of error shall be forthwith brought, and set down for argument; that every irregularity shall be waived; that all delay shall be obviated; that every obstacle shall be removed from the path of the plaintiff, and every facility afforded him in procuring a reversal, and, finally, that if the plaintiff in error fail in procuring a reversal of the judgments in this court by the judgment of the Court of Errors, the defendant consents that these judgments be vacated, and the litigation commenced anew. The only clause in the agreement which, even in appearance, favors the defendant is, that in case of a reversal the defendant shall be at liberty to amend his plea, but not to plead anew. Upon any construction of this clause, it gave the plaintiff simply what the court would have granted much as a mere matter of course, and upon the construction contended

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for by the plaintiff; it was not a concession, but a limitation of the defendant's right. It restrained him even from asking leave to plead anew.

I see, therefore, no mutuality in the agreement; it is wholly in favor of the plaintiff. It is an agreement which, independent of the last clause, under the circumstances of the case, considering the position of the cause and the immense interests at stake, considerate counsel would have hesitated to enter into without the express assent of his client, and which, including that clause, no counsel, with a full understanding of his client's rights and of the character and effect of the agreement, and acting in good faith, ever would have made.

The stipulation to waive the judgment of this court, affirmed in the Court of Errors, was not an agreement for the conduct of the cause: it was a deliberate surrender of his client's rights, a surrender which I conceive the counsel had no power to make, and which, if he had the power, justice would never permit to be enforced. Disregarding the oath of the counsel, by whom this agreement was made, as to the design of the agreement, and the understanding upon which it was entered into; looking solely at the agreement itself, and the circumstances under which it was made, it seems to me impossible to escape the dilemma forcibly propounded to the court by that learned counsel upon the argument. Either the agreement must have been entered into by the counsel of the defendant, under some misapprehension of its character, in which event it is not his agreement, or it must have been founded upon some corrupt consideration, in which event it is utterly void. The high character of the counsel, upon both sides, forbid all imputation of fraud or corruption. The alternative remains, that the agreement was entered into under some mistake or misapprehension, and ought not to be enforced by the court. I think, therefore, admitting the power of the court now to give effect to the agreement, and the power of the attorney to enter into it, a due regard to justice and the rights of the parties forbid that it should be enforced.

There is one aspect of this case in which it may be suggested, that, by possibility, the rights of the plaintiff may be

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prejudiced by this view of the effect of the agreement. It may be said, that if this agreement had not been entered into, and the consent to amend after the affirmance, been given, that the plaintiff would have abandoned his writs of error, and moved for leave to withdraw his demurrer and to surrejoin, to which motion he would then clearly have been entitled. No such intimation has been made, nor is it at all probable, from the character of the pleadings, that such course would, under any circumstances, have been taken, because thereby the material question upon which the rights of the parties depended would have been left wholly unsettled. Still, it is a possible contingency, and in that event, however difficult or impossible it might be for this court to afford relief, substantial justice would seem to require that the plaintiff should not be prejudiced by the agreement, and that he should be permitted to amend his pleadings.

As the interests at stake in these causes are great, and as it is in every view desirable that they should be settled upon the broadest ground of right and justice, it may not be improper, conceding that the view already expressed be erroneous, to consider the character of the pleading and the nature of the issue sought to be made by this surrejoinder.

The plea was the statute of limitations, to which there was a replication, rejoinder, and demurrer. The question presented by the demurrer, upon which judgment has been rendered, was, whether the provision of the act of 1820 (*Rev. Laws* 670), that the statute of limitations should not run against the plaintiff while the defendant was absent from the state, operated only in favor of creditors or plaintiffs who reside here or whose cause of action accrued within this state, or whether it extended, also, to causes of action which arose without the jurisdiction of the state, and operated in favor of non-resident plaintiffs. That was the point presented by the pleadings, argued by the counsel, and decided by the court. It was the same point that was decided in *Beardsley* v. *Southmayd*, 3 *Green* 171, and subsequently reaffirmed in *Taberrer* v. *Brentnall*, 3 *Harr.* 262. The replication, in terms, avers that the trespasses were committed in the state of New York, and

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out of and beyond the jurisdiction of this state; and when the several causes of action accrued, and for a long time thereafter, as well the plaintiffs as the defendants were not residents in this state, but resided in the state of New York, or some other of the states of the United States of America. The material averment of the pleading is, that the causes of action arose without the jurisdiction of this state, and that the parties, plaintiff and defendant, were non-residents of this state. The surrejoinder now filed by the defendant, without traversing either of these material averments, simply avers, that at the time the causes of action accrued, and afterwards, both the plaintiff and the defendant did not reside in the state of New York, nor did they both reside in any other and the same state of the United States of America; thus seeking to raise the issue, not whether the parties were or were not residents of this state, but the totally irrelevant and immaterial issue, whether they resided in New York or Connecticut, or whether they both resided in the same state or in different states. Either issue is alike immaterial and irrelevant. But it is said that the defendant made the matter material by the form of his rejoinder, thereby averring that the parties both lived in the same state. True, but does every averment in a plea make the matter material? If so, there can be nothing superfluous in pleading. Every averment becomes material and issuable, whereas many averments are neither material nor issuable. There is an averment in this rejoinder, that the trespass was committed in New York, and that the parties resided in some one of the United States, but would it therefore be competent for the plaintiff to answer that the trespass was committed not in New York, but in Connecticut, or that the parties resided not in any one state of the United States, but in the District of Columbia, the territory of Iowa, or the island of Cuba? The case is too plain to admit of argument. The averments are neither traversable nor material.

The surrejoinder is utterly frivolous, and we should feel constrained upon this ground, independent of all others, to order it to be stricken out.

The surrejoinder must be stricken out, the rule of this court

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allowing the surrejoinder to be filed, must also be vacated and set aside, as improvidently entered.

Inasmuch, however, as the difficulty has been induced by the act of the defendant's counsel, the rule is ordered without costs, each party to pay his own costs. As the amended pleas in the cause were filed under a misapprehension, the defendant has leave to withdraw them.

Let a rule be entered vacating the rule of October term, 1848, and striking the surrejoinder from the files, but without costs, the amended pleadings to be withdrawn; all other proceedings in this cause, if any there be since the entry of the remittitur, to be stricken out, and the judgment of this court, as affirmed in the Court of Appeals, to stand in all things ratified and confirmed.

Let the same rules be also entered in the thirty-one other cases similarly circumstanced.

Carpenter, Randolph, and Ogden, Justices, concurred.

Nevius, J. These actions were also commenced in this court against the same defendant, and founded on the same alleged act of trespass charged in the next preceding cases. In these, besides the special plea of official justification, the defendant also pleaded the statute of limitations. To the first of these pleas, the plaintiff filed a general demurrer, and to the second, he replied, "that when the cause of action accrued, the defendant was not a resident in the state of New Jersey, but resided in the state of New York, and that he had not been resident in the state of New Jersey for the term of six years, or for so great a term as six years, since the cause of action accrued, and before the commencement of these suits. To this the defendant rejoined, "that the supposed trespasses were committed in New York, and without the jurisdiction of this state, and the several causes of action thereon accrued in New York; and that when the said trespasses were committed, and the said cause of action accrued, and during all the intervening time, and for a long time after, as well the said plaintiff as the said defendant were not resident in this state, but resided in the state of New York, or some other of the states of

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the United States of America; and that as well the said plaintiff as the said defendant have ever since resided, and still do reside, out of and beyond the jurisdiction of this state," &c. To this rejoinder the plaintiffs also filed a general demurrer, and upon the argument of these several demurrers before this court, in the case of *Howe* v. *Lawrence*, both were overruled by the judgment of the court in the term of January, 1848. After that judgment had been announced, *to wit*, on the 10th of January, the counsel and attorneys of the respective parties entered into a written stipulation, "that writs of error should be brought in the thirty-one causes; that all necessary papers should be filed out of time; that the causes might be argued at the ensuing January term of the Court of Errors and Appeals; that all irregularities should be waived in order to effect that object, and that if the judgment of the court should be reversed in the case of *Howe* v. *Lawrence*, the like judgment should be entered in thirty other cases; and that in such event the defendant might amend his plea in all the cases, but not file a new plea; and if the judgment should be affirmed in said case, the like judgment should be entered in the other cases; and that the plaintiffs, respectively, might enter a consent rule in this court giving them leave to traverse and deny the plea of the defendant in an issue of fact."

After this stipulation was signed, the case of *Howe* v. *Lawrence* was argued in the Court of Appeals, and in the term of October, 1848, that court, by their judgment, sustained the demurrer to the special plea of justification, and overruled the demurrer to the plea of the statute of limitations. The cause being remitted to this court, the plaintiff entered a rule in conformity with the above stipulation, and filed a surrejoinder, taking issue on a fact averred in the rejoinder. On the 1st of December, 1848, the defendant filed new pleas, in this and the other like cases, of the same import with those mentioned in the case of *Hale* v. *Lawrence*. The defendant now moves the court—

1st. To strike out the surrejoinder as frivolous, insisting that it is taking issue on a fact not averred in the rejoinder.

2d. He insists that these stipulations ought not to be carried

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out, because they were made without consideration on his part, and were unfairly obtained, and because the legal effect of overruling the demurrer to the rejoinder is a final judgment in his favour, which this court cannot set aside.

3d. The plaintiffs move that the pleas filed on the 1st of December, 1848, be stricken out, because they are new pleas, and filed in violation of the stipulation; or if the court should be of opinion that they should stand as pleas of record, they insist that such pleas are a waiver of the plea of the statute of limitations, and that the plea of the statute should be stricken out, and are willing to accede to either alternative.

And first, as to the motion to strike out the surrejoinder as frivolous. That the court has power to strike out sham or frivolous pleas, is too well settled to admit of debate; but I apprehend that such power is seldom exercised, except in cases where the pleading is clearly so, and not where the question admits of serious argument, and much less where there should be a difference of opinion among the judges themselves on the question, whether a plea is or is not frivolous. Without meaning to decide now whether the surrejoinder filed by the plaintiff is a valid, legal, and available answer to the defendant's rejoinder, *if true*, I will only inquire whether it is frivolous. What is the fact averred in the rejoinder that this plea attempts to answer? It is, "that when the said supposed trespasses were committed, and the said causes of action accrued, and during all the intervening time, and for a long time after, as well the said plaintiff as the said defendant were not resident in this state, but resided in the state of New York, or some other of the states of the United States of America." Here is an averment, which the pleader deemed material, and if so, his adversary has a right to deny it, if permitted to notice it at all. He did not deem it sufficient to allege that both parties were non-residents in New Jersey when the causes of action accrued, but added that they were both residents of the state of New York, or some other of the states. Without intending now to settle the true meaning and construction of this latter allegation, I cannot resist the impression that the fair grammatical construction is, that both parties resided, and continued to

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reside, in one and the same state. And if that was not the true intent of the pleader, it is equally difficult to resist the conviction that he meant the averment to be equivocal. In *Southmayd* v. *Beardsley* (upon which the pleadings in these cases seem to have been framed) the allegation was, that both parties resided in the state of Connecticut when the cause of action accrued, and continued to reside there; and it was upon this allegation, I apprehend, that the court sustained the defence of the statute of limitations. It is, therefore, fairly to be presumed that the defendant's counsel intended to bring himself, or to induce the belief that he had brought himself, within the scope of that decision, for he must be a bold pleader who would venture beyond that. Considering, therefore the fact, that the pleadings in *Beardsley* v. *Southmayd* seem to have been the precedent for the pleadings here, and considering, also, the language of this rejoinder, it is no injustice to the counsel to say, that he intended to allege in his defence, that when the cause of action accrued both parties were resident in the same state, and continued to reside in the same state, or, at least, intended the opposite counsel should so understand him. This, then, was esteemed an important and material fact. I esteem it a material fact, and one which the plaintiffs in these cases, by the terms of the stipulation above mentioned, may take issue upon. But it has been argued that this rejoinder has not only been sustained by the court of Errors and Appeals, but that *that court* also adjudged it would have been good, if it had averred only that when the action accrued both parties resided out of and beyond the limits of the state, and contiued so to reside. I do not so understand the decision of that court, and sincerely hope I am not in error upon this point. Whatever may have been the opinion of one or more of the members of that court, I feel assured that the majority of the court intended to settle only the issue before them, and never intended to exceed their authority in going beyond that issue. And even if a majority of that court did entertain and express opinions without that issue, such opinions are not binding upon this court. I think the motion to strike out the surrejoinder ought not to prevail, but that the defendant, if he

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cannot safely take issue upon it, should be put to his demurrer, if he sees fit.

2d. As to the motion, that this court should disregard the stipulation of the 10th of January, 1848, as having been unfairly obtained without consideration, and that the defendant be declared to be entitled to final judgment in all these cases, I remark, that upon a careful examination of the evidence taken on these motions, I have not been able to discover any ground for the charge of fraud or unfairness on the part of the counsel of the plaintiff in procuring such stipulation. What I have already said on this very point, which was also involved in the case of *Hale* v. *Lawrence*, I here refer to. (*a*)

Upon the question of consideration, I remark, if the stipulation is clear and unequivocal in its terms, and not procured by fraud or misrepresentation, or any unfair means, I cannot perceive that we are bound by any rule of law or practice to inquire into that. If counsel, in the conduct and management of a suit, see fit to enter into written stipulations touching the pleadings or the mode of proceeding, I know of no rule that requires us to constitute ourselves guardians for either party, and to adjudge such stipulation void because we cannot distinctly see a consideration, or an adequate consideration, for it. Stipulations between counsel touching the management of a cause may be voluntary, and not the less obligatory on that account. But if we were called upon to make an inquiry whether there was a consideration for the stipulation in question, I can easily conceive a fair and sufficient inducement on the part of the defendant to enter into such a stipulation. Here were a large number of suits commenced against the same defendant, and all based upon the same alleged act of trespass. These, we may presume, were all brought in good faith, and involved not only a large amount of property, but great and important questions of law, upon which different opinions had already been expressed by the judges of the highest tribunals of a neighboring state. The defendant employed eminent and honorable counsel of his own state, as well as this, to conduct his defence. In the performance of their professional obliga-

(*a*) *Ante*, page 85.

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tions, and, as we are bound to believe, with a full knowledge of their client's case, they determine to cast his defence on two grounds, official justification and the statute of limitations. After placing themselves deliberately on these defences, involving, in their opinion, the true questions in these causes, was there any thing wrong, unfair, or unprofessional, or hostile to the true interest of their client, in stipulating that both these questions should be fairly, fully, and thoroughly argued before, and examined and adjudged by the tribunal before which they were pending, or before which they might be carried by appeal, without regard to technical form? Surely not. Counsel are not only justified in making such stipulations, but I deem it the duty of honorable practitioners to enter into such agreements, if necessary to effect such an object. What, then, may we presume to have been the great ruling object which all the counsel concerned in these cases kept steadily in view, both in the prosecution and the defence? Clearly the settlement of the great questions which they involved, by the tribunal before which they were pending, unembarrassed by any technical rules of practice. Does this stipulation go beyond any such fair, honest, and lawful purpose? I think not. The plaintiffs said, you have chosen the grounds upon which you mean to rest your defence, you have confidence in their merits, and of being able to sustain them, now if the court of last resort shall affirm the judgment you have already obtained in your favor on the legal question, I ask the privilege to take an issue in fact with you. Was it an unreasonable request? Was it unreasonable to grant it? Was it doing any injustice to the defendant? Was it corrupt in counsel to accede to such proposal? By no means: it was no more than plaintiffs' counsel might properly ask, or defendant's counsel grant, and no more than this court would have granted, on a proper application, so far, at least, as regards the special plea of justification. On the other hand, should the judgment of the Court of Appeals be against you, that is, if the judgment of the Supreme Court be reversed, you shall be at liberty to amend your plea, but not have liberty to file a new plea, to present a new and distinct issue, for if you had any other legal defence,

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you should have advised us of it in the outset, and not delayed us by filing these pleas alone. There was nothing wrong in this proposition, no matter from which side it came; it was fair in itself, and fairly agreed to by both parties. Will this court, then, interfere and say, that because counsel have now changed their opinion, we will set aside this stipulation? I can see no reason why we should. For aught that appears, the counsel on both sides were equally aware of the nature and effect of this stipulation: in my opinion, neither the law nor the justice of the case requires us to set it aside.

But it is insisted by the defendant that the judgments of affirmance in the Court of Errors and Appeals, on the demurrer to the plea of the statute of limitations, are final judgments, and the records being remitted to this court, we have no power to permit the plaintiffs to take an issue in fact upon that plea or rejoinder, but only to carry into effect such judgments by issuing executions for recovery of costs. This would certainly be so, were it not for the stipulations we have been discussing. It was in pursuance of the stipulation of the 10th of January, 1848, that writs of error were brought in all these cases, and it is by virtue of that stipulation, and that only, that judgments were rendered in thirty, out of the thirty-one cases, taken up by writs of error. The agreement is, that such judgment as shall be rendered in the case of Howe, shall also be rendered in all the other like cases. Without this agreement between counsel, such judgment would not, and could not, have been rendered in the thirty cases, for they were not moved nor discussed in the Court of Appeals. Without this agreement, we have no reason to suppose that writs of error would have been brought in all these cases, but that the plaintiffs would have applied to this court, after its judgment on the demurrer, for leave to take an issue in fact on the defendant's plea, which, I apprehend, would have been granted. When these causes were taken to the Court of Appeals by writs of error, they were subject to that stipulation, and if that stipulation was valid and legal, it followed the causes into that court, (no matter in what court it was entitled) and, after judgment and remittitur of the record here, the stipulation is again here, is part

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of the proceeding in the causes; and this court, in my opinion, has not only the right, but is bound in justice to the parties, so to modify the judgments as to carry out and enforce the stipulation. Whatever may be the form of the entry in the court above, its true substance is, judgment on the demurrer in favor of the defendant, subject to the right of the plaintiffs before secured, to take an issue in fact. The legal consequence, *to wit*, the finality of the judgments, is suspended, or rather avoided, by the express agreement between the parties, which neither the Court of Appeals nor this court has a right to disregard. Surely this court will not hold the plaintiffs to a technical and formal judgment against them, in direct violation of the defendant's written stipulation, and give him the benefit of a plea never favored in law, and now alleged in the surrejoinder to be untrue in fact. To treat these judgments as final and conclusive against the plaintiffs, will be to give to the defendant the whole benefit of the stipulation, and deny to the plaintiffs the right which was secured to them by the same stipulation. There is no rule of law better settled, and none can be more equitable and just, than that where a party in a cause is relieved from his own stipulations, the adversary should be restored to all the rights he had when such stipulations were entered into. To apply the rule in these cases. If the plaintiffs are not permitted to take an issue in fact, according to the agreement, they should be restored to the situation they were in when the agreement was made; and this will relieve the plaintiffs from the judgment in the thirty like cases, and leave them now to apply to this court for leave to take an issue in fact.

But it is argued that, as the judgments are in the superior court, and the record has been remitted here, this court has no other power over them than to enforce them by execution. It is true we cannot, of our own mere motion, alter or modify the judgment of the higher tribunal; but the record being here, I apprehend we have the right to give it such effect as the parties themselves agree it shall have, if not in violation of any rule of law or right of another court; and it matters not whether such agreement be made before writ of error

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brought on after the cause is again sent down. I think this court ought not to treat these judgments as final, but hold the defendant to his stipulation, and permit the surrejoinders filed in these cases to stand.

3d. The remaining question is presented, on motion of the plaintiffs' counsel, to strike out the new plea filed by the defendant in these cases. Filing these pleas was certainly against the defendant's own stipulation; but as his counsel now allege that they were filed by mistake, and ask leave to withdraw them, I am of opinion that he should have liberty to do so; and am further of opinion that the rejoinder and surrejoinder in these cases should stand as pleas of record, and that the defendant be at liberty to amend his special plea of justification in thirty days.

Motions of defendant granted.

DEN *d.* TRUMBULL ET AL. v. GIBBONS.

1. If a will devise lands to W. and his heirs and assigns for ever, and if W. should die without lawful issue and without leaving a will, or if he should by will, or in any other way, after the date of said devise, give any thing to T., or any of his descendants, then over: this devise vests an estate in fee in the first taker, and the limitation over being upon a *definite* failure of issue, is not void as an executory devise on account of remoteness. If this condition should be held void, as being contrary to policy or good morals, as it is a condition subsequent, it would only defeat the limitation over, and not the estate devised to W.

2. Every testator is presumed to be of sound mind, until the contrary is proved. The burthen of proof is upon the party alleging insanity.

3. A will cannot be set aside on account of any moral obliquity or prejudice of the testator exhibited in the devises in it, or because the disposition of property in it is unnatural or unjust.

4. Strong, violent, and unjust prejudices, if not founded on delusion, do not show mental incapacity.

5. Influence acquired over a testator by kind offices or persuasion, unconnected with fraud, is not such undue influence as would invalidate a will induced by it.

This was an action of ejectment, brought to recover a farm, in the township of Elizabeth, in the county of Essex, in pos-

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session of Thomas McCullor, known as the Walnut-hill farm, containing two hundred and thirty acres. The declaration contained five counts.

1. One on the joint demise of Thomas Gibbons Trumbull, John Heyward Trumbull, Ralph Henry Isham and Ann his wife, and Daniel Coit Ripley and Sarah his wife.
2. One on the demise of T. G. Trumbull.
3. One on the demise of J. H. Trumbull.
4. One on the demise of Isham and wife, and
5. One on the demise of Ripley and wife.

The defendant pleaded not guilty, and the cause was tried at the Essex May circuit, 1848, before the Chief Justice.

On the trial, the plaintiff proved that Thomas Gibbons died many years since, seized of the premises in question. That Thomas Gibbons had had three children, *viz:* his son William Gibbons, the defendant, his son Thomas Heyward Gibbons, who had died in his father's lifetime, leaving one child, Hannah Wheelwright, and his daughter Ann, who married John M. Trumbull, and died in the lifetime of her father, leaving four children surviving her, *to wit*, T. G. Trumbull, J. H. Trumbull, Ann Isham, and Sarah Ripley, the lessors of the plaintiff.

The defendant then opened his defence, and offered in evidence the record, from the surrogate's office of the county of Essex, of a writing purporting to be the will of Thomas Gibbons, bearing date the 26th day of October, 1825, with a copy of the proofs and probate, bearing date the 27th day of May, 1826; recorded in Book D. of Wills, page 344, &c., for Essex county.

To this evidence the plaintiff, by his counsel, objected, and the court overruled the objection, and admitted in evidence the said record.

The defendant then offered, and read in evidence, the record of Thomas Gibbons Trumbull's discharge under bankrupt act —date of petition 17th February, 1842, date of decree in bankruptcy 21st March, 1842, and date of final decree 19th July, 1842; also, the record of John Heyward Trumbull's discharge under the bankrupt act, the petition bearing date

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23d January, 1843, decree 24th February, 1843, and final decree 8th June, 1843; also, the record of Ralph Henry Isham's discharge under the bankrupt act, the petition bearing date October 15, 1842, decree November 18, 1842, and final decree July 18, 1844.

The admission of the record of Ralph Henry Isham's papers was objected to by the plaintiff, but admitted by the court, and read in evidence.

The defendant then rested his cause.

The plaintiff then offered the original will of Thomas Gibbons, from the office of the secretary of state at Trenton, produced by that officer, which will is as follows:

In the name of God, amen. This is the last will and testament of me, Thomas Gibbons, at present of the city of New York, in the state of New York, but late of Elizabethtown, in the state of New Jersey, and formerly of Savannah, in the state of Georgia, esquire, being now weak in body but of sound mind, preparing to meet the king of terrors, when he shall assail me in the feeble moments of departing life, in the last severe and trying period, that laboring hour of nature, I do make this my last will and testament.

First. I recommend my soul to the mercy of my God, through the intercession of my blessed Redeemer.

Second. I submit my body to the grave, to be sealed up in expectation of a happy resurrection.

As to the disposition of my estates, which is the sole object of this instrument, it is as follows:

To my son Thomas Heyward Gibbons I confirm a memorandum in writing to him of the Mount Vernon estate, and the negroes therein mentioned, so far as the same does not interfere with the provisions herein after contained in regard to a portion of the property and estate in the said memorandum mentioned, which has since become vested in me; but I confirm the same to him, on no other condition than is expressed in the said memorandum: and as it is provided in that memorandum, that in case of the failure of issue of my said son, that I shall, by my last will and testament, give the said estate, real and personal, as I shall appoint, I do therefore, by

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virtue thereof, appoint, will, and declare, that the said estate, real and personal, shall in that event pass over to my son William Gibbons, of Savannah, and to his heirs and assigns, upon the same terms and conditions upon which my estate, herein after next devised to him, is limited. To my son William Gibbons, of Savannah, I give all the rest and residue of my estates, real and personal, (except such as is herein after devised to my granddaughter Hannah Gibbons) in the states of Georgia and South Carolina, that is to say: my plantations Shaftesbury, Mansfield, Fairlawn, Orange Valley, White-hall, one thousand acres of pine land nearly adjoining, devised to me by my father, a tract of land, adjoining, I bought of Joseph Bryan, formerly called Brack's old field, a tract of pine barren, adjoining the thousand acre tract, bought of Edward Lloyd or Edward Davies, my plantation Rosedew, in Chatham county, and Tusculum, in Scriven county, with all my negro slaves in the states of Georgia and South Carolina; and I give to my said son William Gibbons, of Savannah, all my lots of ground, with the improvemets thereon, situated in the city of Savannah; and all this estate in the states of Georgia and South Carolina, as well real as personal, I give to my said son William Gibbons, of Savannah, and to his heirs and assigns, upon the terms and conditions herein after next expressed. And as to my estate in New Jersey, namely, my Rose-hill farm, whereon I formerly lived, (bought of Marroll) which includes a lot opposite the dwelling house lately occupied by me, and also my Wheat-patch farm and triangular lot, which I bought of Jonathan Dayton, and also two meadow lots on the Edgar road, and also a lot, nearly opposite to my above mentioned dwelling house, which I bought of Luke Tucker; the lots on the Edgar road, just mentioned, were bought, one from Mrs. Baldwin, the other from Josiah Hunt; and also a house and lot on the turnpike road, bought of George C. Thomas, formerly occupied by Mrs. Jenkins, and also my Walnut-hill farm, bought of Hugh Webster, and the salt meadow lots, bought of Jonathan Mulford, Noah Crane, and Jacob Crane, and Cowper Woodruff, also a four acre lot on the Sound, bought from the heirs of Ogden, and my two farms Rising

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sun, bought of Peter Coriell, and Howard's farm, bought of Howard, also a lot adjoining the Rising sun farm, bought of Ogden, with two small pieces of ground bought of Butler, and all my estates in the states of Georgia, South Carolina, and New Jersey, herein before mentioned; and also three lots of land, with the improvements thereon, situated and being in the city of New Brunswick, county of Middlesex, and state of New Jersey, at present in the occupation of Cornelius Vanderbilt, and lately purchased of James Murphy, as appears by deed of the said James Murphy and wife, dated November first, in the year one thousand eight hundred and twenty-three, and also a large dwelling house in Elizabethtown, used as a tavern, and called the Union hotel, with all the houses, lots, and premises thereto belonging, now in the occupation of William Craig, and also a lot adjoining thereto, bought of Isaac Williamson and Benjamin Williamson, and also a small lot in the rear, down a small street, bought of Thomas Price: all which said premises and estates, real and personal, in Georgia, South Carolina, and New Jersey, I give and devise, and bequeath, to my beloved son William Gibbons, of Savannah, and to his heirs and assigns for ever, upon this special limitation and condition, that in case my said son William Gibbons, of Savannah, shall die without lawful issue, then my said estates, real and personal, in Georgia, South Carolina, and New Jersey, shall be sold at public auction, to the best advantage, by order of some court having due authority in such cases, agreeably to the laws of the several states where the estates severally lie; and the proceeds of which sales shall be divided into three equal parts or shares, one share of which shall go and be paid to the church wardens and vestry of the Episcopal Church in Savannah, to and for the use of the said church; another equal third part or share shall go and be paid to the officers or managers of the Poorhouse and Hospital of Savannah, to and for the use of the said institution, and the remaining equal third part or share shall go and be paid to the officers or managers of the Female Asylum in Savannah, to and for the use of the said institution; and if it shall happen from any cause whatsoever, either from the want of an act of incorporation or from any

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other cause, or from any disability whatsoever, that it shall be deemed or adjudged that either of the said institutions, to which the said proceeds are directed to be paid as aforesaid, shall be, or is incapable of taking, using, and enjoying the share of the said proceeds, so intended to go and be paid to them, respectively, as aforesaid, then and in such case the said share of the said proceeds shall be divided equally between, and be paid to the other two said institutions which may be deemed and adjudged capable of taking their respective share of the said proceeds, so given to them as aforesaid, to be used and enjoyed for the same uses and purposes as the other portions of the said proceeds, so given as aforesaid, are respectively above directed and expressed, and intended to be; and if more than one of the said institutions, to which the said proceeds are so given as aforesaid, shall be deemed and adjudged incapable of taking, using, and enjoying the respective shares of the said proceeds, so given to them respectively as aforesaid, then and in such case the whole of the said proceeds shall go and be paid to the remaining institution, so deemed and adjudged capable of taking, using, and enjoying the one third part of the said proceeds so given to the said institution as aforesaid. I do hereby mean and intend that all the property, real and personal, given, devised, and bequeathed to my said son William Gibbons, of Savannah, shall by no casuality in this life go to John M. Trumbull, or all or any of his children, or one or more of their or either of their descendants.

And I also give, devise, and bequeath to my said son William Gibbons, of Savannah, my Swamp plantation in South Carolina, on Savannah river, also my plantation in Chatham county, Georgia, called Moreland, also a small farm or tract of land, in Elizabethtown, New Jersey, called Long payment, bought of Elias B. Dayton, also a lot of land, in Morris county, New Jersey, called the Mountain lot, now in the occupation of Daniel Phœnix, also all my bank stock in New York, New Jersey, and Georgia, and all money in any bank in either of the states, and also all my steamboats and sail boats, with their appurtenances, and all money due to me, and all my plate, household furniture, and stock of liquors, in Georgia or

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elsewhere, and also all the rest and residue of my personal estate in New York, New Jersey, and Georgia, which I may die possessed of, to him, the said William Gibbons, his heirs and assigns for ever, without any other condition or limitation, than that no part thereof shall be given, directly or indirectly, by my said son William Gibbons, of Savannah, or in any way descend to John M. Trumbull, or any of his children, or their or either of their descendants; and in case my said son William Gibbons, of Savannah, shall die without first making such disposition by will, or otherwise, of the estate, real and personal, herein last above devised and given to him, so as to place the same wholly and entirely beyond the possible reach of John M. Trumbull and his children, and their and every of their descendants, then and in such case my will is, that the said last mentioned estate, real and personal, shall pass in like manner and upon the same terms with the other parts of my estate herein before devised and given to my son William Gibbons, of Savannah. Having heretofore given to my said son William Gibbons, of Savannah, and having had deeds made in his name for the water lots in the city of New York, purchased from James Arden and others, and the steamboat hotel, bought of John Kearny, situated at Marketfield-street, in said city, I do confirm the same to my said son William Gibbons, of Savannah. And I do hereby give and devise to my granddaughter Hannah Gibbons, the daughter of my son Thomas Heyward Gibbons, and her heirs, all that body of land, situate, lying, and being in the county of Scriven, in the state of Georgia, and known as the Mount Vernon estate, composed of several tracts of land, containing thirty-seven hundred acres, more or less, with the hereditaments and appurtenances thereto belonging; which said premises are described in an indenture or deed of conveyance, bearing date on or about the thirteenth day of March, in the year one thousand eight hundred and twenty-five, and made between Samuel B. Parkman, of Savannah, in the state of Georgia, merchant, of the first part, and myself, the said Thomas Gibbons, of the second part, recorded in Chatham county clerk's office, in Georgia, in book N. N., folios one hundred ninety-nine and two hundred,

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and also recorded in Scriven county clerk's office, in Georgia, in book L., folios one hundred and twenty-seven and one hundred and twenty-eight, to have and to hold all and singular the said premises, with the appurtenances, unto my said granddaughter Hannah Gibbons, her heirs and assigns for ever, in fee simple, but upon this condition: that John M. Trumbull, or any of his children, or their or either of their descendants, shall, in no possible event whatsoever, inherit any part of the said lands and premises so devised to her, and that the said Hannah Gibbons shall not, by any devise or other disposition of the said lands and premises hereby devised to her, vest the same, or any part thereof, or interest therein, in the said John M. Trumbull, or any of his children, or their or either of their descendants, either directly or indirectly, by deed of trust or otherwise; and in case of the death of the said Hannah Gibbons without being married or leaving lawful issue her surviving, or without making any disposition of the said lands and premises, by will or otherwise, in conformity with the provisions and intentions of this my last will and testament in relation to John M. Trumbull, his children, and their descendants, then and in such case I give and devise the said lands and premises to my son William Gibbons, of Savannah, under the same limitations and upon the same conditions as are herein before expressed in relation to the Tusculum estate, hereby devised to him under the second devise to him herein before contained, in preference to the said John M. Trumbull, or all or either of his children, or their or either of their descendants, who might otherwise be deemed entitled thereto, as heir-at-law or otherwise. All these devises and dispositions of my estate I do so limit and restrain, and I trust I have so limited and restrained, and so excluded the said John M. Trumbull and his children and descendants, that no court in the United States can construe that any part or portions of the same can go, by any possibility, to the said John M. Trumbull, or any or either of his children, or any person descended from him. And I intend further, that my estate shall be so limited and restrained, that in no possible event, either by the death of my son, the said William Gibbons, of Savannah, or

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of my granddaughter Hannah Gibbons without will, or any will he or she may make, shall the children of the said John M. Trumbull, or John M. Trumbull himself, or any of his or their descendants, acquire or inherit one cent of my estate. And as I reserved to myself the right and power, in and by my deed of the farm called Slovenly, where that man John M. Trumbull now resides, to declare in my will, or otherwise, who shall have or inherit the same after the death of Thomas G. Trumbull, should he die before he attains the age of twenty-one years, all which will appear by my deed of gift to him, duly recorded, I do, authorized as aforesaid, appoint Ann Trumbull, the oldest sister of the said Thomas, to be the person who shall take, possess, and enjoy the said farm and premises to her, her heirs and assigns, for ever; and my said estates, real and personal, in the states of Georgia, New Jersey, South Carolina, and New York, are given, devised, and bequeathed to my said son William Gibbons, of Savannah, upon the following further conditions, that is to say: if he should die without any lawful issue and without making a last will and testament, or if he should make a last will and testament, and thereby devise or bequeath any part of my estate, devised or bequeathed to him in this my last will and testament, to John M. Trumbull, or to his children, Thomas G. Trumbull, John H. Trumbull, Ann G. Trumbull, and Sarah B. Trumbull, or their or any or either of their descendants, or to any person in trust for all or either of them, or of any part of the proceeds or usufruct of my estate while in his possession; or if it shall appear, after his death, that my said son William Gibbons, of Savannah, had in any period of his life, after this date, given any property of any kind, or money arising from what funds or source it may (even if it shall be from property I have already given to my said son), to the said John M. Trumbull, or either of said children or descendants, then and in any such case the estate, by this my will devised and given to my said son William Gibbons, of Savannah, shall go to the public uses herein before expressed, directed, and intended, and not pass by any such his deeds or testamentary dispositions. And I do pray to that God, before whom I am shortly

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to appear, that I have been enabled so to devise and bequeath my whole estate, real and personal, that no events may or possibly can arise, in all the changes of this changing world, that will enable John M. Trumbull, or any of his children, or any person descended from him, to be benefited one cent, or the value thereof, from my estate; meaning, resolving, and intending that they shall be for ever excluded to the end of time, in as conclusive a manner as if the said John M. Trumbull had never been married, and as if all his children by Ann Gibbons were illegitimates.

And I hereby give and bequeath the sum of five hundred dollars to each of the children of my deceased brother Joseph Gibbons, late of Georgia, that may be alive at the time of my decease, to be paid to them, respectively, within twelve months after my decease. I also give the sum of one hundred dollars to Elizabeth Cook, my housekeeper in Savannah. I also hereby give and bequeath unto Elizabeth Covert, now a servant in my house, and who has served me ten years last past, the sum of twenty-five dollars a month during the term of her natural life, to be paid to her monthly by my executor, herein after named, the same to commence from the day of my death; and all delays of payment of this bequest, in manner prescribed, shall carry an interest of seven per cent. per annum. I also give to Henry Parsell the sum of twenty-five dollars, if he shall be in my service at the time of my decease. And to the said son of Belinda Mead, called Thomas Brown, now about seven years old, I give and bequeath the sum of twenty dollars a month, to be paid monthly into the hands of Luke Tucker, of Elizabethtown, New Jersey, for the use and maintenance of the said child; and I appoint the said Luke Tucker testamentary guardian of the said child; this bequest to commence from the day of my death, and the same shall be paid until the said Thomas Brown shall attain the age of twenty-five years; and all delays of payment by my executor shall carry an interest of seven per cent. till paid. And whereas I may have omitted enumerating and specially disposing of the whole of my estates, real and personal, and of every description whatsoever, in Georgia, South Carolina, New Jersey,

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New York, and elsewhere, devised to my son William Gibbons, of Savannah, I do hereby further declare it to be my will and intention, that the whole of these estates, real and personal, and also all the estate, real and personal, I now hold in this world, or whereof I may die seized and possessed, shall go to my said son William Gibbons, of Savannah, on the limitations and conditions herein before mentioned. And, lastly, I do hereby appoint my son William Gibbons, of Savannah, sole executor of this my last will and testament, and hereby I revoke all former wills and testaments, and papers or writings in the nature thereof, heretofore made by me. In witness whereof, I have hereunto set my hand and seal, at the city of New York, this twenty-sixth day of October, in the year of our Lord one thousand eight hundred and twenty-five.

TH. GIBBONS. [L. S.]

Signed, sealed, published, and declared, by the said Thomas Gibbons, the testator, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names, as witnesses thereto, in the presence of the said testator, and in the presence of each other.—The word "otherwise," between the 22d and 23d lines of the 6th page, and the words "of my estate," between the 23d and 24th lines of the 6th page, being first interlined, and the word "himself," in the 23d line of the 6th page, obliterated with a pen.

WM. TALMAGE,
WILLIAM JAQUES,
JAMES ANDERSON.

I, William Gibbons, of Savannah, the devisee within mentioned, do solemnly covenant and agree with my father, the testator, that I will faithfully perform the conditions of his last will and testament, and that I will not, under any circumstances, lend or give one dollar, or the value thereof, to John M. Trumbull, or to any one or either of his children, during my life; nor will I, by any last will or testament, or by any testamentary disposition, give to him or either of them any part of the estate herein before devised to me, or which I hold

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by any donation from my father, or any money or property growing out of the same, or that I may die possessed of.

In witness whereof, I have hereunto set my hand and seal, this twenty-sixth day of October, one thousand eight hundred and twenty-five.

WM. GIBBONS. [L. S.]

Signed, sealed, and acknowledged in presence of,

WM. TALMAGE.

The execution of the will and covenant was proved by the subscribing witness.

The general sanity of the testator was proved by several witnesses, who showed that he was a man of strong intellect, energetic, and self-willed. It was further shown that the testator was a libertine and debauchee, and indulged his propensities in the grossest forms, unrestrained either by principle or regard for decency; that he kept lewd women in his house, by which his wife and family were driven from it; that his daughter Ann and her husband John M. Trumbull, had taken part with the testator's wife, and against him, in the family difficulties arising out of this; that the testator caused to be prepared, by the encouragement and under the direction of his son, the defendant, a pamphlet, which was printed at Boston, containing the foulest and most unnatural charges upon his wife and daughter, and upon John M. Trumbull; that Trumbull brought a libel suit against him, in which he recovered fifteen thousand dollars damages; that the testator was much enraged at this, and declared, from this time forward, that this was all that Mr. or Mrs. Trumbull, or their children, should receive of his estate. His diary was also offered in evidence, showing that this feeling was sustained and nourished during the rest of his life. A former will, executed in 1819, and codicils thereto, executed, respectively, in 1821, 1822, and 1823, were offered in evidence, containing devises and directions, so far as regards the Trumbulls, in the same spirit as those in his last will, and with like covenants by William Gibbons annexed.

Evidence was also given to show that, after the death of Mrs.

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Trumbull, a bill was filed, in 1819, against the testator, in the names of the lessors of the plaintiff, then infants, by their next friend, and that the litigation in chancery was continued for years.

The will was drawn by Mr. Talmage, a counsellor in the city of New York. He was waited on by William Gibbons, who went with him to his father, and found him reclining on a sofa. William, at his father's request, got the old will and papers, and handed them to him. The testator and scrivener went over them together. His intellect was vigorous, and he gave all the instruction as to the preparation of the instrument. The will was drawn at William's room, because it was more retired, and the attorney would be less liable, as he said, to interruption there than at his own office. William aided him in the preparation. When it was completed, it was taken back by the attorney, read to Mr. Gibbons, fully understood and approved by him, and afterwards executed in the presence of witnesses whom the testator well knew, and who well knew him. The will was substantially the same as the former will and codicils. No alteration was made in favor of William Gibbons.

The Chief Justice charged the jury as follows:

This action is brought for the recovery of the one equal undivided third part of a farm, of two hundred and thirty acres, in the township of Elizabeth, known as the Walnut-hill farm. The lessors of the plaintiff claim title to the premises as the heirs-at-law of Thomas Gibbons.

In support of their claim, they prove that, in or about the month of May, 1826, Thomas Gibbons died seized of the premises, which were conveyed to him in fee simple from Hugh Webster and wife, by deed dated the 20th of October, 1815. That Thomas Gibbons (the ancestor) had three children, *viz:*

1. William Gibbons, the present defendant, his youngest child, who alone, of all his children, survived him.

2. Thomas Heyward Gibbons, who died in the lifetime of his father, leaving issue one daughter, Hannah, who still survives.

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3. Ann, who married John M. Trumbull, and died in the lifetime of her father (on the first of June, 1817,) and left surviving her five children, one an infant, who died shortly after her mother; the other four children are the lessors of the plaintiff.

1. Thomas Gibbons Trumbull.

2. John Heyward Trumbull.

3. Ann Heyward, who intermarried with Ralph Henry Isham.

4. Sarah B., who intermarried with Daniel Coit Ripley.

These four children of Ann Trumbull, the daughter of Thomas Gibbons, are now before you, claiming their share of the estate of their grandfather, as his heirs-at-law.

Upon this statement of facts, it is apparent that the real estate of Thomas Gibbons descended to, and vested in his heirs-at-law in three equal portions, as follows, *viz:* one equal undivided third part to the defendant, William Gibbons, one other third to his granddaughter Hannah, and the remaining third, the share of the mother, Ann Trumbull, in four equal portions, to his four grandchildren, the lessors of the plaintiff. Each of them, therefore, became entitled to the one fourth of one third, or, in other words, to one twelfth of these premises.

By this evidence the lessors of the plaintiff establish a clear title, as the heirs-at-law of Thomas Gibbons, to the one equal third of the real estate whereof he died seized, and consequently, in the absence of other proof, they would be entitled to your verdict for the one equal third of the farm in question.

The plaintiff's title (you will observe) rests entirely upon the ground, that Thomas Gibbons died intestate, or without will. They claim as heirs-at-law, by descent from their grandfather. If the land was devised, they cannot, of course, take by descent.

1. The defendant, by way of defence, claims title to these premises under Thomas Gibbons, by virtue of his last will, and that, therefore, no title vested in the plaintiff. The question, therefore, for your consideration is this: did Thomas Gibbons leave a last will and testament?

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The defendant, in the second place, insists, in case any title whatever vested in the plaintiff, as to three of them, it has since been divested by bankrupcy, and, as to their shares, there can be no recovery. As this latter defence extends only to a part of the premises, and does not affect the main question, I call your attention first to this branch of the defence. It is shown that Thomas Gibbons Trumbull and John Heyward Trumbull, two of the sons of Ann Trumbull, and Ralph Henry Isham, who married Ann, one of the daughters, have taken the benefit of the bankrupt law. That law declares that all the property, and rights of property, of every name and nature, and whether real, personal, and mixed, (excepting certain property specially exempted in favor of the bankrupt and his family) is by force of the decree in bankruptcy divested out of such bankrupt, and vested in his assignee.

All the right, title, and interest, therefore, of Thomas and John Trumbull, and of Ralph Henry Isham, in the estate of Thomas Gibbons was divested by their bankruptcy. For these shares no recovery can be had in this suit. It is truly said, that the right of Mrs. Isham still remains unaffected by the bankruptcy of her husband; it is undoubtedly so, that nothing passed but the interest of her husband; and that upon his death her rights will remain in full force. It is equally true, that in this suit her rights cannot be enforced. It is also alleged that Mr. Isham purchased from the assignee in bankruptcy of Thomas Trumbull, and that he received that share.

My charge, however, to you is, that the title to that share is not in Isham, or, if it is, cannot be recovered in this action. The title being in himself, a valid demise could only be made by Isham alone, and there is no such demise contained in the declaration.

That reduces, gentlemen, the subject of controversy in this cause to the one twelfth of this farm, the share claimed by Daniel Coit Ripley and Sarah his wife. As to that share, the right of the plaintiffs has not been divested; if it ever vested, it still remains in them, unbarred by lapse of time or other cause.

The question then recurs, did Thomas Gibbons leave a valid

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last will and testament? This question retains all its importance, and the great interest at stake, the important principles involved, and the learning that has been enlisted in their support, all require at your hands the calmest and fullest investigation of the question submitted for your decision.

It is said, that admitting this to be the will of Thomas Gibbons, that it was duly made and published as his will, and that at the time of making it he was of sound and disposing mind and memory; yet the will itself is upon its face illegal, immoral, and void.

Its illegality and immorality are said to consist in this: that the testator, by his will, so limited the devise to William Gibbons that he could not convey it to Trumbull or his heirs; that there is an expression in the will, that it was the intention of the testator that the heirs of Trumbull, to the remotest generation, should never inherit any of his estate. This declaration of his intention is no limitation or condition of the estate granted.

The condition annexed to the devise is simply this: if William Gibbons died without issue and without a will, it shall go over to certain public or benevolent institutions; that if he gives, in his lifetime or by his will, any part of the estate to Trumbull, or any of his descendants, he shall forfeit the estate so devised to him. Now suppose this condition is void, what then? the estate is clearly vested in the devisee. It is not the condition upon which it is to be vested, but upon which it is to be forfeited. If, then, the condition be void, the devise does not fail, but vests absolutely in William Gibbons. Is, then, the instrument produced by the defendant the last will and testament of Thomas Gibbons? If it is, the cause is at an end, your verdict must be for the defendant.

This inquiry resolves itself into two, *viz:*

1. Is the instrument executed with due legal formalities to make a valid disposition of real estate? Upon this point there is no difficulty; the evidence is very clear and explicit that the will was duly signed, executed, and published by the testator, in the presence of three subscribing witnesses.

2. Does the instrument in question contain the will of the

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testator? did he execute it freely, knowingly? and was he at the time of its execution of sound and disposing mind and memory? I say at the time of its execution, for this is the material point of time to which your investigation is to be directed; the state of the testator's mind, before and subsequently, is material only as it tends to throw light upon its condition at the time he executed the will. It is competent, only as it may aid you in making the inquiry, was he of sound and disposing mind and memory when he executed the instrument under which the defendant claims? The presumption of law is in favour of sanity, the burthen of proof is upon him who denies it. When, therefore, the execution of the will has been proved, accompanied with the requisite legal formalities, it is incumbent on the parties who seek to impeach the validity of the will, to make out, to the satisfaction of the jury, the want of testamentary capacity.

But, gentlemen, what is testamentary capacity? what is that sound and disposing mind and memory, of which the law demands that every testator shall be possessed, to enable him to dispose of his property by last will and testament? It may be answered negatively, that the law does not require, in order to constitute testamentary capacity, a mind unimpaired by age, by disease, or by infirmity, or by dissolute habits; old age, sickness, infirmities, intemperance, do not necessarily take away the capacity of making a will. The mind may be impaired by age, weakened by disease, shattered by long continued habits of intemperance or licentiousness, and yet the testator, in the eye of the law, be capable of disposing of his property by will.

The test which the law applies is a practical one. Was the testator, at the time of executing the will, capable of discerning and feeling the ties of kindred and obligations of family and blood?

Had he a mind to recollect the property he means to dispose of, the persons who are to be the objects of his bounty, and the manner in which it is to be distributed between them? To sum up the whole in the most simple and intelligible form, were the testator's mind and memory, at the time he executed

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the will, sufficiently sound to enable him to know and understand the business in which he was engaged? Was the mind of Thomas Gibbons, on the 26th of October, 1825, when he executed the instrument now offered as his will, sufficiently sound to enable him to know and understand the business in which he was engaged? The first and most material testimony upon this point is that of the subscribing witnesses to the will: they are placed by the law around the testator to guard him against fraud and imposition, and to attest to his condition at the time of executing the will. The subscribing witnesses to this will are, William Talmage, the attorney and scrivener who drew it, James Anderson, the family physician, who attended the testator during his illness, and William B. Jaques, an agent of the testator, employed by him in the management of his business. It is not superfluous to remark, that it would be difficult to select three persons who, from their position and relation to the testator, would have better opportunities of ascertaining the state of his mind, and be better qualified to judge and speak understandingly of his capacity. The agent is dead. The physician and attorney have been produced, and both speak clearly and decisively as to the general capacity of the testator when he executed the will. Doctor Anderson testifies—that he commenced attending the testator in Elizabethtown, in the summer of 1823, the summer previous to his removal to New York. He testifies—I saw the testator sign the will; his mind, I think, was perfectly sound; I say this without hesitation. I am in the habit of attending persons insane and under delusion: the testator was under no delusion; I am perfectly satisfied upon that point. He could not be easily controlled, he was a firm decided man in his opinions and conduct; he was naturally a man of strong mind and strong feelings. Again, he says, I attended him all the time he was in New York. He had a paralysis; the effect of the paralysis would depend upon the seat of the disease, whether it reached his mind or was confined to his muscles; in his case it was confined to his muscles.

The defendant further produces Dr. Trenor, a physician and dentist, who saw him in August and September, the two

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months preceding the execution of the will. He saw him but twice, and on one of these occasions but for a short period; on one of these occasions, he says "I had considerable conversation with him: I was struck with the clearness and collectedness in his remarks, especially in reference to the state of his health; my impression was, that he was as clear and intelligent as any person I ever conversed with; I should think his mind perfectly clear, and sufficient for any business purpose."

The other witnesses, who speak of the state of the testator's mind nearest to the period of the execution of the will, are, Maria Van Cott, a servant in the family from the summer of 1825 till a few weeks before his death, who was much about the person of the testator; Eliza Coles, who visited him almost daily; Capt. Cornelius Vanderbilt, his confidential agent; George Abbe, James P. Allaire, and Samuel Dawes, who occasionally saw and conversed with the testator. Mr. Abbe testifies—I became acquainted with the testator in 1824. I accompanied him from Elizabethtown Point to New York; from that time till his death I saw him often. His mind was very strong, and continued so; I never saw any variation in it till his death. I last saw him a week or ten days before he died; I saw him almost every Sunday afternoon. In conversation he showed no weakness of mind, though his body was feeble. Cornelius Vanderbilt was in the testator's employ from 1818 until his death; he was in the habit of seeing the testator very often, especially in the absence of his son William, when he received his instructions from the testator. Captain Vanderbilt testifies—I think he was one of the strongest minded men I ever was acquainted with; I never knew any man that had any control over him, nor do I believe that any human being ever had; some persons had influence with him, I believe I had. I do not know that William Gibbons ever started a project which his father did not originate. I never saw any failure in his mind. I last saw him in April, 1826, before he died in May; I did business with him then; I thought him as capable of business then as he ever was; there was no failure in his mind in the fall of 1825.

These nine witnesses speak of the condition of the testator's

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mind, from the period of his removal from Elizabethtown to New York, in the summer of 1824, at the precise time of the will, in October, 1825, and down nearly to the period of his death, in May, 1826. They are the only witnesses who speak of his condition during this period, or within many months of the date of the will. They all concur in opinion as to his mental capacity; if they are to be believed, their evidence puts the question of the general sanity of the testator entirely at rest: no one impugns their testimony, no one testifies to the contrary. In addition to this testimony, as to the state and condition of the testator's mind during his last illness, and at the time of executing the will, we have this emphatic testimony of the character of the testator from Mr. D. B. Ogden: "I considered Thomas Gibbons a man of very strong mind, of very strong passions, of very strong prejudices, and very strong self-will."

But the plaintiff's counsel do not rely upon the general insanity of the testator to impeach the will. It seems to be conceded that general insanity did not exist: it is insisted, however, that the testator labored under partial insanity, monomania, or derangement upon one subject, *to wit*, in relation to his son-in-law Trumbull and his children, and that William Gibbons obtained the will by undue influence or by fraud and contrivance. Upon this part of the case the first ground of impeaching the will is, that it was procured by undue influence on the part of William Gibbons. All influence on the part of the devisee in procuring a devise in his favor is not undue influence. The influence of affection, of kind offices, even of persuasion, does not invalidate a will, otherwise the very motive to the testator's benevolence would make void the gift.

The influence which the law denounces as undue influence over a testator, must be such as to destroy his free agency, and amounts to moral or physical coercion: it must be proved, moreover, that the act done was the result of such coercion; there must be a control exercised over the mind of the testator, or an importunity practised which he could not resist, or to which he yielded for the sake of peace. It is shown, in support of this allegation, that William Gibbons, the principal de-

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visee, had an active participation in the preparation of the will: he procured the attorney who drew it; he accompanied him to the house of the testator; he was present at the house, and, so far as the attorney can recollect, in the room when the instructions were given, and when the will was executed, and whenever the attorney saw and conversed with the testator.

The will was drawn not in the house of the testator or in the office of the attorney, but at the lodgings of the devisee. The devisee actually took part in preparing the draft of the will, and paid the attorney his fees for drawing it; and not only so, but, at the time of the execution of the will, he entered into a covenant with his father to hold the property upon the condition upon which it was devised to him. I am asked to charge that that is a part of the will. But why so? It being written on the will makes it no part of the will; it is a mere covenant to perform the will. These circumstances are certainly calculated to excite attention and to call for diligent investigation and scrutiny; they do not, of themselves, produce undue influence or influence of any kind, but they show that William Gibbons stood in a position where it might readily and naturally have been exercised; and if the testator had been of feeble and irresolute mind, under the control or dictation of his son, dependant upon him for his living as a member of his household; if the son had been continually with his father, and all other persons excluded from intercourse with him, the participation of William in the preparation of the will would have been entitled to very great weight in your deliberations. And where the testator was very infirm, and the will executed in the article of death, it has been rightly held that the preparation of the will by the principal legatee was conclusive against its validity; it induced the belief that the will was not the will of the testator, but of the party benefited by it. But when it is recollected that the testator was a man of strong mind and strong self-will, a man over whom, in the language of one who knew him intimately, no human being had any control; that he was at this very time in the full vigor of his intellectual powers; that he was in no wise dependant upon his son; that he did not reside with him; that

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he was in the habit of free intercourse with others, and that there is no pretence that any one was excluded from his presence; above all, when it is remembered that the attorney received his instructions from the testator himself, and not from the devisee, and that the principal, if not the entire provisions of this will in favor of William Gibbons had been prepared by the testator in his own writing years before, the suspicion which would naturally attach to the participation of William Gibbons in the preparation of the will, is in a great measure removed.

These circumstances admit of a fair explanation. The mere fact, that a son participated in the preparation of his father's will, or that he actually drew it, does not of itself invalidate the will. And in the absence of all proof of any influence, undue or otherwise, exercised by the devisee over the testator, it is in strict accordance with reason, justice, and the rules of law to put a fair and favorable construction upon his conduct.

But it is said that the testator labored under a monomania in regard to Trumbull and his children; that William Gibbons artfully ministered to this delusion, and thus, by fraud and artifice, supplanted the family in the affections of the testator, and secured the estate to himself.

To establish the existence of this delusion, the plaintiff relies mainly upon the contents of the will, of certain diaries, written by the testator, and put in evidence by the defence, and of a libel published by him in 1816. These documents will be all before you. It is needless that I repeat, or particularly advert to their contents; they certainly exhibit a painful, humiliating, mortifying spectacle of human passion and human depravity; it would seem well nigh incredible that the author of those productions could be sane; that a husband should thus address his wife; that a father should thus assail the purity of an only daughter, should proclaim to the world his own and his family's shame; that he should spread upon his will the record of his deep malignant feelings toward the offspring of his own loins, his own flesh and blood, and thus perpetuate the record of his own and his family's infamy, are calculated to create the impression, if not the hope, that the

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author was a maniac. But the inquiry with you will be, was the man deranged, in the appropriate technical sense of the word, or was he merely the victim of unbridled passion? was reason dethroned, or had passion seized the rein and acquired mastery? was the voice of reason silenced, or was it merely unheard and unheeded amid the loud clamor of contending passions? I need not say that there is a line, broad, clear, and well defined, though to our imperfect senses ofttimes imperceptible, between the maniac, the man irrational and irresponsible, and he whose soul is seared by the burning lava of human passions. In balancing the weight of the testimony upon this point, the origin, the nature, and duration of the resentment of the testator against his son-in-law and his family are worthy of your particular attention. The resentment did not originate in delusion, it was a reality; it was not a sudden caprice, it was an abiding feeling, extending and deepening through many years; it had its origin, according to Mr. Trumbull's testimony, in 1812, in consequence of Mr. Trumbull's remonstrating, with great propriety, against the licentious conduct of Mr. Gibbons in the family of his daughter.

Here was a provocation, just or unjust, right or wrong; it was a reality, not a delusion, and the headlong fury of that lust, which polluted the purity of his daughter's household, which tainted the sanctity of his own hearth, was not likely to be checked in its career by the remonstrance of a young man, and that man a son-in-law; it was not unnatural that the interference should be deeply felt and keenly resented; it was the bitter hatred which vice bears to virtue, the keen resentment which licentiousness ever manifests against that purity which is its reproach. This feeling was again revived, after a brief temporary suspension, in 1814, by the very same cause. It then broke out in all its bitterness in the publication of the libel which is in evidence.

In 1817 Gibbons declared, through Luke Tucker, to Trumbull, that if he continued the libel suit he would cut him and his children off for ever. This libel suit was instituted in 1816, and brought with it, doubtless, irritation and bitterness. In 1818 the testator declared to Mr. Ogden that he had made

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his will; that he had cut Trumbull off, and had so disposed of his property that neither he nor his children should have a cent of it. He turned a deaf ear to Mr. Ogden's remonstrance. A few months afterwards he declared to Allaire that Trumbull was a fool for taking $15,000, instead of one-third of his estate. In 1819 he executed a will, which is before you, carrying this long cherished purpose into effect, if it had not already been, as he declared to Mr. Ogden in 1818. In 1822 and 1823 he renews the same declaration, and avows the same determination by two successive codicils, notwithstanding the reconciliation of 1820 or '21, and in 1825 he completes his purpose by the execution of the will in question. You see that this was not a delusion, but a reality; it was not a temporary passion, but an abiding resolution, early formed and constantly adhered to. Another circumstance ought not to escape your attention, not a witness has been produced to testify to the existence of this alleged delusion or mania during the life of the testator. Numerous witnesses are yet living who knew him well during the whole period of this alleged insanity; he was engaged in active and extensive business, in extensive intercourse with those around him, and yet, so far as appears by the evidence in this case, this insanity was never alleged or suspected in his lifetime. He was prosecuted and held liable by a jury for this very libel, which is now relied upon as the main evidence of his insanity; and yet if he was insane, if he labored even under this moral mania, which is now set up as a reason for depriving him of the control of his property, he would not have been held responsible for that act. But there are here witnesses before you who knew the testator, and conversed with him upon the very subject upon which his insanity is alleged to exist, neither of whom intimate the least suspicion of his insanity—I allude particularly to Mr. Trumbull and to Mr. Ogden. The testator's conversation with Mr. Ogden, especially, has been urged upon you as affording the strongest evidence of the testator's insanity, and certainly there is nothing in the cause which exhibits more strikingly the character of the testator's feelings and the temper of his mind. And yet it seems never to have occurred to Mr. Ogden,

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an intelligent man, a keen observer, and a competent judge, that there was any insanity in the testator's mind; on the contrary his testimony is, that he was a man of strong mind, strong passions, strong prejudices, and strong self-will. And yet you are now called upon, after the lapse of more than twenty years, upon such evidence, to impeach this will because the testator was insane. I do not say it may not be done, but I respectfully submit to you that it ought not to be done, except upon the clearest evidence and the most unquestionable grounds; the existence of a doubt should be decisive against such a conclusion.

I need not say to an intelligent and reflecting jury, that the validity of this will can in no wise depend upon the virtues or the vices of the testator. If this will be invalid, no virtue of the testator can sustain it, if valid, no vices of the testator can impair it. Much less can the validity of this will depend upon the consistency of its provisions with our ideas of fairness or propriety, or even with the principles of justice and humanity; such a test of its validity would be certainly subversive of that absolute control and dominion which the law gives to every man over his own property. The question for your decision is not, is this a fair will, a just will, an equitable will, the will of a right thinking man and a kind hearted father, but is it Thomas Gibbons' will? If it is, your verdict should be for the defendant. Nor need I say to you, that this is not the place nor the occasion for the indulgence of our sympathy with misfortune, or our indignation against vice, much less are you here to rebuke sin. We are here in the discharge of a high and sacred duty, which is to be performed with a single eye to the law and the testimony, irrespective of our feelings and our sympathies.

The jury rendered a verdict for the defendant.

Upon the coming in of the *postea*, a rule *nisi* was obtained to set aside the verdict and for a new trial.

The argument upon the rule to show cause was had in January term, 1849, before the Chief Justice, and Carpenter and Randolph, Justices. *W. Pennington* and *Hornblower*,

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counsel for plaintiff, *Vroom* and *Wood*, counsel for defendant.

J. C. Hornblower, in support of rule for new trial.

This case is one of the highest importance, involving the validity and construction of a will under which property is held to a vast amount, and it is one which deserves the fullest consideration. The trial at the circuit was but the breaking of the case; the verdict was the result of the charge merely, and the law and the facts may here be fully reviewed.

The undue reverence once paid to wills ought not now to be felt in this free country, where the leaning should always be against contrivances to create perpetuities. On this motion, any thing arising on the will may now be considered.

1. The devises to William Gibbons are void in law: they gave no estate known in the law, and the limitation was unlawful, an intention which the law will not support. A grant is always presumed to be on a good consideration. If a condition subsequent be bad, the condition is void and the estate absolute. In case of wills, the devisee must take according to the general and prevailing intent, so as not to disappoint the testator, or not take at all; and no consideration moving from the devisee is necessary to give the will validity. If the intention on the face of the will be, that the estate must be taken for a particular object, the will is good or bad according to the character of the object and the honesty of the intention. A devise to a man on condition that he would commit a murder would be no devise at all.

I distinguish between the case where there is a further disposition over, and when not. In the former case, if the condition be unlawful the devise is void.

A devisee must take under the will some estate known in the law, or he cannot take at all. This will is *sui generis*, and scarcely to be illustrated by adjudged cases, one in which the testator prays divine aid that he may be able to shut out the poor children of his own daughter from all benefit of his estate.

What estate does W. G. take under this will? All the de-

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vises were given upon special condition: if broken, the property was to be sold, and the proceeds distributed, under the declared intention, that under no casualty should J. M. T., or his descendants, inherit or receive any part of his estate.

The estate given is not a fee simple. It cannot take effect by way of executory devise, for there is legal devise over. Whether the charitable institutions designated could, by the aid of a court of equity, have obtained the benefit of the intended disposition in their favor in case of the death of W. G. without issue, is another question. The limitation over is too indefinite, and not good as an executory devise. The will is incongruous, and attempts to impose limitations on an estate in fee simple, or rather to create some new estate not known in the law. 6 *Cruise Dig.* 449, "*Devise,*" *c.* 17, § 22.

In order to sustain the devise to W. G., the court must go the length of giving him a fee simple, notwithstanding these limitations over. But the intention was that it should go over, and under a limitation that is unlawful. The prevailing intention is one not consistent with legal rules; it was to strike down one branch of his family.

The following cases were cited and commented on: *Den* v. *Blackwell,* 3 *Green* 387, 389; *Co. Litt.* 223, § 361; *Doe* v. *Pearson,* 6 *East* 173; 6 *Cruise* 158, § 8; *Ib.* 161, § 18; *Doe* v. *Laming,* 2 *Burr.* 1108; 3 *Peters* 117; 3 *Burr.* 1634; *Den* v. *McMurtrie,* 3 *Green* 276, and cases cited; *Humberston* v. *Humberston,* 1 *P. Wms.* 332.

2. The will of Thomas Gibbons was unlawful, not only as *contra bonos mores,* but against public policy and against all the principles which lie at the foundation of society. Its attempt is to sap those ties which unite human nature. It is not asserted that it is unlawful to cut off a child, even from bad motives; but it is a principle that never will be recognized, that property may be so tied up as that it cannot be applied to the plainest duties by those to whom given.

The law will not execute contracts for immoral or inhuman purposes, nor will courts sustain devises on such conditions. Suppose devise on condition that a man would not read the Scriptures, or would not sustain his own children, and the

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like. How far can a man go in annexing these unholy conditions?

The covenant annexed, void as it is in law, characterizes the will.

3. The will shows such hallucination of mind, as against Trumbull and his children, that, in connection with the circumstances which appeared on the trial, it is evident that the testator was not of sound and disposing mind and memory at the time of its execution. It is an insane mixture of religion and impiety, such as no mind could produce, unless off its balance and unhinged, at least on one point. Charity requires us to suppose that there was insanity, either general or partial. The counsel referred to, and examined the evidence given on the trial in support of this point.

4. The will was the result of undue influence, and was procured by the corrupt and fraudulent conduct of the principal devisee. Such is evident from the will in connection with the covenant, the diary, the libel, and the circumstances under which the will was made, as shown by the testimony on the trial. The testimony was here again referred to at considerable length, and commented on.

5. The judge, on the trial, misdirected the jury. The view taken by the judge of the character of the estate given was not in accordance with the true view which ought to have been taken.

Too much weight was given in the charge to the testimony of the subscribing witnesses.

We insist the judge was too general in his remarks in regard to undue influence. Whether the circumstances shown in this case proved undue influence, ought to have been left to the jury. Deception without coercion would be sufficient. The judge went too far. The opinion of the court on matters of fact should be given as opinion, and was not by way of direction. *Canal Co.* v. *Knapp*, 9 *Peters* 541, 567; *Tracy* v. *Swartwout*, 10 *Ib.* 80, 95; *Firemen Ins. Co.* v. *Walden*, 12 *John.* 513, 517. Our allegation was, that the will was made under the control of the son: the charge assumes that the testator was one whom no human being could control.

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The court charged that there was no delusion upon which the resentment against Trumbull proceeded. We did not pretend that there was any in the commencement, but we contended that the will was made under a monomaniacal feeling against Trumbull, or under deception and influence by the son. The general history of his conduct was the evidence of his monomania.

The case is of great importance, and deserves to be reheard after a deliberate review of the law and the facts, and when an opportunity may be had for a more satisfactory trial than was possible in the first instance.

P. D. Vroom, contra.

The first general ground of the plaintiff is, that the devises are void in law, because, he says, they give no estate known in the law. The substance of the will is, that if W. G. dies without issue and without will, then the property is to go over; and so if he dies leaving a will giving the property, or any of it, to Trumbull or his family, then, also, the property is to go over to the charities named.

The proposition is novel, that the whole will must fail because, as alleged, some of the conditions are illegal. Certainly the limitation over is good on failure of issue. The order of sale makes no difference; still the limitation over to the charities is good. The devise is one over on the happening of a certain event, if on definite failure of issue, then it is a fee simple with an executory devise over; if on an indefinite failure, then an estate tail, an estate known in the law, though modified here by statute.

Suppose no donee over who could take, still the first estate given would be good. If the condition tended to perpetuity, the condition would be void, but the first estate would stand.

But, looking at the further limitations, it is clear that the testator intended a definite failure of issue, the contingency, *dying without will*, clearly referring to the death of the devisee.

As to the subsequent condition in regard to the Trumbull family, it is good or bad. If good, in case of not being per-

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formed the estate would be lost by forfeiture. If bad, by a condition subsequent, the estate would, of course, simply stand free of the condition. *Litt.* § 360; *Co. Litt.* 223, *a*; *Den* v. *The Lawrence Church*, *Spenc.* 551.

The leading intention was to give the property to W. G. coupled with the condition in question; if the condition be unlawful it falls, but the general intention is not affected, and the estate remains.

2. The will is not void because against public policy. There is no legal immorality in the exclusion of a child. A will is not void because the offspring of embittered feelings; it may be legal, and yet neither just nor generous.

3. There is nothing to show hallucination of mind. The will may seem a strange will, but still religious professions coupled with harsh provisions in a will do not show insanity. The profession of faith and the exercise of inhuman feeling would not show insanity. The will of an infidel would not be avoided because of insincere professions.

What is monomania? Dr. Darcy gives us no precise definition, though he seems to think it well understood at the present day. It is a novelty of the present century. Dr. Rush knew nothing of it. Dr. Darcy says it consists in derangement or obliquity of mind on a single subject, which the subject cannot be argued out of. *Pritchard* (21) says there must be a total delusion as to the subject matter.

But Lord Erskine, on the trial of Hatfield, laid down the true test of insanity, which is delusion, not false reasoning from facts. The causes of irritation in the case of the testator arose from no delusion, but from facts. Offence was taken at the actual conduct of Trumbull, and not at fancied matters having no existence. Nobody, not Trumbull himself, dreamed that Gibbons was a monomaniac: and unfounded prejudices even are no ground for setting aside a will. *Attorney Gen.* v. *Parnther*, 3 *Bro. C. C.* 443–4; *Greenwood* v. *Greenwood*, 13 *Ves.* 89; 3 *Curteis* 337 (7 *Eng. Ecc. Rep.* 432); *Fulleck* v. *Allinson*, 3 *Hagg.* 527 (5 *Eng. Ecc. Rep.* 196).

4. In regard to fraud and undue influence, the matters urged under this head were pressed before the jury. No evidence

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was given which will support this point. The kind offices of a son, or any one else, do not form what is called undue influence, which must be such coercion as destroys free agency. *Williams* v. *Goude*, 1 *Hagg. Ecc. Rep.* 577; *Bird* v. *Bird*, 2 *Ib.* 142; *Mountain* v. *Bennett*, 1 *Coxe Ch. Rep.* 353.

5. As to the alleged misdirection. The charge is to be treated as a whole, and not by dissecting every paragraph and weighing each isolated part. The charge in regard to the estate was in accordance with the law.

No undue weight was given to the evidence of the subscribing witnesses. 3 *Wash. C. C.* 586; 4 *Ib.* 268; 1 *Green's Ch. Rep.* 11; 2 *Ib.* 573, 577.

Nor did the court go too far in the directions to the jury as to the effect of the testimony.

Geo. Wood (of New York), on the same side.

A variety of errors in regard to the trial and to the charge of the judge is alleged, which, if founded in fact, were sufficient to set aside the verdict. First, as to the objections which appear on the face of the will.

1. It is said that the disposition is immoral and impious. The immorality and impiety are in the motives which led to the disposition. We must distinguish between the subject matter and mode of disposition, and the motives which led to it; a distinction not adverted to on the other side. No authority has been adduced, none could be found for the position, that the motives which led to the disposition can be assumed for avoiding the will. 6 *Paige* 151.

We have nothing to do with the motives which led to the disposition. *Stat pro ratione voluntas.* The power of disposition is a cherished privilege. It encourages industry. It comports with freedom of action. It enables a man to control his family, and it is generally well when he keeps the staff in his own hands. What a scene of litigation would be produced were courts to scan the motives which influence men in the disposition of their estates, and set aside wills because unequal or unjust! Is a jury to inquire into the merit or demerit which

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led to a given disposition? Is evidence of good or bad conduct to go before a jury in order to support a will?

The will is not affected by the covenant, which is now admitted not to be part of the will. It is inoperative, and does not for this reason affect the will. But it is, at most, nothing more than what is implied by the acceptance of the devisees, which is an implied agreement to comply with the terms. The design was probably merely to impress upon the mind of the devisee what he was expected to do. There was no error in the charge, that the motives, even if immoral, do not affect the will.

But it is said that the conditions are illegal, and that the charge is wrong because it does not sustain this position.

The conditions, which are all embraced in the latter clause of the will, are all subsequent in their nature, to take effect upon the death of the testator and after the will should go into effect. If illegal because immoral or against public policy, the condition is simply void, for which position certainly it is not necessary to cite authority.

But the conditions are valid. The one drawn in question is simply not to alien to a particular person or to his family. 4 *Kent* 131 (*5th ed.*); 1 *Preston on Estates* 477; *Co. Litt.* 223, § 361; *Den* v. *Blackwell*, 3 *Green* 389. The case of *Perrin* v. *Lyon*, 9 *East* 171, shows the extent to which the restraint may go when the condition was, that the devisee should not marry a Scotchman, which was held good.

It is no objection that condition is not confined to property given by the will, provided it is not *per se* unlawful. Devise is good on condition that claim should not be made to the property.

The devise is not an estate tail, for the limitation over takes effect on a definite failure of issue. The effect is to give Mr. G. an estate in fee with a conditional limitation over. It is said, however, that there is no estate over limited, but merely sale directed, and proceeds to be paid to certain charitable institutions. True, but does not affect the disposition. There is no illegality in the disposition over, and no violation of the rules in regard to perpetuities.

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But suppose limitation over not good, the only effect would be that the estate would be absolute in the first devisee.

In regard to the novel idea of the general and particular intent said to appear in this will, it is certainly not drawn from the rule in *Shelley's* case. Earnestness of expression is not what constitutes, in the legal sense, the general intention in a will, but the magnitude of the estate.

3. But as to objections extrinsic to the will: and, first, as to undue influence, which constitutes a prominent objection to the charge. It is attempted here to narrow unsafely the ground within which a judge may operate, which would be to render a jury an unsafe tribunal. Undoubtedly he has a right to give his opinion upon facts, though not to take the case from the jury, where there is evidence upon which that jury might rightfully find a verdict. It is his duty to recapitulate, and to distinguish between leading and subordinate facts, and to present the issues in a distinct manner to the jury. If the evidence is clear on one side, he has a right to call the attention of the jury to this, and to prevent them from running off on slight inferences.

A judge has another right, or rather duty. When some important fact is necessary to be shown, in order that a party may succeed, and the evidence fails, or is very slight, it is his duty to say so, and not to permit the jury to fall into error, when in such case the verdict must be set aside. It is particularly necessary in cases of seeming hardship, when the jury may readily be led astray by the impassioned eloquence of able counsel. When such efforts to carry a cause are made, as were in the present case, the judge is never to be deprived of the power of sifting evidence and of giving his own opinion; thus leading the minds of the jury from the blaze of eloquence to the light of truth.

There was not a particle of evidence before that jury such as is necessary to establish the charge of undue influence. The sort of influence which will invalidate a will must amount to moral coercion, if not to physical duress. It has been called pressing importunity, when the will is yielded to the force of such pressure and destroying free agency. It must not be the

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influence of affection nor of mere flattering attentions. 1 *Coxe's Ch.* 352; 13 *Serg. & Rawle* 269. The evidence shows that the mind of the testator was not thus to be operated on, and that its vigor continued to the last.

The counsel referred to the will of 1819, of which this will was almost a copy, to the cross-bill filed by Trumbull, and to other causes of exasperation on the part of the testator against Trumbull, and examined the testimony in regard to the alleged undue influence at some length.

4. But the great point is monomania, alleged to have been practised on by the defendant, William Gibbons, which I have placed under the head of matters extrinsic to the will, though aid is sought on the opposite side, on one point, from the face of the will. It is a strange idea that a religious appeal, because connected with a harsh disposition, should be considered as evidence of insanity. Much of this character has in all ages evinced the wickedness and hypocrisy of men, but it has never been held a test of insanity. In all ages have men's mouths been filled with religious professions while their hands have been red with blood.

But it is said that there was moral insanity, although not coupled with delusion. This is a kind of insanity much in vogue just now, but had it been set up in court as an excuse for crime in Mr. Gibbons, while living, the judge to whom offered might have lamented the necessity for punishment, but he would have gone on and administered it, as a terror to evil doers, with slight regard to such pretence.

The counsel here examined the evidence at considerable length, to show that the conduct of the testator, at the period when this will was made, and at other times, was the natural result of irritated feelings, which, if not justifiable, are very natural under the circumstances and the supposed causes of offence which arose from time to time.

W. Pennington, in reply, adverted to the great importance of the case, the haste of the former trial, the preparation for which was made very much in the dark by the counsel of the plaintiff; the singularity of the will, and the circumstance that

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the lessors of the plaintiff were utterly cut off by their ancestor without one cent. He recapitulated the prominent topics on the part of the plaintiff, and urged that the heirs-at-law, under all the suspicious circumstances connected with the making of this will, ought not to be cut off without an opportunity of another verdict, by which their claims might be tested. The terms of the will are very extraordinary, the will is very peculiar, the mind of Mr. Gibbons brooding for years on one idea, the suspicious circumstances under which the will was made, the imperfect opportunity on the first trial to obtain testimony, all demand further investigation; and particularly as, under the strong charge of the judge, no room was left for action on the part of the jury.

The opinion of the court was delivered by

CARPENTER, J. The amount, directly or indirectly, involved in the present controversy, rather than any intrinsic difficulty in the questions raised, has given importance to the argument of this cause. A new trial is sought, chiefly on the ground of misdirection, partly in regard to matters apparent on the face of the will, and partly matters extrinsic, arising in the course of the trial.

1. I shall first make some remarks upon the construction of the will, remarks which I intend to apply only to the character and validity of the disposition of the real estate in this state. I shall look for the legal character of that disposition, not in the motives and feelings which actuated the testator, but in the nature of the disposition itself. That the will was the offspring of an immoral and irreligious state of feeling; that the motives which led to it were uncharitable, anti-christian, or even impious, according to my judgment, can have no effect on this branch of the inquiry. What, then, was the disposition made by the testator?

In the first place, he devises certain enumerated estates, among them the premises in controversy, to William Gibbons, his heirs and assigns for ever, and adds, that in case William Gibbons should die without lawful issue, the said estates should go over to certain specified religious and charitable institutions.

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It is not necessary to inquire whether these words, standing alone, would or would not create an estate tail. They do not stand alone, but are qualified and controlled by subsequent dispositions in the will. The testator then adds these words to the clause already referred to:

"I do hereby mean and intend that all the property, real and personal, given, devised, and bequeathed to my said son, shall by no casualty in this life go to John M. Trumbull, or all or any of his children, or one or more of their or either of their descendants." And in the subsequent clauses he attempts to carry this declared intention into effect. In a succeeding clause, other estates are also given to William Gibbons, his heirs and assigns for ever, with a limitation over in case of his death without issue or without such will as would exclude Trumbull and his family from the enjoyment of any part of his estate. But the conditions attempted to be imposed are all to be found in a subsequent clause of the will, which, therefore, it will only be necessary for me further to recite: "And my said estates, in the state of Georgia, New Jersey, South Carolina, and New York, are given, devised, and bequeathed to my said son William Gibbons, upon the following further conditions, that is to say: if he should die without any lawful issue and without making a last will and testament, or if he should make a last will and testament, and thereby devise and bequeath any part of my estate devised and bequeathed to him, &c., to John M. Trumbull or to his children, &c., or their or either of their descendants, or to any person in trust for all or either of them, or any part of the proceeds, or as a part of his estate while in my possession; or if it shall appear after his death that my said son William Gibbons had, in any period of his life after this date, given any property of any kind, or money arising from what funds or source it may, (even if it should be from property I have already given my said son) to the said John M. Trumbull, or either of his children or descendants then, and in any such case the estate, by this my will devised and given to my said son, shall go to the public uses herein before expressed, and not pass by any such deeds or testamentary dispositions." To which clause the testator

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added a most extraordinary prayer for success in this unnatural exclusion.

These limitations and conditions, so attempted to be imposed on the principal devisee, and which are drawn in question in the present controversy, stripped of the peculiar phraseology with which the testator has chosen to invest them, I think will be found to be substantially the following: If William Gibbons should die without lawful issue and without will, or if he should make a last will, and give or devise any part of the estate derived from the testator to John M. Trumbull, or any of his descendants, or if it should appear, after the death of William Gibbons, that he had ever so given any of such estate, or any part of the proceeds thereof, (or indeed funds arising from any source) that then the estate should go over to the charities specified in the will. It is to be seen whether this devise gives any estate known in the law, whether the conditions annexed are unlawful, and, if so, whether they avoid the primary estate, or whether the whole disposition is void because against sound morals and against sound policy.

The position taken by the defendant's counsel is clearly sound, that no court will attempt to set aside a will on account of its disapprobation, however strong, of the motives that actuated the testator, or of the disposition made by him. The power of disposition belongs equally to the good and to the bad, and wills cannot be set aside merely because unequal or unjust. If capacity, formal execution, and volition appear, the will of the most impious man must stand, unless there is something, not in the motives which led to the disposition, but in the actual disposition, against good morals or against public policy. It may be harsh and severe, it may be extremely cruel under some circumstances, to disinherit one child, and to bestow the whole estate upon another, but if the testator be of disposing mind and memory, and duly execute such will in the forms prescribed by law, no court can interfere. If this will, or any of the devises contained in the will, be void, it must be on other grounds than those to which I have referred.

When a devise over depends upon a definite failure of issue, an estate in fee with an executory devise over is created, but

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when such devise over is made to depend upon an indefinite failure of issue, it becomes a contingent remainder limited on an estate tail. That a definite failure of issue is here meant is very clear, the dying without issue being connected with the further contingency of dying without making a last will. There is a strong analogy between this limitation and one lately under the consideration of this court, in the case of *Armstrong* v. *Armstrong*, 1 *Zabriskie* 509. In that case, after words of disposition, which, standing alone, would have carried a fee, the testator added a limitation over, in case the first taker died without heirs and *intestate*. The court held that a power of disposition by will was implied; that such power of disposition was inconsistent with, and defeated the limitation over, and that consequently the estate was absolute in the first taker. See, also, *Cuthbert* v. *Purrier*, 1 *Jac.* 415; *Green* v. *Harvey*, 1 *Harr.* 428; 4 *Kent* 270, &c. If the language of this will comes within the case of *Armstrong* v. *Armstrong*, the limitation over in such case will not be good by way of executory devise. If it were simply in case of dying without issue and without will, in such case, the limitation over not being good, the first estate would become absolute. But this phraseology is coupled with the further conditions which are attempted to be imposed. The power of disposition by will is not absolute; but there is this further condition annexed, that if the devisee should in any way give any part of any property derived from the testator to Trumbull, or to any of his family, the estate should be forfeited and go over. Whether good or bad, this is a condition subsequent in its very nature. It is a condition to defeat the estate given, and not one upon which the estate was to vest. If a conditional limitation because an estate is limited over on the breach of the condition, still the limitation over was intended to take effect only on a contingency which must happen, if at all, subsequently to the vesting of the primary estate. If, then, the condition be bad, the estate is discharged of the condition, and is absolute in the first taker.

It has, however, been urged by the defendant's counsel, that the condition is one simply in restraint of alienation to a particular person and to his heirs, and that such condition is

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good. It is not necessary for the present purpose to settle whether the condition be good or bad. The present case, perhaps, goes much farther than any case cited on the argument, being an attempt, not merely to restrain alienation by grant or devise to Trumbull or his heirs, but to shut out one branch of the testator's descendants from the possibility of receiving aid from the devisee, whatever might be their necessity or the urgency of their distress. The testator makes it a condition, that if the devisee should give any property of any kind, or money arising from any source, to Trumbull or any of his descendants, then the estates should go over. Such condition might well be held bad without infringing the generally received rule as to partial restraints or alienation; but, as I have already said, it is not necessary to consider or to settle the question. Suppose the conditions to be declared bad as *contra bonos mores*, as an attempt to impose an uncharitable unchristian restraint upon the devisee, still the primary devise would not fail; it would be simply discharged of the condition, and rendered absolute. The authorities are clear, and further discussion on this point seems unnecessary.

2. But it has been urged with great earnestness, on the side of the lessors of the plaintiff, that there was hallucination of mind on the part of the testator towards Trumbull and his family, a causeless and unwarrantable dislike amounting to monomania, and that this state of feeling was caused, or at any rate practised on by the son, who thus obtained the disposition in his own favor.

Every person is presumed to be of sound mind, until the contrary is proved; it is therefore incumbent on the party attempting to defeat a will on the ground of the testator's insanity, to prove the existence of such disability. The rule is well established by authority, and it is one which is in accordance with sound reason. He who wishes to impeach a will for such cause must support his allegation by proof, before he can overcome the presumption which the law raises of the sanity of the testator. *Shelford on Lunacy* 274; *Sloan* v. *Maxwell*, 2 *Green's Ch. Rep.* 581.

This is not one of those cases in which it is a question, what

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amount of capacity will enable a testator to dispose of his estate, or what weakness of understanding will disable him from so doing. It was not contended in the argument, that there was any thing in the case to show general insanity or a general want of testamentary capacity on the part of the testator. He was a man of unusual powers of mind, and, as the evidence shows, he retained those powers nearly or quite to the close of his life, certainly down to the period of making this will. But while it is admitted that he was a man of more than ordinary vigor of intellect, yet it is said that he labored under a morbid state of mind, of the character already mentioned, and that the will was the offspring of such feelings.

When delusion exists in the mind of a person on one or more subjects only, it is termed partial insanity. I do not question but that partial insanity will invalidate a will which appears to have been the direct result of such insanity, though the testator, at the time of making it, may have been sane in other respects upon ordinary topics. The great case of *Dew* v. *Clark*, 2 *Addams* 279, may be considered as establishing this doctrine. The testator in that case harbored the most unfounded and unreasonable impressions in regard to the character of an only daughter, against whom, in consequence, he entertained an unnatural dislike. He imagined that the daughter was vile, profligate, and depraved in the highest degree, and treated her accordingly with the utmost severity, and even cruelty, and finally cut her off in his will with an inadequate provision. It was a dislike founded purely on delusion. It was satisfactorily shown, that while this delusion had gained such possession of his mind that nothing could shake his belief, yet, in point of fact, she was amiable in disposition, engaging in her manners, of superior natural talents, diligent, dutiful, affectionate, modest, and virtuous, and giving no occasion for the extraordinary feelings exhibited by the father. The will, being proved to be the direct offspring of this delusion, was set aside and declared void by the distinguished judge before whom the cause was first heard; and his judgment was subsequently sustained by the courts before which, by appeal or otherwise, it was brought for review. The case

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turned on the fact of a remarkable delusion, the only clear test of insanity, unquestionably proved, and it has since received the unqualified approbation of the profession. See S. C. on application for commission of review. 1 *Russ. & Milne* 103, and *Shelford* 297.

In what does the alleged delusion exist, or how has it been exhibited in the present case? I have carefully looked through the testimony to be found in the case prepared, and in the documents, including the diary and the libels, which evidence I am not disposed to recapitulate or record. It is sufficiently referred to and stated in the charge of the Chief Justice for the present purpose, and it undoubtedly exhibits a sad instance of the extent to which family feuds may be carried. There seems to have been, on the one side, an imperious and haughty temper sustained by wealth and power, and restrained by no softening influences from moral or religious principles. On the other, as I take it, there was great imprudence on the part of a daughter and son-in-law in dealing with the errors of an uncontrollable and violent parent, upon whom they were dependent. But I can find nothing like delusion or insanity. The first dissatisfaction and incipient dislike were heightened, by continued disputes and irritation, into settled aversion and enmity; but this was the result of obvious causes having an actual existence, and not the consequence of imaginary difficulties. The rebukes for alleged licentiousness, the disputes and difficulties with regard to property, threatened divorce, the libel suit, all these matters, which embittered the feelings of the testator in the highest degree, were not mere imaginary causes of offence. These and other successive bitter quarrels between the testator and his son-in-law, daughter, and family, certainly occurred, and they account for the provisions of the will, by which the latter were disinherited, without any necessity to resort for explanation to monomania or any other form of insanity. No one witness produced, not even Mr. Trumbull himself, towards whom this hallucination was said chiefly to exist, has expressed the opinion that the testator was in the slightest degree insane.

The idea of undue influence need not be resorted to in order

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to account for a result which might naturally flow from causes such as have been merely alluded to: certainly it must be clearly proved, and cannot be inferred under such circumstances. It has been said, that the influence to vitiate a testamentary act must amount to force and coercion destroying free agency, importunity which could not be resisted, and which was yielded to for the sake of peace, so that the motive was tantamount to force or fear.

It is not the influence acquired by kind offices, or even by persuasion unconnected with fraud or contrivance; though if persuasion or other means of influence be connected with fraud, it may admit of a far different consideration. Fraud may be employed as means of influencing, and may afford ground for impugning a testamentary act no less than force, and the peculiar relation between the testator and the party benefited, as client and attorney, &c., when the former was weak and liable to imposition, has been held to furnish strong presumptions in regard to undue influences. But I can see no such evidence in this case as will support the charge. No direct coercion can be pretended; but the relation between the testator and his son, in connection with the circumstances under which the alienation in the family took place, and in connection with the circumstances under which the will was made, and the character of the dispositions for the benefit of the son, are relied on as proving or authorizing the inference that the prejudices and feelings of the father were practised upon. These circumstances were recapitulated by the judge in his charge, and submitted to the jury as grounds for a vigorous examination, and they would, as stated, go far to raise suspicion, if the father had been a man likely to be controlled or influenced, if the disposition had not been in accordance with intentions long previously expressed. The employment and payment of the scrivener by the son, the aid he gave in drafting the will, his conduct towards Trumbull, his connection with the printing of the libel, and the part taken in drawing and signing the covenant, undoubtedly deserved attention at the trial, and under some circumstances might have weighed much in the investigation. Yet still they are but mere grounds

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of suspicion, while the character and conduct of the testator repel the idea that he was operated on by any such extrinsic influence as could be effective to set aside his will.

The father was a man who, according to the testimony, could not be controlled, "a man of strong mind, strong passions, strong prejudices, and strong self-will." He had quarrelled with Trumbull years before: additional causes of irritation had from time to time sprung up, in regard to which there is no proof that they were stimulated or aggravated by the son; and even if such had been the case, it could scarcely have been urged as a ground for impugning a will made so long subsequent. He had repeatedly declared, that in a certain event, he would cut off Trumbull and his children from all further benefit of his estate; and when that event occurred, which depended on the action of Trumbull himself, he reiterated his determination, to which he unalterably adhered. In 1819, he made a will, in which he carried that determination into effect, and in two or three subsequent codicils, all, as well as the will just referred to, his own handwriting, his continued action was in perfect accordance with his previously declared intentions. These former wills and his antecedent declarations and conduct were all in entire accordance with the actual disposition finally made, and leave no other conclusion on my mind but that the last will was the result of a deliberate determination on the part of the testator, and not of any extrinsic influence. In my judgment the jury rightly responded to the inquiry, so emphatically and so properly put to them in the charge, that they were to inquire, not whether the will was a fair will, a just will, an equitable will, the will of a kind hearted and right thinking man, but whether it was the will of Thomas Gibbons. The judge properly put the case to the jury with a directness and an emphasis suitable to the occasion. No other verdict could have stood, and it was right that the jury should not be permitted to err from feelings which possibly may have been excited by the harshness of the will, when the evidence was clear and the case free from doubt.

I have not thought it necessary to notice some of the minor points argued by counsel, because, in the view I take of the

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case, they become immaterial. I have come to the conclusion, after a careful examination of the case, and after an anxious attention given to the argument of the respective counsel, that there was no misdirection by the judge; that the verdict is in accordance with the evidence, and that the rule should be discharged.

The Chief Justice and Randolph, Justice, concurred.

Rule discharged.

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CASES DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW JERSEY,

AT JULY TERM, 1849.

FERRIS v. MUNN.

1. If a matter in dispute is submitted by both parties to referees or arbitrators, and, in pursuance of the submission, it is made a rule of court, the submission is then irrevocable.

2. A *mandamus* will not issue to a court below to direct their proceeding in a matter of sound discretion within their jurisdiction.

On application for a *mandamus* to the Morris circuit court.

This cause was at issue, and noticed for trial in the Morris circuit, and a special jury had been struck and summoned for the occasion, when, by a written agreement, entered into between Randolph Ferris, the plaintiff, and Dr. Munn, in behalf of his son, John Munn, the defendant, the cause was referred to three referees. The agreement was filed, on the same day of its execution, in the clerk's office of the county; and the next day the plaintiff filed, in the same office, a written revocation or discharge of the same. At the next circuit, plaintiff urged on his cause for trial, pursuant to notice, and defendant moved for the ordinary rule of reference, in accordance with the agreement. The court decided that the rule of reference should

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be entered, and this court is now moved for a *mandamus* requiring the circuit to vacate the rule of reference, and to proceed with the cause to trial according to law.

Argued, in the branch court, before the CHIEF JUSTICE and Justice RANDOLPH. *Hager* and *Whelpley*, for the motion, *J. J. Scofield*, contra.

RANDOLPH, J. The first question to be noticed, is the effect of this agreement of reference. Can it be discharged or disregarded by the court? No doubt it may, when there has been fraud used in obtaining it; but none is pretended here, unless the fact alleged, that Dr. Munn, the defendant's agent, knew that plaintiff's counsel was opposed to a reference, unless one of the referees was a lawyer. This, however, would amount to no fraud or cause for setting aside the agreement, for the plaintiff had a right to refer his cause, either with or without his counsel's approbation.

Nor can the evidence offered, that this agreement was made upon the condition that plaintiff's counsel approve of the same, have any effect upon the motion. It is not found in the written agreement, and the court must be governed by that, it being entered into by the plaintiff in person, and for the defendant by his authority. We are, then, brought to this single question, had the plaintiff a right to rescind or revoke this agreement of reference. If he had, it was done, and the court should have proceeded to try the cause. Numerous cases have been cited from the English authorities to show that agreements to arbitrate or refer matters in dispute, may be rescinded at any time before the award rendered. 2 *Arch. Pr.* 324; *Kyd* 29; *Watson on Arbitration* 27; 3 *Harr. Dig., Title "Arbitration"* (8) 237.

But these are all cases under the English mode of proceeding by arbitration, which is at common law, derived from the civil law (*Kyd on Awards* 8), and is—1st, by submission, either in writing or by parol; 2d, by an order at *nisi prius*, on an agreement of the parties that the submission be made a rule, either of the court out of which the record issued or of some other court. *Kyd* 23; 1 *Anstruther's Rep.* 1; 9 *Dow P. C.*

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124. This virtually took the case, or rather the cause of action, from the court, and it then became the subject matter of an arbitration, strictly so called, the result to be enforced by attachment from the court where the rule was entered for a violation of that rule. Though sometimes a verdict was taken by consent for security to abide the event of the arbitration (*Kyd* 314), the mere submission or *nisi prius* rule not being a stay of proceedings. And 3d, proceedings under the statute 9 and 10 *William* 3, *c.* 15, § 31, when the submission is, by the agreement, made a rule of court, although no cause be pending in any court. The object of this act was to place a submission to arbitrators, when no suit was pending, in the same condition as if suit had been brought, and the submission made at *nisi prius.* 2 *Burr.* 701. In each of these modes of proceeding, the power or authority coming entirely from the party himself, and not from the court or act of law, it was held the party might revoke that authority at any time before it was executed, leaving the question of costs or forfeiture of the arbitration bond as a subject for future consideration. The inconvenience and injustice arising from these revocations became such as to call for legislative relief, and, by the statute of 3 and 4 *William* 4, *c.* 42, § 39, a submission made a rule of court is rendered irrevocable, except by leave of the court, and the arbitrators are required to proceed notwithstanding any such revocation. 3 *Harr. Dig.* 240. Beside these three modes of proceeding by arbitration or reference, as they are indiscriminately called in the English books, several of the United States have adopted a fourth, a reference properly so called, when a cause pending in court, or the subject matter thereof, instead of being tried by a jury, is referred to referees to adjust the matter and make a report of their proceedings to the court from whence their power emanated, this report being of the character of a verdict of a jury, and by the statute of Pennsylvania of 1705 (*Kyd* 34) expressed to be of the same effect.

The statute of New Jersey, drawn it is presumed by Judge Paterson, was passed in 1794, and the third section provides for references by rule of court and proceedings on the report

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of the referees. This rule of reference, though made with the consent of the parties, is the act of the court, and cannot be revoked by the party, but only discharged by the court on mutual consent. 1 *South.* 123; 3 *Halst.* 116. The proceedings and report of the referees are in place of the act and verdict of a jury, and may be confirmed or set aside by the court, but one of the parties might as well undertake to rescind the *venire* or to revoke the proceedings of a jury as the rule of reference or proceedings of referees. Had there been an actual reference, then, in this case, the plaintiff's revocation would have been a nullity. There was only a written agreement, however, to refer, and no rule entered until after plaintiff had filed what he calls a revocation; but the agreement to refer was authority, so far as the parties were concerned, to enter the rule at any time; and had it been entered when the agreement was filed, it would have been valid, and the court would not have disturbed it.

This court, in looking at the proceedings, must consider either that the reference was made at the time of making and filing the agreement, or subsequently, by a rule of the circuit court, and in neither case can the party be entitled to relief here. If the reference was actually made, it is irrevocable and beyond the control of either court; if made by a rule of the court below, it was an act done by that court, within its jurisdiction and the exercise of its sound discretion; and if any error has occurred, it cannot be rectified by a *mandamus* from this court to the court below, requiring the judge to reverse his own judgment, vacate his rule of reference, and proceed with the cause according to law. The plaintiff's rule must be discharged with costs.

The Chief Justice concurred.

Rule discharged.

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BARTON v. McKELWAY.

1. In an action on a covenant to deliver a number of trees at a certain time and place, if plaintiff proves that he offered the trees at such time and place, and left them there, it is no defence, that no one was there, on part of the defendant, to examine, count, and receive the trees. A party cannot evade a contract by absenting himself from the time and place of performance.

2. In an action on a covenant to deliver a number of morus multicaulis trees of not less than one foot high, it is competent for the defendant to show that, by the universal custom and usage of all dealers in that article, the length was measured only to the top of the ripe wood, rejecting the green immature top; and this, although the trade had existed only for a few years. It is not necessary that such usage be immemorial. Usage can be proved to explain a doubtful contract, not to contradict an explicit one.

This was an action of covenant, brought in this court by Henry N. Barton against John McKelway, upon the articles of agreement given in evidence at the trial, to recover the price of 13,800 morus multicaulis trees, delivered to the defendant by Joseph C. Potts and Edwin I. Cooper, on the 14th of November, 1839. The trial of the cause was had before Justice Randolph, at the Mercer circuit, at September term, 1846. On the trial, the plaintiff proved and gave in evidence the following articles and letter:

1. Articles of agreement, made and entered into this twenty-first day of March, eighteen hundred and thirty-nine, between Henry N. Barton, of the city of Trenton, county of Mercer, and state of New Jersey, of the one part, and Joseph C. Potts, of the same place, and Edwin I. Cooper, of the city of Philadelphia, of the other part, witnesseth, that the party of the first part will forthwith convey in fee simple, clear of all encumbrances, his row of three new houses, with the lots on which they stand, fronting on Lamberton-street, in the village of Bloomsbury, Mercer county aforesaid, running in depth one hundred feet from the northeasterly corner to the rear line of the said lots, crossing at right angles the said lots; and shall further complete the same in all things, according to the present plan of the said Barton for building the same, in the best manner and of the best materials, paving the sidewalks in front of the same, and curbing the same, and fencing, with a

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neat ornamental fence, the yards in front, and paving a suitable pathway up to the door, and sodding with grass the spaces between the pavements and porches in front; each door to have over it an ornamental portico, a Grecian balustrade to ornament the roof in front, and a lattice balustrade in the rear; the kitchens, to be built to the houses, to be twelve feet square, and set six feet from the houses connected therewith, with entries two and a half feet wide, and piazzas six feet wide; the whole to be painted with two good coats of paint, except where left rough for whitewashing, in which places to be whitewashed; fences to be made around, and dividing the gardens, and suitable privies to each house, at least eight feet in depth, well and substantially built and whitewashed; the well to the said houses to be of a suitable depth of water, and to be furnished in a proper way to be used. In consideration whereof, the said parties of the second part agree to deliver to the said party of the first part their bond, duly executed for five hundred dollars, payable on the first day of April, eighteen hundred and forty, and also to deliver to the said party of the first part, on or before the fifteenth day of April next ensuing the date hereof, twenty-eight thousand cuttings of lively and vigorous trees of the morus multicaulis, and also covenant and agree to deliver to the said party of the first part thirteen thousand eight hundred and forty-eight morus multicaulis trees of the growth of the ensuing summer (1839). The trees to be taken and counted as the field shall run, except that no tree shall be counted being less than one foot high; the trees to be delivered in the city of Trenton, during the month of October, at such time and place as the said party of the first part shall select and give notice of, ten days previous in writing, to the said party of the second part. Provided nevertheless, and it is hereby distinctly agreed, that if the said party of the second part shall sell the said trees at any time before the first of October next, (to which end they hereby retain the exclusive right over the said trees, to make sale thereof up to that time,) then the said party of the second part shall pay in money to the said party of the first part at the rate of thirteen cents and a half for each tree so sold, to be paid on

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the first day of October next. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

HENRY N. BARTON, [L. S.]
JOSEPH C. POTTS, [L. S.]
E. I. COOPER, [L. S.]

Signed, sealed, and delivered in presence of—[Agreed before signing that Barton is to have the house he lives in, until the first day of April, 1840, free of rent, and that he is to have the rents of the other two houses until the first of October, 1839.]

Barton and Potts signed in presence of

SAMUEL KAY.

E. I. Cooper signed in presence of

IVES CUNNINGHAM.

2. Articles of agreement made and entered into this nineteenth day of April, eighteen hundred and thirty-nine, between Henry N. Barton, of the county of Mercer, of the first part, and John McKelway, of the same place, of the other part, witnesseth, that the said Barton, in consideration of the covenant hereafter mentioned, covenants and agrees that the said McKelway shall have all the right and title and interest which the said Barton now has, to a certain lot of morus multicaulis trees deliverable to him in October next by Joseph Potts and Edwin I. Cooper, and the said McKelway's receipt for the same shall be a full discharge therefor. In consideration whereof, the said McKelway covenants and agrees to pay to the said Barton at the rate of ten cents a tree for each of said trees, upon delivery of the same by the said Potts and Cooper to the said McKelway. In witness whereof, the said parties have hereunto put their hands and seals the day and year first above written.

HENRY N. BARTON, [L. S.]
JOHN McKELWAY, [L. S.]

Signed, sealed, and delivered in presence of

JOS. C. POTTS.

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3. TRENTON, October 28, 1839.

Messrs. Cooper and Potts.

Sirs,—You will please not to take up the morus multicaulis trees, now growing by you for me, as the mildness of the season has prevented them from maturing as much as was expected when I contracted for them. Unless I give you further written orders, agreeably to the contract, you will please deliver the trees on the 15th of November next, at the house of Dr. John McKelway, in Trenton, or to his written order.

Your obedient servant,

HENRY N. BARTON.

The above order is given with my consent, and agreeably to my wishes.

JOHN McKELWAY.

The plaintiff further proved that Potts and Cooper, on the 14th and 15th days of November, 1839, dug up 14,000 morus multicaulis trees, and, on the 15th, delivered them at the door of the defendant's residence at Trenton; that the defendant was not at home, nor was there any person there to receive them; that the defendant's wife refused to permit them to put them on the premises, and thereupon they placed them on the sidewalk in front of his house, against the fence; that the defendant, a day or two afterwards, had them put in his cellar and counted; that, in this number of 14,000 trees, all trees were counted that measured not less than a foot, measuring from the root to the top of the stem, including as well the green part as the ripe wood.

The plaintiff also proved and gave in evidence the following letters.

TRENTON, November 16, 1839.

Mr. Potts.

Dear sir,—Will you have the goodness to let me have a copy of the paper which Henry N. Barton and myself signed on the 29th ult., and oblige your most ob't,

JOHN McKELWAY.

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To Messrs. Joseph C. Potts and Edwin I. Cooper.

Gentlemen,—On my return home, on the evening of the 16th November last, I found a quantity of morus multicaulis mulberry trees piled on the pavement in front of my house. I was informed by my family, that you, or your agents, had placed them there, saying, at the time of doing so, that they were delivered there in fulfilment of a certain contract made between you and Henry N. Barton, dated 21st March, 1839, by which you were bound to deliver to Mr. Barton thirteen thousand eight hundred and forty-eight morus multicaulis mulberry trees of the quality and description mentioned in the contract, and that all Mr. Barton's interest in the trees mentioned in the contract having been assigned to me in April last, the trees deposited at my door were therefore brought there in fulfilment of that contract. Shortly after my return home, it being late on Saturday evening, I put the trees into my cellar, to have them out of the way on Sabbath, and in order to examine them to see if they were in number, quality, and description according to the contract. I have since, and at as early a day as I could conveniently, had them examined, measured, and counted, under my direction, and find that they are not such trees as are called for by the contract, the trees left by you being altogether different in quality and description from those which you were by the terms of the contract bound to deliver. I cannot, therefore, receive them, and accordingly I return them to you, that you may dispose of them as you deem proper. Your most ob't ser't,

JOHN McKELWAY.

Trenton, December 2, 1839.

These papers being read to the jury, the plaintiff, by his counsel, rested his case, whereupon the defendant moved the court to nonsuit the plaintiff, for the following reasons:

1. That it appears on the face of the record that no action lies against the defendant on the covenant declared upon.

2. That it appears by the evidence in the cause that no action lies upon the covenant declared upon.

3. That the covenant declared upon is variant from that offered in evidence.

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4. That there is no legal evidence to sustain the issues joined upon the part of the plaintiff.

And the court, after hearing the counsel, overruled the motion to nonsuit the plaintiff.

The defendant opened his defence, and proved that he had the trees moved from the sidewalk to his cellar, and had them counted there; that there were only 9700 trees there not less than one foot high, measuring from the top of the root to the top of the ripe wood, and rejecting the immature top, which it was proved was of no value for cuttings or propagation of the tree, for which these were bought.

The defendant offered to prove that the universal practice of all dealers in morus multicaulis trees was to measure the top of the ripe wood only, which evidence was rejected by the court.

The defendant proved, that on the 30th of November, 1839, he returned the trees to Mr. Potts, by offering them to him in front of his house in Trenton; that Potts refused to receive them: whereupon they were left on the sidewalk in front of the house. The jury rendered a verdict for the plaintiff for the price of the 13,848 trees.

Upon the coming in of the *postea*, the defendant obtained a rule to show cause why the verdict should not be set aside, and a new trial had.

The argument of this rule came on at April term, 1849, before Justices Nevius, Capenter, and Ogden.

W. L. Dayton, for the defendant.

A new trial is asked, upon several grounds. 1. There was a variance between the contract set out in the declaration and the evidence to support it. The first covenant was incorporated, by reference, in the second, on which this action was brought. The contract was under seal, but the time of the delivery was extended by parol, that is by writing not under seal. The declaration was therefore demurrable, but it may also be taken advantage of at the trial. An action of covenant cannot be maintained when the extension is by parol, and that is relied upon. *Ford* v. *Canfield*, 6 *Halst.* 327; *Lang-*

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worthy v. *Smith*, 2 *Wend.* 587; *Littler* v. *Holland*, 3 *T. R.* 590, 592, *note*; *Morgan* v. *Carter*, 4 *C. & P.* 295; 2 *Greenl. Ev.* § 235.

The only question is, if we can take advantage of the difficulty in this mode; but failing in this, we ask that the judgment may be arrested. 1 *Saund.* 154, *note*; 2 *Tidd* 867 (3 *Am. ed.*); *Gregory* v. *Mack*, 3 *Hill* 380; *Boyd* v. *Townsend*, 4 *Ib.* 183, 186.

The principle admitted, they stand on the other side on very narrow ground when they endeavor to distinguish this case. Certainly it was not so understood by the pleader, who has set out an extension of time.

2. The declaration avers a delivery. An offer to deliver is no delivery. Throwing the trees in the street was no delivery, and taking them in the cellar merely to count them was no acceptance.

3. The judge overruled legal evidence. We offered to prove that, by the universal usage of trade in regard to this article, the immature wood was not measured as part of the tree. The trees were bought to be cultivated, and were entirely useless for that purpose. The alleged custom was founded in the nature of the thing; it would be strange if otherwise. 1 *Greenl. Ev.* § 293, and *note*; *Ib.* § 295, &c.; *Smith* v. *Wilson*, 3 *B. & Ad.* 728.

4. The verdict was against the weight of evidence and the charge of the judge. We showed, by a witness, that Barton had assented to this kind of measurement, and the court told the jury that if he had assented to it, he was bound by it.

S. G. Potts and *Vroom*, contra.

Did not deny law as to parol extension of time in sealed instrument, but urged that this was not within the cases cited. The construction of the covenant is, that they were to be ready for delivery during the month of October, to be delivered at any time on ten days' notice. The trees could not be delivered without notice, and within the month the party comes and gives notice, and this is within the spirit and meaning of the contract. All the parties acted upon the understanding that

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the trees were to be delivered on a notice to be given in October. The parties had to the last day of that month to give the notice (3 *Wash.* 140), and so the defendant understood it, for he gave notice on the 28th October to deliver on the 15th November. It was no new agreement, but a notice under the agreement.

The allegation, as to extending the time, is surplusage, and may be rejected. 1 *Greenl. Ev.* § 67. But delivery of articles after the stipulated time is good, if the party agrees to it. *Chit. Contr.* 720.

2. Delivery was proved, and it has been so found by the jury. The trees were left at the house of the defendant, in accordance with the notice, and when he came home they were put by him in his cellar.

3. The custom which may be proved to explain the terms of a contract must be one of long established usage. The trade in this case was of a day, and no custom could have grown up in relation to it. 3 *Kent* 260, *note;* 3 *Wash.* 149; 2 *Sumner* 567; 2 *Ib.* 377; *Trueman* v. *Loder*, 11 *Ad. & Ell.* 589; 6 *Bin.* 420; 1 *Watts* 360.

Lastly, that the verdict is against evidence. The case should be very clear to overcome the verdict.

Nevius, J. Upon the argument of this rule, the defendant's counsel also discussed, to some extent, a motion in arrest of judgment; but as the adverse counsel refused to enter into that discussion until the question of a new trial was decided, I will restrict my remarks to the latter question.

The suit is for the price or consideration of 13,848 morus multicaulis mulberry trees, alleged to have been delivered by the plaintiff to the defendant, according to contract, on the 15th of November, 1839, at the rate of ten cents a tree. Assuming that, by the terms of the contract, the trees were to be delivered, on the day above mentioned, at the house of the defendant, and were not to be less "than a foot high," that the price to be paid on delivery was ten cents a tree, we easily arrive at the questions involved in the case. On the trial the plaintiff proved, that on the 14th and 15th days of November,

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1839, he measured, counted, tied up in bundles and loaded on wagons, carried and delivered, the trees at the house of the defendant, in the city of Trenton; that the defendant was not at home, and his wife refused to receive them or permit them to be laid on his premises; and there being no one else there authorized to receive them, they were laid on the sidewalk in front of defendant's house. It further appeared in evidence that the defendant, on his return home the day following, caused them to be removed to his own cellar.

The defendant now objects that this evidence does not establish a legal delivery; that there could be no delivery where there was no one duly empowered to examine the nature and quality of the article to be delivered, and to determine whether the same was or was not in conformity with the contract. There is no force or reason in this objection. The defendant was aware of the time and place fixed for the delivery, and had given his written consent to it, and it was his duty to have been there at the time to receive the trees, or to have left an agent to act in his place. He cannot evade his contract by absenting himself from home that day. The plaintiff did all he could, and all that the law bound him to do, to effect the delivery. He carried the trees to the place mentioned in the contract, on the day therein appointed, and there made the only tender and delivery in his power to make. There is no ground in this objection for a new trial.

But it is further objected, that the court below overruled legal and material evidence offered by the defendant on the trial. To get at the point of this objection, it is necessary to refer again to the written contract, which provides, in terms, that the trees to be delivered were not to be less than one foot high. The plaintiff proved that the trees delivered were one foot high, measuring from the top of the root to the top of the stem. The defendant then proved that, after his return home, he caused these trees to be counted and measured, and that, according to such measurement, there were only 9000 trees of a foot high and upwards, and that the rest were rejected, as falling short of that measurement. The mode of measurement adopted by the defendant (according to the evidence) was

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from the top of the root to the extent of the ripe or hard wood, and not to the top of the stem. It became apparent, then, that the discrepancy in the count and measurement of the trees, by the different witnesses, arose from the different modes of measuring adopted by them. The defendant then offered to prove by witnesses that the mode adopted by him was the lawful and proper rule; that it was the rule well known and practised by all dealers in that article, from the commencement of the trade until the time when this contract was made; that this custom or usage of measuring mulberry trees, from the top of the root, or bottom of the stem, to the extremity of the matured or hard wood, was uniform and universal in the execution of all contracts for the sale and delivery of the article, made by dealers therein; that the plaintiff himself and those from whom he had acquired his title to the trees in question, were dealers in the article, residing in the neighborhood where that usage prevailed, and were well acquainted with it.

All this evidence was offered with the avowed purpose of explaining the true intent and meaning of the parties to this contract touching the phrase, "*one foot high*," and not to alter, contradict, or even modify the terms of the contract.

This evidence was overruled on the trial, and I think erroneously. It is no answer to say, that "*tree*" is a word of precise and definite signification, or that a "tree" is a "tree," and can be nothing else, and that every body knows what a tree is. It is the qualification contained in the contract that we are to consider in this case. The trees were to be at least a foot high. This involves the question of measurement, and how were they to be measured, while standing and growing in the ground, or after they had been dug from it? Were they to be measured from the extreme root to the extreme branch (both of which are parts of the tree), or in what other mode were they to be measured, in order to determine their height? It seems to me that the inquiry proposed by the defendant was legitimate and proper, and tended to settle an ambiguity in one part of the contract.

It is a well settled rule of law, that contracting parties

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are always presumed to make their contracts with reference to the general custom and usage that appertains to the subject matter of their contract, if any such general custom prevails, and all ambiguous terms or phrases used in expressing such contract may be explained by resorting to such general usage. And all terms and phrases employed by parties to express their intentions, if at all ambiguous, are to be construed in conformity with such usage, in order to arrive at their true intent and meaning. *Doug.* 513. It is not necessary that a usage of trade should have existed immemoriably; it is sufficient if it is established, known, uniform, and reasonable, and not contrary to law. Its true office is to interpret the otherwise indeterminate intention of parties, and the nature and extent of their contracts, and fix and explain the meaning of words. 2 *Greenl. Ev.* 251. The defendant's offer was, to prove that the trade in mulberry trees was of recent origin in this country, and that the practice of measuring them in the manner pursued by him commenced with, and uniformly continued with the trade itself, as long as it lasted, and was known to all dealers in that trade. I think this offer ought not to have been overruled. The jury were called upon to decide whether the plaintiff's or the defendant's rule of measurement was the true rule, and they could do that satisfactorily only by being informed of the usage that appertained to the subject matter of the contract, and that usage was good evidence to explain the intention of the parties. 2 *Star. Ev.* 455.

But, apart from the reasonable and well settled principle of the law of evidence, the nature of the thing contracted for and the object of the parties rendered the evidence lawful. The defendant was the purchaser of these trees, and in his contract he provided that they should be one foot high. For what purpose? Why a foot high, rather than six inches high? The plain and obvious answer is, that he might have a tree which, when divided into parts, would produce, when planted, a tree from every part, that is, that each part would vegetate. But all the witnesses proved that the part of the tree which did not consist of ripe or hard wood was entirely worthless, had not in itself a power of vegetation, but, as soon as the tree

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was removed from the ground, wilted and died. How, then, could the parties have contemplated that worthless part of the stem of the tree as a portion to be paid for by the terms of the contract.

I think the court erred in overruling the evidence offered by the defendant, as it had a legitimate bearing on the issue, and for that reason that the verdict should be set aside, and a new trial granted.

CARPENTER and OGDEN, Justices, concurred.

New trial granted.

DEACON v. SHREVE.

1. If jurors, pending a trial, go with the witnesses of one of the parties to the place in dispute, without the knowledge of the other party, for the purpose of having the premises shown, or the evidence explained by these witnesses *ex parte*, it is such misconduct in the jurors as will set aside the verdict.

2. The affidavits of jurors, or evidence of their admissions, are not competent testimony to prove their own misconduct; but it may be proved by the oath of a fellow juror, who is not inculpated in such misconduct.

On rule to show cause why verdict should not be set aside.

This was an action for overflowing land, and obstructing the operation of a mill, by raising the water of a pond below, on the same stream, beyond the proper level. The plaintiff recovered a verdict, and the defendants obtained a rule to show cause why that verdict should not be set aside, on the ground of misconduct on the part of the jurors, alleged to have been at the instance of the plaintiff. Depositions were taken to sustain the reasons assigned. A juror, whose deposition was taken, testified that a notice, styled "Exhibit A," of which the following is a copy, was left at his house:

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RANCOCAS, 9mo. 13th, 1845.

Friend William Garwood,—I was requested to inform thee that James Gardner and Benajah Powell wants thee for to come and see that spring that was talked about in court before the jury of review. They say that it was misrepresented to you, and they want thee to come to Benajah's on second day next, at eight o'clock in the morning.

By the request of the above.

JOHN BORTON, JUN.

It is expected that the jury will be there.

Gardner and Powell were two of the plaintiff's witnesses, who had been examined before the adjournment, and Borton was a friend of the plaintiff, and was shortly after married to his sister. Gardner did not go to Powell's, but three of the jurors did go, and were there met by a brother of the plaintiff and one Montgomery, a friend and witness of the plaintiff; and, in company with these, the three jurors examined the spring alluded to. This took place during an adjournment of the court pending the trial, which was a protracted one.

The defendant offered depositions to show, by the admissions of these three jurors, that they had attended at the spring, and were to be paid for their attendance.

Argued before NEVIUS, CARPENTER, and OGDEN, Justices.

W. Halsted and *G. D. Wall*, for defendants.

We allege misconduct on the part of some of the jurors, at the instance of the plaintiff. A private examination of a spring, &c., having an important bearing on the matter in controversy, was made by three jurors, in the presence of the friends and agents of the plaintiff, in the absence and without the knowledge of the defendants. The note of invitation, upon which these jurors attended, was written by a friend of the plaintiff, and who, in two weeks afterwards, became related by marriage, and on the day the brother of the plaintiff was present, and aided those jurors in their examination. Those jurors received pay from the plaintiff for their services on that day, as is proved by their own admissions. The declarations of the

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jurors, made while still charged with their duty, are admissible, for they cannot be examined to criminate themselves. 1 *Phil. Ev.* 94 (*Conn. ed.*); 2 *Ib.* 176, *note* 179; *Coxe* 123; *Ib.* 166; 4 *Harr.* 77; 3 *Ib.* 450.

Browning (attorney general) and *Dayton*, contra.

During the adjournment, three of the jurors made a visit to the Powell spring, in the absence of the defendants. If of their own motion, it could be no reason to set aside the verdict: to lay any ground, it must be shown to have been at the instance of the plaintiff. It is not shown to have been at his instance. They were invited by Powell and Gardner, two witnesses examined in the cause. The juror to whom the note was addressed did not attend, and it is only an inference, that similar notes were sent to others. We object to proof of declarations by jurors to break down their verdict. Declarations after the trial, or except when made in the room, are not admissible, and then only because the jurors themselves cannot be called. Strike out their declarations, and nothing remains but the fact of the simple visit to the spring. If any thing improper passed between others and the jurors, we deny that it was with plaintiff's knowledge. *Graham on New Trials* 110, 126, 128, &c.; *Coxe* 32, *note*; 2 *Chit. Rep.* 268.

Nevius, J. This is an action for overflowing lands, and was tried at the Burlington circuit, in the term of August, 1845, and a verdict rendered in favor of the plaintiff for $500, which the defendants seek to have set aside for misconduct of the plaintiff and some of the jurors during the trial. It appears by the depositions, taken under a rule of this court, that after the trial had commenced, and some days spent in the examination of witnesses, the cause was adjourned over until the 24th of September following. It appears, also, that before the adjournment took place, a witness or witnesses had been examined touching a certain spring on the lands of one Benjamin Powell, the position and condition of which became a material point in the evidence. After the adjournment, and on the 13th of September, one of the jurors received the following note, *viz:*

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"RANCOCAS, 9 mo. 13th, 1845.

Friend William Garwood,—I was requested to inform thee that James Gardner and Benajah Powell wants thee for to come and see that spring that was talked about in court before the jury of review. They say that it was misrepresented to you, and they want thee to come to Benajah's on second day next, at eight o'clock in the morning. By the request of the above.

JOHN BORTON, JUN.

It is expected that the jury will all be there."

Borton, in whose handwriting the foregoing note was proved to be, shortly after the date thereof, became connected with the plaintiff, by the marriage of his sister-in-law. Garwood did not attend pursuant to the notice, but three others of the jurors did visit the spring, either on the morning designated in said note, or some other morning during the recess of the court, and there spent from an hour and a half to two hours in company with one Benjamin Montgomery, and Benjamin Deacon, a brother of the plaintiff. Neither of the defendants nor their counsel were present, nor does it appear they had any notice of such meeting. Whether this visit to the spring took place by the procurement of the plaintiff or not, is not very material to determine, though it is difficult to avoid the inference, that it was with his knowledge and approbation. It is sufficient, if we find that the jurors themselves were guilty of misconduct, to warrant the court in setting aside the verdict. It is not denied but that the situation of the spring had become a material point in the cause; several witnesses had been examined concerning it, among whom was Benajah Powell. This meeting, therefore, at the spring was manifestly with the view of obtaining information, or to confirm or contradict what the witnesses had sworn to. What information these jurors did obtain on that visit does not appear, nor does it appear how it affected their verdict; but whatever it was, the defendants had a right to know, that they might, by their examination, explain or contradict it. All evidence in a case should be openly and publicly given in presence of both parties. Jurors cannot give

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a verdict founded on their own private knowledge, for it would not be known whether such verdict was according to or against evidence; and it is possible that the private grounds of belief might not amount to legal evidence. And if such private knowledge be communicated by one juror to the rest, it would be without the sanction of an oath or opportunity of cross-examination, and will be ground for a new trial. *Stark.* 449. Where in an action on the case for obstructing lights, the trial of which commenced on Saturday and ended on Monday, some of the jurors went to the premises on Sunday, and in the presence of the plaintiff examined the lights and the alleged obstruction, a verdict found for the plaintiff was set aside. *Tyrrell* v. *Bristow*, 1 *Alcock and Napier* 398; 7 *E. C. L. R.* 433.

I will not dwell upon that part of the evidence contained in the affidavits before us, which tends to the belief that the plaintiff procured this meeting of the jurors at the spring, and paid them for their attendance, though there is strong evidence of such misconduct. I will rest the case upon the single fact, that three of the jurors, in company with a nigh relative of the plaintiff, visited that spring during the recess of the court, without the knowledge of the defendants. I consider it misconduct on the part of these jurors calculated to prejudice the rights of the defendants, and for this reason am of opinion that the verdict ought to be set aside, without costs.

Carpenter, J. The defendants move to set aside the verdict in this case for misconduct charged against some of the jurors who tried the case, and which, it is alleged, took place at the instance or by the connivance of the plaintiff. The parties are the owners of mills on the same stream, and the defendants, who own the lower mill, were charged with having raised the water in their pond beyond its proper and accustomed level, so as to impede the operation of the plaintiff's mill above. The trial of the cause was commenced at the term of the Burlington circuit, but was unavoidably adjourned, in consequence of a providential occurrence, for several weeks, when it was resumed and concluded. A spring of wa-

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ter, called the Powel spring, became, it is said, an important subject of inquiry on the trial, from its relation to the water in the lower pond.

During this adjournment, a note, dated September 13, 1845, which was Sunday, was addressed to William Garwood, a juror, requesting him to attend the next day, at a designated place, to view that spring. The note was written, or signed, by one William Borton, a person who shortly after (within a fortnight) married the sister of the plaintiff's wife. It purported to have been written at the request of Gardner and Powell, two witnesses, who testified at the trial, on the part of the plaintiff, in regard to that spring. It stated that they wished the juror to come and view the spring; that misrepresentations had been made to the jurors in regard to it; requested him to come to the house of Powell, the witness, and further stated, that it was expected the jury would be there.

The juror to whom this note was addressed did not attend at the place thus designated, but three others of the jurors did attend, leaving room for the inference, that some similar invitation had been made to them, if not to all the jurors. At the day mentioned, the three jurors came to the house of Benajah Powell. They were there met by Benjamin Deacon and one Montgomery, the former a brother, the latter a witness and a friend, if not an agent, of the plaintiff. The jurors and these two persons then proceeded to view the spring, Montgomery going along expressly for the purpose of showing it. Borton, who wrote the note, does not appear to have been present. Powell and Gardner, at whose request the invitation purported to be given, were with the jurors at the house of Powell, but did not accompany them to the spring. A piece of timber called, because of its position, a cap, seems to have been a subject of testimony on the trial, and to have been considered as a mark by which the relative height of the water in the lower pond might be ascertained. Some of the jurors said they would like to see this cap, and it was shown to them by the same person. During the time which the jurors were so engaged, they conversed in relation to these matters, in which

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conversation Deacon, if not Montgomery, who were both present, participated.

The trial was resumed on the 24th of September, after the long adjournment referred to. Depositions have been taken, in order to prove conversations by the same three jurors, in which they admitted that they had attended at the spring. Their attendance at that place, under the circumstances already shortly narrated, was proved by direct testimony, and evidence of their declaration to that effect is quite immaterial. But the proof, as to their declarations, is attempted to be carried much farther. A fellow juror testified, that after the cause had been recommenced, and during its progress, he heard one of these three jurors tell the two others that he had got his dollar from the plaintiff for his attendance at the spring; that the other two then said they meant to have their pay too, one of whom subsequently said he, also, had got his pay for the same service. From the intelligence and respectability of the jurors upon whom such conduct is charged, I cannot but think, as well as hope, that the whole conversation was of a jocular character, and that it must have been misunderstood. It is remarkable that the great impropriety of their visiting and examining the premises in company with the friends and witnesses of the plaintiff, did not strike the minds of these jurors, but it is almost beyond belief that they could have received pay for such service. But the whole testimony, as to their declarations, is objected to as incompetent, and its admissibility seems to be very questionable.

The principle is now well settled, that generally the affidavits of jurors shall not be received as to what took place in the jury-room, or elsewhere, to show misbehavior, or on the delivery of the verdict to show mistake, for the purpose of correcting or destroying the verdict, though it seems their affidavits are admissible for the purpose of exculpation. The rule stands on the ground of public policy, courts being unwilling to permit a dissatisfied juror by such means to destroy a verdict to which he had given a public assent. So what a juror cannot do by his own statement under oath, he cannot do by his admission or confessions when not under oath. In a case

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in England, an affidavit, that one of the jurors had admitted to the deponent that the verdict had been decided by lot, was peremptorily rejected. It was said, that to set aside verdicts on such statements would be dangerous, and likely to lead to the greatest fraud and abuse. *Straker* v. *Graham*, 4 *M. & W.* 721; *Hindle* v. *Birch*, 8 *Taunt.* 26; *Burgess* v. *Langley*, 5 *M. & G.* 722.

It is requisite to prove such misconduct by the affidavit of the officer who had charge of the jury, or in some other way than by the declaration or oath of a juror, unless, indeed, the declaration of the juror be made at the time, in which case it may be admissible as part of the *res gestæ*. Thus, in a case cited on this argument, a motion was made to set aside a verdict, on the ground that it had been entered by mistake; and affidavits were offered to prove declarations made by two of the jurors in a conversation on the same day, but after the delivery of the verdict. The affidavits were rejected, Lord Ellenborough saying, that it would not do, unless the conversation was at the time and *part of the transaction*, and while the jury were together. *Davis* v. *Taylor*, 2 *Chit.* 268. If in this case the conversation offered to be proved had been part of the transaction, and while the alleged payment was being made, it would have stood on a different footing, but it is the mere subsequent admission of the jurors. Though made during the recess of the court, yet having been made, as alleged, during the progress of the trial, and while the jury were still charged with their duty, this has been urged as distinguishing this case from those where the declarations were made after verdict. I am not inclined to make the distinction, but, if adopted, the affidavit would be inadmissible, being made by a juror, who was incompetent, by his oath, to inculpate his fellows. I think that so much of the deposition as relates to the declarations of the jurors must be rejected.

But, independent of these declarations of the jurors, and of their supposed admissions as to receiving pay from the plaintiff, I think the verdict must be set aside, simply on the ground of the misconduct of those jurors. I say nothing as to the plaintiff, or any attempt by him to influence the jury, though

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the evidence is such as to create in my mind the strongest suspicion of his connivance, if not of his direct interference, in regard to the visit to the spring: the letter, written by a person whose relation to the plaintiff has already been stated, the plan of meeting, the evidently preconcerted attendance by the persons who met the jurors, one of them the brother of the plaintiff, the others his witnesses, and whose only object, so far as appears, was to converse with those jurors on the subject of the trial. But, laying aside any consideration as to the action of the plaintiff himself, these jurors, in the absence and without the knowledge of the defendants, by preconcerted arrangement, met the friends and witnesses of the plaintiff, and privately conferred with them in regard to matters which were considered to have an important bearing on the case. It was nothing less than an *ex parte* examination of evidence in the cause, the influence of which we cannot know, nor, indeed, ought we to inquire as to it. However inadvertent the conduct of the jurors may have been, who were perhaps drawn into it by the pretence that the evidence of the two witnesses, as to the spring, had been misrepresented, still it was a gross irregularity, which, if permitted, would destroy all confidence in the purity of jurors, and in the impartiality and fairness of their verdicts. Though verdicts should not be set aside on slight grounds not likely to be prejudicial to a party, yet certainly the welfare and security of the community require us to interfere in a case like this.

I am of the opinion that the rule should be made absolute, and the verdict set aside.

OGDEN, Justice, concurred.

New trial granted.

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VANDEGRIFT v. REDIKER.

1. An engineer in charge of a locomotive engine, held not to be liable for an accidental injury to a cow, which, suffered to go at large, had strayed on the railroad.

2. The owner of cattle is bound to keep them in his own close at his peril; and nothing but wilfulness on the part of the engineer would make him liable for the loss of a cow, so exposed by the fault of the owner.

This was an action of trespass, brought, before a justice of the peace of the county of Burlington, against the plaintiff in *certiorari* (who was defendant below), an engineer in the employ of the Camden and Amboy Railroad Company. The action was brought against him for killing the cow of the plaintiff below, by running against her with a locomotive, then in charge of the defendant. The justice gave judgment for the plaintiff below, and the defendant appealed to the Court of Common Pleas. On the appeal the judgment was affirmed by consent, a state of the case being agreed upon, in order that, upon *certiorari*, the cause might be settled in this court, upon the law as applicable to the facts. It was agreed that if the Supreme Court, upon the whole case, should be of opinion that the plaintiff was entitled to recover, the judgment of the pleas should be affirmed, with costs; if otherwise, that the judgment should be reversed.

The evidence taken before the justice was fully stated, but it is unnecessary to repeat it at length. A short summary seems to be sufficient. The cow of the plaintiff below was at large, and had strayed on the railroad at an unenclosed part of the road near Bordentown, and just as the train, at its usual speed, was approaching the spot. It was an excursion, and not one of the regular trains. The railroad, at the place where the accident occurred, runs alongside the public road, and one standing on the track at that point can see down the road more than one-fourth of a mile. A witness, who saw the cow come from the woods and walk on the railroad alone, said he heard the approach of the cars, and the bell ring once before the cow was struck. A passenger in the train said he heard the bell tap twice; that the engine was reversed, and the speed

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stopped. He said, that from the tap of the bell until the accident occurred was but a few seconds; that the locomotive was not thrown off, or the train much detained, and that the engineer was a careful man.

Bradley and *Wall*, for the plaintiff in *certiorari*.

If this was not a case of inevitable accident, at any rate there was no wilful design, or such gross negligence as to amount to wilfulness. It may be admitted, that if the act had been wilful the engineer would be liable; but short of wilfulness, the cow being illegally on the road, he is not liable. Every man is bound to keep his cattle on his own close. *Chambers* v. *Matthews*, 3 *Harr.* 368; *Coxe* v. *Robbins*, 4 *Halst.* 384; *Stafford* v. *Ingersoll*, 3 *Hill's N. Y. Rep.* 38; *Lyman* v. *Gibson*, 18 *Pickering's Rep.* 427; *Dovaston* v. *Payne*, 2 *H. Black.* 527; 3 *Black. Com.* 209, 211; 3 *Kent's Com.* 438. The engineer was shown to be a careful man, and he was in the performance of a lawful duty. *Charter of the Co.*, and *Turnpike Co.* v. *Railroad Co.*, 2 *Harr.* 314. It cannot be presumed, therefore, that he would wilfully put in peril his own life and the lives of the passengers in his train. And no amount of mere carelessness will make a man liable as a trespasser, who is lawfully employed on his own property, or where he hath good right to be, to one who comes there illegally. *Bush* v. *Brainard*, 1 *Cowen* 78; *Blyth* v. *Topham*, *Cro. Jac.* 158, *S. C.*, 1 *Roll. Ab.* 88; *Ilott* v. *Wilkes*, 3 *Barn. & Ald. Rep.* 304; *Sarch* v. *Blackburn*, 4 *C. & P.* 297; *Burckle* v. *N. Y. Dry Dock Co.*, 2 *Hall's Sup. Ct. Rep.* 151; *Rathbone* v. *Payne*, 19 *Wend.* 399; *Brown* v. *Maxwell*, 6 *Hill's Rep.* 592; *Burroughs* v. *Housatonic Railroad Co.*, 15 *Conn. Rep.* 124; *Deane* v. *Clayton*, 7 *Taunt.* 489, judgments of *Just. Park*, and *Ch. Just. Gibbs.* The case differs widely from those of ordinary collisions on a public and common highway, by land or water, where both parties have an equal right to be; though if judged by the *principle* which prevails in *those cases*, the defendant would not be liable. *Lynch* v. *Nurdin*, 1 *Adolp. & Ellis, N. S.* 29; *Butterfield* v. *Forrester*, 11 *East* 60; *Bridge* v. *Grand Junction Railway*,

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3 *Mees. & Welsb.* 244; *Davies* v. *Mann*, 10 *Mees & Welsb.* 545; *Wakeman* v. *Robinson*, 1 *Bingh. Rep.* 213; *Vanderplank* v. *Miller*, 1 *Moody & Malk.* 169; *Luxford* v. *Large*, 5 *C. & P.* 421; *Woodrose* v. *Sims*, 2 *Dodson's Adm. Rep.* 85; Judgment of *Lord Stowell*, *Rathbone* v. *Payne*, *qua supra*; *Davis* v. *Saunders*, 2 *Chit. Rep.* 639. Besides, it is contended that this was a case of involuntary trespass or inevitable accident, which never renders a party liable to an action. *Millen* v. *Fawdrey*, *Poph.* 161, *S. C.*, *Latch* 13, 119, *W. Jones* 131; *Weaver* v. *Ward*, *Hobart's Rep.* 134; *Scott* v. *Shepherd*, 3 *Wils.* 403, *S. C.*, 2 *W. Black*, 892; *Brown* v. *Giles*, 1 *C. & P.* 118. Many cases in the books, which might at first sight seem against us, have depended on the form of pleading; it being held that in trespass inevitable accident must be specially pleaded where the injury *resulted* from a *voluntary* act of defendant; though where he was merely an instrument of some overruling necessity, his will not concurring in the act from which the injury resulted, he may plead not guilty. *Hall* v. *Fearnley*, 3 *Ad. & El. N. S.* 919. Those cases cannot apply here, because no special pleading is required in a justice's court in New Jersey, and because we have set the special matter forth in the plea, if it *were* required.

Vroom, contra.

The cause was argued in April term last, before Justices Nevius, Carpenter, and Randolph, and the unanimous opinion of the court was read at the present term by

Carpenter, J. When the act charged as a trespass was committed, whether that act was accidental or otherwise, the defendant, an engineer having charge of a locomotive, was engaged in the regular performance of his duty. This duty was a lawful one, and the company in running the engine on its railroad was clearly within the powers granted by its charter. The road had been built, and engines and cars placed thereon, for the purpose of transporting passengers and merchandise by means of steam power, in exact conformity with

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the object of the act of incorporation. *Turnpike Co.* v. *Camden and Amboy Railroad Co.*, 2 *Harr.* 314.

The duty, then, in which the defendant was engaged being lawful, neither he nor the company could be liable for any accidental injury which might occur in consequence of the passage of the train, unless there was a want of diligence and precaution, or the right was exercised in an unlawful and unreasonable manner. Undoubtedly a company, intrusted with an agent of such dangerous character for its private and particular advantage, must use all reasonable diligence to prevent damage to the property of third persons. If negligent, of course the company would be liable for all consequent injury to any one who had not deprived himself of his remedy by some default or misconduct on his own part. *Burroughs* v. *Housatonic Railroad Co.*, 15 *Conn. Rep.* 124; *Garrison* v. *Railroad Co.*, 2 *Iredell (N. C.)* 324; *Piggott* v. *Eastern Counties Railway Co.*, 3 *C. B.* 229.

But the case shows that the cow was unlawfully at large, straying without control in a public thoroughfare, when killed by the locomotive. At the common law it is well settled, that a man is not obliged to fence against any cattle, unless indeed it be against cattle rightfully in an adjoining close; but the owner is obliged to keep them in his own close at his peril. The statutes of this state which prescribe the regulations as to fences, extend only to owners of adjoining closes, and owners of land are not compelled to protect themselves against trespasses committed by cattle suffered to wander at large and pasture upon the public roads. The rule, it seems to me, must apply to a lawfully authorized railroad as well as to other property. In this case it does not appear that the cow had escaped from the owner without any fault on his part, or that he had made fresh pursuit. Any injury that might occur in case of such accidental escape, or that might occur to cattle being driven along the public highway, in consequence of the unfenced railroad, might admit of a different consideration. But in this instance the cow when struck was trespassing, so far as appears without excuse, upon the property of the company. *Coxe* v. *Robbins*, 4 *Halst.* 384; *Chambers* v. *Mat-*

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thews, 3 *Harr.* 368; *Rust* v. *Low*, 6 *Mass.* 90; *Stackpole* v. *Healy*, 16 *Ib.* 33; *Stafford* v. *Ingersoll*, 3 *Hill* 38.

Under such a state of facts nothing but wilfulness on the part of the engineer, or such negligence as would amount to wilfulness, would make him liable for the loss of the cow so exposed by the fault of the owner. It was properly admitted by one of the counsel on the argument, that had the injury been wilful, the defendant would have been liable, and undoubtedly such is the rule. See *Brownel* v. *Flagley*, 5 *Hill* 282; Lord Denman, in *Lynch* v. *Nurdin*, 1 *Q. B.* 29; *Davies* v. *Mann*, 10 *M. & W.* 546; *Butterfield* v. *Forrester*, 11 *East* 60. But in case of mere negligence, not so gross as to evince recklessness or design, an action cannot be maintained by one, himself clearly in the wrong. It has been so held in cases arising upon the collision of carriages and vessels, as well as in other cases which present a strong analogy. There must be wrong as well as damage, and there is no legal injury where the loss is the result of the common fault of both parties. *Rathbun* v. *Payne*, 19 *Wend.* 399; *Barnes* v. *Cole*, 22 *Ib.* 188; *Butterfield* v. *Forrester*, *supra*; *Sarch* v. *Blackburn*, 4 *C. & P.* 297; *Vanderplank* v. *Miller*, 1 *Mood. and Malk.* 169.

It does not appear that there was any culpable negligence on the part of the engineer in the present instance. It is said in the evidence, as stated, that he was a careful man. According to the testimony of a passenger in the train, the bell was twice tapped, and the engine twice reversed, though, the whole occurrence being sudden, the collision almost immediately succeeded the notice thus given. We cannot presume that a careful man, charged, as was this defendant, with the safety of the numerous passengers in the train, would have periled their lives by wilfully running against a cow previously seen. The only circumstance which can give the least color to such a charge, is that the line of road, at the point where the accident occurred, could have been seen by the engineer from the distance of one-fourth of a mile, perhaps farther. But the train was in rapid motion. The exigencies of the business to which railroads at this day are applied require as much speed as is

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consistent with safety. The cow, alarmed by the approach of the engine, may, at the moment, have darted on the road, so that the view of the danger by the engineer and the collision may have been almost simultaneous. We do not think, therefore, that this circumstance will authorize us to infer such gross negligence as will make the defendant liable. We are of opinion that the judgment below must be reversed.

STARR ET AL. v. TORREY.

1. It is a good defence to a promissory note in the hands of the payee or endorsee, with notice of the fact, that it was given for a consideration which has totally failed.

2. It is no ground for a new trial, that one, of two counsel of the plaintiff engaged in the trial, was called away during the trial, if the other counsel proceeded and tried the cause in his absence, without requesting an adjournment.

3. If a letter from defendant to plaintiff, produced by defendant, is proved to have been mailed to plaintiff at the proper post office, and has the proper post mark upon it, and the possession of it by the defendant is accounted for in a way that shows a presumption that he received it from plaintiff, it is sufficient proof to permit the whole evidence to go to a jury, to determine therefrom, if the letter had been received by plaintiff.

4. What circumstances are sufficient evidence to warrant a jury in finding that the endorsee of a promissory note had notice of the failure of consideration.

5. If plaintiff agrees to deliver to defendant at P., an engine for defendant's road at M., defendant takes the engine to M., and tries it there, and finds it does not answer the object for which it was bought, and which it was warranted to answer, it is a sufficient rescinding the contract to give notice thereof to plaintiff at P., without bringing back and tendering the engine there.

6. If an engine, or other article, be sold warranted to answer two purposes, the purchaser is not bound to rescind the contract as soon as he finds the warranty fails for one purpose, but may continue the trial of it until he finds that it fails in both, and then may return it or rescind the contract on account of the failure of the warranty lastly tested.

On rule to show cause why verdict should not be set aside, and a new trial granted.

Argued before Nevius, Carpenter, and Ogden, Justices, by *Vredenbergh* and *Vroom*, for plaintiffs, and *W. L. Dayton*, for defendant.

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NEVIUS, J., delivered the opinion of the court.

This cause was tried before me, at the Monmouth circuit, in the term of August, 1845, and a verdict rendered for the defendant. On the coming in of the *postea*, a rule to show cause why the verdict should not be set aside was granted. The action is upon three several promissory notes, of $500 each, given by the defendant to the firm of Eastwick & Harrison, and by them endorsed to the plaintiffs. These notes bear date on the 17th and 24th of June, and 1st of July, 1842, and are respectively payable at four months. On the trial, the signatures of the drawer and endorsers were proved, and the plaintiffs then rested their case. The defendant, in defence of the claim, then set up, that these notes were part of the price or consideration to be paid by him to E. & H. for a locomotive engine purchased by him, to be used on a wooden railway, of his own construction, in the county of Monmouth; that the engine delivered did not correspond with the terms of the contract; that it was wholly unfit for the purpose intended and worthless to the defendant, and that E. & H. had full notice of this fact, and that the plaintiffs were fully advised of the failure of the consideration before they became the owners of the notes in question.

In support of this defence, the defendant, on the trial, proved that the notes in question were delivered to E. & H., on the 3d of August, 1842, and were substituted in the place of three other notes of like amount, signed by himself, of a prior date, and also payable at four months, and which were then held by E. & H., and that the object of such substitution was to obtain an extension of the time of payment; that the original notes were the price, or part of the price, of the engine E. & H. were to deliver to him, on a contract entered into with them in June, 1842; that, according to that contract, the engine was to be adapted to the defendant's road, which Harrison had previously seen and examined; that it was not to exceed five tons in weight when supplied with its complement of fuel and water, and was to be a good and complete engine, capable of drawing on that road thirty tons at a rate of six miles an hour, for which the vendors were to receive $2500. He further

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proved that Harrison, one of the firm of E. & H., after examination, pronounced the road a good one, and declared that the engine they proposed to let the defendant have was calculated to run on such a road; that, when the terms of this contract were settled between the parties, the defendant was requested to give his five several notes, of $500 each, which after some hesitation he did, on Harrison's warranty that the engine should be, and should perform in all respects, as he promised and represented. Upon the delivery of these notes, the defendant took the following receipt:

"New York, June 24th, 1842, Rec'd from W. T. his five several notes, dated May 6, 13, 20, 27, and June 3, 1845, at four months from date, for five hundred dollars each, being a total of twenty-five hundred dollars in full for a locomotive, now in complete order for use, and to be delivered at Philadelphia to his order, according to agreement hitherto made, and in all respects to conform to said agreement."—Signed, Eastwick & Harrison.

The defendant further proved, that the engine was delivered about the last of June or 1st of July, and that it did not correspond with the terms of the contract; that the axle did not suit the road, and had to be sent to Philadelphia to be altered; that its weight, with wood and water, exceeded eight tons; that it was imperfect in its construction, and wholly unfit for any useful purpose on that road; that after a good deal of time and labor spent by the defendant and his hands (aided by an engineer sent with the engine by the vendors) to render it fit for use, without success, it was finally abandoned to the vendors, of which due notice was given by letter from the defendant to them, dated the 22d August, 1842.

It was further proved, that at the time of the contract the engine belonged to the present plaintiffs; that it had before been tried by other engineers, and proved to be worthless, and wholly unfitted for a railroad; that the plaintiffs knew this, and one of them, when applied to, in July, to construct some tubes for this engine, said, that it had been tried on a railroad near Philadelphia, and had been proved useless, and there was

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no use to go to any expense. Upon this evidence, briefly but substantially stated, it was left to the jury to say whether the consideration for these notes had or had not wholly failed, and if it had, whether the plaintiffs had or had not notice of such failure when these notes were endorsed to them, and if they found in the affirmative, then to render their verdict for the defendant, which they did.

This verdict the plaintiffs ask us to set aside—1st. Because, during the progress of the trial, and before the evidence was closed, one of their counsel was unexpectedly and necessarily called away, and was obliged to leave their case with other counsel not familiar with the facts. Here it is proper to state the facts, as they occurred. Neither of the attorneys in the case were present at the trial, nor, as far as is manifest to us, was any brief prepared or handed to counsel. When the trial commenced, Mr. V. answered as counsel for plaintiffs, and sitting beside him, taking notes of trial, was Mr. W., both of whom were considered by the court as counsel for the plaintiffs. The cause was progressed in until the defence had been fully developed, and all the witnesses on the part of the defendant had been examined except one, who testified what one of the plaintiffs had said about the worthlessness of the engine, when Mr. V., who was the leading counsel in the case, was called away. No application was made to the court to suspend the trial on this account, but the cause continued under the management of Mr. W., as counsel for the plaintiff, until its termination. This reason is insufficient to warrant the court in setting aside the verdict. There is no evidence that the plaintiff lost any thing by the absence of one of his counsel; that they had any other witnesses present than those who were examined in the case. It is true that, since the trial, two witnesses have been examined before a commissioner, on the part of the plaintiffs, as I suppose under a rule of this court. The first of these, Mr. Woodward, was the engineer who attempted to run the engine upon this road. His testimony is, in substance, that the high grades and imperfect construction of the road was the cause of the failure, and not the imperfection of the engine itself. Yet he admits that the engine was not calculated for

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that road, and was not only useless, but destructive to the road. The other witness examined since the trial is Mr. Mason, who says that these notes were endorsed to the plaintiffs by E. & H. without recourse, and in payment to them of this very engine, which was their property when the contract was made between E. & H. and the defendant; that E. & H. were to pay for it $1350, but this was to depend on the contingency of their sale to the defendant.

There is no evidence, nor even allegation, that these witnesses were present at the time, nor that their's is newly discovered testimony; nor is there any thing in their depositions which, in connection with the other evidence in the cause, would, in my mind, call for a different verdict from the one rendered. I cannot, therefore, perceive that the plaintiffs were in any wise prejudiced by the absence of one of their counsel near the close of the trial.

A second ground urged for a new trial is, that illegal evidence was admitted on the part of the defendant. The point of this objection is, that a letter of the defendant to E. & H., dated the 22d of August, 1842, wherein he abandoned the engine, was offered and received in evidence, notwithstanding objection made at the time. This letter was proved to be in the defendant's handwriting, endorsed and directed to E. & H., Philadelphia, and, in addition, had the usual post mark upon it. And the clerk swore he was sure he had mailed it. But as it was then produced by defendant's counsel, it was insisted that it had never come to the hands of E. & H. The defendant then, to obviate the objection, offered to prove, by one of his counsel, how he had become possessed of that letter; but the plaintiffs being willing to take the statement of counsel without oath, he proceeded to explain the manner in which he became possessed of it, which was consistent with the presumption, that it had come to the hands of E. & H. in due course of mail. Thereupon the letter was read in evidence. This objection, therefore, ought not to prevail.

But, thirdly, it is objected, that although this defence might have been good between the original parties to the notes, yet it cannot be set up against the plaintiffs, as endorsees. This

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must depend upon the fact, whether the plaintiffs had or had not notice of the contract and the consideration upon which these notes were founded. That was a matter left to the jury upon the evidence, and I cannot say they committed an error in their finding. It was shown that the engine belonged to the plaintiffs when the contract was made; that the plaintiffs were aware that E. & H. were negotiating with the defendant for the sale of it; that if sold to the defendant they were to receive $1350, otherwise E. & H. were to pay them nothing; that after the engine had been delivered, and proved defective, they declared that it had before been tried, and proved useless, and that there was no use in going to any expense with it. These facts fully proved, with the additional facts, that the plaintiffs were to receive only $1350, while E. & H. were to receive $2500 for the engine, and that these notes were transferred without recourse to the endorsers, were sufficient, in my mind, not only to establish notice, but to raise a strong presumption that the plaintiffs were participators in an attempted fraud. Upon the same evidence, I apprehend, any honest jury would arrive at the same result.

Again it is urged, in support of this motion, that the defendant ought to have repudiated or rescinded the contract as soon as he discovered that the engine was not according to the terms of the agreement; that he did not do so, but kept it from the 1st of July to the 22d of August, and in the mean time substituted these notes for those originally given, thereby ratifying and confirming the contract after he knew of the defects in the engine. This objection is not well taken; for although the defendant knew at once that the engine was heavier than contracted for, yet, if in other respects it was perfect, he might be willing to keep it. It proved defective, wholly defective, but it required time to make the experiment. Alterations and additions were to be made to it, to obviate its defects, and these were made with the hope that it would yet answer the purpose for which it was intended: and when these efforts all failed, then the defendant gave notice of rescinding the contract. For this neither E. & H. nor the plaintiffs had any right to complain. This labour and time was in

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truth expended for their benefit, and if they had proved successful the contract would have been carried out.

Lastly it is said, that the defendant was bound to return the engine to E. & H., to give them the opportunity of accepting or refusing it. I do not think he was bound to do any such thing. After the delay and expense incurred by him in attempting to repair an engine, known by the vendors to be worthless at the time of the contract, it was sufficient for him to give notice that he would not take it; and upon such notice they might have informed him whether they would or would not receive it, and advised him where to deliver it, if he was bound to deliver it at any other place than where it then was. The notice of the 22d August, in my opinion, was sufficient.

As to the allegation, that the defect was in the defendant's road, and not in the engine, it is sufficiently answered by the proof that one of the vendors had examined and approved the road before the contract was made.

I can see no reason for setting aside this verdict, and think the rule should be discharged, with costs.

CARPENTER and OGDEN, Justices, concurred.

PARSONS v. WOODWARD.

1. A contract to deliver at a certain price a quantity of trees of a specified kind, to be grown after the contract, is not strictly a contract of sale, nor would it be valid as such, but it is a valid executory contract; and it does not confine the vendor to deliver any particular individual trees, or only trees raised by the contractor, but a tender of any trees answering the description in the contract will be a compliance with the contract.

2. Any beneficial contract may be assigned, and courts of law will protect the rights of the assignee suing in the name of the assignor. And such assignment, made in good faith, is a sufficient replication to a plea, that the nominal plaintiff, after such assignment, became bankrupt, or assigned all his rights and choses in action to a general assignee or to an assignee under the insolvent law.

This is an action of covenant, and the plaintiff declared as follows:

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"For that whereas heretofore, *to wit*, on (the 19th January, 1839,) at M. H., in the county of B., and within the jurisdiction of this court, by certain articles of agreement, &c., making profert, it was agreed, by and between the said parties, that the defendant, for four thousand morus multicaulis trees, on the day and year last aforesaid, sold to him by the plaintiff, and by him to be delivered upon the ground where the said trees should grow, in the fall months of the year aforesaid, the trees to be at least three feet high and as much above as they should grow, root, stalk, and branch, would pay to the plaintiff the sum of twelve and a half cents per tree for each and every tree so as aforesaid sold and described, when they should be delivered in the fall aforesaid. And, for the faithful performance of the said agreement, the said parties bound themselves, &c., in the sum of $1000, as by said articles, &c., would appear." The declaration then avers that the plaintiff, afterwards, in the fall of the year aforesaid, *to wit*, on the 21st of November, in the year aforesaid, had on five several lots of ground, situate in the township of C., in said county, four thousand morus multicaulis trees, grown upon said lots, of the description named in the agreement, ready to be delivered, on said lots, to the defendant, where they remained ready to be delivered, of which the defendant afterwards, on &c., at &c., had notice; and although the defendant was requested to come to the lots and accept the trees, and pay therefor, yet he refused to accept and pay, and still continues, &c., contrary to his agreement, &c., concluding in the usual form of breach in such cases.

The second count is similar to the first, with this exception, that it does not state the number of lots upon which the trees were situate, but avers generally that the plaintiff had them upon the ground where they had grown, in the township of C., &c., ready to be delivered, &c.

To this declaration the defendant pleaded—

1st. *Non est factum.*

2d. *Actio non:* because, he saith, that the said plaintiff had not in the fall of the year 1839, on the 21st of November, or at any other time in the fall months of said year, four thousand

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morus multicaulis trees, or any other quantity, on the ground where they grew, of the description and dimensions alleged in the declaration, ready to be delivered to the defendant in conformity with the agreement, concluding to the country.

3d. *Actio non:* because, he says, that before and at the usual time of planting morus multicaulis trees in the spring of the year 1839, being the spring next succeeding the date of said articles of agreement, and when it was necessary to have planted said trees to be ready for delivery at the time specified in said articles of agreement, the said Richard H. Parsons had not any morus multicaulis trees to plant, and did not plant or raise any morus multicaulis trees that season, and had not at any time in the fall season of that year any morus multicaulis trees to deliver to the said John E. Woodward, jun., in pursuance of and in conformity with said articles of agreement, or any such trees of his own property whatsoever; but, on the contrary, did propose to deliver to the said John E. Woodward, jun., and did request him to receive four thousand morus multicaulis trees of one John Hitchens, in the lieu and stead of the said four thousand morus multicaulis trees of the said Richard H. Parsons mentioned in said agreement; which said trees of the said John Hitchens the said John E. Woodward, jun., refused to accept or receive in lieu and stead of the said four thousand morus multicaulis trees agreed to be delivered by the said Richard H. Parsons, and this he, the said John E. Woodward, jun., is ready to verify; wherefore he prays judgment, &c.

4th. *Actio non:* because, he says, that at the time of making and executing the said articles of agreement, *to wit*, on the 19th of January, 1839, the said Richard H. Parsons was the owner and in possession of morus multicaulis trees sufficient to have raised therefrom the said four thousand morus multicaulis trees, as specified in said articles of agreement, and that afterwards, and before the usual time for planting said trees, in the spring then next following, *to wit*, on the 19th March, in the year last aforesaid, he, the said plaintiff, sold and delivered the said trees to divers persons, and entirely divested himself hereof, and of all right and interest therein, and has not since

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that time been the owner or in possession of any morus multicaulis trees whatsoever to deliver to the said defendant, and this he, the said defendant, is ready to verify; wherefore he prays judgment, &c.

5th. *Actio non:* because, he says, that the said morus multicaulis trees mentioned in the said declaration of the said plaintiff, and therein alleged to have grown upon five several lots of ground in the township of C., and to have been ready in the fall of the year 1839 to be delivered on the said lots to the said defendant, were not the property of the said plaintiff, but the property of one John Hitchens; and the said defendant protesting that he was not bound by said articles of agreement to receive the said four thousand morus multicaulis trees mentioned in the said articles of agreement of the said John Hitchens, or any other person; but the said plaintiff nevertheless saith, that he, the said defendant, never had any notice whatever from the said plaintiff that the said trees were ready to be delivered, and this he, the said defendant is ready to verify; wherefore he prays judgment, &c.

6th. *Actio non:* because, he says, that at the time of making and executing the said articles of agreement, *to wit*, on the 19th of January, 1839, the said plaintiff had not any morus multicaulis trees to sell to the said defendant, and this he, the said defendant, is ready to verify; wherefore he prays judgment, &c.

7th. *Actio non:* because, he says, that after the making and executing the said articles of agreement, *to wit*, on the 20th of March, 1839, the said plaintiff made and executed to Craig Moffett and Mathew McHenry a deed of assignment of all his lands, tenements, and hereditaments, goods, chattels, moneys and effects, rights and credits whatsoever, and generally all his estate and property, real and personal, for the equal benefit of his creditors, pursuant to the statute in such case made and provided; that the said assignees did accept of the said assignment, whereby the said plaintiff became and was divested of all his estate, real and personal, and of all interest whatsoever in and to the said articles of agreement, and the same became and was vested in the said Craig Moffet and

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Mathew McHenry, as assignees as aforesaid; and this he, the said defendant, is ready to verify; wherefore he prays judgment, &c.

Upon the first and second pleas the plaintiff joined issue. To the 7th plea the plaintiff replied—

Precludi non: because, he saith, that before the making and execution of the deed of assignment in the said plea mentioned, *to wit*, on the 18th of March, 1839, at, &c., he, the said plaintiff, by writing under his hand endorsed on said articles, and for and in consideration of the sum of ten dollars, to him paid by one John Hitchens, did assign all the right, title, and interest of the said plaintiff to the said articles of agreement to the said John Hitchens, and did authorize him to fulfil the contract contained in said articles, as fully as the said plaintiff himself could have done, and did then and there deliver the said articles to the said John Hitchens, of which said several premises the said defendant afterwards, *to wit*, on the day and year last aforesaid, had notice. And the said plaintiff further saith, that the writ of summons in this case was sued out in the name of him, the said plaintiff, for the use and on the behalf of the said John Hitchens, and for the purpose of enabling him, the said John Hitchens, to recover and receive the said sum of money stipulated to be paid by the said defendant, upon the delivery to him of the said trees in the said declaration mentioned, according to the form and effect of the said articles of agreement, and not for the benefit, use, or behoof of the said plaintiff, that is to say, at, &c., and this he is ready to verify; wherefore he prays judgment and his damages, &c.

The plaintiff demurred specially to the third, fourth, fifth, and sixth pleas. The causes assigned will sufficiently appear in the points taken by counsel, and the defendant joined in demurrer.

The defendant demurred generally to the replication to the fourth plea, and the plaintiff joined in demurrer.

Argued before NEVIUS, CARPENTER, and OGDEN, Justices.

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W. L. Dayton, for plaintiff.

The third plea is multifarious, and sets up several distinct matters of defence. It is also argumentative. But if the plea sets up any thing which is a defence, it amounts to a plea of non-performance, by the plaintiff, of the conditions on his part to be performed, and should have concluded to the country. The plea, however, is no answer to the declaration. There is nothing in the covenant set forth in the declaration which shows that the plaintiff undertook to deliver any specified trees of his own, growing in a particular field. He might raise them by the agency of John Hitchens, or any one else, provided he had them ready for delivery of the stipulated character and at the proper time. Most of these remarks apply to the other pleas demurred to.

The fourth plea is also argumentative, and proceeds upon the idea of the sale of some specific trees, the property of the plaintiff at the time of making the agreement. It is no answer to the declaration.

The remarks already made apply to the fifth plea, which is double, and sets up no legal defence. It, as well as the other pleas, is evasive and argumentative, and does not deny, confess, or avoid the substantial matters alleged in the declaration. It sets up that the property of the trees alleged to have been ready for delivery was in one John Hitchens, and not in the plaintiff, and avers that the defendant had no notice, &c. It should have concluded to the country.

The sixth plea sets up the immaterial allegation, that the plaintiff, at the time he made and executed the article of agreement on which the suit is brought, did not own any morus multicaulis trees. *Conover* v. *Tindall*, *Spenc.* 517; 1 *Chit. Pl.* 556–7; *Stevens* v. *Bowers*, 1 *Harr.* 16, 19; 2 *Kent* 468; 6 *Wend.* 123.

The replication avoids the effect of the matter set up in the seventh plea. The assignment, which was under the statute, only carried property in which the debtor had a beneficial interest. It did not affect the property which had been previously assigned to Hitchens. *Sloane* v. *Somers*, 2 *Green*, 509, 512.

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P. D. Vroom, contra.

Pleas which set up several facts tending to establish one point are not multifarious, *to wit*, in this case, that the plaintiff did not offer to deliver his own trees, but those of another person. The agreement implied that the trees were to be the trees of the plaintiff. *Conover* v. *Tindall* does not apply to sales of personal property.

The sixth plea denies property in the plaintiff at the time of the sale. There must be something to be sold, something on which the contract can operate. *Chit. on Con.* 332 (*ed.* 1844); *Robinson* v. *McDonnell*, 5 *M. & S.* 228, 236.

As to the seventh plea and application, the contract is not such an intent as could be assigned to Hitchens, so as to pass a right against us.

Carpenter, J., delivered the opinion of the court.

The case, as presented by the pleadings, is in substance this: The parties, 19th of January, 1839, entered into this covenant, that the defendant, for four thousand morus multicaulis trees, on that day sold to him by the plaintiff, to be delivered on the ground where the said trees should grow, in the fall months of the same year, and to be of a stipulated character, would pay the plaintiff twelve and a half cents for each tree so as aforesaid sold and described, when they should be delivered. On the 18th of March, 1839, the plaintiff, by endorsement on the covenant, assigned his interest in the contract to one John Hitchens; and on the 20th of March, 1839, the plaintiff made a general assignment, under the statute, for the benefit of his creditors.

Objections have been urged to the third, fourth, fifth, and sixth pleas, upon grounds specially assigned for causes of demurrer; but it will scarcely be necessary to advert to technical grounds relating to the form of the pleas, if the defence attempted to be set up is insufficient and the pleas are entirely defective in substance. Now the defence set up is, that the trees held ready for delivery, and whereof notice was given to the defendant, were the trees not of the plaintiff, but of one John Hitchens. It is very true that it has been held, that in a

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strict contract of sale *to pass the title* the articles must belong to the grantor, and have an existence actual or potential at the time of making the contract, and that the grant is void if otherwise, unless ratified after the property has been acquired. *Lunn* v. *Thornton*, 1 *C. B.* 379; *Jones* v. *Richardson*, 10 *Metc.* 481; 9 *Boston Law Reporter* 344 *S. C.* See *Mitchel* v. *Winslow*, 2 *Story Rep.* 638; 2 *Kent* 468; *Ib.* 504; *Bell on the Contract of Sale* 16, 26, &c., (*Law Lib. ed.*, 1845).

The two cases just cited, in which the older authorities are collected, have placed the question in a clear light. But an agreement in respect of something to be collected and furnished, though not strictly a contract of sale, because the article is not specified or identified and capable of delivery, yet it may be good as a special or executory agreement. This is not a contract of sale, but a special executory agreement under seal, in which the plaintiff covenanted to deliver a specified quantity of a particular article at a future time. The defendant has not, upon oyer, set out the covenant in his plea. There is nothing in the covenant, as stated in the declaration, to show that the plaintiff undertook to deliver any specific trees, or the produce of any specific trees, then belonging to him and growing in any particular field. He agreed to deliver (by words applicable, it is true, to a present sale, but which must be understood according to the subject matter of the contract,) four thousand morus multicaulis trees, not then planted or even in existence, to be delivered at a specified time on the ground where they should be subsequently planted and grown. There is nothing that debarred him from procuring them to be raised by John Hitchens, or any one else, to whom he might delegate the duty and assign the profits. The terms of the agreement, as shown in the declaration, that the trees should be delivered in the field where they should be subsequently grown, and of course planted, seem to be conclusive that there was then no present sale, but only an executory agreement to deliver trees of a particular character and description. If specific trees then in the field had been in the contemplation of the parties, the liability of the plaintiff to deliver the trees would have depended upon his success in cultivating the trees,

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and upon their growth into the requisite quality. *Boyd* v. *Siffkin*, 2 *Camp.* 326. And of course the liability of the defendant would have depended upon the ability of the plaintiff to deliver those trees in the state so required by the covenant. But nothing is seen in the covenant which requires or will admit of this construction. On the contrary the plaintiff, at all events, was then to deliver in the field (not any specified field, but wherever the trees should be grown,) trees of the requisite character; and if he did tender such trees, no matter by whom raised, the defendant was bound to accept and pay for them.

The third plea sets up, that at the usual time of planting, in the spring next after the making of the covenant, the plaintiff had no multicaulis trees to plant; that he did not plant or raise any that season, and in the fall had none to deliver of his own property, but proposed to deliver the trees of one John Hitchens. If this plea raises any matter of defence, it is argumentatively the same matter set up by the second plea, that he had not any of the requisite character ready to be delivered in conformity with the agreement. While it seems faulty as argumentative, yet, if we are right in the construction of the covenant, it is defective in substance, presenting no substantial defence, as with the assent of Hitchens, his trees, if of the requisite character, rightly tendered, would be a full compliance with the stipulation on the part of the plaintiff.

The fourth plea proceeds upon the same idea, of the sale of some specific trees. It is therefore equally defective, and on the same grounds with the plea already disposed of.

The fifth plea sets up want of notice that the trees were ready to be delivered. Properly pleaded, undoubtedly, this would be a good defence. But the plea is based upon the same idea, of a sale of some specific trees. It avers that the trees mentioned in the declaration, and therein obliged to have grown upon certain lots, &c., were not the property of the plaintiff, but of one John Hitchens, and protesting that the defendant was not bound to receive the said trees; then it avers that he had no notice. Considered as a plea simply, that no

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notice was given of the plaintiff's readiness to deliver, it is faulty for the reason specially assigned, of an improper conclusion. It is a mere negative response to an affirmative allegation in the declaration. It is also faulty because argumentative and attempting to put in issue matter not alleged, nor necessary to be alleged, in the declaration.

The sixth plea is also defective, for the principal reason already given. Upon this contract it was immaterial whether, at the time of making it, the plaintiff had or had not multicaulis trees. His covenant was to deliver trees of a certain description at a subsequent time.

The replication to the seventh plea presents the question, whether the contract was one which could be assigned, and the beneficial interest pass under such assignment to Hitchens; so that he could fulfil the terms of the contract, and maintain an action for its breach against the opposite party, in the name of the plaintiff. If it can so pass, by priority in time, undoubtedly, it will be protected against the subsequent general assignment.

It was a well known rule of the common law, that a mere thing in action was not assignable at law, with the exception of negotiable instruments, unless by statute; such is still the general rule, at least without the assent of the debtor. But it is otherwise in equity, where one party may purchase by assignment the whole interest of another in a contract, or security or other property, even in litigation, provided there be nothing which savors of maintenance. Thus an equitable interest under a contract for the purchase of real estate may be the subject of sale, the original holder becoming in such case a trustee for the sub-purchaser to whom such sale is made; and he will be compelled, under proper indemnity, to permit his name to be used in any proceedings necessary for obtaining the benefit of the contract. Even unearned freight has been held the subject of equitable agreement or assignment, which will be protected at law as well as in equity. *Leslie* v. *Guthrie*, 1 *Bing. N. Cases* 699. See 2 *Story Eq. Jur.* § 1050, 1055, and *Cases*.

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The doctrine of equitable assignments, having its origin in courts of equity, has been followed to a great extent in courts of law, though the mode in which equitable rights are there protected or enforced is limited by technical forms and arbitrary rules. So far have courts gone that it has even been said of the ancient rule, that choses in action are not assignable, that it only remains to give form to some legal proceedings. One form in which the rule still remains is, that when a debt or other chose in action is assigned, ordinarily it is necessary to sue at law in the name of the original creditor, the person to whom transferred being treated rather as an attorney than an assignee; though his rights will be recognised and protected, to some extent at least, even in a court of law. *Sloan* v. *Somers*, 2 *Green* 510; *Winch* v. *Keeley*, 1 *T. R.* 619; *Welsh* v. *Mandeville*, 5 *Wheat.* 277. It was said by Justice Story, who delivered the opinion of the court in the last case, that courts of law, following in this respect the rules of equity, now notice assignments of choses in action, and exert themselves to afford them any support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals according to the course of the common law.

The authorities referred to in the progress of this opinion clearly show that beneficial contracts are assignable in equity, in which case, when *bona fide* and for a valuable consideration, the assignor becomes a trustee for the assignee, who is authorized to use the name of the former to enforce the interest which he has acquired. The necessary steps may be taken by the assignee, as the attorney or agent of the assignor, though for his own benefit; and such equitable assignment previous to bankruptcy or insolvency, when necessary may be pleaded, many instances of which might be cited. See *Parnham* v. *Hurst*, 8 *M. & W.* 743, and *Winch* v. *Keeley*, already cited. When the plea, as here, sets up the insolvency of the assignor, the proper answer in the replication is, that the debt or contract though in the name of the plaintiff, yet in substance belongs to a third party, and therefore did not pass under the assignment for the benefit of the creditors; if not,

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it is still in the plaintiff, for the benefit of such third person, and the action can be maintained.

The pleas demurred to are overruled, and the replication to the seventh plea sustained.

Judgment for the plaintiff.

THE STATE v. CALVIN.

Bank notes are not "goods or chattels," and the receiver of stolen bank notes cannot be indicted under the statute making it a misdemeanor to receive stolen "goods or chattels."

This case came before the court from the Passaic Oyer, for an advisory opinion. The defendant was indicted for, and convicted of receiving a large number of bank bills, amounting in value to $4000, "of the property, goods, and chattels" of Drew, Robinson & Kelly, the defendant well knowing said bank bills were taken by robbery, &c., contrary to the statute, &c.

Argued before the CHIEF JUSTICE, and RANDOLPH, Justice, by *Barkalow*, for the State, and *A. S. Pennington*, for defendant.

RANDOLPH, J., delivered the opinion of the court.

As choses in action and bank bills had no intrinsic value at common law, and were not the subject of larceny or robbery (1 *Hawk.* 142; 4 *Bl. Com.* 234; *Arch. Cr. Pl.* 65), the question is, whether they are included in the statute respecting the receiving of stolen goods or goods and chattels taken by robbery. The language of the act is (*Rev. Stat.* 279, § 72), "if any person shall receive or buy any goods or chattels that shall be stolen or taken by robbery," &c. In the thirty-fourth, thirty-fifth, and thirty-sixth sections of the same act, which treat of the crime of larceny, the phrase used is, "shall steal of the *money* or personal goods and chattels," but in the thirty-

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seventh section, which applies to double larcenies, the words "goods and chattels", only, are used. Sections thirty-eighth and thirty-ninth, respecting robbery, and assault with intent to rob, &c., make use of the words "*money* or personal goods and chattels," and the forty-fifth section makes the stealing or taking by robbery of any *bank bill or note*, bill of exchange, order, &c., a misdemeanor of the same degree and nature as if the offender had stolen or taken by robbery "any *other goods* of like value, with the money due on such bank bill," &c., "money, wares, merchandise, goods, or chattels" are used in the fifty-second section, which relates to obtaining goods under false pretences. The same phraseology is used in all the preceding statutes applied to the respective crimes, as is now used in the revised statutes, they being copied almost literally from the English statutes. Thus the 3 *W. & M. c.* 9, § 4, states, that if any person shall "buy or receive any goods or chattels" feloniously taken or stolen, he shall be deemed an accessary; and 5 *Anne, c.* 31, 4 *Geo.* 1, *c.* 11, and 22 *Geo.* 3, *c.* 58, all relating to receivers of stolen goods, make use of the words "goods," or "goods and chattels," only. "But," says a learned author, "it has often been determined that receivers of stolen money are not within the statutes." See 2 *East's Cr. Law* 748. In the case of *Sadi and William Morris*, 2 *East* 748, and *Leach's Cr. Cas.* 404, it was directly ruled, by a majority of the ten judges, that bank notes were not within the statutes relating to the receiving of stolen goods: one of the judges thought the construction would have been the same, if the act of 2 *Geo.* 2, which first made the stealing of bank bills felony, had been passed prior to the act of 3 *W. & M.*; but other judges thought that inasmuch as 2 *Geo.* 2 had rendered the stealing of bank notes felony, it drew after it all the incidents of felony at common law, and therefore included receivers as accessaries after the fact; the majority, however, considered the offence not within the statutes, and refer to *Cayle's case*, 8 *co.* 33; *Yelverton* 68; *Miller* v. *Ran*, 1 *Burr.* 457. See, also, 3 *Burn Justice, Title, Larceny* 38; 4 *Bl. Com.* 133, *note* (12). In *Rex* v. *Anne & William Gaze* (*Russ. & Ryan* 385), who were convicted, the former of stealing, and the latter of

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receiving a promissory note, eleven of the judges were unanimously of the opinion that William Gaze was not rightfully convicted under the statute of 3 *W. & M.* Upon the reason assigned by Justice Ashurst, in *Rex* v. *Sadi and William Morris*, that although 2 *Geo.* 2, making the stealing of notes and securities felony, would draw after it all the common law incidents of felony, and render accessaries liable, yet receivers were not accessaries at common law, and were not included. This appears to be the settled construction of the English statutes, though there are some cases not entirely reconcilable with it. Thus, in the *King* v. *Crone*, defendant was convicted of a misdemeanor for receiving a promissory note under the act 23 and 24 of *Geo.* 3, which mentions only goods and chattels. 3 *Br. Cr. Ca.* 47. So there have been several convictions for receiving bank bills under 12 *Anne, c.* 7, which mentions *money*, goods or chattels. In *Rex* v. *Vyse*, 1 *Br. Cr. Ca.* 218, the conviction was sustained only on those counts which charged the promissory notes as so many pieces of stamped paper of the goods and chattels of J. W. These difficulties, however, have all been obviated in England by the passage of the statute of 8 *Geo.* 4, 24, which makes the receiving of bank bills, promissory notes, and other securities, a distinct and independent offence. The case of *Boyd and wife* (to be found in 3 *City Hall Recorder* 57), puts the same construction on the New York statute as *Rex* v. *Morris* does on the English acts; and since that decision the New York statute has been amended. Our statute makes the receiving of goods and chattels stolen or taken by robbery a distinct offence, and not as accessory to the larceny or robbery; and although subsequent sections render the stealing or taking by robbery bank bills, as well as goods and chattels, an indictable offence, yet these cannot draw after them, as a necessary consequence, another distinct and independent offence; so that whether common law or statutory accessaries are included or not in the principal act under the English statute, neither can be included under ours, for that embraces no such offence as accessory to the larceny or robbery, but the receiving is a misdemeanor by the statute, and by that, which alone creates the

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crime, must it be defined and specified; and as that does not include bank bills, although the other sections of the act do, it is to be presumed that the legislature never intended that the receiving of stolen bank bills should be an indictable offence. In the case of *Sadi and William Morris* (before referred to) the court remark, that bank bills having no peculiar mark may enter into the currency, be passed as such, and so received; and hence the propriety of including them in the offence for receiving stolen goods is much questioned.

The indictment, therefore, cannot be sustained.

FRANCIS v. OGDEN AND McCOMB.

If, after judgment against him, a defendant is discharged from his debts under the bankrupt law, it is irregular to issue execution on such judgments without an order for that purpose on notice: the debt is *prima facie* satisfied by the discharge.

In this case a judgment was recovered, November 9, 1831, and an execution thereon, issued into the county of Essex, returnable to the then next term, which was returned without a levy.

The defendant filed his petition to be declared a bankrupt November 21, 1842, and, being so declared, was afterwards discharged from all debts owing by him at the time of the filing of the petition, *to wit*, November 21, 1842, by decree dated November 21, 1843.

A *testatum fi. fa. de bonis et terris* was issued on the judgment into the county of Passaic, after the date of the discharge, and returnable to the term of April, 1849, which was returned with a levy on all the right, title, and interest of the defendant in certain real estate in the county of Passaic.

A rule upon the plaintiffs to show cause why the execution, levy, and return should not be set aside, was made at the term of April, 1849, on the production of a certified copy of the discharge, and was argued at the term of July, 1849.

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A. C. M. Pennington, in support of rule, *A. Gifford*, contra.

PER CURIAM. The execution was irregularly and improvidently issued. The defendant is *prima facie* discharged from the judgment by his discharge in bankruptcy, and the execution should not have issued without an order of the court allowing it, made upon notice to the defendant of the motion rule for such order.

ANONYMOUS.

A sheriff, on sale of lands, cannot charge to the defendant the fee for acknowledging the sheriff's deed or the printer's bill for advertising: all the law allows for advertising in the newspaper is one dollar and fifty cents.

In debt. *Fi. fa. de bonis et terris.*

The sheriff of the county of Camden, having sold the real estate of the defendant in execution, J. B. Harrison, for the defendant, moved to retax the bill of costs filed by the sheriff. He objected to two items in the bill—1st, a charge of $4, paid printer for advertising in newspaper; 2d, fifty cents, paid for acknowledgment of deed.

Costs are *stricti juris*, and depend entirely upon statute. *Penn.* 336; *Ib.* 804; 1 *Green* 156; *Spenc.* 56. By statute, the sheriff is allowed $3.50 for advertising in handbills, and $1.50 for advertising in newspaper, and no more. He is actually prohibited, by express words, from taking greater fees than is allowed by law. *Rev. Laws* 489, 671; *Rev. Stat.* 464, 670. The sheriff must bear the burthens, as well as take the profits of the office. This point is of some importance to defendants, as in some cases sheriffs have taxed extravagant printers' bills over and above the fees allowed by law.

The charge for the acknowledgment of the deed cannot be supported. The sheriff is allowed $2.50 for making the deed to a purchaser of real property. If the acknowledgment is

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necessary to complete the deed, the expense is included in that fee. If not necessary, then the purchaser, if for greater security he desires the deed to be acknowledged, must pay for the acknowledgment.

Browning, contra, urged that the fee of $1.50 was allowed the sheriff for his trouble in procuring the advertisement of sale to be inserted in a newspaper; but that the printer's bill was an item of expense which he was obliged to incur, and in regard to which he ought to be reimbursed. The fee of $1.50 will not, in many instances, pay the bill of the printer. It is true that costs, at any rate final costs, are by statute only, but expenses stand on a different footing. Thus, in attachment the sheriff is necessarily allowed, for his expenses in keeping the property attached, over and above his taxable costs, and in some instances these expenses are very heavy. The fee is intended to remunerate the sheriff for his trouble, not to pay the printer's bill.

PER CURIAM. Both the items objected to must be stricken out. The statute prescribes, in direct terms, the compensation to which the sheriff is entitled.

WEST v. THE STATE.

1. It is not necessary in the record of a criminal conviction to state *where* the trial was had. In New Jersey the court can be held at but one place, that designated by statute, and it will be intended that the trial was had there.

2. It is not necessary to aver in the record that the trial jury were "good and lawful men."

3. It is not necessary, except in capital cases, that the court, in pronouncing sentence, should first demand of the prisoner "if he has aught to say why sentence should not be passed upon him."

4. When the sentence inflicts any corporal punishment it is necessary that the prisoner should be present in person; but it is not necessary that this should be averred in express terms in the record; it is sufficient if it can be collected therefrom by fair intendment.

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5. A verdict without judgment in civil cases cannot be given in evidence; but in criminal cases it is otherwise, and on a plea of *autre fois acquit* a verdict of acquittal may be given in evidence without judgment thereon: it is therefore no error in a record of conviction that no formal entry of a judgment of acquittal is entered upon the counts on which the defendant was acquitted.

6. Technical errors in the mere making up the record, even in criminal cases, are not to be received with favor; and the better practice is to remit the record for amendment of such defects, even after errors assigned.

7. In an indictment for forgery with intent to defraud, it is sufficient to allege the intent to be "to defraud A," without showing how, or alleging the interest of A in the subject.

8. If an indictment contain some good and some bad counts, a general conviction under it will be sustained.

9. Parol evidence may be given of the contents of a writing, the absence of which is not accounted for, if the object of such evidence is not to prove such facts as the writing would prove if produced, but only a collateral matter, as its identity with or diversity from another writing.

10. On the trial of an indictment for forgery, it is not error to admit proof that the signature of C. S., one of the subscribing witnesses, is not the handwriting of a man named C. S., without first proving that he is the same C. S. who purports to be the subscribing witness: that fact may be made out by after testimony.

11. On an indictment for forging a deed, as a link in the chain of title to a certain tract of land, it is competent to prove that, shortly before the uttering, the defendant said he claimed title to the tract through a different document, and that he was informed that there was no such document in existence.

12. The direction of the *manner* of cross-examining a witness is in the discretion of the court, and error cannot be assigned on matters resting in discretion.

13. A document offered to contradict a witness who referred to such a one, must first be identified as the one referred to by him.

14. To prove handwriting, in general a witness must know it by having seen the person write, or having corresponded with him; but in the case of ancient deeds or papers, so old that no living witness can be produced, the genuineness of handwriting may be proved by an expert, by comparison with papers whose genuineness is acknowledged.

This cause came up by writ of error to the Burlington Oyer and Terminer, removing therefrom into this court the record of the conviction of Joseph E. West, the plaintiff in error, on an indictment for forgery. With the record came up a bill of exceptions, signed by virtue of the act of March 9, 1848, (*Pamph. Laws* 272) which was passed after the trial in this cause, at the November term of the Burlington Oyer in 1847.

The first count in the indictment was in the words following:

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Burlington county, *ss.*—The grand inquest for the state of New Jersey, in and for the body of the county of B., upon their respective oaths and affirmation present, that Joseph E. West, late of the township of N., in the county of B., on the 31st day of August, in the year of our Lord 1844, at the township of N., in the said county of B., and within the jurisdiction of this court, did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting, a certain deed of bargain and sale, which said false, forged, and counterfeited deed of bargain and sale is as follows, that is to say: This may certify, that I, John Buffin, of Mansfield, in the county of Burlington, and western division of the province of New Jersey, for the consideration of forty pounds, good and lawful money of said province, to me in hand paid by Daniel Ellis, of the same county, have, and by these presents do grant, bargain, sell, convey, and confirm unto the said Daniel Ellis, his heirs and assigns, all my cedar swamp and pine land on the branches of Northampton river, otherwise called Ancocas, to the southward of Pole bridge branch, laying near to the tracts which he purchased of Japhet Leeds, and of which the sixty acre tract interferes, being surveys made to my father, Michael Buffin, and to me his heir-at-law, to have and to hold the same to him and his heirs for ever.—In witness whereof, I have hereunto set my hand and seal the tenth day of July, one thousand seven hundred and sixty. John Buffin, jun., [L. S.] Sealed and delivered in the presence of Caleb Shreve and Andrew A. his mark † Bozarth.

With intention to defraud one Israel Kerlin, against the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

The second count of the indictment was for uttering the above forged deed, knowing the same to be forged.

The third count, in the same form as the first, was for "the false making, forging, and counterfeiting a certain certificate

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of the acknowledgment of a certain deed of bargain and sale, which said false, forged, and counterfeited certificate of acknowledgment is as follows, that is to say:

County of Burlington, *ss.*—Personally appeared before me, the underwritten, one of the judges of the county court for houlding of pleas, John Buffin, the grantor of the within written deed, and did acknoulidge he signed, sealed, and delivrd the same for the usses therein mentioned. Acknoulidged July ye 14th, 1760, before me.—Rob't Smith.

The fourth count was for uttering said forged certificate, knowing the same to be forged, &c.

The fifth count was in the same form as the first, for forging the deed *and* certificate.

The sixth count was for uttering the deed *and* certificate.

In all the counts the intent to defraud was averred in the same language as in the first.

The record of the trial and judgment was in the following words: "And afterwards, *to wit*, at a session of the Court of Oyer and Terminer and General Jail Delivery aforesaid, *to wit*, on the third Tuesday of November, in the year of our Lord one thousand eight hundred and forty-seven, before the justice and judges aforesaid, comes as well the said John C. Ten Eyck, who prosecutes, and as the said Joseph E. West, in their proper persons; and the jurors of that jury, by the said sheriff of the said county of Burlington aforesaid, for this purpose duly summoned, empannelled, and returned, *to wit*, (naming the eleven jurors) being elected, tried, and solemnly affirmed, according to the statute in such case made and provided, to speak the truth of and concerning the premises aforesaid, and the remaining *one* of those jurors, *to wit*, Stacy W. Budd, being elected, tried, and sworn to speak the truth of and concerning the premises aforesaid; and the said jurors, upon their respective oath and affirmation aforesaid, say, that the said Joseph E. West is guilty of the premises in manner and form, as by the second, fourth, and sixth counts of the said indictment aforesaid is supposed against him. And that the said Joseph E. West is not guilty of the premises in manner and form, as by the first, third, and fifth counts of the

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said indictment aforesaid is supposed against him: whereupon all and singular the premises being seen, and by the court here fully understood, it is considered by the court here that the said Joseph E. West be imprisoned at hard labor in the state prison of this state for and during the term of five years, and thence stand committed until the costs of prosecution be paid."

During the trial, the following exceptions were taken to the decisions of the court on the admissibility of evidence, and bills sealed thereon, under the statute of 1848.

The Attorney General offered as a witness, on the part of the state, Richard Jones, who was duly affirmed, and stated, on his examination in chief, that the defendant had exhibited to him a deed from John Buffin, jun., to Daniel Ellis, previous to the finding of the indictment for the tract of land claimed under the deed in question; and, for reasons stated by the witness, he examined the deed particularly, and he stated that that deed was not the same as the deed now in question, alleged to be a forgery to the best of his knowledge: thereupon the defendant objected to witness stating his reasons why he knew it was not the same deed, as it would be proving the contents of said deed, or some part thereof, without the deed being in evidence or its absence accounted for; which objection the court overruled, and the defendant excepted thereto.

The witness then stated that the particular reason why he thinks that deed is not the same as this, that there was an alteration in that not in this, either a small word inserted or interlined: he read the deed several times to see if it altered the sense, and did not see that it did; it struck him that it did not appear like the same, though the signature and the appearance were the same; the ink was very black; it appeared altered with a sharp pen, and recently done; is not certain, but thinks the deed was shorter, and folded above the signature; can't say to a certainty, but thinks two lines in this deed, not in that, the line beginning thus, "which were purchased of Japhet Leeds," &c.; his impression is that the township of Hanover, or New Hanover, was that mentioned in the deed, since it purported to be made by John Buffin, jun.; is

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entirely certain the deed had the alteration. All this evidence, which related to the contents of said deed, was objected to as incompetent evidence, as the deed had not been produced or its absence accounted for; which objection the court overruled, and the defendant, by his counsel, excepted thereto.

And the Attorney General offered Joshua Forsyth as a witness, who testified as follows: February twenty-fifth next, I shall be sixty-nine years old; I knew Caleb Shreve well, I lived with him from the year 1784 to the year 1792, the time of his death; I used to see him write every day; he kept store, and I was in and out every day; he lived in Mansfield township, in this county; I think he died in 1792; I lived with him when he died.

The witness was here asked by the state to look at the deed alleged to be forged, and say if the signature, Caleb Shreve, one of the subscribing witnesses thereto, was the handwriting of his grandfather Caleb Shreve. Witness, after examining the signature, said, I never saw Caleb Shreve, my grandfather, write such a hand as that; it is not his handwriting; I never knew any more Caleb Shreves before him; he was quite a public man. To this evidence the defendant objected, because the identity of the subscribing witness, Caleb Shreve, with the grandfather of the witness was not established, and it did not appear that the signature of said subscribing witness purported to be the signature of the grandfather of the witness. The court overruled the objection, and allowed the evidence. To this decision of the court the defendant excepted.

And the Attorney General offered George Sykes as a witness, who testified as follows: West called upon me in relation to the land he claimed in the Buffin meadow; it was at Brown's mills, July 6, 1844; I had never before seen West; I accidentally stopped there; as we were about leaving, West told me he had a difficulty about some land with Israel Kerlin, and he wished to employ me to make an exhibition to the court; I then asked where the dispute was; I told him I knew the titles to most of the lands about there, and asked him what he claimed under; he said under a survey to Japhet Leeds, made in 1763. I told him it could not be so, there was no

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such survey there. The defendant objected to the conversations with the defendant about land, in July, 1844, being given in evidence, because such conversations were irrelevant; but the court overruled the objection, and admitted the evidence. To this decision the defendant excepted.

And the Attorney General offered John M. Sharrock, who testified as follows: I reside in Atlantic; I know Joseph E. West, have known him since 1832; I worked for him six or seven years during that time; I saw him write a great many times; I have seen considerable of his writing; I consider myself familiar with his hand. [The deed set forth in the several counts of the indictment being shown to witness.] The impression that deed makes on my mind is, that it is Mr. West's writing. And, being cross-examined, he said: the last time I saw him write was last fall a year ago, in New York, at his own house; I saw him write six or seven years ago at May's Landing; it is because it resembles other writings I have, I think there is a striking resemblance to West's handwriting; I do not know that I have ever seen the writing of any other man that looks like that. The witness was here shown an instrument in writing, a part of the writing being covered and concealed by a piece of newspaper tied over it, and was asked by the counsel of the defendant if the portion of the writing that was visible was West's. To the question and mode of exhibiting the paper the counsel of the state objected, and the court sustained the objection, and decided that the paper must be so shown that the witness could see the whole of the writing, and to enable the other party to examine it, or the paper must be withdrawn. To this decision the defendant excepted.

The defendant offered as a witness Francis J. Brognard, previously sworn on the part of the state, and some depositions, taken before and signed by Joseph E. Potts, a master in chancery, subscribed by several persons, and among the rest by Joseph Walker, a witness on the part of the state, who had testified to West's handwriting, and in cross-examination said, that he thought he was subscribing witness to some depositions, and had seen him write then and at other times, which being

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shown to said F. J. Brognard, he said, that the signature of Joseph E. Potts, signed to the *jurat* of the deposition of the said Joseph Walker, is the signature of the said Joseph E. Potts. And thereupon such deposition of Joseph Walker was offered in evidence by the defendant, for the purpose of contradicting the evidence previously given by Walker, when examined on the part of the state. The counsel objected to its admission in evidence, as not being identified, and the court entertained the objection, and ruled out the deposition. To this decision the defendant, by his counsel, excepted.

And after the defendant rested, the Attorney General offered John Beatty as a witness to testify as an expert, and to rebut the evidence of Henry B. Hurst, who had testified on the part of the defendant, and also, as an expert, to the signature of John Buffin, jun., to the deed alleged to be forged, and also to the signature of John Buffin, jun., to certain old deeds and papers, marked from No. 1 to No. 6, in all of which he gave it as his opinion that the name of John Buffin, jun., was written by the same hand; and said that he had been cashier of Mount Holly bank since 1830, that it was his business to examine and detect spurious signatures. He had examined the signature of John Buffin, jun., to deeds No. 2 and 3, and to the deed now in question, and that it was his opinion that the handwriting in the signature No. 2 and 3 was different from that in the signature to the deed in question; there was a distinct character to No. 2 and 3, though each letter was not alike, there was a sufficient nearness to make them a consistent whole, and to have been written by the same person; that in the signatures in the deed in question he recognised three distinct styles of writing. Two old deeds being shown to him with the signature of John Buffin, he said that, in his opinion, those signatures were written by the same person who wrote No. 2 and 3, and that the same remark which he had made in relation to the latter deed would apply to No. 7 and 8.

On cross-examination, he said he came to this conclusion purely by comparison from what he saw on the table; he never saw the signatures of John Buffin, jun., till the papers No. 2 and 3 and the deed in question were recently submitted

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to him for examination; that from the examination of the old signatures to No. 1, 2, and 3, and 7 and 8, he had fixed in his mind such a standard of the signatures of John Buffin, jun., that he could say that the signature to the deed in question was not, in his opinion, that of John Buffin, jun., though he had not the deed to compare with it; he would be very cautious in case of another signature of a deed, unless he put it alongside and compared it; that his conclusion in this case was drawn from a comparison of the signatures.

After the testimony of this witness was closed, and after the exceptions herein after made were taken to his testimony, John Gibbs was affirmed as a witness for the state, and testified, that he gave deeds No. 7 and 8 to Mr. Kerlin, the prosecutor; witness had them in his possession since 1833, before then they were in possession of his father; knew this at least ten years before that time; after his father's death they came into witness' possession; he once held property under them.

Thereupon defendant objected to the evidence of said John Beatty, because he was an expert, and testified only from comparison of handwriting, and that deeds No. 7 and 8 had not yet been proved or given in evidence; which objections were overruled by the court, to which decision defendant excepted.

The certificate attached to the record was as follows:

New Jersey Supreme Court.—Joseph E. West *v.* The State of New Jersey, on indictment for forgery. In error to the Court of Oyer and Terminer of the county of Burlington. We do hereby certify, that the exceptions to the decisions of the said Court of Oyer and Terminer, taken upon the part of the defendant on the trial of the above stated indictment, and hereto annexed, are well taken. Dated January 3, 1849. Rob. D. Spencer, Garret D. Wall, J. W. Scott, Wm. Halsted.

I do hereby certify, that the foregoing certificate was not presented to the Burlington Court of Oyer and Terminer at the time when the bill of exceptions was presented, but that afterwards, on the settlement of the said bill, at the time and place agreed on by the respective parties, objection was made to allowing or sealing any bill of exceptions; for the want thereof,

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leave was granted to the counsel for the defendant to present said certificate at that time, which was done accordingly. Jos. F. Randolph.

Errors were assigned for causes appearing in the record of the proceedings, for causes appearing on the face of the indictment, and for causes appearing in the bill of exceptions. These errors assigned will sufficiently appear by the argument of counsel and in the opinion of the court.

This cause was argued before the CHIEF JUSTICE, and NEVIUS and OGDEN, Justices, by *W. Halsted* and *Vroom*, for plaintiff in error, and *Browning*, Attorney General, and *W. L. Dayton*, for the state.

Halsted, for defendant.

There are six counts, three for forging and three for uttering. The great effort was made on the counts for forging; the verdict was not guilty on these, and guilty of *uttering*.

Our objections are of three kinds:

I. To the record.

II. To the indictment.

III. On the bill of exceptions.

I. To the record.

1. There is in it nothing to show that the court was held at Mount Holly. 4 *Chit. Cr. Law* 374, 394; 1 *Lil. Ent.* 251.

2. The jurors did not *come* to Mount Holly. It does not say they came, nor when they came. *Chit. Cr. Law* 383 (403), 386 (407), 392 (413).

3. Record no where shows that the jurors were good and lawful men; they are not shown to be freeholders, they may have been slaves, or without property. The precedents that omit good and lawful men, are in cases where there was a precept to summon the jury. 4 *Bl. Com., Appendix* 3; 4 *Chit. Cr. Law* 372, 265, 277.

All exceptions to this are where there is a *venire* or *distringas* commanding sheriff to summon lawful men.

4. It does not appear that West was present when judgment was pronounced against him. It does not appear that the court even demanded of him why judgment should not be

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pronounced against him. All the precedents contain this. 1 *Chit. Cr. Law* 567 (1819), 695–6; 1 *Ld. Ray.* 267; 1 *Salk.* 56; *Loft's Rep.* 400; *Hawk. P. C., b.* 2, *c.* 48, § 17; *Skinner* 684; 1 *Chit. Cr. Law* 588, 721.

That demand must be made of prisoner. See *Arch. Cr. Law* 54, "*Pardon;*" 3 *Mod.* 265; 1 *Show.* 132; 3 *Com. Dig.* "*Indictment,*" *Judgment, n.;* 4 *Bl. Com.* 375, *Appendix* 4; *Coke's Ent.* 532; 1 *Sid.* 85; *Rastall's Ent.* 455; 2 *Salk.* 630; *Stubbs' Cr. Cases* 79; 4 *Chit. Cr. Law* 372, 346; 1 *Chit. Cr. Law* 587, 720.

5. Although it appears he was found not guilty on three counts, there is no judgment on those counts in his favor.

He cannot plead *autrefois acquit,* unless there be judgment on the verdict. 3 *Ph. Ev. (Cowen)* 1070, *note* 729; 1 *Ph. Ev.* 389; 1 *Harr. and John.* 253, 405; 2 *Bin.* 70; 1 *Stark. Cr. Law* 319.

The form of judgment in such cases is found in 1 *Chit.* 719; 11 *East* 511; *Woodford* v. *Ashley, Coke's Ent.* 356; *Rastall's Ent.* 67–8, 51; *Arch. Cr. Law* 50.

6. The judgment takes no notice what he was sentenced *for.* He was convicted on three counts, and must have been sentenced on all; one count bad. The case of *State* v. *Stone, Spenc.* 404, was on a general verdict.

I do not mean to conflict with that case. Here is a special finding, guilty on three counts, and not guilty on three counts.

Where there is a general verdict and judgment the court is deemed to have passed sentence on the good counts. *Wharton's Am. Cr. Law* 619, 620, 622; *O'Connell's case,* 11 *Clark and Fin.* 15; 9 *Jurist* 30.

The judgment is an entire thing. The cases cited in *Wharton* 618, are all on general judgment. In *Farwell* v. *Smith,* 1 *Harr.* 133, judgment in civil action was arrested for this cause. And see *Coxe* 34.

II. Objections to form of indictment.

1. To the second count. It no where appears how a deed, made in 1760, from Buffin to Ellis could be to the prejudice of Kerlin. The court cannot say upon face of the deed that it was to Kerlin's prejudice; no pretence that Kerlin had any

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lands there; he had none in fact. There must be an averment that Kerlin had or claimed *title* to, or *possession in the land.* It is not like the case of a promissory note. It is an injury by forging a deed. Injury by passing note is by setting afloat spurious money. How can a deed be *uttered* until delivery and title passed. All the uttering proved was that he showed the deed. 2 *Stark. Cr. Law* 506, 527–8; 3 *Chit. Cr. Law* 1063; *Crown Cir. Comp.* 344; *People* v. *Wright,* 9 *Wend.* 193; *People* v. *Galloway,* 17 *Wend.* 540; *People* v. *Stearnes,* 21 *Ib.* 409.

The intention to defraud must be proved as laid. *Leach* 76–7, *Powell's case.*

This doctrine has never been applied to a deed for land. See *Fitzgibbon* 57; *Rex* v. *Crone, S. C.,* 2 *Stran.* 901; 1 *Stark.* 181; *Whart. Cr. Law* 138; 1 *John.* 66; 13 *Mass.* 245; 1 *Richardson's Rep.* 219; 1 *Leach* 48; 9 *East* 446, *contra; Foster's Cr. Law* 116, *Lewis's case* 118.

2. As to the fourth count. A certificate of acknowledgment does not fall within any of the classes of instruments made the subject of forgery. *Rev. Stat.* 271. It is not mentioned; if embraced, it must be by terms "*record*" or "*authentic writing of a public nature.*" This is *neither.* It is not a record or authentic writing, unless it is averred to be taken before a person having lawful authority to take it. It must also be put upon *record before it is a record.* There is no averment that Smith was authorized to take acknowledgment; certificate does not state it; it might have been helped by averment.

The property conveyed is not stated to be in New Jersey, nor even that it was for land. There is not any power to acknowledge it, except it is a deed of land, and of land in New Jersey. In 1760, a judge of the pleas was only authorized to acknowledge a deed for lands in the county in which he lived. *Allinson* 132. This act was in force till 1799, and only gave authority to take acknowledgment of deeds of *lands.* In *Pat.* 398, § 2, we find a special act authorizing judges to take acknowledgment of deeds of lands in other counties. *Rex* v. *Wilson,* 1 *Russ. & Ry.* 50. There must be a valid instrument, or no

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indictment for forgery. 2 *Stark. Cr. Law, No.* 145, *p.* 523; *Ib. No.* 146, *p.* 526.

There is no allegation of any genuine instrument of which this is a counterfeit. Nor is it mentioned that Kerlin had any interest in the land. 9 *Wend.* 193, *People* v. *Wright.*

Can this deficiency be supplied by parol. *Hunter's case,* 2 *Leach* 624; *Thompson's case,* 2 *Leach* 910; *Wall's case,* 2 *East Cr. Law* 953; 1 *Leach Cr. Law* 431; 1 *East Cr. Law* 954; 3 *Chit. Cr. Law* 1041 *(Eng. ed.)*; 2 *Russ. on Cr.* 1484. Forgery cannot be committed, except of legal instrument. 2 *Russ.* 1452; 2 *East Cr. Law* 953, 961; 1 *Leach.* 431; *Wharton's Cr. Pr.* 339; 1 *Russ. & Ry.* 193–5. It may be alleged that courts are to presume that judge acted within scope of his authority. 3 *Barr.* 329, *Hazelton Coal Co.* v. *Ingham.*

3. The sixth count charges uttering deed and certificate in one count. All objections to this exist which went to the fourth count. If any one bad, whole judgment is clearly bad.

III. Objections arising out of *exceptions.*

The admission of incompetent evidence.

The court ruled that a part of a paper could not be covered up, and opinion asked as to the balance. Part of letter can be shown. *Stark. Ev.* 174, *Quin's case.*

The court also admitted the evidence of Jones, contents of another deed, with no notice to produce it. 3 *Cowen's Phil. Ev.* 1210, 1212; 9 *Wheaton* 558; 1 *S. & R.* 27; 3 *Ib.* 191.

The court admitted the evidence of John Beatty, founded on comparison of writing. How far is comparison of handwriting competent, in a criminal case, to *prove forgery?* 3 *Halst.* 87, *Goldsmith* v. *Bain*; 4 *Wash. Rep.* 731, *United States* v. *Craig*; 2 *Stark. Ev.* 374, 378, "*Handwriting;*" 2 *Ib.* 331, "*Forgery;*" 1 *Denio* 343, *People* v. *Spear*; 1 *Dana's Rep.* 179; 7 *Peters' Rep.* 763; 1 *Car. & K.* 433, *Carey & Pitt; Nor. Peake, Appendix* 25; 7 *Car. & P.* 548, *Bromage* v. *Rice;* 5 *Ad. Ellis* 514; 1 *Greenl. Ev.* § 580, 581; 8 *Mees. & W.* 123.

There was an attempt to legalize this evidence by evidence after the decision. Admitting the deeds to be genuine deeds

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of John Buffin, still the question is, is it *this* John Buffin? 7 *Ala. Rep.* 701, *Smith* v. *Armisted*; 5 *Ad. & El.* 751; 4 *Bain & Al.* 330; 4 *Esp.* 113; 10 *Cl. & Fin.* 154.

Browning, Attorney General.

It appeared that deed was in existence more than two years before finding indictment, therefore jury obliged to acquit by statute of limitations. It was proved that deed was uttered and published as true within two years.

Objections to indictment.

1. Second count. It is insisted that the party charged to be defrauded must be shown to have interest in the land. All the authority for that position is in relation to indictments framed under 5 *Eliz.*

Under that statute it was held necessary to state interest of party in the land. *Stat.* 5 *Eliz.*, to be found in 3 *Chit. Cr. Law* 458, 1032; 2 *Stat. at Large* 556.

And see 2 *East* 915; *Stark.* 515, *note;* 20 *Wend.* 420 *Arch. Cr. Pl.*, "*Forgery*"; 3 *Chit. Cr. Law* 1043; 2 *Leach C. C.* 76, 90; 2 *W. Bl.* 787; 1 *Stark. Cr. Law* 111; 2 *Stark. Cr. Law* 505; *East P. C.* 988–9, 92; 2 *Stark. Cr. Law* 507.

Fourth count. *Rev. Stat.* 271, § 48. The words of statute are "authentic matter of a public nature." This is a public matter. 4 *Bl. Com.* 247, *note; Wall's case*, 2 *East Cr. Law* 953, where the indictment sets out that it is a writing of a public nature.

Sixth count. Both instruments set out *in hæc verba.*

Objections to the record.

The caption. *State* v. *Gustin*, 2 *South.* 746; *State* v. *Price*, 6 *Halst.* 203; *State* v. *Berrian*, 2 *Zabr.* 9.

2. Continuances. 1 *Trem. P. C.* 223; *Stubbs* 28, 75, 79, 83, 85, precedent of present record; *State* v. *Price*, 6 *Halst.* 203.

3. Defendant not at bar; and it does not appear that he was called on to say why such judgment should not be pronounced. That proclamation is only to be found in judgments in capital cases. *Stubbs' Crown C. C.* 28, 75, 83; *Wharton's Cr. Law* 155. All judgments are in *this form.* Judgment, so far as it goes, is good. 1 *Trem. P. C.* 162.

III. Bill of exceptions.

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As to Jones' evidence, the whole object was to show that the deed was different from the one on the table. The object was to show that at the time he had not this deed, but another.

As to the cross-examination, it showed part of writing conconcealed, and the mode of examination is matter in the discretion of the court. 1 *Greenl. Ev.* § 431.

As to *Beatty's* testimony. Experts always give opinion. Physicians do it. 3 *Halst.* 87; 1 *Greenl. Ev.* § 578. Section 581, read by opposite counsel, does not refer to experts. 1 *Phil. Ev.* 491–2; 8 *Wend.* 431–2; *Jackson* v. *Brooks, Buller's N. P.* 236; 7 *East* 232, *note a;* 14 *East* 327; 8 *Price* 650; 1 *Denio* 343; 2 *Stark. Ev.* 678.

Dayton, for state.

I. As to the *indictment.* It is alleged necessary to set out character of Kerlin's interest. No advantage in setting it out. *Arch. Crim. Pl.* 232. In *Wall's case*, (cited) (2 *East* 953) interest is not stated.

Admitting count to be bad, the principle is well settled, that if one count good, the conviction is good.

As to the instrument not being named in statute. See 2 *Leach* 883, 910; 2 *H. P. C.* 842; 1 *East* 181; 2 *Chit. Cr. Law* 1035–9; *Foster's Cr. Law* 116; *Leach* 83, 175; 2 *East* 951; 20 *Wend.* 419.

II. Record.

As to place not stated. See 4 *Bl. Com., Appendix; Arch. Forms* 98.

As to there being no judgment of acquittal. Suppose he ought to have judgment on these three counts, does it follow that judgment must be reversed? 8 *T. R.* 112; 5 *Cowen* 654; 2 *Saund.* 101. Judgment may be affirmed in part, and reversed in part.

Vroom, for plaintiff in error.

I. Record.

Technical errors are *substantial* in criminal cases. The place of trial should appear with reasonable certainty. *Stubbs* 83; 4 *Chit.* 384; 3 *Ld. Ray.* 18. There has been a uniform mode of making up records. Shall we depart from forms?

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As to pleading at the bar. See 3 *Mod.* 265. Judgment reversed because question was not asked. This is a case for which at common law a man may be convicted capitally.

Judgment only on three counts. See *Law of Error* 46; 2 *Russel* 389; 1 *Stark. Cr. Pl.* 298, &c.

II. As to the objections to the indictment. See 1 *Rush* 357; *Cro. Car.* 326; 1 *Bac. Ab.* 65; 2 *Bulstrode* 137; 1 *Lev.* 138; 1 *Sid.* 442; 3 *Bac. Abr.* 279, "*Forgery,*" *B*; 9 *Cowen* 778; 12 *Serg. & Rawle* 237.

The Chief Justice delivered the opinion of the court.

The numerous errors assigned in this cause consist of three classes. They relate—I. To the formality and sufficiency of the *record;* II. To the validity of the *indictment;* III. To the legality of the proceedings upon the trial; and we propose to consider them in the order in which they are stated.

I. The first and second errors assigned to the sufficiency of the record are, that it does not aver that the court at which the trial was had, was held at Mount Holly (the place designated by law), nor that the jurors summoned to try the cause came to Mount Holly.

The record sets out, in usual form, that the indictment was found at a court of Oyer and Terminer and General Jail Delivery holden at Mount Holly, in and for the county of Burlington, on the third Tuesday of August, 1846; that afterwards, at the same term, the defendant was arraigned, and pleaded not guilty. It then sets forth the postponement of the cause, by the usual continuances, from term to term, until the third Tuesday of November, 1847; the award of a *venire* returnable on that day at Mount Holly; and that the trial was had at a session of the court holden on the day specified, without averring at what place the session was held.

Where the cause is tried at the same term at which the indictment is found, without any continuance, it is not usual to specify the place at which the court is held, otherwise than in the commencement of the caption. 4 *Bl. Com., Appendix,* § 1; 4 *Chit. Cr. Law* 384, 386; *Cr. Cir. Comp.* 88; *State* v. *Price,* 6 *Halst.* 204.

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But where the cause is continued from term to term, or from one day to a subsequent day in the same session, but at a different place, the precedents usually specify at what place each successive term or sitting of the court is held. 4 *Chit. Cr. Law* 380, 381, 387, 402; *Cr. Cir. Comp.* 83; 1 *Tremaine's P. C.* 161.

It will be observed that in many of the precedents the continuances are to different places, no two successive continuances being to the same place. The place of the holding of the court is not fixed and unchanging. At each adjournment, the time and place to which the cause stands adjourned is designated and specified on the record, and the record avers that each successive session was held at the time and place to which the adjournment was made. Under such circumstances, the propriety of specifying at each successive term the place at which the court is held is obvious. Under our statute, the place of the sitting of the court is fixed. The court, as appears by the record, was not continued to a special term, but until the next regular term. The time and place of holding the term is ascertained. The court is adjourned to no specified time or place, but to meet "according to law." Moreover the award of the *venire*, as entered upon the record in this case, is that "a jury of the country thereupon come before the justice and judges aforesaid, at the next session of the Court of Oyer and Terminer and General Jail Delivery to be held at *Mount Holly*, in and for the county of Burlington, on the second Tuesday of November, 1847, by whom," &c. And the record sets forth that, at a session of the court holden on the day specified in the award of the *venire*, the jurors of that jury being duly summoned, empannelled, and returned, also come, &c. Under the award of the *venire* contained in the record, the jurors of that jury could not be *duly summoned, empannelled*, and *returned* at any other place except Mount Holly. With these averments on the face of the record, the place of the sitting of the court being fixed and determined, it appears, with reasonable and convenient certainty, that the court was held, and the trial had at Mount Holly.

In the case of *The State* v. *Price*, 6 *Halst.* 205, the record

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does not state, even in the award of the *venire*, to *what place* the jury are to come; which is uniformly stated in the English precedents, even when the trial is held at the same term. 4 *Bl. Com., Appendix*, § 1; 4 *Chit. Cr. Law* 384, 386.

The third error assigned is, that it is not shown by the record that the jurors by whom the indictment was tried were *good and lawful men*. The record, in this respect, is fully sustained by the precedents. It is not usual to aver in terms upon the record, that the jurors by whom the cause is tried are good and lawful men. That averment is uniformly made touching the grand jury, but not so in relation to the petit jurors. The record here, as elsewhere, contains the averment, that the jurors, duly summoned, empannelled, and returned for the trial of the cause, were *elected* and *tried;* which is a substantial averment that they were good and lawful men. Nor is this averment omitted, as was suggested on the argument, only where the award of the *venire* requires that the jurors shall be good and lawful men. Many of the precedents contain no such averment, even where the qualification is omitted in the award of the *venire*. 1 *Lil. Ent.* 241; *Cr. Cir. Comp.* 28, 75, 78, 83.

The fourth error assigned is, that it does not appear that the court demanded of the defendant, before passing sentence, why judgment should not be pronounced, or that the defendant was present in court when the judgment was rendered. It is not necessary, except upon *a capital charge*, that the defendant should be asked if he had any thing to offer why judgment should not be pronounced against him. 4 *Bl. Com.* 375; 2 *Hale's P. C.* 401, 407, 408; 1 *Chit. Cr. Law* 720.

It is, however, necessary in all cases where any corporal punishment is to be inflicted upon the defendant, that he should be personally before the court at the time of pronouncing sentence, and it should so appear by the record. *Hawk. P. C., b.* 2, *c.* 48, § 17; 1 *Ld. Ray.* 267; 1 *Salk.* 56; 1 *Chit. Cr. Law* 695, 721.

But it is not necessary that it should be averred in express

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terms that the defendant was present when the judgment was pronounced. It is sufficient if it can be collected by fair intendment from the record. When the record sets forth that it was demanded of the defendant why judgment should not be pronounced, it is not averred that the defendant was personally present. The reasonable intendment is, that the demand was in open court, and that the defendant was there personally present. It appears by the record in this case, that the defendant was personally present in court on the third Tuesday of November, the day of trial, and on that day the judgment purports, on the face of the record, to be rendered. The record averring that he was present at the trial, and on the day on which judgment purports to be rendered, the legal intendment is, that he continued in court, and was present at the rendition of judgment. It is no answer to say, that peradventure the court adjourned from day to day. The complaint is not of the facts, as they really occurred, but of the defect apparent in the record.

Under the former act constituting courts for the trial of small causes, it was necessary, to entitle the defendant to an appeal, that he should have been present at the rendition of the judgment; and that fact must appear on the record, or the court of appeal has no jurisdiction. Being a question of jurisdiction, the right of appeal must clearly appear. Yet if it appear by the record that the defendant appeared at the trial, and judgment was thereupon rendered without an adjournment to a future day, or, in case of an adjournment, that the defendant appeared in court on the day to which the cause was adjourned, it has always been held that the record shows with sufficient certainty that the defendant was present at the rendition of the judgment. *Vandoren* v. *Vandoren*, 5 *Halst.* 286; *Reeves* v. *Wilson*, 2 *Green* 116.

The application of this principle fully sustains the validity of the record in the present case. In legal contemplation the term is but one day.

The fifth error assigned is, that no judgment appears to have been pronounced on the three counts upon which the defendant was acquitted. And it is insisted that the defendant

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cannot avail himself of the record upon a plea of *autrefois acquit* in regard to the offences charged in those counts.

In civil cases it is true that ordinarily a verdict is not admissible in evidence, unless judgment has been pronounced. But in criminal cases the better opinion seems to be, that it is not necessary, in order to sustain a plea of *autrefois acquit*, that judgment should be rendered on the former verdict. The verdict itself constitutes the bar. *State* v. *Benham*, 7 *Conn.* 418; 3 *Phil. Ev. (Cowen)* 955, *note* 692; *Whart. Cr. Law* 155.

The reason why a verdict alone, without the judgment, is inadmissible in evidence, is because judgment may have been arrested or a new trial granted. The record of a judgment is therefore required. 1 *Greenl. Ev.* § 510; 1 *Phil. Ev., (Cowen)* 389.

But in the present case the objection is not applicable. Here is a record competent to be offered in evidence. It appears by that record that a verdict had been pronounced, and that judgment final in the cause had been rendered. There can be no new trial or arrest of judgment. And no court with that record before it, and with the evidence that the defendant had been tried and acquitted, would ever permit the defendant to be deprived of the benefit of his plea, or of any substantial right whatever, because the judgment of discharge was not formally spread upon the record. In point of fact such judgment is never pronounced. I find no valid objection to the sufficiency of the record.

It may be remarked, in regard to all of this class of objections, that they are purely formal. The objections are not, that in point of fact, the trial did not take place at Mount Holly, or that the jurors were not good and lawful men, or that the defendant was not present at the time judgment was pronounced. But the objections consist in this, that it does not properly appear to this court, by the record, how the facts really were, in other words, that the record has not been made up in technical form. In point of fact, records in criminal cases, not capital, are never made up except there be a writ of error. They are made up by the clerk, or more usu-

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ally by the attorney, months, or even years, after the rendition of the judgment. To many clerks criminal records are entirely unknown, and comparatively but few attorneys are at all familiar with the forms. In matters so highly technical, and with which the clerk has no familiarity, errors can scarcely be avoided. Under such circumstances, to discharge a defendant when there is no substantial error, when there has been a fair trial upon a legal presentment, upon the mere ground of a technical omission in the record, without affording an opportunity of amendment, seems an unnecessary, if not an unwise deference to legal technicalities. It is sacrificing the substance to the shadow, substantial justice to mere form. Neither the ends of justice nor the substantial rights of parties are promoted by such means. The court sits in judgment rather upon the skill or the ignorance of the clerk, than upon the guilt or the innocence of the defendant, the legalities of his trial, or the fairness of the proceedings by which his guilt was established. Under the operation of a severe penal code, where the defendant was put upon trial without the aid of counsel, some reason may have existed for this technical strictness, which certainly has no application to our penal code, or to the practice under it.

We are of opinion that the ends of justice would be better promoted, the law more effectually enforced, and no substantial right of the defendant entrenched upon, by giving an opportunity, in all cases where exceptions are taken to the form of the record, to apply to the court below to have the record amended, according to the truth and the fact of the case. To permit the record, after remaining open for months, to be shaped and moulded at the discretion of the clerk or attorney, and then the moment it is signed to invest it with such solemnity that no relief can be had against its omissions or its errors, savors more of scholastic refinement than of sound judicial wisdom. The course suggested was adopted by the Court of Errors of this state, in the case of *The State* v. *Carter*, upon an indictment for murder, and we see no sound objection to the practice.

II. Under the exceptions taken to the validity of the in-

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dictment, it is assigned for error that the second count is defective, because it contains no averment that Kerlin (the party who it is alleged was intended to be defrauded) had or claimed title to, or possession of, the land pretended to be conveyed; nor does it show upon its face that he had any interest whatever in the said land.

Whether this objection be valid depends entirely upon the legal effect and operation of the statute upon which the indictment is founded.

It is usually sufficient if an indictment be so framed that the offence is described in the words of the statute, or according to its legal effect and operation. 2 *East's Cr. Law* 989.

It is invariably requisite that all the ingredients which constitute the offence should be set out in the indictment with certainty and precision. 1 *Chit. Cr. Law* 169; *Arch. C. P.* 15, 16.

Thus, in an indictment for forgery, it is necessary to aver that the act was done with intent to defraud, for that is made by the statute an essential ingredient of the offence. But how, or in what manner the party was to be defrauded, is no ingredient of the crime, and, all the authorities agree, need not be set out in the indictment. *Arch. C. P.* 23, 194; 2 *East's Cr. Law* 989, § 59; *King* v. *Powell*, 2 *W. Blac.* 787; 1 *Leach* 215; *Rex* v. *Goate*, 1 *Ld. Ray.* 737.

The real question presented by this assignment of error is, whether, under the statute of New Jersey against forgery, (*Rev. Stat.* 271, § 48,) it is necessary, to constitute the offence, that the party intended to be defrauded should have any interest whatever in the land pretended to be conveyed.

The English statute, 5 *Eliz. c.* 14, 2, (2 *Stat. at Large* 556,) prohibits the making or forging of any false deed, &c., "to the intent that the state of *freehold or inheritance* of any person in any lands, or the right, title, or interest of any person in the same, shall or may be molested, troubled, defeated, recovered, or charged." The third section of the same act makes it penal for any person to forge or make any false charter, deed, or writing, to the intent that any person shall have or claim any estate or interests *for term of years* of, in, or

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to any lands. The precedents framed upon the second section of this statute uniformly set out the title of the party whose estate in the land was intended to be molested. 2 *Stark. Cr. Law* 481; 2 *Chit. Crim. Law* 1062; *Crown Cir. Com.* 344.

The reason and necessity of this averment is apparent from the provisions of the statute. The offence defined by the act consists in the making of the false or forged instruments, with the intent that the estate of a person having a freehold or inheritance in the land be molested or changed. It is an essential ingredient in the offence that the act should be done with intent to molest the estate of a freeholder, and that fact must appear upon the face of the indictment.

The statute upon which the present indictment is founded (*Rev. Stat.* 271, § 48,) prohibits the false making, altering, forging, or counterfeiting of any deed, &c., with intent to prejudice, injure, damage, or defraud any person or persons, body politic or corporate. The statute is very similar in its terms to the English statute, 2 *Geo.* 2, *c.* 35, and was manifestly designed to embrace a class of cases not within the statute of Elizabeth. The latter statute contemplates solely an act done with design to molest an estate of freehold. The statute of New Jersey has no such limitation, but prohibits the act, if done with intent to defraud any one. To limit its operation to persons having an interest in the same, or any other land, would greatly narrow its operation, and defeat its most important objects. It would be, moreover, in direct contravention of the plain language of the act. In order to put such construction upon the statute, it would be necessary to show that no one could be defrauded by a forged deed, unless he had an interest in the land pretended to be conveyed, or in some other land, to the prejudice of which the forged instrument might operate. But it is too obvious to admit of controversy, that fraud, by means of a false or forged deed, may be committed, not only upon the person having title to the land, but more readily and more certainly upon persons who are induced to loan or advance money upon the faith of the pretended title. Such cases come clearly within the plain *terms*

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and obvious meaning, and, as we apprehend, within the effect and operation of the statute.

If such be the true construction of the act, it can neither be necessary nor advisable to set out upon the indictment the title of the person intended to be defrauded. It is not necessary, because the fact averred is no essential ingredient of the offence. It is not advisable in any case, even when such interest exists, because, if stated, the proof must tally with the averment, or the defendant will be acquitted. 2 *East's Cr. Law* 988.

But it is further insisted, that there should appear upon the face of the indictment some apparent connection between the transaction complained of and the party to be defrauded; and it is objected, that it does not appear how a deed from Buffin to Ellis, bearing date in 1760, can operate to defraud Kerlin.

But the cases all agree that it is not necessary to show upon the face of the indictment *how* or *in what manner* the party is to be defrauded. That is matter of evidence upon the trial. It is enough, if by possibility he may be defrauded, upon the face of the indictment. That it is not necessary to show upon the face of the indictment any apparent connection between the transaction and the party to be defrauded, is apparent from the precedents. Thus a defendant is charged by indictment under the statute, 2 *Geo.* 2, *c.* 35, with forging a bill of exchange, in the name of A. M., upon R. G., with intent to defraud A. S. 2 *Stark. Cr. Pl.* 493.

Now if the act were charged to have been done with intent to defraud the drawer or endorser of the bill, there would have been upon the face of the indictment an apparent connection between the transaction and the person intended to be defrauded. But there is no apparent connection between the transaction, as stated in the indictment, and A. S., not a party to the bill.

So for forging and uttering a receipt from T. F. to J. B., with intent to defraud T. B. 2 *Stark. C. P.* 495; *Cro. Cir. Comp.* 387.

So in Anne Lewis' case, the indictment is for uttering a forged deed purporting to be a power of attorney from Eliza-

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beth Tingle to Frederick Predham, with intent to defraud Edward Mason. *Foster's Cr. Law* 116.

So under a statute of Pennsylvania, the indictment charged that the defendant falsely altered and defaced the registers and records of the office of the surveyor general of the commonwealth, by the following corrupt interlineation: "*April*, 1794, *A. R. in right of A. S.* 161 *acres, and* 95 *perches*," with intent to defraud G. K. *Ream* v. *Commonwealth*, 3 *Ser. & R.* 207; *Whart. Prec.* 139.

It was suggested, upon the argument, that a different form of indictment was necessary where the instrument alleged to be forged respected real estate. But why so? No such rules exist at common law. 1 *Trem. P. C.* 135. The statute draws no distinction between the two classes of instruments. It seems difficult to perceive why a different phraseology should be required in indictments to describe offences which the statute describes in language identical. No reason for the distinction was suggested upon the argument, and I apprehend none exists in fact.

The doubt respecting the form of the indictment has probably arisen from precedents of indictments under the statute of Elizabeth, and which have in some instances, either from abundant caution, or perhaps from inadvertency, been applied to offences under the statute of *Geo.* 2.

This count being in the terms of the statute, including all the essential ingredients of the offence, and being in accordance with approved precedents under similar statutes, we are of opinion that this error cannot be sustained.

This conclusion renders it unnecessary to express any opinion upon the other counts of the indictment. It has been long and well settled, that where the defendant is found guilty upon several counts, some of which are bad, judgment may be rendered upon the good counts. 1 *Bos. & Pul.* 187; 1 *Chit. Cr. Law* 249–50; 1 *Salk.* 384.

And where judgment has been pronounced upon an indictment containing several counts, some of which are bad, the judgment will not be reversed on writ of error, but the court will apply the judgment to the good counts. 1 *John.* 320; 17

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Pick. 80; 3 *Wend.* 365; 6 *Metc.* 240; *Spenc.* 404; *Whart. Cr. Law* 618, 619.

This rule cannot be considered as unsettled by the recent decision in the House of Lords in the case of *Rex* v. *O'Connell*, 11 *Clark & Fin.* 15.

The distinction suggested, upon the argument, between a general verdict of guilty, and a verdict of guilty upon certain specified counts, cannot alter the application of the principle. The verdict was in the latter form in O'Connell's case, but that circumstance does not appear to have been relied on as affording any ground for the opinion of the majority of the court.

In the case now under consideration, the sentence pronounced is authorized by law to be awarded in regard to the offence specified in the second count. The offence charged in the three counts upon which the defendant is convicted is virtually the same, and the punishment would have been the same whether the defendant had been convicted upon one count or upon all.

III. The third class of errors relates to the legality of the trial, and are founded upon bills of exceptions sealed by the court, pursuant to the act of March 9, 1848. *Pamph. Laws* 226.

1. The first exception is, that parol evidence was admitted of the contents of a deed, without the proof of notice to produce it. It appears, by the record, that the witness had testified that the defendant exhibited to him a deed, from Buffin to Ellis, for the land described in the deed in controversy, and that he believed that the deed thus exhibited was a different deed from that charged to be a forgery. The witness then stated the grounds of his belief that the deeds were not the same, to be, that in the deed exhibited there was an alteration, a small word, interlined; that it was shorter, and folded above the signature; that the township of Hanover, or New Hanover, was mentioned, and that the deed before the court contained two lines which were not in the deed exhibited to witness. All this evidence was objected to because the deed itself was not produced, nor its absence accounted for. It is

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not clear what contents, if any, of the absent deed were proved. But, conceding the fact to be as alleged, the evidence does not fall within the principle of the objection. The contents of that deed were not in question before the jury. The parol evidence was not offered as a substitute for the written instrument, nor to contradict or alter it. Nor does it fall within the objection, that it was not the best evidence. It was a simple question of identity or diversity. The witness had sworn that he believed that the deed in question was not identical with a deed which had been previously seen by him, and, in stating the grounds of his belief, he enumerated a variety of particulars, in which according to his recollection, the two instruments differed. Now the production of the deed before the jury would have been no evidence whatever of the grounds of his belief, though it might either have confirmed or contradicted his impressions.

The second exception is, that the court admitted evidence to show that the signature, *Caleb Shreve*, as one of the subscribing witnesses to the deed charged to be forged, was not the signature of Caleb Shreve the grandfather of the witness, though the identity of the subscribing witness to the deed with the grandfather of the witness had not been established.

The decisive answer to the objection is, that the evidence is competent as far as it goes; though not an entire chain, it is a complete link in the chain. The fact stated was competent and relevant. To how much weight it might eventually be entitled, would depend, doubtless, upon how strictly the state identified the subscribing witness with the person referred to. This witness states that he never knew any other Caleb Shreve before him. Had another witness testified that no other Caleb Shreve resided in that region of country at the date of the deed, it could not be denied that the entire evidence would be both relevant and material, though the testimony of each witness standing alone might be indifferent, and the whole united not conclusive. It is incumbent upon a party complaining of an error, to show clearly that the error was committed. As the case stood, the judge clearly committed no error in admitting the evidence. The whole evidence is not required to be spread upon the bill of exceptions. How fully the identity

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was established, this court cannot know. The mere admission of testimony in itself competent, but which becomes irrelevant or incompetent by the failure of some essential link in the chain, is no ground for reversal.

The third exception is to the admission of the evidence of George Sykes, who testified, that in July, 1844, the defendant called on the witness in relation to the land he claimed in the Buffin meadow. He told witness that he had difficulty about some land with Israel Kerlin. Witness told him he knew the title to most of the land about there, and asked him what he claimed under. Defendant said under a survey to Japhet Leeds, made in 1763. Witness told him it could not be so, there was no such survey there. The ground of exception to this evidence is, that the conversation detailed was irrelevant.

The defendant stood charged with making and uttering a forged deed from Buffin to Ellis to defraud Kerlin. The uttering is alleged to have taken place on the 31st of August, 1844. Upon this issue it was certainly not irrelevant to show that, within two months of the alleged uttering of the forged deed, the defendant had claimed title to the tract in question, not under a deed from Buffin to Ellis, in 1760, but under a survey of Japhet Leeds, in 1763, and that he was then informed that there was no such survey as that under which he pretended to claim. But it is alleged that the tracts referred to in the conversation were in *Buffin's meadow*, and must therefore have been different from the tracts included in the deed, which are described as cedar swamp and pine land. The answer is, that the tracts described as cedar swamp in 1760 may have been converted into meadow before 1844, and that the tract known as *Buffin's meadow* may have included within its limits cedar swamp and pine land, as well as meadow. The identity of the two tracts may have been fully established upon the trial. It is enough for this court to see that there is no evidence upon the record that they were not the same.

The fourth exception is, that on a cross-examination, by the defendant, of a witness on the part of the state, and who had testified that the deed alleged to be forged was in the handwriting of the defendant, the witness was shown an instrument of

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writing, a part of the writing being covered and concealed by a piece of newspaper tied over it, and was asked by the counsel of the defendant if the portion of the writing that was visible was West's, the defendant's. To the question and mode of exhibiting the paper, the counsel of the state objected. The court sustained the objection, and decided that the paper must be so shown that the witness could see the whole of the writing. In this there was no error. It does not clearly appear for what purpose the evidence was offered. It may have been to prove the instrument shown, for the purpose of offering it in evidence, or it may have been, as was probably the case, for the purpose of testing the value of the witness' opinion in respect to the handwriting of West, and discrediting him before the jury. If the former were the object, the witness could form and express his opinion only upon the whole writing. If the latter, the better opinion seems to be, that the party was entitled to lay the paper before the jury, to form their opinion as to the testimony of the witness, and therefore the whole paper should be shown. For the jury should not judge, from the inspection of the entire instrument, of the value of the opinion of a witness who has only seen a part of it.

But admitting that the witness is not, as a general rule, entitled to see the entire instrument, it is clearly the duty of the court to see that the paper is so exhibited as to enable the witness to judge of its general character, and that the cross-examination is so conducted as fairly to test the value of his opinion. This must be left, in some measure, to the discretion of the judge, and if he err in a matter of discretion, his opinion is not subject to review. 1 *Greenl. Ev.* § 431.

The propriety of the decision must necessarily depend upon circumstances of which this court can have no knowledge. What was the extent of the writing? what part of it was shown? was it sufficient to enable the witness fairly to judge of the character of the writing?

The fifth exception is, that the deposition of Joseph Walker, offered by the defendant for the purpose of contradicting the evidence previously given by said Walker, on the part of the state, was overruled by the court.

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What evidence the deposition was designed to contradict, or whether it was material or relevant to the issue, does not clearly appear. The only evidence of Walker contained in the bill of exceptions is, that having testified to West's handwriting on cross-examination, he said he thought that West was a subscribing witness to some deposition, and that witness had seen him write *then* and at other times. The design of offering the deposition seems to have been to show that West's handwriting was not upon it, and thus to contradict the witness. The objection was, that the deposition offered was not identified as the one referred to by the witness; and the objection seems well founded, for there appears upon the record no evidence whatever of the identity of the instruments.

The last ground of exception is the admission of the testimony of John Beatty, "because he was an expert, and testified only from comparison of handwriting, and because two of the deeds (from which he formed his opinion) had not been proved or given in evidence. It appears by the record that the latter ground of objection was removed, upon the trial, by proof of the deeds. The question presented by the record, in connection with the facts, as there disclosed, is, whether upon an indictment for forgery of an ancient deed, in regard to which, from lapse of time, all personal knowledge may be presumed to be lost, it is competent to establish the forgery by the testimony of an expert, who has no previous knowledge of the handwriting, but who speaks entirely from comparison of the handwriting in the instrument alleged to be forged with that in other ancient deeds or writings admitted or proved to be genuine.

The general rule of the common law, that handwriting is not to be proved by comparison, has been fully recognised in this state, and is not now questioned. The proof must be by a witness having proper knowledge of the party's handwriting, acquired either by seeing him write, or by correspondence or other business transactions with him, from which a personal knowledge of the character of the handwriting is acquired.

Where, however, the writings are of such antiquity that

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living witnesses cannot be had, the rule is, and from the very necessity of the case must be, relaxed. In such cases the course is to rely upon the testimony of experts, who testify concerning the genuineness of the instrument in question by comparison with other documents admitted to be genuine, or proved to have been treated and acted upon as such. Or the expert may speak from a knowledge of the handwriting, acquired by a *previous* inspection of such ancient writings. 7 *East* 282, *note a;* 14 *East* 327; 1 *Phil. Ev.* 491; *Greenl. Ev.* § 578; *Jackson* v. *Brooks*, 8 *Wend.* 426, *S. C.;* 15 *Wend.* 111; *Strother* v. *Lucas*, 7 *Peters* 767; *Rout's administrator* v. *Riley's administrator*, 1 *Leigh* 222.

The deed alleged to be forged bears date in 1760, and clearly comes within the reason and operation of the rule. Of the handwriting in a document so ancient, no living witness could speak otherwise than by comparison. If the evidence be rejected, no direct evidence of the forgery is attainable.

In the cases cited the evidence was offered in civil suits, in order to prove the genuineness of the signature. But if evidence by comparison is properly admitted in such case to prove the genuineness of a signature, the same kind of evidence must also be admitted to prove that the signature is not genuine. 1 *Phil. Ev.* 492.

The general rules of evidence are the same in criminal and civil cases. What may be received in the one case, may be received in the other, and what is rejected in the one, ought to be rejected in the other. 2 *Stark. N. P.* 155; *Roscoe's Crim. Ev.* 1; *Buller's N. P.* 235; *Doe* v. *Newton*, 5 *Adol. & El.* 514; *Doe* v. *Suckermore*, 5 *Adol. & El.* 703.

We find no error, either in the frame of the indictment, the making up of the record, or in the exceptions sealed upon the trial, and are of opinion that the judgment be affirmed.

NEVIUS and OGDEN, Justices, concurred.

Judgment affirmed.

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CASES DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW JERSEY,

AT OCTOBER TERM, 1849.

THE DELAWARE AND RARITAN CANAL COMPANY v. LEE.

1. An actionable nuisance may be caused by an act perfectly lawful in itself when the nuisance complained of is only a consequence of that act, as if a canal constructed by authority of law across land of A., by his consent, throw backwater on land of B., it is an actionable nuisance.

2. If one part of a farm or tract of land be taken by a canal company for a canal, and the value thereof and the damage done to the farm by taking it be assessed by commissioners, or if the owner convey to the company such part for the purpose of their canal, the owner of the farm is not thereby barred from recovering the damages done to his farm in consequence of the construction of the canal on another part of the route distinct from his farm.

3. A conveyance of land by the owner to a company for a canal, or the assessment of the value and damages by commissioners, only bars the recovery of such damages as naturally and necessarily arise from the construction of a canal there; but not such damages as arise from an unskilful or improper construction, as the stoppage of a watercourse that might by a proper culvert have been left open.

4. The statute of limitations is no bar to allowing damages done within six years, by a nuisance erected before the six years, in cases where the nuisance has not been so long continued as to raise presumption of a grant.

This was an action on the case, originally commenced in the Mercer circuit, by Lee against the Canal Company, at June term, 1848. The declaration stated was for a misde-

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meanor in obstructing the flow of the water in a watercourse which flowed through the plaintiff's close, and thereby throwing back the water on the plaintiff's close, and injuring it.

The defendants pleaded the general issue and the statute of limitations.

On the trial of the cause, it appeared that the water from the plaintiff's meadows flowed upon the lands of an adjoining proprietor into Watson's creek, and were thence discharged into the river Delaware. The canal was constructed across Watson's creek, the water of the creek being carried under the canal by means of a culvert. The injury to the plaintiff's land was occasioned, according to the testimony of his witnesses, by the defective construction of the culvert: its capacity was not sufficient to *vent* freely the waters of the creek, which were thus obstructed in their accustomed course, and penned back upon the lands of the plaintiff. The canal does not cross the creek upon the plaintiff's land, but upon the land of an adjoining proprietor lower down the river. At the time the canal was constructed the plaintiff's farm was owned by Joshua Wright. Wright, by deed bearing date on the first day of February, A. D. 1834, conveyed one acre and three-fourths of land, upon which the canal is constructed through the plaintiff's farm, to the Canal Company. This deed contains a release to the company of the obligation imposed upon them by the charter to build a bridge across the canal for the convenience of the plaintiff's farm. On the first of April, 1836, Wright conveyed the farm to the plaintiff. The culvert was constructed in the year 1833, and completed in the fall of that year.

The Circuit Court charged that the plaintiff below was entitled to recover, notwithstanding the deed from Wright, all damages done within six years before the commencement of the suit.

Argued before the Chief Justice, and Randolph and Ogden, Justices, by *J. S. Green* and *Field*, for plaintiffs in error, and *Beasley* and *W. Halsted*, for defendant in error.

J. S. Green and *Field*, for plaintiffs in error.

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1. An action for nuisance can only be maintained where the act complained of is unlawful; here the construction of the canal down Watson's creek is a lawful act authorized by the charter of the company. Sec. 12 of Charter, &c., *Harr. Laws* 278.

2. It is clear, from the evidence in the case, that the damage is only on account of the insufficiency of culvert to discharge the water arising from rains or freshets; it is sufficient to discharge all the water from springs or ordinary sources.

3. The deed from Wright to the company for his lands taken, covers all damages done by the construction of the canal. Lee, who took by subsequent conveyance from Wright, excepting the one and three-fourths acres conveyed to Canal Company, stands in the position of Wright. And by the deed, Wright was in the same situation, as to his right to recover, as if the lands had been assessed by commissioners. *Van Schoick* v. *Del. and Rar. Canal Co., Spenc.* 249, and *Brearley* v. *Del. and Rar. Canal Co., Ib.* 236, show that an assessment of commissioners includes all damages arising from construction of canal. *Zimmerman* v. *Union Canal Co.*, 1 *Watts & Ser.*; 1 *Suppl. U. S. Dig.* 504, § 122.

If such damages are caused by the construction of the canal, no matter *how*, they ought to have been included in an assessment by commissioners, and would be released by the deed. The deed includes them if done to the same tract of which part was conveyed by the deed. We do not contend that a deed for part of one tract would cover damages done to a separate tract or parcel held by the same owner.

Beasley and *W. Halsted*, for defendant in error.

1. The act complained of is a wrongful act, not authorized by the charter of this company. It was not *necessary* for the construction of their canal to stop up this stream, they could cross it by a *sufficient* culvert. If not necessary for the construction of a public work, the charter *does not*, and the legislature *could not*, grant this power.

2. The deed does not affect this action, it is for land nearly

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two miles distant from the obstruction complained of, and the obstruction is on no part of the tract of Wright, the grantor. That deed grants the land described in it, and, according to the decisions in *Van Schoick's* and *Brearley's* cases, takes away all right of action for damages occasioned by the lawful construction of the canal on *that land*, but it does not give the company a right to damage the plaintiff's land by the improper or unlawful construction of their canal elsewhere. Otherwise a conveyance or an assessment for the value of land taken at the end of a farm, would at any time enable the company to stop up and destroy a stream which drove a mill at the other end, and that might be worth thousands of dollars.

3. This deed releases no damages, it only conveys certain lands therein described. In the company's charter, value of lands and damages are two distinct matters, one may be paid for, and the other not, and no release can arise here by implication; there is an express release as to the right of a bridge, and "*enumeratio unius est exclusio alterius.*"

The Chief Justice.

The injury complained of by the plaintiff is a nuisance created by the obstruction of a natural watercourse by the defendants, and penning the waters back upon the plaintiff's land. The injury is in its nature actionable. Three questions are raised by the plaintiffs in error upon the bill of exceptions.

1. Are the defendants liable for the injury.
2. Is the plaintiff in a situation to demand remuneration.
3. Is the claim barred by lapse of time.

1. It is insisted that the Canal Company are not liable for any nuisance necessarily resulting from the construction of the canal; that a nuisance necessarily implies a violation of law; that the act complained of was done under the authority of an act of the legislature, was done by sanction of law, and that the company are not liable, civilly or criminally, for the consequences of such act. It is true that a party is not liable criminally for an act done by authority of law. *King* v. *Pease*, 4 *Barn. and Ad.* 30.

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Nor, as it seems, is he civilly liable for such injuries as are not the natural, direct, or necessary consequences of such act. *Bord. and So. Amb. Turn. Co.* v. *The Camden and Amb. Railroad Co.*, 2 *Harr.* 314.

But it is by no means true that an act constituting a nuisance must necessarily be in itself unlawful. On the contrary, acts which in themselves are perfectly lawful may, and frequently do, in their consequences, work actionable injuries to others. To construct a mill dam upon one's own property is a perfectly lawful act; but if by means of such dam the natural current of the water is obstructed and thrown back upon the lands of another, it becomes actionable as a nuisance. *Sic uter tuo ut alienum non laedase*, is a sound maxim in law as well as in morals. In the present case the construction of the canal by the defendants was a lawful act, but the consequence of that act, the penning back of the water upon the plaintiff's land, was an infringement of his rights, for which he is entitled to remuneration in damages. It is well settled, that an injury to private property resulting from an act authorized by law, and done in pursuance of the statute, cannot be justified, unless the act were done by one acting as an agent, or in behalf of government, or to affect a public interest. And the statute is no bar to an action for damages resulting from such act, unless it provide a different mode of compensation. *Crittenden* v. *Wilson*, 5 *Cowen* 166; *Rogers* v. *Bradshaw*, 20 *J. R.* 735; *Gardner* v. *Trustees of Newburg*, 2 *J. Ch. R.* 162; *Stephens* v. *Middlesex Canal*, 12 *Mass.* 466; *Bassett* v. *Johnson*, 2 *Green's Ch. Rep.* 417; *Sinnickson* v. *Johnson*, 2 *Harr.* 129.

This doctrine has been recognised as applicable to this company in the case of *Ten Eyck* v. *The Del. and Rar. Canal Co.*, 3 *Harr.* 200. The present case, upon this point, is directly within the principle of that decision, and must be controlled by it.

2. Is the plaintiff in a situation to demand remuneration.

At the time of the construction of the canal, the plaintiff's farm was owned by Joshua Wright. The plaintiff became the purchaser after the culvert over Watson's creek, which creates

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the difficulty, was completed. The purchaser, it is clear, can stand in no better position than the vendor, nor do I apprehend that his situation is any worse. In fact, as to all damages resulting after the title passed, he stands in the shoes of the vendor. The case is to be considered, therefore, as if Wright himself was the plaintiff. Could he maintain this action?

It is said that the damages of which the plaintiff complains result directly from the construction of the canal, and that, a mode of compensation for these damages being provided by the charter, no action will lie; and in support of this position, the decision of this court in *Vanschoick* v. *The Del. and Rar. Canal Co.*, *Spenc.* 249, is relied upon. Justice Nevius, by whom the opinion of the court in that case was pronounced, said: "I believe that the legislature intended all damages accruing to the owner of lands from any and every physical effect produced by the construction and use of the canal, whether the same were clearly to be seen and easily estimated before the construction of the canal, or whether they were uncertain and doubtful results from such construction. I believe that the legislature intended that the commissioners should assess all damages sustained by the owner, or likely to be sustained by him, from the construction and use of the canal, whether they arise from the alteration or destruction of a public or private way, the exclusion or the overflowing of waters, the alteration or change in the current of streams or in the destruction of crops, the deterioration of adjacent lands by leakage, or whatever other damage may result from the natural and physical effects produced by the canal; *provided always*, that the canal shall be constructed according to the provisions of the act and with proper care and skill." This language is certainly very comprehensive, and its terms may include the damages now sought to be recovered. It is, however, a well settled rule, that the language of a judicial opinion is always to be construed in reference to the case under consideration. As applied to the facts of that case, this language may be taken as strictly proper and as sufficiently guarded. In that case the plaintiff had brought his action for damages, resulting in part or in whole from the construction

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and use of the canal across the lands of the plaintiff, for leakage from the canal and injuries to the soil, by shutting out the direct flow of the freshet of the river, and changing the currents of the water. But the learned judge, I apprehend, never intended to say that the damages awarded by the commissioners to the landholder for the construction of the canal included damages arising from the construction of a work at a remote point in no wise dependent upon or connected with the construction of the canal across the plaintiff's land. The damages complained of by the plaintiff in the present case do not result from the construction and use of the canal across his land. They have not the remotest connection with, or dependence upon that act, but result from the act of the company in obstructing a stream at a point remote from his premises. These are not, in the language of the judge, uncertain and doubtful results from the construction of the canal, much less such as were to be clearly seen and easily estimated. Such damages could by no possibility have been foreseen or estimated by the commissioners, nor do I apprehend that they could have been within the contemplation of the legislature. It never could have been the design of the act, that if the company remunerated the landholder for damages sustained in the construction of the canal across his farm, they were authorized, at a remote point in its course, to divert a watercourse from a valuable mill seat, or to submerge his meadows by penning back the water from below. I am confirmed in the opinion, that no such inferences were designed to be drawn from the language of the court in the case of *Vanschoick* v. *The Del. & Rar. Canal Co.*, because the same learned judge who delivered the opinion in that case, on another occasion held this language in regard to the charter of company: "The whole scope of their charter indicates clearly that the legislature did not mean to interfere with private and vested rights without providing a recompense to be paid by the company, and not by the state. And if injury or damage has accrued to the private property or rights of others, which could not be foreseen or anticipated, and therefore not provided for in the charter of the company, this constitutes no reason why the party thus

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injured should not be compensated. *Ten Eyck* v. *The Del. and Rar. Canal Co.*, 3 *Harr.* 200.

In the present case damages were not assessed by commissioners; but, on the first day of February, 1834, Wright, who then owned the farm, conveyed one and three-quarter acres, upon which the canal was constructed across the farm, to the company. The deed is silent as to the object of the conveyance; but, as the canal was already built, it may be presumed that the conveyance was made for the express purpose of the canal. If this be conceded, and it be also conceded, for the sake of the argument, that the conveyance of the land for the purpose of a canal operated as a release of all damages resulting from its construction, for which compensation is provided in the charter, it is abundantly obvious that the damages now sought to be recovered are neither within the contemplation of the deed or the act of incorporation. If the owner sold and conveyed the land for the purpose of a canal, it may fairly be presumed that he took into consideration all the damages which might result from the construction of the canal through his farm, and that he received a price which in his estimation would cover such damages. The deed, therefore, may fairly be construed as a release of such damages. *Brearley* v. *The Del. and Rar. Canal Co.*, *Spenc.* 238.

But can it be seriously contended that, in conveying land for the use of a canal across his farm, the grantor took into consideration damages resulting from the construction of the canal at another and a different point, and that the conveyance operates as a release of such damages? The question carries with it its own answer. No such damage could have been within the contemplation of the parties.

But another and decisive answer to the objection is, that the damages of which the plaintiff complains are not the natural or necessary result of the construction of the canal, on the contrary the difficulty arises from the imperfect or defective construction of a culvert through which Watson's creek passed under the canal. The case, therefore, falls directly within the exception stated by the court in *Vanschoick* v. *The Canal Co.* There is no evidence, or even averment, that the work might

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not have been constructed so as freely to vent the water of Watson's creek without the least difficulty or injury to the works of the defendants.

The statute of limitations is no bar. The erection was made in 1833. The action was commenced in 1848. No prescriptive right had been acquired by the company to flow the plaintiff's land, nor had the nuisance been continued for such length of time as to raise the presumption of a grant. The action is not brought for the erection of the culvert, but for the injury resulting from the overflow of water. It is a continuing nuisance, for which it is well settled that a plaintiff may receive damages for a period not exceeding six years, though the obstruction which occasioned the injury is of much longer continuance. The point was settled by this court by the decision in *Wright* v. *The Canal Co.*, 2 *Zabr.* 469.

Randolph, J. This action was brought for consequential damages arising to the property of the defendant in error, as alleged, from the embankment of the canal, the improper construction of the canal itself, and a culvert some half a mile, or more, below the land of Mr. Lee, the culvert, as insisted on by the plaintiff, being too small to vent the water as the natural channel did formerly; and owing to this cause, and to the embankment keeping the water on the meadow for a longer time than it used to remain, he says that his meadow is greatly injured, and that he has sustained damage to a large amount. On the trial it appeared that the canal embankment and culvert were finished, as they have existed ever since, in 1833, and that, in February, 1834, Joshua Wright owned the premises now belonging to Mr. Lee, and through which the canal passes; and at that time he and his wife, by deed, conveyed to the defendants, in consideration of the sum of three hundred dollars, the acre and three-quarters of land taken by the Canal Company in its passage through Mr. Wright's, now Mr. Lee's farm. On the trial it was insisted that this deed constituted a complete bar to the present action, and the court below, willing to have the matter settled by this court, directed the jury to consider that point as overruled, and to render a verdict for

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such damages as the plaintiff "may have proved to have sustained within six years next before the commencement of this suit arising from the insufficiency of the culvert, notwithstanding the deed from Mr. Wright."

By the thirteenth and fourteenth sections of the charter of the Canal Company, (2 *Harr. Laws* 278) it is provided, that "when the company and the owner of lands or materials required" cannot agree "for the use or purchase thereof, and damages sustained," commissioners are to be appointed "to make a just and equitable estimate or appraisement of the value of the same, and assessment of damages," who are to report what sum is to be paid "for such land or materials and damages aforesaid;" and in case of dissatisfaction with this report, a jury is to be empannelled "to assess the value of the said land or materials and damages sustained." When there has been an agreement between the parties respecting the subject matter, it is of the same force and extent as the report of commissioners or verdict of a jury, unless there is a restriction in the agreement itself; and when that agreement is in the form of a deed for the land taken by the company, the compensation in the deed is to be taken as the value fixed by the parties for the land and damages, unless the contrary appears. *Brearley* v. *The Del. and Rar. Canal Co.*, *Spenc.* 236. The deed offered in this case is for an acre and three-quarters of land, and the consideration three hundred dollars, a sum far beyond the highest estimate made of the lands conveyed, of course the deed and its consideration is to be considered as embracing both land and damages. But what damages does the deed or the statute embrace? Were this entirely an original question, or its investigation absolutely necessary to settle the present case, we might inquire whether the term "damages," in the statute, was intended to embrace all damages, direct and consequential, (to the whole, or what portion of the owner's property) that might arise from the construction and use of the canal? or whether the term was to be limited to such damages only as necessarily resulted to the owner's farm or tract of land, from the taking a portion thereof for the use of the company, or for taking the owner's "materials" in

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constructing the canal? For the term damages applies to the same extent to materials as to lands, so far as the nature of the property will admit. But this statute has received a judicial construction by this court in the case of *Vanschoick* v. *The Del. and Rar. Canal Co., Spenc.* 249. There the charge was, that the company had constructed their canal in so unskilful a manner that the water leaked through and destroyed the plaintiff's grass and injured his land, and that where the waters of the Delaware formerly flowed off in a natural course, they were now obstructed by the banks of the canal, and confined until enabled to pass off at the lower extremity of the embankment; and that, owing to the same cause, the waters of Crosswicks creek were changed in their flow over the plaintiff's meadow to his injury. This charge is substantially the same as that contained in the plaintiff's declaration, though in this it is more specifically stated, and the construction of the culvert is put forth more prominently as the cause of the injury. In truth the property in each case lies in the same vicinity, and the injury resulted in a great measure from the same cause. In that case the court decided that these damages were all embraced in the statute, and the plaintiff was prohibited from recovery for any or all of them, because there had been in his case an assessment under the statute, although all evidence in regard to these damages was rejected by the judge who tried the assessment. This being a strong case, embracing the same points involved in the present action, we must consider it as *res judicata* in this court. "I believe," says the learned judge who delivered the opinion of the court, "that the legislature intended that the commissioners should assess all damages sustained by the owner, or likely to be sustained by him, *from the construction and use of the canal*, whether they arise from the alteration or obstruction of a public or private way, the exclusion or the overflowing of waters, the alteration or change in the current or stream, or in the destruction of crops, the deterioration of adjacent lands by leakage, or whatever other damages may result from the natural and physical effects produced by the canal; provided always, the canal shall be constructed ac-

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cording to the provisions and with proper care and skill." And we may infer, from the course that this suit has taken, that it was intended not to contest the extent of that decision, so much as to bring the case within the proviso laid down by the court, *viz:* that the canal, or rather the culvert, was not constructed "with proper care and skill." On this point there was an abundance of evidence, as also on the question, whether any, and if any, what damages resulted therefrom; the testimony was contradictory, but the whole constituted a question of fact, which was left to the jury, who decided in favor of the plaintiff, and there the matter must rest, so far as this court has any thing to do with this part of the case. But there is another point, which is urged upon the court with some force, and that is, that this deed was executed about a year after the canal and the culvert were constructed, and there has been no alteration of either from that period to the present. Why was the making of this agreement or deed between the parties deferred till after the construction of the works? was it in pursuance of some previous agreement, and only postponed through inadvertence, or was it by design?

We have only the deed and the date of its execution before us, and a fair inference to be drawn from these is, that the "owner" of the land waited to see what might be the "damages," and therefore included the same in the consideration. But still, giving the deed the most liberal construction, it would cover no more damages than would be embraced in an assessment of commissioners or a verdict of a jury under the charter, and as these would not embrace damages arising from the misconstruction of the canal or the insufficiency of the culvert, on which latter ground this case was put before the jury, of course the deed forms no bar to the present action or to the damages claimed and presented by the jury. The question, whether the statute of limitations applies to the continuance of a nuisance, when the cause thereof is of more than six years' standing, was the direct point decided by the court in the case of *Wright* v. *The Del. and Rar. Canal Co.*, where it was considered that the statute did not apply. I think the judgment must be affirmed.

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Ogden, J. A judgment was rendered in the Circuit Court of the county of Mercer between these parties, upon the verdict of a jury, for the sum of seven hundred and ninety-seven dollars and forty-five cents damages, besides costs of suit; which judgment has been removed, by the defendant therein, into this court by a writ of error.

The action was instituted, by a process returnable to the term of June, 1848, for the recovery of damages, alleged to have been sustained by Aaron Lee, between the 17th of March, 1842, and the day of the commencement of the suit, in his tract of land, in the township of Hamilton, in the county of Mercer, from the effects of certain works and devices, done and constructed by the Canal Company in and over the natural outlets of Abbot's creek and Watson's creek, which theretofore emptied, without interruption, into the Delaware river.

The defendants below pleaded the general issue and the statute of limitations, and issues were joined thereon.

It having been conceded, upon the argument here, that the second issue should follow such decision as this court should make upon a similar point raised in the case of Robert Wright against the Canal Company, then under advisement, our attention is limited to the consideration of the charge given to the jury by the judge of the Circuit Court upon the legal effect of two deeds which the defendants had given in evidence.

The case shows that the Canal Company, by virtue of the authority of their charter, had located their canal, its locks and other devices, between the city of Trenton and Bordentown, passing in its line, for about seven chains, over lands of one Joshua Wright; that, at some distance below the premises of Mr. Wright, the line crossed Watson's creek and Abbot's creek; that, in making their canal, the company had filled up the mouth of Abbot's creek, and had carried their canal, by an aqueduct, over a culvert, which they constructed in Watson's creek, and that they also had connected the two creeks by an artificial passage. The culvert in Watson's creek was completed in August or September, 1833.

By a deed, dated the first, and acknowledged on the twenty-

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eighth of February, 1834, Joshua Wright, with his wife, for the consideration of three hundred dollars, sold and conveyed unto "the Delaware and Raritan Canal Company" a certain lot of land, described therein, as situate on the route of the canal, and as in the use and occupation of the company, beginning at a fixed point on the southerly side of the canal, running thence, the four courses and distances expressed in the deed, to the point of beginning, embracing one and three-quarter acres.

It contains the usual covenants of seizin and of warranty of the *described* premises, and likewise a release of all right or claim upon the company for a bridge over the canal.

That strip was a part of a farm of two hundred and thirty-four acres, which the said Wright, with his wife, afterwards, on the first day of April, 1836, conveyed to Aaron Lee, the plaintiff below, for the consideration of eleven thousand five hundred dollars; the deed containing an exception thereout of a parcel of land, conveyed to "the Delaware and Raritan Canal Company," containing about one and three-quarter acres. Those two deeds were received in evidence.

The *gravamen* of the plaintiff's action was, that the Canal Company, by their works in these creeks, had so interrupted the natural flow of waters through them into the Delaware river, that the water was penned up upon his meadows lying above, his herbage thereby destroyed, and he greatly damaged.

The defendants relied for a legal justification upon the deed from Joshua Wright to them, insisting that, as the plaintiff had derived his title from the same party subsequent to the erection of the canal, and *after* the execution and delivery of *their* deed, he stood towards them in the same relation as Wright would have done, had he retained the farm.

The judge of the Circuit Court pronounced the case to be not free from doubt, but nevertheless he instructed the jury, that they should consider the defence founded on the deed as *untenable*, and that the plaintiff was entitled to recover such damages as he had proved he had sustained within six years next before the commencement of the suit arising from the in-

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sufficiency of the culvert, notwithstanding the deed from Joshua Wright to the company, suggesting that the legal effect of that deed could be settled thereafter.

A bill of exceptions was sealed to this charge, upon the prayer of the defendants.

The defendants now rely for authority in support of their position upon two cases adjudicated in this court. The one is that of Brearley against "the Delaware and Raritan Canal Company," reported in *Spencer* 236, the other that of Van Schoick against the same company, reported in the same book, page 249.

In the former case, the plaintiff having sold and conveyed to the company, for a fixed consideration, a parcel of land situate on the route of the canal for the purpose of their cutting and constructing the canal, through which strip it was afterwards cut with his consent, prosecuted the company for the recovery of damages sustained by him, in not having a bridge erected by them, under the thirteenth section of their charter, for connecting the two points of his farm, which were intersected by the canal.

Their conveyance and the accompanying facts were pleaded by the defendants, and the court, on demurrer, decided that the question was controlled by the *contract* of the parties, without reference to the charter; that as the land was sold for the purpose of having the farm *divided* by the canal, the plaintiff was presumed, in fixing his compensation, to have taken into account all the inconvenience which might result from the construction of the canal through his premises; that the defendants having used the land for the single purpose for which it appeared by the deed to have been purchased, they should not have more burthens imposed upon *them* than an individual would be subject to, who might have purchased it for the like or for any other improvement; and that they were not in law liable in damages for any inconvenience which the plaintiff might sustain, *necessarily* resulting from doing the act contemplated by the parties; that the right of the company to enter upon that land, and dig the canal, was founded upon the contract, and not upon the statute, and that

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the facts pleaded by the defendants constituted a legal defence.

The other decision arose out of an action, instituted against the company by one Van Schoick, for the recovery of damages sustained from leakage, on account of the alleged unskilful construction of the canal over his premises, and from the hemming in of waters upon his lands by the embankments of the canal.

The company pleaded the general issue and a former recovery.

In support of the issue joined upon the latter plea, they gave in evidence before the jury proceedings had, at a Burlington Circuit Court, upon an issue directed by this court between those parties.

No contract had been effected by them, but the company had acquired their right to enter upon the premises and construct their works, and the plaintiff had acquired his right to recover compensation under the thirteenth section of the charter of the company.

Commissioners had been duly appointed; a report had been made, which, upon application of the plaintiff, was set aside by this court, and an assessment of the value of the said land and of the damages sustained had been made by a jury.

In reaching the conclusion to which the court came in that case, the judge who delivered the opinion sought simply to declare what was the legal effect of an award of commissioners; or, in case that should be set aside, the effect of a judgment rendered upon the verdict of a jury empannelled under the provisions of the charter.

Such proceedings were therein adjudged to be final and conclusive between the parties, both as to the value of the land and the damages accruing from any and every physical effect produced by the construction and use of the canal, provided it be constructed according to the provisions of the act and with proper care and skill.

There was no evidence of careless or unskilful construction of the canal, and that case was settled, and the plaintiff de-

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feated, by the legal effect of the proceedings had under the charter.

However desirable it may be that the rights of companies established for the promotion of public improvements should be quieted, and that repeated suits against them for the recovery of damages incident to the erection and the use of their works should be discouraged, I am not prepared to say that either of the decisions cited furnish authority for the court to disturb the judgment which has been rendered in this case.

These parties stand upon their *contract*, and their rights and duties must be ascertained from it.

The company had the choice of two modes of acquiring titles and of settling for damages, the one by agreement with the owner of required lands, for the use or purchase thereof, and for compensation for the damages sustained, and to be sustained by him, the other by the agency of commissioners.

In this instance they did not resort to the latter mode, either for ascertaining the value of the lands of Joshua Wright or for assessing any damages which he had sustained, or might sustain, from the erection and use of the canal; but they progressed with their work through his farm, constructed the culvert over Watson's creek, upon the land of another party, at a point some distance beyond Wright's western line, and, in February, 1834, made a contract with him, which is expressed in the deed before adverted to.

Aaron Lee, the plaintiff below, having purchased from Wright, after his conveyance to the company, can be in no better position than Mr. Wright would have been had he retained the farm until the time of the commencement of this suit below, nor is he in a worse condition than Wright would have been.

We thus are brought to determine the intent of the parties to *that deed*, as indicated by the language employed.

Can the instrument, upon the most liberal construction, be applied to extend to lands other than those therein described, and to other damages than those incident to the construction and use of the canal through those specific lands?

If, however, we adopt the defence of the company, we

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must construe the deed as reaching to damages sustained in a different part of the farm, and springing from the erection and use of a portion of the canal which is built over another person's premises.

Had the company intended that their contract with Mr. Wright should be as extensive in its operation and effect as an adversary assessment under the provisions of the charter, they would have used *some* expression in the deed that could give color to such intent.

No person, on reading the deed, could suppose that the lands of the grantor were likely to be affected by the canal at any other place than where they were intersected; and nothing in the situation of the parties, or in the character of the suit, should lead the court to a forced construction of the instrument.

I therefore conclude that the deed from Joshua Wright to the company constituted *no legal defence* to a claim of compensation for the damages set out in the plaintiff's declaration, and that the judge did not err in his instructions to the jury.

It was objected, by the opening counsel for the company, that they were not trespassers; that they had constructed their works under an authority derived from the state of New Jersey, and hence, in so doing, that they could not be guilty of creating a nuisance.

The unsoundness of that position was so manifest, that the court declined hearing a reply upon it from the other side.

The decision pronounced by this court upon the issue of the statute of limitations, in the action of Robert Wright against the company, bearing against that branch of the defence set up in this suit, I am of opinion, upon the whole case, that the judgment of the Circuit Court should be affirmed, with costs.

Judgment affirmed.

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DEN *ex dem.* HOWELL v. ASHMORE.

1. The general rule of law is, that a tenant cannot dispute the title of his landlord or of the person under whom he entered. The cases where the landlord's title has expired, or has been changed by act of law, as by a sheriff's sale, are exceptions to this rule. But the case of an adverse latent title arising from a defect in the conveyance to the landlord, which is set up only by the tenant as an outstanding title, without any right under it, or attornment to the owner, is not within the exceptions.

2. If the interest of a witness appear at any time during the examination in chief either in direct or cross-examination, his testimony should be overruled. And, for the purpose of showing such interest, he may be asked, on his cross-examination, the contents of a writing under which such interest arises, without accounting for its absence, in the same manner as he might upon his *voir dire.*

The premises in dispute in this case were two lots of land in the township of Nottingham, in the county of Mercer. The cause was tried before Justice Randolph, at the Mercer circuit, in September term, 1847. The premises in dispute were part of the estate of which James Mathis the elder died seized many years since. After his death, being intestate, his children divided his real estate among them by parol, and have since held according to that partition. In that decision the lands in question fell to the share of James Mathis the younger. James Mathis the younger died before the year 1814, intestate, leaving Sarah his daughter, the wife of John Milward, his only heir-at-law. John Milward and Sarah his wife, by deed dated September 17, 1814, conveyed the premises in question to Joseph Ashmore absolutely in fee. This deed was acknowledged by the grantors, but there was no private examination of Sarah Milward, in whom the title was, apart from her husband. Anthony Ashmore, a son-in-law of James Mathis the elder, was put in possession of this lot by Joseph Ashmore after this purchase, and with his son Thomas Ashmore, the defendant, who lived with him, cultivated it. While the land was so in possession of Anthony and his son Thomas, James Ashmore, another son of Anthony, who, as well as Thomas, was unmarried and lived with Anthony, at the request of his father, bought these lots of Joseph Ashmore, who conveyed them to James, by deed dated June 24, 1816. James

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Ashmore was a cooper by trade, and did not work on the farm or lands cultivated by his father. He continued to live in the family with his father about a year after the deed to him. Thomas lived with his father, Anthony, until the death of the latter, in 1826, and during his father's life, and after his death until this action, cultivated these lots, and was in possession of them, he supporting and providing for his father's family. There was no written or verbal lease of these lots from James in evidence, but there was evidence that Thomas had, at different times until within a year or two, called them and shown them as James' lots. James Ashmore, by deed dated December 27, 1845, conveyed these lots in fee to Peter Howell, the lessor of the plaintiff. After the execution of the deed to Joseph Ashmore Sarah Milward died, and her husband, who survived her, had also died before the date of the deed to the lessor of the plaintiff.

On the cross-examination of Mitchel Wright, a witness of the plaintiff, it came out that James Ashmore received only part of the consideration of the sale at the execution of the deed from him to Howell, and took Howell's note for the residue, to be paid when Howell received peaceable possession of the premises; and that James Ashmore, by will, had given the residue of his estate to the wife of Mitchel Wright, the witness. Upon the defendant moving that the testimony of the witness, Mitchel Wright, should be stricken out, the court overruled the motion, on the ground that the objection came too late.

Under the charge of the court, a verdict was rendered for the plaintiff. Upon the coming in of the *postea*, a rule to show cause why a new trial should not be had, was granted. The argument was had on this rule.

Argued before Nevius, Carpenter, and Ogden, Justices, by *W. L. Dayton*, in support of the rule, and *P. D. Vroom*, against it.

Nevius, J. This case, as presented here, covers much paper, but involves only two serious questions. I will state the facts out of which these questions arise as briefly as I can,

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and without special regard to the order in which they appeared at the trial, as that is not material to the decision of these questions.

The premises for which the action is brought are two lots of land in the township of Nottingham, in the county of Mercer, of which James Mathis died seized before the year 1814, and which, with other lands, descended to his heirs-at-law, one son and four daughters. James Mathis, the son, after the death of his father, died intestate, leaving an only daughter, Sarah, who intermarried with John Milward. On the 17th of September, 1814, Milward and wife conveyed the lands in dispute, by deed, to Joseph Ashmore, the same having before been set off and assigned to the said Sarah, in a voluntary partition, made among themselves, by the heirs of the said James Mathis the elder. This deed was executed and acknowledged by the said Sarah Milward, but not on a private examination and separate and apart from her husband. Previous to the execution and delivery of this deed, Anthony Ashmore, father of the defendant, who had married one of the daughters of James Mathis, was in the actual possession of these lots, and continued such possession after said conveyance, and requested his elder son James to purchase them, and give them to his younger son Thomas, the defendant. At that time the father was aged and infirm, and had, to a great extent, given up the charge of his family, and cast the burthen upon Thomas, who took it in charge, and cultivated these lands. James made the purchase of Joseph for the consideration of one hundred and seventy dollars, as appears by the deed made to him in 1816; and, on obtaining this deed, delivered it to Thomas, who gave it to his mother, in whose possession it remained till her death.

Before James made this purchase, he had boarded in the family of which Thomas had the charge and maintenance for one year, and continued to board there a year and a half after the purchase without paying board. He then left the premises, and resided elsewhere until his death, in 1845. Thomas remained on the premises, and cultivated and improved them during the lives of his father and mother, contributing to their

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support, the former dying in 1826 and the latter at a much later period, and is still in possession.

In 1845, James, who had become debilitated in mind and body, and was then living with one Mitchel Wright, in the county of Hunterdon, conveyed these lands, by deed, to the lessor of the plaintiff for two hundred dollars, of which fifty dollars was paid at the time of the conveyance, and the balance was to be paid when he obtained possession, and not before. During the whole time that Thomas was in possession, *to wit*, from 1814 to the commencement of the suit, he paid all taxes, but never any rent; nor was there any evidence that any rent was ever demanded of him, or that there ever was any express agreement between him and James that he should be the tenant of the latter, or pay any rent. John Milward, the husband of Sarah Mathis, in whom the fee simple of these lands was vested, died before the commencement of the suit.

Upon this case, briefly, but I believe substantially stated, the first question is, can the plaintiff recover upon the title shown? His title rests on the deed from Milward and wife to Joseph Ashmore, in 1814, and if this deed was so defectively executed as not to convey the fee simple title of Sarah Milward, then on the death of her husband, John Milward, the lessor's title became extinguished, and the right of possession, as well as title, was in Sarah Milward, or in case of her death was vested in her heirs-at-law. I think that the fee did not pass by the deed from Milward and wife. She, a *feme covert*, could not be divested of her title, except by deed acknowledged by her in the mode prescribed by the statute, that is on a private examination apart from her husband. There was no such acknowledgment in this case, at least the certificate does not show it. It follows, then, that the title made to Joseph Ashmore, under whom the plaintiff claims, had expired before suit brought, and there was no right of entry in him.

But it was argued that the defendant cannot raise that defence here, because he came in as tenant to James Ashmore, or held under him, and cannot deny or impeach his landlord's title. No rule of law is better settled, than that a plaintiff in ejectment must recover on the strength of his own title, or that

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he must show a good legal title or right of possession to the lands in dispute before he can eject the tenant, whose actual possession is *prima facie* a good title until a better is shown. But however general this rule, it is not universal, and has its exceptions, one of which is, that a tenant who enters upon premises by virtue of a lease or by permission of another, is not permitted, in an action by the landlord, to dispute the title of the latter, which by his own act he has acknowledged. He shall not be permitted to get possession of lands by admitting the title of another, and then retain that possession by denying it. The true meaning of this is, that a tenant shall not deny the title under which he entered, or set up a title in another, in contravention of the one he has admitted. But a tenant may always show that his landlord's title has expired at the time of suit brought, (*England* v. *Slade*, 4 *T. R.* 682; 1 *Dowl. and R.* 1; *Neave* v. *Moss*, 1 *Bing.* 360,) or that he has sold his interest in the premises, (*Doe* v. *Watson*, 2 *Star. R.* 230,) or that it is aliened from him by judgment and operation of law, (*Jackson* v. *Davis*, 5 *Cowen* 123, 135). (*a*) This is no denial of the landlord's original right. There is nothing in such a defence incompatible with the tenant's implied admission in accepting the lease. It was therefore perfectly competent for the defendant to show that the title to these lands was not in the lessor of the plaintiff. But it became unnecessary for him to do so, for the plaintiff showed it by the evidence which he himself produced. Upon the production of his own deed, which he deemed necessary to show, as the foundation of his right to recover, and the evidence of Milward's death, the fact that his title had expired clearly appeared. The deed to Joseph Ashmore recites that the fee simple of the land was in Sarah Milward, as heir-at-law of James Mathis, who was one of the heirs of James Mathis the elder; and the plaintiff himself produced this deed, which did not convey that fee. He did not rely upon a written or parol lease, and, indeed, no such lease or agreement was shown; on the contrary, the whole evidence tended rather to prove a parol gift of the lands

(*a*) See, also, *Jackson* v. *Rowland*, 6 *Wend.* 666; *Brudnell* v. *Roberts*, 2 *Wils.* 143; *Blake* v. *Foster*, 8 *T. R.* 487; *Treport's case*, 6 *Co.* 15.

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to the defendant by James Ashmore, than the relation of landlord and tenant between them. But even admitting that the plaintiff had by implication established that relationship, he was bound to show that there was an end to that tenancy, either by expiration of the lease or by notice to quit, or in some other way, which he failed to do.

There is another important question involved in this case. In the progress of the trial, it became a matter of serious inquiry, whether the defendant had not, upon some occasion, acknowledged the title of James Ashmore, and also whether James Ashmore was or was not of sane mind when he executed the deed to the lessor of the plaintiff. To establish the affirmative of both these propositions, the plaintiff called one Mitchel Wright, who was a subscribing witness to said deed, and who testified positively to the mental capacity of the grantor, and also to the defendant's calling the land James Ashmore's. On being recalled to the stand, and cross-examined, he said, that James Ashmore resided with him at the time the deed was executed and when he died; that he had made a last will and testament, wherein he had bequeathed his property to his (witness's) wife and children, and that a note of the plaintiff's lessor for one hundred and fifty dollars, part of the consideration for the lands, and payable when possession was recovered, was part of the property so bequeathed. It was objected, that the contents of this will, showing the interest of the witness, could not be proved by parol, but that the will itself, or an exemplified copy, should be produced, and the court sustained this objection. The witness was then asked, whether he had any interest in the property of James Ashmore, and, on objection made, the question was overruled by the court. I think the court was in error in both these rulings. The defendant was entitled to prove the incompetency of this witness, from his interest in the event of the suit, at any stage of the cause, when he first had reason to suspect the existence of such an interest. And as this was a collateral point, the strict rules of evidence did not require the production of the will. The witness himself was competent to swear, as to the fact, the nature, and extent of the interest he had under the

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will of James Ashmore. In *May* v. *Gray*, 2 *Penn.* 840, the late Chief Justice Kirkpatrick said, "It is altogether within the rule of law to interrogate a witness as to his interest, after he has been sworn in chief, and if he turns out to be interested, to overrule his testimony. And as to the doctrines set up here, that the witness must produce the written documents upon which his interest rests, it is entirely without foundation." This, with the single qualification, that the witness should be interrogated as to his interest, as soon as that interest is suspected, I take to be sound law and sound sense, and by this rule the court below erred in requiring the production of the will, and overruling the question put to the witness touching his interest. It may be that the other testimony in the case was sufficient to establish the mental capacity of James Ashmore at the time of executing this deed; but Mitchel Wright was an important witness on this point, as well as on the other above mentioned, and we cannot tell the effect his testimony had upon the verdict of the jury.

In my opinion the verdict ought, for these reasons, to be set aside, and a new trial granted.

Carpenter, J. Joseph Ashmore acquired the premises in dispute by deed, dated September 17, 1814, from John Milward and wife. The property was a part of real estate previously belonging to one James Mathis, but then deceased, and had been held by Milward in right of his wife, who was a daughter of Mathis. It is said that the partition of the real estate of Mathis was informal and by parol merely, but it had been so held for so many years that no question can now be raised in this case on that point.

It is said that the deed by Milward and wife was inoperative; so far as regards the wife, the certificate of her acknowledgment being informal, and that Milward having died some two or three years before suit brought, all the interest which passed by this deed ceased; that, even if the defendant entered under James Ashmore, and in such case might be estopped from denying the title of the person under whom he entered, yet that he is not estopped from showing that that title has

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expired. The rule by which, in ejectment, a tenant is concluded from denying his landlord's title, rests on the ground of an equitable, and not a technical estoppel, and, with its exceptions, must depend upon the particular circumstances of each case. The exception, that the tenant may show that the title of the landlord has expired, is for the protection of the tenant when some equity intervenes, and is scarcely to be applied to the case of a mere doubtful latent adverse title, set up only by the tenant himself, without any rights under it. The deed of Mathis and wife may or may not convey the interest of the wife; but she has set up no claim, nor has the tenant, to prevent an eviction, consented to hold under her. There is, therefore, nothing in the case to enable the tenant to invoke the benefit of this exception to the general rule. Indeed, so far from admitting the entry and possession under James Ashmore, and then, upon the expiration of his title, admitting the supposed title of Mrs. Milward, the defendant has entirely denied the title of his landlord, and claimed to hold against him by adverse possession. He has disclaimed the title of the supposed landlord, and must stand or fall by the title he has set up in himself.

Joseph Ashmore conveyed the premises by deed, dated June 26, 1816, to James Ashmore, who, December 27, 1845, conveyed the same to Peter Howell, the lessor of the plaintiff. The defendant has been in possession ever since 1816, having taken possession of the premises shortly after the purchase by James Ashmore. He has tilled the premises, and used them, so far as they were susceptible of use, from that time to the present; he has paid the taxes, and they have been known as, and called the lots of the defendant. He claims, therefore, to hold them against the plaintiff, by an alleged adverse possession of more than thirty years. But, according to my judgment, there is nothing upon which to found an adverse possession; no entry is shown under claim and color of title. It clearly appears that Thomas entered under his brother, and held the premises permissively under him, and he is therefore not entitled to defend his possession adversely against James, or against the lessor of the plaintiff claiming under James.

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James, Thomas, their father, and one sister, at the time of the purchase, formed one family. James continued to live with his father, brother, and sister for about eighteen months after this property was purchased by him. The testimony of the defendant himself shows that the purchase was made by James, in consideration of these circumstances. The use of the property was a suitable contribution to his family by a son, whose success in business was such as enabled him so to aid them. It was, however, the use of the land that was intended to be given, not the land itself, or the deed would have been drawn otherwise than to James himself. James purchased the land in his own name, and his title was acknowledged long subsequently by the brother, who entered under him. Nothing like a claim to hold adversely appears until within a short period, and there is nothing in the case on this point which creates any doubt on my mind as to the correctness of the result to which the jury arrived, or leads me to think that the verdict should be disturbed.

But there is a difficulty in regard to the evidence of Mitchel Wright. He was called by the plaintiff, and no question was raised as to his competency upon the examination in chief. Upon the cross-examination, the defendant alleged that he had discovered him to be interested under the will of James Ashmore: the wife of the witness being the sole legatee and devisee, and the property, as alleged, having been sold under an agreement that the payment of the consideration money should depend upon the success of the lessor of the plaintiff in obtaining possession, I see no difficulty as to the time and mode of raising the objection, though it is not so clear whether it is to be claimed as a strict right, or whether it does not, in some degree, depend upon the discretion of the judge. The strictness of the rule, if the witness has been once sworn and examined in chief, has been relaxed, and the objection may be taken at any time, provided, as is held in some of the cases, that it be done as soon as the interest has been discovered. 1 *Greenl. Ev.* § 421; *Jacott* v. *Layborn*, 11 *M. & W.* 685; *Den d. Downam* v. *Camblos*, 1 *Green* 436; *Shurtliff* v. *Willard*, 19 *Pick.* 212. Here the offer to prove the interest of the wit-

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ness was not only on the cross-examination, but by the contents of a will, the will not being produced. It was objected by the connsel of the plaintiff, that the will must be produced, and that a cross-examination on the point of interest was no exception to the general rule. The court sustained the objection. I think that in this the judge, in the haste of the trial, erred.

On an examination upon the *voir dire*, and in preliminary inquiries of the same nature, if the witness discloses the existence of a written instrument, it is clearly settled that he may also be interrogated as to its contents. The general rule does not apply in such case, for the objecting party may have been in ignorance of the instrument, or, at any rate, of any necessity for its production until disclosed by the witness; nor could he be supposed to know that such witness would be produced. 1 *Greenl. Ev.* § 95; *Ib.* § 422; 1 *Phil. Ev.* 132 (*Cow. ed.* 1842); *Carlisle* v. *Eady*, 1 *C. & P.* 234, *note.* But though such inquiry into the contents of written instruments is clearly admissible on the *voir dire*, Lord Ellenborough was disposed to confine it to the *voir dire.* In one case he said it could only be in its due order before the examination in chief. He said, that if at any time it appeared incidentally that the witness was interested, he would strike out his evidence; but that on cross-examination he would not allow the privileges of an examination on the *voir dire.* He refused to permit such question to be put upon the cross-examination, though the only object was to show that the witness was interested. *Howell* v. *Lock*, 2 *Camp.* 14. The reason for such rule is not very obvious where there has been no negligence, by which the party may be deemed to have waived the objection. In the case supposed, the testimony, as well on the cross-examination as on the *voir dire*, is addressed to the court, and not to the jury. When the interest is discovered, and the witness is questioned on this point, the examination becomes in its nature preliminary, and the case seems to be equally within the reason of the rule, which excuses the production of the instrument upon the *voir dire.* But there is an express decision in this state, where a different rule was followed. The court held

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that a witness might, on cross-examination, be interrogated as to his interest, without producing the documents upon which it was said to arise. *Mayo* v. *Gray*, 2 *Penn.* 837.

The evidence of the contents of the will was overruled, and by possibility such evidence as might have excluded the witness's whole testimony was very direct and positive upon material matters strongly controverted on the trial. Such error may not be fatal where, if the testimony of the witness objected to be stricken out, the court can plainly see that there is still sufficient evidence to sustain the verdict, and they are clear that the jury have arrived at the proper conclusion, the motion for a new trial being addressed to the discretion of the court. But I am not satisfied that this is such a case, and on the last ground I concur in setting aside the verdict.

OGDEN, Justice, concurred with Justice CARPENTER. The CHIEF JUSTICE and Justice RANDOLPH did not hear the argument, and expressed no opinion.

New trial granted.

JORALEMON v. POMEROY.

1. In an action for slander an innuendo cannot be used to enlarge or extend the meaning of the words spoken; it can only explain them, by connecting them with the inducement or *colloquium* previously averred.

2. The slander must appear substantially by the *colloquium* or inducement and the words alleged, and, unless it can be collected from them, it cannot be created by an allegation in the innuendo; it must appear by the natural meaning of the words in the conversation and circumstances in which their use is alleged.

Demurrer. Argued before Justices NEVIUS, CARPENTER, and OGDEN.

This action was in case, for words, and in the first and second counts the words charged are, "You are a public whoremaster," and "you are a common whoremaster," to which counts the defendant pleaded the general issue.

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3d count. "You" (meaning the plaintiff) "are a pretty man, riding the women along the street" (meaning and insinuating that the plaintiff was in the habit of having carnal copulation with divers loose, immodest, and lewd women). The fourth, fifth, and sixth counts are substantially the same, different innuendos being given in these several counts to meet the different construction that possibly might be given to the words charged.

7th count. *Colloquium* of and concerning one Jane Wilson, wife of John Wilson. "You" (meaning the plaintiff) "are in the habit of riding the women" (meaning and insinuating that the plaintiff was in the habit of having carnal copulation with the said Jane Wilson and some other woman).

The eighth, ninth, tenth, and eleventh counts, containing in substance the same charges, need not be recited.

12th count. Inducement, that the plaintiff was a country storekeeper, and used, as such, divers weights and measures, and *colloquium* of and concerning a pair of gray horses and a pair of red nets, of which the plaintiff was the owner.. "Short weights and measures paid for them," (meaning the said pair of gray horses and the said pair of red nets) "by cheating the public" (meaning and insinuating that the plaintiff was a man of wicked and depraved mind, and had contrived and fraudulently intended to cheat and defraud divers persons, while he used, exercised, carried on, and followed the said trade and business, and for that purpose had knowingly, wilfully, and fraudulently kept and used, in the way of his said trade and business, certain false weights and measures for weighing and measuring goods, wares, and merchandise by him sold in the way of his said trade or business, so made and constructed as to cause the goods, wares, and merchandise weighed and measured therein and thereby, and sold thereby, to appear of greater weights and measures than the true and real weights and measures thereof, and did knowingly, wilfully, and fraudulently sell and utter to divers persons, in the way of his said trade and business, divers goods, wares, and merchandise, as and for the apparent weights and measures of the same, by such false weights and measures,

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when in truth and in fact the weights and measures of such goods, wares, and merchandise, so sold and uttered, were short and deficient of such apparent weights and measures, and had thus defrauded and cheated a large number of persons and made large gains of money, sufficient to purchase the said pair of gray horses and the said pair of red nets, and had purchased the same with such gains).

The thirteenth count is the same as the twelfth, except that the words laid are "*false* weights and measures paid for them, by cheating the public," &c.

14th count. Same inducement and *colloquium* as in twelfth count: "Short weights and measures paid for them," (meaning the said pair of gray horses and the said pair of red nets) "by cheating the public," (meaning and insinuating that the plaintiff had knowingly, wilfully, fraudulently, and publicly kept and used, in the way of his said trade and business, false weights and measures, and knowingly, wilfully, and fraudulently did thereby and therein sell and utter to divers persons, in the way of the said trade and business, divers goods, wares, and merchandise, as and for their apparent weights and measures, by such false weights and measures, when in truth and in fact the weights and measures of such goods, wares, and merchandise so sold were short and deficient of such apparent weights and measures, and had thus defrauded and cheated a large number of persons, and thereby made large gains of money, sufficient to purchase the said pair of gray horses and the said pair of red nets, and had purchased the same with such gains).

The fifteenth count is the same as the fourteenth, except that the words are "*false* weights," &c.

To the last thirteen counts the defendant filed a general demurrer.

A. C. M. Pennington, for the plaintiff.

The counts, from the third to the eleventh, both inclusive, allege the use of words by the defendant, importing the charge of the commission by the plaintiff of the crime of *fornication*, and the counts from the twelfth to the fifteenth, both inclusive,

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allege the use of words, by the defendant, importing the charge of the commission by the plaintiff of the crime of cheating at common law, and of fraud and deception in the practice of his trade or business.

The innuendo charges (and such is in part the use and purpose of the innuendo in pleading) the sense in which the plaintiff alleges and insists the words were used by the defendant. It is not contended that the innuendo can enlarge or change, in any way, the force of the words, but it is used properly to define the sense in which it is insisted the words were used. *Cooke on Defamation* 93, *et seq.*

It is not requisite, in order to sustain any of those counts, that the words used necessarily import a charge of crime, and can mean nothing else. It is sufficient that they may in some sense import such charge, and that it is alleged they were used slanderously, with intent to make such charge. *Starkie on Slander* (*ed.* 1832) 36, 50, 51, 58, 64.

It will be left to the plaintiff to satisfy the jury at the trial, under the instruction of the court, that the words were used in the sense complained of, and the sense in which they were used and the *quo animo* are to be gathered from the concomitant circumstances of the occasion on which they were used. 3 *Green* 248.

The old doctrine, that words are to be used *in mitiori sensu*, is exploded. *Stark.* 36.

Applying these principles, the words used may in some sense import the charges alleged.

The innuendoes sufficiently allege that the sense in which the words were used imported the charges against the plaintiff of the commission of the crimes of *fornication* and *cheating*, and of fraud and deception in his trade or business.

B. Williamson, contra.

Carpenter, J., delivered the opinion of the court.

One set of counts in the plaintiff's declaration, from the third to the eleventh inclusive, relate to the same charge, which is laid in different ways to meet the possible contingencies of the case. They allege the use of words, which by the

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innuendoes in the several counts are so explained as to charge the plaintiff with the crime of fornication. Whatever may yet be the rule in England, undoubtedly it is actionable in this state to impute this offence, one involving moral turpitude, and which here has long since been made punishable by indictment. The question raised is not, whether it is actionable *per se*, without proof of special damage, to charge this offence upon another; but it is, whether the words do import the offence, and are properly explained by the innuendo, so that the special meaning, which it is alleged they were intended to convey, is evident without the aid of any previous *colloquium* or statement of extrinsic facts.

It is true that it is no longer the rule that the words alleged to be slanderous are to be construed *in mitiori sensu:* they are to be taken in their ordinary sense, as they would naturally be understood by the persons to whom they were addressed. But the meaning of the words is not to be ascertained by the innuendo. An innuendo cannot extend the sense of the words spoken beyond their natural meaning, unless something is put upon the record to which the words may be referred, and by which they may be explained. It connects the words spoken with something already on the record, and is only a link to attach together facts previously made known to the court. It may apply to whatever is already expressed, but cannot enlarge or change the sense of the previous words. *Rex* v. *Horne*, *Cowp.* 684; *Goldstein* v. *Foss*, 6 *B. & C.* 154; *Bartow* v. *Brands*, 3 *Green* 248; *Barham* v. *Nethersall*, *Yelv.* 22; 1 *Wm's. Saund.* 243, *note* 4. When words are susceptible of different meanings, of a harmless but also of an injurious meaning, the innuendo may then serve to define the sense in which the words were in fact used. In such case it will properly serve to point to the meaning which is injurious, and therefore actionable, and which, if found by the jury, will sustain the suit brought. *Griffith* v. *Lewis*, 8 *Q. B.* 841.

In this case the words are not susceptible of an injurious meaning, according to any legitimate interpretation. In themselves they are harmless, and they must have been used in some peculiar and cant way to convey the imputation charged

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in the innuendo. Now if words have a mere local or cabalistical meaning, which is slanderous, or have been so used, being in their usual sense innocent, they must be made significant by a proper *colloquium* or inducement. There must be a previous averment of the sense in which they were used. Thus in *Angle* v. *Alexander*, 7 *Bing*. 119, it was decided as to the words "you are a prover under bankruptcies," meaning that the plaintiff was accustomed to prove fictitious debts under commissions, that a previous averment, that the defendant had been accustomed to employ the words in that sense, was requisite. So it has been said, that the words "black sheep" and "black legs" could not be explained by innuendo to mean persons of bad reputation, guilty of cheating or defrauding; though, perhaps, the necessity of a prior averment of the sense in which these words were used may not be so clear as in the former instance. They are words which, perhaps, have acquired a fixed meaning, and when used in a certain connection, possibly the injurious meaning may be sufficiently obvious without the use of any prior explanatory averment. *McGregor* v. *Gregory*, 11 *M. & W.* 287. See *O'Brien* v. *Clement*, 16 *M. & W.* 159 (167); *Carter* v. *Andrews*, 16 *Pick.* 1; *Cooke on Defamation* 96, 100. Here the words do not, in their natural sense, impute any thing injurious, and upon this distinction, established by the well considered cases to which I have referred, they require the aid of an introductory statement of the peculiar sense in which it is asserted they were used to make them actionable. They require an inducement, and the innuendo will not suffice. The demurrer has been well taken to these counts.

The twelfth to the fifteenth counts, inclusive, relate to words spoken of the plaintiff, in his capacity of a country shopkeeper or retailer. The pleader in these, as in the preceding counts, seems to have mistaken the office of the innuendo. Averments of extrinsic and additional facts are made in this part of each of these counts, which would have found an appropriate position in the previous *colloquium*, and would have removed all ambiguity or doubt as to construction of the words. But these counts are not without an introductory statement, and setting

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aside such averments as appear in the innuendo alone, we must look to the words charged, in connection with the prior averments, to ascertain if the action can be maintained. "If the words before the innuendo do not sound in slander, no words produced by the innuendo will make the action maintainable, for it is not in the nature of an innuendo to beget an action." *Barham* v. *Nethersall*, *supr.* Still if sufficient appears to support the action, an innuendo improperly enlarging the sense beyond the prior statement, or so much thereof as is faulty in that respect, may be rejected as surplusage. *Roberts* v. *Camden*, 9 *East* 93; *Harvey* v. *French*, 2 *Tyrwh.* 284, *cit.* 2 *Harr. Dig.* 2431.

But the words stated in these counts, which it appears were spoken of the plaintiff in respect of his trade and business, are in our judgment actionable. The declaration states that the plaintiff was a country storekeeper, and, as such, used divers weights and measures; that he was the owner of a pair of gray horses and red nets, and that, in a conversation of and concerning the plaintiff and his said horses and nets, the defendant said: "Short (or" as in some counts "false) weights and measures paid for them," (meaning the said horses and nets) "by cheating the public." The innuendo, or so much as is necessary to refer to, in substance explains the charge to be, that the plaintiff paid for the said horses and nets by his gains, as such storekeeper, in the use of short or false weights and measures in the sale of his wares and merchandise. The explanation, to this extent, seems warranted by the words as spoken in connection with the business and occupation of the plaintiff. The words so used import a charge of fraud in his trade and business. Considered in their natural sense, as they must have been understood by the persons to whom they were addressed, they can mean nothing less, and are therefore plainly actionable. The demurrer to these counts must be overruled, and judgment for the plaintiff.

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DANIEL D. SOUTHARD v. WILLIAM POTTS AND AARON P. WRIGHT, ADMINISTRATORS OF EDWARD W. POTTS, DECEASED.

1. In an action against an administrator upon a judgment of assets *quando* it is sufficient to allege in the declaration that assets came to the administrator's hands since the judgment. It is not necessary further to show that the plaintiff is entitled to have them applied to his debt. It seems that is matter of defence to be pleaded.

2. *Plene administravit* is a good plea in New Jersey, and *(semble)* a decree of insolvency and distribution under it may be given in evidence to sustain this plea.

3. To an action or a *scire facias* on a *general* judgment against an administrator, *plene administravit* cannot be pleaded, but it may to a judgment *quando*.

4. An *administrator* defendant may plead that he has fully administered, except a certain sum, which he is ready to pay over; and the plaintiff may take judgment for that sum, or may traverse the plea by alleging that the defendant has more assets; and on an issue on such traverse the question would be, whether there was any greater sum which the plaintiff was by law entitled to have paid on his debt.

The declaration contains three counts; the first and second are substantially the same.

They set out a judgment recovered by plaintiff against defendants, as administrators, &c., of Edward W. Potts, deceased, in Supreme Court, September term, 1835, for seven hundred and six dollars thirty-five cents damages, and thirty-nine dollars twenty-nine cents costs, amounting in all to seven hundred and forty-five dollars and sixty-four cents, to be levied of the goods and chattels, rights and credits, of the said Edward W. Potts, deceased, when assets should come to the hands of the said defendants to be administered; that the said judgment is wholly unsatisfied, and that after the recovery of the said judgment as aforesaid, *to wit*, on the eighth day of September, 1835, *to wit*, at Trenton, in the county of Mercer aforesaid, divers goods and chattels, rights and credits, which were of the said Edward W. Potts, deceased, at the time of his death, of great value, *to wit*, of the value of the damages, costs, and charges aforesaid, in form aforesaid recovered, came to the hands of the said defendants to be administered, and which said goods and chattels, rights and credits, the said defendants afterwards, *to wit*, on the same day and year last aforesaid, at Trenton, in the county of Mercer aforesaid, delayed, wasted,

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and converted and disposed to their own use, whereby an action, &c.

The third count is for interest money.

To this declaration the defendant, William Potts, (the said A. P. Wright having died after filing the declaration, and his death having been suggested upon the record,) pleaded three pleas: 1st, *nil debet*, on which issue is joined; 2d, as follows:

And for a further plea in this behalf, by leave of the court here first had and obtained, according to the form of the statute in such case made and provided, the said defendant, as to the first and second counts of the said plaintiff's declaration, says, that the said plaintiff his aforesaid action thereof against him ought not to have and maintain upon the said two counts, because, he saith, that he has fully administered all and singular the goods and chattels which were of the said Edward W. Potts, deceased, at the time of his death, and which have ever come to the hands of the said defendant, or of this defendant and Aaron Wright, now deceased, and who in his lifetime was coadministrator with this defendant, or of either of them, to be administered, *to wit*, at Trenton, in the county of Mercer aforesaid; and that this defendant hath not, nor had either or both said administrators at the time of the commencement of this suit, nor at any time since, any goods or chattels which were of the said Edward W. Potts, deceased, at the time of his death, in his or their hands, as administrators as aforesaid, to be administered, and this he is ready to verify; wherefore he prays judgment of the said plaintiff, his aforesaid action thereof against him ought to have or maintain, &c.

And the said defendant, for a further plea in this behalf, by leave of the court here first had and obtained, according to the form of the statute in such case made and provided, as to the said first and second counts of said declaration, says, that the said plaintiff, his aforesaid action thereof against him ought not to have and maintain, except as to the sum of two hundred and forty-seven dollars and seventeen cents, and the further sum of six hundred and thirty-four dollars and fifty-three cents, as herein after mentioned, because, he says, that he, this defendant, and the said Aaron Wright, his coadminis-

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trator, in his lifetime, fully administered all and singular the goods and chattels which were of the said Edward W. Potts, deceased, at the time of his death, and which have ever come to the hands of the said administrators to be administered, except the said sum of two hundred and forty-seven dollars and seventeen cents, being the amount of dividend declared to be due to the said plaintiff, as his share or proportion of the assets of the estate of said intestate, on the sixth day of July, one thousand eight hundred and forty, and which the said defendant has at all times been willing to pay to the said plaintiff, and is still willing so to pay, of which the said plaintiff had notice, *to wit*, at Trenton aforesaid, and also the further sum of six hundred and thirty-four dollars and fifty-three cents, assets of said estate, received by this defendant, and remaining in his hands to be disposed of according to law, *to wit*, at Trenton aforesaid; and that the said administrators had not, at the time of the commencement of this suit, nor at any time since, nor hath this defendant now, any goods or chattels which were of the said Edward W. Potts, deceased, at the time of his death, in their or his hands to be administered, except the said sums above mentioned, and this he is ready to verify.

The plaintiff demurs generally to the second and third pleas.

This cause was argued before the Chief Justice and Justices Randolph and Ogden, at July term, 1849, by *Browning* for plaintiff, and *Vroom*, for defendant.

Browning, in support of demurrer.

This suit is brought on a judgment against the administrators, to be made of assets *quando acciderint*. The declaration alleges subsequent assets and a *devastavit*. The judgment is but the inducement; the material allegation is, that assets have come to defendant's hands since the judgment. This allegation the plea ought to deny. The plea of *plene administravit* is an evasive one, is no answer to the specific allegation in the declaration. He could not fully administer without paying this judgment. *Toller on Executors* 407; *Spencer* 4; and *Ib.* 480.

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The allegation *plene administravit* is surplusage and immaterial. 3 *Chitty* (*ed.* 1840,) 943–4; 2 *Saund.* 220, *n.*; 15 *Johns. Rep.* 325.

Plene administravit cannot be pleaded in an action on a judgment. *Spencer* 574; *Ib.* 480.

The third plea is unintelligible and indefinite. It alleges a dividend, but does not say by whom declared, or of what. If a decree of insolvency, it should be pleaded, and when made; if after judgment, of no effect. *Spencer* 577.

For what sum can he take judgment, for two hundred and forty-seven dollars and seventeen cents, or six hundred and thirty-four dollars and fifty-three cents, or for both together?

Plea must show how assets came, and why plaintiff cannot be paid out of them. 1 *Chit. Pl.* 490.

Vroom, contra.

The first plea alleges that the defendant has fully administered, and that he had no assets at the commencement of this suit or since. This, if true, covers and denies the allegations in the declaration. This is the right plea to raise the question, whether the assets were legally administered; other creditors had an equal claim in them with this plaintiff; he is only entitled to a dividend. Plea of *plene administravit* is not good in action on a judgment against administrator where the judgment, expressly or by implication of law, admits assets. But a judgment *quando* expressly admits that there are then *no assets*, and this plea is therefore not inconsistent with it. 2 *Mas.* 311; 1 *Saund.* 129.

The third plea admits two hundred and forty-seven dollars and seventeen cents in defendant's hands, to be paid to plaintiff, who may take judgment for it. The precedents (3 *Went.* 211, 214, and 2 *Chit.* 451,) bring money into court, but this is not necessary. It also shows six hundred and thirty-four dollars and thirty-three cents in hands, received since, to be distributed among the creditors. If the plea is defective in not showing how this is to be distributed, the declaration is equally so in this very matter, and on demurrer judgment is given against the first defective pleading. This declaration alleges

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that assets have since come to defendant's hands, but does not show that plaintiff is entitled by law to receive them, or what part of them. If other equal creditors, he is only entitled to a distributive share; if judgment creditor of intestate, or other preferred claim, he may be entitled to nothing of it.

In *Spencer* 573, Carpenter says, that such declaration was sufficient, but that was a *general* judgment against administrator, not a judgment *quando.*

Randolph, J. This is an action of debt, brought on a judgment *quando acciderint*, obtained by the plaintiff against the defendant in this court, in the term of September, eighteen hundred and forty-five, and to the declaration defendant files three pleas: 1st, *nil debet*, on which issue is joined to the country; 2d, *plene administravit;* and 3d, *plene administravit præter;* and to the last two pleas the plaintiff files a general demurrer.

As the defendant's counsel, in arguing this case, took exceptions to the declaration, we will consider them as first in order: The declaration is in the usual form in actions on judgment against administrators, suggesting a *devastavit* (3 *Chit. Pl.* 254); but this, it is said, is a case where the original judgment was by default or on *relicta*, and thereby assets sufficient is admitted; granted, yet in the case of *Noel et al.* v. *Nelson*, 2 *Saund. Rep.* 219, which was on a judgment *quando acciderint*, the same form is used, except that it is alleged that defendant retained the goods, instead of that he wasted them, which difference is immaterial, as is also the averment itself. The material allegation is, that goods sufficient to satisfy the plaintiff's demand had come to the hands of the defendant after the judgment was obtained; and this is sufficiently set forth, it not being necessary for the plaintiff to anticipate the defence by showing or averring that he was entitled to them. If he allege and prove sufficient assets after judgment, then the defendant can only exonerate himself from payment, either by plea or defence, that owing to prior claims or the insolvency or distribution of the estate, plaintiff is entitled to no part, or to only a distributive share of the assets proved. I think the declaration sufficient.

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As to the pleas. Under the English system of administering estates, when there are various grades of debts and priorities, and debts of a higher nature have exhausted all, or all but a small portion of the assets, *plene administravit* or *plene administravit præter* are the ordinary pleas filed in actions brought by creditors whose debts are of an inferior grade. But under our statute respecting the estates of persons who die insolvent, and our general system of administration, which admit of no priorities except such as were liens on the estate prior to the decease and the funeral expenses and physician's bill during the last illness, a doubt had arisen whether such pleas could be pleaded; the opinion of the bar was not uniform and the practice had been variant, but the question came fairly before the court in *Haines* v. *Price, executor of Price, Spencer* 480, (also *Howell's administrators* v. *Potts' administrators, Spencer* 4) whether the plea of *plene administravit* could be pleaded, or whether, in case of insolvency and settlement and distribution under the statute, the matter must be specially pleaded? The court in that case decided, unanimously, that although the plea of *plene administravit* might not have the same force and effect under our law as it had in England, and that its operation is more special, yet that it was a good plea in this state, even in an action brought on a bond given by defendant's testator, and that a settlement and distribution under the insolvent estate act might be given in evidence under an issue taken thereon.

The present action, however, is on a judgment, and counsel insist that there can be no full administration without the payment of that judgment, therefore the plea is not applicable. But the validity of this objection depends on the nature of the judgment; if it be a general one against the administrator *de bonis si et si non*, as if by default, or on plea of payment, or any other plea except the want of assets, and it is found against him, he, by such judgment, admits assets sufficient to satisfy the claim. 3 *T. R.* 685; 1 *Saund. Rep.* 219; 1 *Salk.* 310; 1 *Ld. Ray.* 690; 1 *Ath.* 292; 3 *East* 2; *Spenc.* 4 and 569. And if the party omit to plead in bar, and judgment be against him, he cannot afterwards set up the omitted matter

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in debt or *scire facias* brought on that judgment (2 *Strange* 732); but if defendant plead *plene administravit* in the original suit, plaintiff may immediately take judgment *quando*, (*Noel* v. *Nelson*, 2 *Saund. Rep.* 226) and the mere praying for such judgment is an admission at that time there is no assets. *Ib.* 219, *note* 2. The court is not informed what were the pleas in the original action in this case; but that is of no importance, for the plaintiff has taken his judgment *quando*, and thereby admitted no assets at that time, and he now brings his action on that judgment merely for assets subsequently acquired. In such an action it is competent to plead any matter which he might have done originally, or which he has not been debarred from pleading. There is no bar or admission in the judgment against him, but there is against the plaintiff, of no assets at the time. The defendant may put his defence upon the general issue of *nil debet* or *not guilty*, (1 *Saund. Rep.* 219 (6); 2 *Ld. Ray.* 1502; 1 *T. R.* 462) or *plene administravit*, or simply that he has no goods. 2 *Saund. R.* 220, *note* 3. But it is said, that if the judgment was obtained before the decree of insolvency, then under the statute (*Elmer* 169, *Spenc.* 2 and 577) the party does not take a mere distributive share, and therefore the plea of *plene administravit* cannot affect that case. If so, then it does not determine the plea bad, but merely that the case does not come within it, or the evidence does not support it. The whole defence arising under the insolvent estate act, it has been decided may be raised under this plea, whether from that it shall appear that plaintiff is entitled to have satisfied the whole, or portion, or no part of his debt.

Although there would seem to be a discrepancy between the time fixed by the averment of no goods, and that set forth in the plea, yet taking the whole plea together, that all the goods that had ever come to hand had been fully administered, and that he had no goods at the time alleged or since, it covers the whole ground; and though this *plene administravit* clause might be omitted as immaterial (2 *Saund.* 220, *note*), yet it has been inserted, and it completes the plea, and of course will not be stricken out or considered as omitted for the mere

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purpose of destroying the plea. The judgment on the third plea must, of course, be taken for the amount of assets admitted as coming to the plaintiff; and *quando* as to the part still uncollected or undistributed.

The declaration charges, that since the judgment defendant has received goods sufficient to pay the same, and wasted them; and the plea, as before stated, answers that defendant has administered all that ever came to his hands, and that he had no goods at the commencement of the suit, nor has he received any since. This, though not directly denying the plaintiff's allegation as to waste, meets the whole case, at least inferentially: had he traversed the eloignment (*Gould Pl.* 7, § 32) the plaintiff might have replied and taken issue. But if this be important and defective, advantage can only be taken of it by special demurrer, under 4 *Anne* 16; *R. S.* 990, § 13; 1 *Bac. Ab.* 151, *Amendment and Jeofails B*; 5 *Ib.* 383, *Pleas and Pleading, H.* 3. But such a traverse has been held bad (11 *Vin. Ab.* 312), for the having wasted the goods is but inducement, and the substance is, whether or no the executor had assets at the time alleged. In 2 *Saund.* 214, the judgment was *quando* as here, and the declaration set forth that afterwards this defendant received goods sufficient to pay the demand, which he retained; but the plea was *plene administravit*, in the precise form of the one in the present case. The plaintiff may take issue on the pleas, and if he prove that defendant has received more goods than is admitted by the third plea, it will be for the defendant to set up the statute of distribution, or any other defence, which he may under the pleas and issues. The demurrer must be overruled, with costs.

OGDEN, Justice, concurred.

Demurrer overruled.

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THE STATE v. STIGALL AND TURNLEY.

1. The father of a legitimate child is entitled to its custody and possession, in preference to the mother, when the father and mother are living separate.

2. When children of sufficient age to have a discretion to choose are brought up on *habeas corpus* to be removed from the custody of one parent to that of the other, the court or judge will ordinarily make no order for their delivery, but will see that the children are allowed to go with such parent, as they may choose.

3. When a child of tender years, having no discretion to choose, is in the custody of the father, it will not be taken from his custody, and given to the mother, *(semble)* however gross the father's conduct or character might be.

4. When a child of *very tender* years is in the custody of the mother, it is in the discretion of the court or judge to deliver it to the father, or permit the mother to retain it, as from their character and circumstances may seem most for the advantage of the child.

5. In a case where no other facts appeared, than that the father and mother were living separate, with mutual recriminations, on a *habeas corpus* prosecuted by the father to remove their infant children from the custody of the mother, who was living with her father, the court ordered that the eldest boy, of five years old, be delivered to the father, and that the others, a girl of one year and boy of three and a half years old, remain with the mother.

On a *habeas corpus* to the defendants to bring up the bodies of three infant children of the prosecutor.

The case was submitted without argument upon the papers to RANDOLPH and OGDEN, Justices.

The opinion of the court was delivered by

RANDOLPH, J. The return to this writ shows that the defendant, Elizabeth M. Stigall, is the mother of the three children required to be produced in court, and that they and their mother are living for the time present with her father, Charles W. Turnley, the other defendant, but not, as he retains in his custody or control, but merely there at the mother's request for support and consolation. The father prosecutes the writ, and demands the custody of his three children, and that they should be taken from the mother, and given to him. The parents, without a divorce, live separate and apart; the mother having left her husband's abode and taken her children with her, in her return sets up, by way of excuse, various grounds of crimination against the husband, all of which he, in his answer, ex-

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plains or denies, and recriminates the mother and her father. Time was given for the parties to take proof, but none has been taken, and no argument or point has been furnished by counsel, so that the court are under the necessity of looking into the cases, and deciding on general principles, without the intervention of special circumstances. From the return it appears that the three children were of the following ages: Charles William Stigall, born April 30, 1844, Robert Stigall, January 29, 1846, and Elizabeth Rebecca Stigall, May 27, 1848; so that at the return of the writ Elizabeth was thirteen months old, Robert three years and five months, and Charles five years and two months.

The custody of children, as a general principle, belongs to one or both of the parents, yet for their protection and education, or the preservation of their property, courts of equity, in the exercise of a sound discretion, will deprive both parents of the custody, and place them with third persons. 2 *Story's Equity*, § 1341, and the cases there referred to.

When a child is brought up on *habeas corpus*, if of sufficient age and discretion, the court will only ascertain whether the child is under restraint, and if so will merely make an order setting him at liberty, to go where he chooses; and if it be necessary to give effect to that order, will send an officer to see that it is respected and observed. And the same rule applies when a wife, apprentice, or any other person who has arrived to years of discretion, is brought up on *habeas corpus*, the court usually refusing to make other order, unless it be absolutely necessary. *Rex* v. *Deleval*, 3 *Burr.* 1434; *Rex* v. *Clarksen*, 1 *Strange* 444; *Rex* v. *Smith*, 2 *Ib.* 982; *Case of Woolstonecraft*, 4 *J. C. R.* 80.

But where the child is of tender years, and the father and mother have separated, or the wife has left the abode of her husband, it often becomes necessary for the court or judge, on the return of the *habeas corpus*, to determine as to the custody of the child, without waiting for the slower action of the chancellor, or referring the matter to him, as the *parens patriæ*, in the place of the sovereign. There are two classes of cases in the books, very distinctly marked in character and princi-

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ple, especially in the English decisions; the one is when the writ is brought up by the mother to remove the custody of the child from the father, or from his control, and the other is when the father sues out the writ to deprive the mother of the custody, and give it to the father. The general principle operating in both cases is, that the father, as head of the family, is entitled to the custody and control of his legitimate child, and may by will delegate that custody to a guardian. *Case of Nickerson*, 19 *Wend.* 16; *Case of Chegay*, 18 *Wend.* 637; 25 *Wend.* 72; 3 *Hill* 400; 9 *J. B. Moore* 279; 5 *East* 221; 4 *Ad. & El.* 624; *Story's Equity*, § 1341, *a*; 1 *Bl. Com.* 453.

But in the case of illegitimate children, the mother, and not the putative father, is entitled to the custody; and if deprived of it, the court will restore them to her. *Rex* v. *Mosely*, 10 *Vesey* 52, *note a*; *Rex* v. *Soper*, 5 *T. R.* 278; 7 *East* 579; 2 *Inst.* 375; 2 *Mass.* 109.

Under the general rule of the common law, courts have not felt authorized to take the child from the father, and give it to the mother, although some very strong cases have arisen which seem to demand the interference of the court. Thus, in the case of *De Manneville*, 5 *East.* 221, the court refused to take a child of eight months old from the father, and give it to the mother, on the allegation that he intended to take it out of the kingdom; and even the chancellor, on application in the same case, (10 *Vesey* 52) merely made an order restraining the father from removing the child from the kingdom, but refused to order it to be delivered to the mother, living separate from the husband. And in the case of *Skinner*, 9 *Moore* 279, wherein the mother applied to have the child removed from the father, who was living in jail and cohabiting with a mistress, the court refused to make the order, referring the matter to *chancery*, as the proper tribunal. To the same effect is *Ball* v. *Ball*, 2 *Sim.* 35, and *Wellesley* v. *the Duke of Beaufort*, 2 *Russ.* 9. This rule seemed so harsh and unsatisfactory that parliament was constrained to mitigate its rigor, and now, by 2 & 3 *Vict. c.* 54, § 1, the chancellor or master of the rolls, upon petition of the mother of any infant in the custody of the father, or other person under his authority, may make or-

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der for the access of the petitioner, or, if the infant be within the age of seven years, for the delivery of such infant to the mother, until he attains such age, under convenient regulations. 2 *Harr. Dig.* 3379, *Tit. Infant* 4. But when the father had asked a court of law or a judge to grant an order to reinvest him with the actual custody of his child, the court, before making such order, would look into the case, and notwithstanding the presumed right of the father, would exercise a discretion in the matter: such ever was and still is the law, with much less change in the rule than in the mode of exercising the discretion, or the extent of its exercise. The principle of the action of the court, or refusal to act, is this: the power and right of the father is allowed for the benefit of the child, and not to enable him to govern with arbitrary caprice or tyrannical control, so as to subvert the very object of the law in giving him the authority. Thus, when the children would be exposed to cruelty or gross corruption, immoral principles or habits, or the father is not of ability to provide for the support, education, and future prospects of the child, and the mother, or person with whom the child resides is able, the court will make no order granting the custody of the child to the father. And, too, if the child is of tender years, and especially if a female or of sickly constitution, in the custody of the mother, against whom there is no charge but inability to live with her husband, the court would make no order of removal. The discretion is pretty broad, and perhaps extending with the improvements and refinements of the age, yet it is not arbitrary, but based on sound principles, yet, like all other discretionary proceedings, will take its hue from the officer exercising it. In *Rex* v. *Greenhill*, 4 *Ad. & El.* 624, the father left his home and family, and was cohabiting with a mistress; then the mother left and took with her her three young children. The husband was otherwise of good character, and had large property, the mother none. He offered to abandon his mistress and be reconciled to his wife, or to take the children to his mansion, to be educated under the supervision of his mother, and away from any immoral influence. The wife refused, and the court made the order of removal, on the ground

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that it would be for the benefit of the children, and there being nothing of cruelty or corruption about the father or his home, the law gave him the custody. But in *Rex* v. *Dobbins*, and in *Rex* v. *Wilson*, in the same book, p. 664–5, *note*, where the conduct of the father at his home came within the discretionary exceptions, the court refused to take the child from the mother. In the matter of *Waldron*, 13 *Johns. Rep.* 419, where the father was poor, and his wife went home to her father, who was of large estate, when she was delivered of a child and died, leaving the child the heir apparent to his grandfather, and when it was still of tender age, the father applied for his custody; but the court refused it, on account of the inability of the father and the great benefit of the child, and that the special powers of the *Court of Chancery* in the case invoked would be sufficient to correct any evil. In the *case of Nickerson*, 19 *Johns.* 16, the court say the father is the natural guardian, and entitled to the custody of the child, if there be no danger of ill usage or he be not of grossly immoral principles or habits, or unable to provide for him. In the *De Hautville case*, the child was but twenty-one months old, very sickly, and, in the opinion of physicians, not of an age to be separated from his mother; and, on these grounds the court rightfully refused to remove the child from the mother, and place him with the father. The case derives interest from the station of the parties, the extended and exciting evidence in relation to the history of the marriage and separation of the parents, as well as from the great ability and learned investigations of both counsel and court, yet in its simple details is of no extraordinary character, and though differing in result from *Rex* v. *Greenhill*, yet it comes within the principles and scope of the exceptions stated by the court in that case; the real difference is in the mode and extent of the discretion. In the English case the court, in a very strong case, exercised their discretion, and removed the child because they considered the exercise within the rule and for the benefit of the child: in the American case the court, in not a very strong case, refused its exercise, for pretty much the same reasons. In the case of *Barry* v. *Mercein*, to be found in 25 *Wend.* 72, 3 *Hill* 401,

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and 8 *Paige* 47, the same difficulty occurs as to the mode of exercising the discretion, but upon the general principles of law there is no great diversity among the several jurists who examined the matter, and these principles will generally be found to accord with what has been before stated. In *Grey's case*, 6 *Law Journal* 529, the child was of tender years and feeble health, and was left with the mother, though living apart from the husband. So in the present case, the two younger children, one of thirteen months and the other of about three years, are too young to be removed, for any practical or useful purpose to themselves at least, and as nothing is proved against the mother but her inability to live with her husband, they should for the present remain with her; but an order may be entered to deliver the eldest child to his father.

THE STATE v. ENGLISH AND OTHERS.

The map annexed to the return of surveyors of the highways laying out a road may be made and annexed by the practical surveyors, by their direction. It is not necessary that they should sign it or that they should see it.

On *certiorari* to the Mercer pleas, in matter of highway.

Argued before the CHIEF JUSTICE and RANDOLPH, Justice, *Wilson*, for prosecutor, *Beasley*, for defendants.

The CHIEF JUSTICE delivered the opinion of the court.

The only reason relied on for the reversal of the proceedings below is, that the surveyors did not make and annex to their return a *map*, in pursuance of the requirements of the statute. *Rev. Stat.* 516, § 5.

The surveyors, in their return, certify as follows: "We do herewith return a map and draft of the said road, with the courses and distances, and reference to the most remarkable places, and the improvements through which it passes." There is a map in proper form annexed to the return. It appears, however, by affidavits taken under a rule of this court, that

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the surveyors of the highways, having signed the return, and having given directions to the practical surveyor, by whom the route of the road was surveyed, to prepare a map in accordance with the survey, to be annexed to the return, finally adjourned; that the map annexed to the return was subsequently prepared by the professional surveyor from his field book, and was by him annexed to the return, without having been seen or approved by the surveyors of the highways by whom the road was laid out.

It is insisted that the office of surveyor being judicial in its character, its duties cannot be performed by deputy, and that, having finally adjourned, their power was determined, and that no act subsequently done can be regarded as their act. We think the objection is not well taken. The surveyors having viewed and laid out the road, having caused it to be surveyed by a practical surveyor, and marked at proper distances, having signed the return containing a full description of the road as laid out, and having directed the surveyor, by whom the route of the road was surveyed, to prepare and annex to the return a map of the road, in accordance with the survey, and such map being prepared and annexed to the return, the requirements of the statute are complied with.

The mere mechanical operation of drafting a map is in no sense a judicial act. It must accord with the route, as designated in the return. In point of fact it is never signed nor in any way ratified, or even identified by any act of the surveyors, and the statute does not require it. No practical advantage could be derived from the map being shown to, or approved by the surveyors.

The proceedings must be affirmed.

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IN MATTER OF A PUBLIC HIGHWAY, LAID OUT IN THE COUNTIES OF BERGEN AND HUDSON.

1. If a turnpike company, whose charter has expired by its own limitation, sell their road and bridges to an individual, all the franchises connected therewith are destroyed, and the property is held as private property, unprotected by any contract or franchise in the charter.

2. If a road already formed and bridges already built be owned by an individual as private property, a public highway cannot be laid over them by surveyors, so as to take the improvements for the use of the public. The word *land*, in the road acts of New Jersey and in the exception in the constitution, means land in its popular sense, without the improvements upon it.

3. Costs cannot be awarded on a successful motion to set aside a return of surveyors as laying out a road; there is no statute in settled practice to authorize it. *(note.)*

In matter of highway. On motion to set aside the proceedings of surveyors.

Six surveyors of the highways of the counties of Bergen and Hudson, appointed by this court, at April term, 1848, on application of Albert R. Terhune and others to lay out a public highway in the counties of Bergen and Hudson, made a return, laying out a highway as applied for. To the recording of this return, Abraham J. Berry, an owner of lands through which the road was laid out, filed a *caveat*, and, at the term of July, obtained a rule upon the applicants to show cause why the return and proceedings of the surveyors should not be set aside, with leave to take affidavits.

No grounds for setting aside the return were assigned in the rule or by any paper in the cause, they are to be gathered from the arguments of the counsel and the opinions of the judges. Both parties took depositions, and offered exhibits under the rule for that purpose.

The notices of the application for the appointment of surveyors did not allege, or show on their face, that ten of the applicants were residents and freeholders in Bergen and ten in Hudson, but was signed with twenty names, alleging themselves to be freeholders and residents in Bergen and Hudson; the affidavit annexed proved that ten of them were freeholders and residents of Bergen and the other ten of Hudson. This notice did not contain any particular description of the route

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of the road applied for; it gave the beginning and ending points with certainty, and described the road as "thence to run southeasterly and southerly, in said townships of Lodi, Harrison, and North Bergen", to the ending stake. Objection was made by the caveator, on the application for the appointment of surveyors, to the sufficiency of the notice in the designation of the residence of the applicants, and to the sufficiency of the description of the route of the road to be laid out. But the court, after hearing counsel, held them sufficient, and appointed the surveyors.

By the proof it appeared that Edo Vreeland, one of the surveyors appointed, and who signed the return, had before his appointment expressed his opinion in favor of laying out the road; that at town meeting, in 1848, he had told a voter that he desired to be elected again (he having been a surveyor for thirteen years) for the purpose of laying out this road; that his house was, and had for years been kept as a public house on the road to be laid out, and that the surveyors, on the day of laying out the road, met and were entertained at his house.

It further appeared that the road laid out by the surveyors passed, for almost its whole length of five miles, over the route of the turnpike road formerly constructed by "the New Barbadoes Toll Bridge Company," crossing the remains of former bridges built over the Hackensack river and Berry's creek, two navigable streams, and passing through one side of the remains of a toll house standing near the shore below high water mark on the Hackensack river; that the bridges had become dilapidated, were partly thrown down, and had for some time been impassable; that the frame and part of the weatherboarding of the toll house were standing, but that it was not inhabited or inhabitable; that the turnpike road had become impassable, its use had for one or two years been abandoned, and part of it had been enclosed by the persons to whom the land originally belonged.

The New Barbadoes Toll Bridge Company had been incorporated by an act passed February 16, 1816, (*Pam. Laws* 130) and their charter was to be void, unless the road was completed in — years from the passage of the act. By several

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supplements, the time for completing the road was extended to February 18, 1843. The legislature did not further extend the time, and the road was not then completed; but the bridges had been built, and part of the road completed, and had for years been travelled, the legislature having, by a special act, granted power to take toll on the road and bridges before completed.

The company, after the 18th of February, 1843, exercised none of the franchises granted by their charter; and by deed dated February 15th, 1843, reciting that their charter was about to expire on the 18th of that month by reason of their not having completed their road, they conveyed their road and bridges and all their real property to Abraham J. Berry, in trust for the benefit of the creditors and stockholders of the company. Abraham J. Berry, in pursuance of the trust, conveyed the road and bridges to John A. Berry by deed, dated May 28, 1844, for eight hundred dollars. Before the laying out of this road, the title of John A. Berry to the turnpike road and bridges had become vested in Abraham J. Berry, the caveator.

The road, as laid out by the surveyors, extended in the enclosure of Edo Vreeland, at the northwest corner of his farm, for the distance of ten or twelve feet; but, by the enrollment of a decree in chancery, it was shown that the title of this gore was not in Edo Vreeland, but had vested in the company, and was now in Abraham J. Berry.

It was proved by the surveyors that they hesitated about laying out the road, on account of the expense which the long and expensive bridges required would throw upon the county; and that this objection was obviated by the assurances given to them during their deliberation by the counsel for the applicants, that these bridges would be built by R. Morrell, who was about organizing a company for that purpose, and would not involve the county in expense.

Stephen Kingsland, one of the surveyors, testified that he would not have laid the road there on the meadows, if it had not been that it could be made at a small comparative expense on account of the causeways built over the meadows on the route

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taken, by the old company; that he thought the road was required by the public, and that the necessity was great enough to warrant the expense, but he would have been unwilling to incur it, because a great part of it would have fallen on the township of Harrison, where he lived, and he would have been taxed, and would have derived no benefit, as he lived in the other end of the township.

It further appeared that all the land taken by the road laid out on the route of the old turnpike, with the exception of three small parcels, had been given by the original owners to the turnpike company, for the purpose of having a road constructed upon it, and that these same owners had contributed to its construction by subscribing to the stock of the company.

The case was argued at January term, 1849, before the Chief Justice and Justices Nevius, Carpenter, and Ogden, and held under advisement until October term.

Vroom and *W. Halsted*, for caveator, *Zabriskie*, for applicants for road.

Vroom, for caveator.

I. It should appear on the face of the notices for the application that ten of the applicants reside in each county; this is required by the construction given to the act. 2 *Penn.* 665; 2 *Halst.* 36. The notice ought to show on its face that all the requirements of the law had been complied with; that it so appears in the affidavit is not sufficient.

II. The application is too general, it gives only the beginning and ending points and the general course. And in a road of five miles in length gives no other point, and does not mention two navigable tide rivers over which it passes.

III. The allegation in the return, that the notices of the surveyors meeting were signed and set up according to law, is not sufficient. It should show how many, and when and where put up.

IV. The description of the road in the return is too indefinite, in a road of five miles in length it gives courses and distances, and says, passing over lands of A. I. B., M. V. M., &c., without saying how far on each; it does not designate

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how much is on old turnpike road, nor does it mention the bridges which are improvements.

V. This road is laid out over, and takes private improvements of great value; the road bed and bridges are expensive improvements, which by this laying out are attempted to be taken from the owner without compensation. The exception in the constitution is, that *lands* may be taken as heretofore.

VI. Edo Vreeland should not have been appointed a surveyor; he was not impartial, he had expressed his opinion, solicited an election, and the value of his tavern depended on the laying out of this road. This entertaining the surveyors shows the interest he took in this matter.

VII. The inducements held out to the surveyors by the promise to build the bridge were improper. Surveyors must be left unbiassed in their judgments, to form them from the circumstances as they exist, and the land owner is entitled to the protection which the expense of making a road affords against its being laid out. 1 *Green* 176, *State* v. *Stites.*

Zabriskie, for applicants.

I. As to the first reason, it is a sufficient answer, that the act which prescribes the notice does not direct that the residence of the applicants should appear on it. *Rev. Stat.* 515, § 3. No reason of public policy or private justice requires it, and the courts will not legislate by adding new requisites, even if it should not be thought expedient so to amend the act. The practice in this court has been both ways; in ten years I find nine cases with county designated, and three without it.

II. As to the description of the road in the notices of application, it conforms exactly to the only direction in the road act relative thereto, it designates the beginning and ending points; and this was held by Kirkpatrick, C. J., to be the most proper description. 1 *South.* 31, *Matter of road.* Besides this matter as well as the first objection taken were fully argued before this court on the application for surveyors, and the court, after argument, consideration, and consultation, overruled both objections.

III. The road act makes the determination of the surveyors,

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as to the notice of their meeting, conclusive, and the form in this return, in that respect, is the one universally used.

IV. As to the description of the road in the return, it is as definite as courses, distances, and monuments can make it. The improvements are not noticed in the *return*, the statute does not require it; in the annexed *map*, where the statute requires it, they are all marked down. *Rev. Stat.* 516, § 5.

V. As to the improvements taken, there are none taken that are forbidden by statute; the remains of the toll house is no dwelling house; a *dwelling house, ex vi termini*, is a house in which some one dwells; it is so settled in burglary and arson. 1 *Russell on Crimes* 799, 803. In the road act exception, it must at least be *habitable*, this was not; if this were a dwelling house, a single timber or one rod of stone wall remaining would make a dwelling house: besides, there is no proof that this ever was a dwelling house. By settled decisions before the constitution, other buildings, as a bark house, did not prevent the laying out a road. *State* v. *Stites*, 1 *Green* 176. The true construction of this clause in the act, coming as it does in this and all preceding acts after the thirty-second and thirty-third sections respecting encroachments, would seem to confine it to them. The first introduction of this clause in the road act was in the act of March 17, 1774. *Allison* 389, § 5. It was then plainly confined to removing encroachments in old streets, the word "by" being where "or" now is. It was first changed in act of March 16, 1798, *Pat. Rev.* 327, and this alteration only extended it to highways *out of* villages.

If land could be taken in this way before the constitution it can still be so taken. As to the toll house and bridges, they are nuisances in navigable waters, which any one may abate; they are not to *be taken* for the road; but if they are in the way of a lawful road they may be removed by the proper authorities: the company, when their charter expired, properly ceased to maintain them, and they went to decay. As to the franchises of the company, they are forfeited; they do not pretend to exercise them; and the recital in their deed of February 15, 1843, that their charter was about to expire, con-

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cludes them; there could be no *quo warranto* against a company refusing to exercise or usurp franchises.

There is in this case a peculiar equity in taking the road bed of the old turnpike. That land was first given by the adjacent proprietors to the company, for the purpose of building a road on it; they subscribed stock for the same object: a road, not dividends, was their object. When the charter of the company expired, the lands *reverted;* company could not convey, they were only given and taken for a road, the company had only the easement. The whole line of the road was abandoned, and part of the lands were fenced in by the former owners.

VI. Edo Vreeland was not disqualified as a land owner, the record of the chancery suit shows that his *title* to all the land occupied by the road was out of him; the other objections to him were addressed to the *discretion* of the court. *State* v. *Conover*, 2 *Halst.* 217, and that discretion must be exercised at the time of the appointment. *Rev. Stat.* 515. Either of them, if shown at that time, might have induced the court not to appoint him. His entertaining the surveyors, as he was an innkeeper, will be presumed to have been for compensation paid by them or the applicants.

VII. As to the influence of the offer of building the bridges, the court will not look into the motives of surveyors. Ewing, C. J., in *State* v. *Stites*, 1 *Green* 172. And this offer was not illegal, it was fair and just, not against any rule of law or principle of morals.

Halsted, for caveator, in reply.

The residence of the applicants is not mere matter of form. The objection to Edo Vreeland, if he had been bribed or hired for this object, could not have been taken by us at the appointment, if we did not then know it. This is not analogous to a challenge to a petit juror. A grand juror may be challenged afterwards.

[Chief Justice. That point has recently been decided the other way in this court, and the case of *The State* v. *Rockafeller*, 1 *Halst.* 332, overruled.]

Land which once belonged to a corporation cannot be taken

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for a road, even if the charter is gone. *State* v. *Demott*, 1 *Green* 156–7. The franchises of the company exist until forfeited by a decree of some competent court directly on the point. By the right of eminent domain corporate property or franchises may be taken on compensation rendered. 1 *Saxt.* 157; 6 *Howard* 507, *Bridge Co.* v. *Dix*, 17 *Conn.* 40, 45–7; 23 *Pick.* 360, *Water Power Co.* v. *Railroad Co.*; 7 *N. H. Rep.* 67; 11 *Ib.* 122; 15 *Verm.* 145; 11 *Pet.* 168; 3 *Met.* 380, *Dodge* v. *County Commissioners*; 5 *Ib.* 371, *Ashley* v. *Easton Railroad Co.*; 10 *N. H.* 247.

Under the old New Jersey road law, corporate property was never taken for roads, and in the constitutional exception *land* is to be taken in its popular acceptation. In West Jersey lands were at first only taken for roads upon compensation. *Learn. & Spicer* 440, § 18.

Green, C. J. The caveator in this case seeks to set aside the return of the surveyors—1st, on the ground of numerous irregularities in the proceedings, and 2d, because the surveyors had no authority to lay out the road in question. The last objection, as it lays at the foundation of the entire controversy, I propose to consider first.

The facts of the case, so far as they are material to the present inquiry, are briefly these: The road, as laid out by the surveyors, commences on the east side of the Passaic river, opposite Acquackanonck. It extends a distance of more than five miles, crossing two navigable streams (Berry's creek and the Hackensack river), and terminates on the island of Secaucus. Its entire length, with the exception of an inconsiderable portion near the beginning point, is laid out over the turnpike road and bridges constructed by "the New Barbadoes Toll Bridge Company." That company was incorporated by an act of the legislature, passed on the 16th day of February, 1816. They were authorized by their charter to construct a road four rods wide from the east of the Acquackanonck bridge to the Hackensack and Hoboken turnpike road, and to build bridges across Berry's creek and Hackensack river in the line of the road. As soon as the road and bridges should be

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completed, the company were authorized, under a license for that purpose to be obtained from the governor of the state, to erect a turnpike gate across the bridge over the Hackensack river and to receive tolls. The charter contains further provision, that if the company should not within three years after the passing of the act commence making the road, and within ten years thereafter complete the road and bridge, the act should cease. By several supplements to the original act, the time for the completion of the work was extended from time to time until the 18th day of February, 1848. By a supplement, passed on the 18th of February, 1840, the company were authorized to receive tolls.

The company caused the bridges to be built over Berry's creek and the Hackensack river, and the road to be laid out and partially constructed. The road, however, was not completed within the time limited by the original act, or by the supplements, and the act of incorporation ceased on the 18th of February, 1843. On the 15th of February, 1843, before the determination of the charter, the company conveyed their turnpike roads and bridges, and the land occupied thereby, to Abraham J. Berry, upon certain trusts in the deed of conveyance specified. On the 25th of April, 1844, the trustee, in pursuance of the power reposed in him, sold the road, real estate, and bridges, conveyed to him by the company, at public vendue, for nine hundred and ten dollars, to John A. Berry, and by deed of conveyance, bearing date on the 25th of May, 1844, conveyed the same to the said John A. Berry in fee simple. By several subsequent conveyances, the title of John A. Berry vested in Abraham J. Berry, the caveator. The title of the said Abraham J. Berry to the said real estate, road, and bridges has not been divested, but remained in him at the time of laying out the road.

From this statement of facts, it is apparent that the case does not involve any violation of corporate franchise or infringement of charter rights. The charter of the company was forfeited. Their very existence was determined. The property taken was exclusively individual private property. The power of the state therefore, by virtue of the eminent

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domain, to take and appropriate to public use corporate franchises, is not brought in question. The case, it must be admitted, stands entirely clear of that difficulty. It does not fall, therefore, within the principle of *the West River Bridge Company* v. *Dix*, 6 *Howard* 507. That case decides that a bridge owned by an incorporated company, having the franchise of taking tolls under a grant from the legislature, may be taken as a part of a public highway, and the franchise of the company destroyed by virtue of the eminent domain, without a violation of contract or an infringement of the constitution. Nor does the case come within the principle of *The State* v. *Demott (2 Green* 254*)*, which decides that, under the law of this state, surveyors of the highways have no power to vacate a highway granted and confirmed by charter from the legislature.

The question presented is, whether a turnpike road or a bridge owned by a private individual, acquired by purchase or constructed for his private benefit, can be taken and appropriated, under the laws of this state concerning highways, to public use without just compensation? Whether such structures or improvements are *land*, within the meaning of that clause of the constitution which declares that "Private property shall not be taken for public use without just compensation; but *land* may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made?" Whether regard be had to the origin of the law, the practice under it, or to sound principle, I am clear that the question must be answered in the negative. The familiar principle, that private property shall not be taken for public use without just compensation, is a dictate of natural justice. It is founded in natural law. It has its origin back of political constitutions.

The apparent departure in the legislation of this state from so clear a principle, had its origin in the practice of the proprietors, early adopted and uniformly adhered to, of including in every grant of land an allowance for highways. The amount of the allowance varied in the two provinces, but in each it was amply sufficient to meet all the probable requirements for

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roads through a long period of time. In fact the allowance was such, that in many of the agricultural districts of the state, where lands are held under ancient grants, the surveys still contain more than the original grant, notwithstanding all the deductions that have been made for highways. The legislation had its origin at a period when the laying out of a highway over land was a benefit conferred, rather than a burthen imposed upon the proprietor. Under such circumstances, the taking of land for public roads was not a taking of private property for public use, within the appropriate sense of the term. The lands taken were in fact given to the grantee for public purposes; he paid nothing for them. The grantee was trustee; he stood seized in equity for the use of the public. When, therefore, a road was laid over the lands of a proprietor, nothing was in fact taken which was properly considered private property. Early legislation upon this subject must therefore have had regard to the taking of land in its more strict and appropriate sense, and not to structures or improvements upon it. Nor are there wanting expressions in the act which favor such construction. Roads are required to be laid out in such manner as to do the least injury to private property; and, by the thirty-sixth section of the act, it is enacted, that nothing in the act contained shall be construed to extend to narrowing, widening, or altering any street in any of the cities, towns, or villages of the state, or to pulling down or removing any dwelling house, market house, or other public building heretofore erected, and which may encroach on any highway. Without insisting upon such construction of this section as would prohibit the laying out of a highway upon or over any dwelling, the provision itself sufficiently indicates the general policy and spirit of the act, and the intention of the legislature in its enactment, and the practice under it is believed to have been in conformity with such construction. If a public highway has in any instance, in this state, been laid through or over a dwelling, such instances are certainly rare. No instance has fallen under my observation, nor, upon inquiry, have I heard of one; on the contrary, the disposition to avoid interfering with structures or improvements of any kind, and so to

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carry out the act as to do the least injury to private property, has been such as to create, in many instances, serious public inconvenience in the laying out of roads. Bridges, turnpike roads, or other structures have not heretofore been taken for public highways, nor are they *land* within the meaning of the constitutional provision.

While there would be manifest impropriety in disturbing, without legislative authority, the practice of taking land for highways, "as heretofore," sanctioned as it is by the constitution, there would be a still more obvious impropriety in giving greater latitude to the practice, and in taking not only *land as heretofore*, but bridges, turnpike roads, canal banks, or any other private property for public use without compensation. It is the duty of the court to maintain the law as it stood at the adoption of the constitution, but not to extend its operation. If the materials for the construction of a bridge or a turnpike road be brought upon the ground, it is very clear that they could not be taken for public use without compensation, and it is difficult to perceive what new right the public acquire to them, after the owner had bestowed his labor upon them in constructing a road or erecting a bridge.

If an extensive landed proprietor or manufacturer should construct upon his own premises, for the use of his land, or his forge or other works, a plank road and bridge, may it be taken and appropriated to public use or a highway? May a highway be located upon the bank of a canal? I think these questions must be answered in the negative, and if so, it must be on the ground that such structures or improvements are not *land* within the meaning of the constitution.

It would certainly be a straining of the principle to declare that in the laying out of a highway, no structure, bridge, or road might be incidentally crossed or interfered with. A fair application of the principle warrants no such conclusion. But in the present case, although the application is entirely silent as to the existence of a previous road or bridge, it is clearly established by the evidence, and is not questioned, that the road is laid out a distance over five miles directly upon the turnpike road and bridges of the caveator, and that it was so

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done with the design of taking the improvements of the caveator, and appropriating them to the public use; such an act is taking private property for public use without just compensation, and is alike unconstitutional and unjust.

It is no answer to the objection, that the road is in places impassable and the bridge ruinous. The principle cannot depend upon the value of the property at stake. It is in evidence that these improvements cost many thousands of dollars; they were purchased by the caveator at a cost exceeding nine hundred dollars. They cannot, therefore, be pronounced valueless, and the fact that they are taken for the use of the public, is a strong indication that the public expect to derive a benefit, not from the *land* merely, but from the improvements of the proprietor. Mr. Kingsland, one of the surveyors by whom the road was laid out, expressly testified that he would not have felt justified in laying the road, if the turnpike had not been there. In other words, the laying out of the road was warranted, if not induced, by the fact, that the public would enjoy the use, not of the *land* merely, but of the *improvements* which the proprietor had made upon the land. If so, it is a dictate of law and of justice that he should be compensated for the property so taken.

Nor can it excuse the act, that the improvements are of little value to the individual, but will be of great utility to the public. It is infinitely better that the public should suffer a temporary inconvenience, than that sound principle should be sacrificed, or the safeguards of private rights trampled under foot.

Nor is it perceived that there is either truth or weight in the objection, that the bridges, being erected over navigable streams, are nuisances, and that, therefore, the caveator cannot complain of a violation of his property by their removal or appropriation to public use. The bridges were erected by the New Barbadoes Toll Bridge Company, under express sanction of law. The mere determination of the charter cannot convert a lawful erection into a nuisance. If it be an obstruction of the navigation of the river, it may be complained of as such, and relieved against. But it was originally a lawful

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erection. The Toll Bridge Company had lawful authority to construct it, and title to the structure when completed. Their title to the structure was conveyed to, and vested in the caveator.

This road being laid, throughout almost its entire extent, over the turnpike road and bridges of the caveator, the return is unlawful, and must be set aside.

The conclusion to which I have arrived upon this point, renders it unnecessary to give any opinion at length as to irregularities in the proceedings urged before us as grounds for setting them aside. I do not see in any of them sufficient reason to authorise us to set aside the proceedings.

Nevius, J. Several reasons have been assigned, and urged before us, in support of the motion to set aside the return of the surveyors in this case. I concur in the views expressed by the Chief Justice on all the points discussed by counsel, except that which relates to the location of the road, and here I feel constrained reluctantly to withhold my concurrence.

It is objected to the return, that the surveyors have laid the road on and over a strip of land heretofore purchased by a turnpike company for the construction of a turnpike road, and through and over a building formerly used or designed for a toll house, and over a bridge erected many years since by the aforesaid company.

The facts, as they appear from affidavits taken under a rule of this court, are these: In the year 1816, a company was incorporated with power to extend the Paterson and Hamburgh turnpike to the Hudson river; but if the said road should not be completed within a certain time, prescribed by the charter, it was provided that the same should be forfeited, and all the rights and franchises, as granted to the company, should cease and become null and void. In pursuance of this charter, the company was organized, purchased the right of way from the landholders, on the whole or part of the route, erected the bridge and toll house in question, and made some progress in the construction of their road; but, failing to complete it according to the provisions of their charter, the same became

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forfeited, and their franchises as a corporation ceased. The property thus acquired, consisting of the land, bridge, and toll house, was afterwards sold, and purchased by the caveator in this case, who now claims to hold it free from liability to be taken and occupied by the public for a public highway, unless just compensation shall first be made to him. The bridge is now in a dilapidated condition, and the house not only uninhabited, but uninhabitable.

The practice of taking lands of private individuals for public roads without compensation to the owners, has prevailed in the state of New Jersey from time immemorial, and, in the language of this court in the case of *The State* v. *Potts*, 1 *South.* 349, cannot at this day be questioned. It had its foundation, probably, in the grants of lands from the original proprietors, which uniformly contained an allowance of five per cent. for roads and highways. This practice, too, is fully recognised and sanctioned by the present constitution of the state. The sixteenth section of the first article declares that "lands may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made." This has not yet been done.

The land, then, of private individuals may be taken for roads without compensation, according to immemorial usage and constitutional sanction. And land comprehends, not barely the soil, but all improvements of a permanent and substantial nature made upon it; herbage, trees, fences, buildings, and the like, are all embraced in the term land. The power, therefore, to take private lands for public roads extends to all lands, however improved, unless it is limited by the practice prevailing before the adoption of the present constitution or by some legislative provision. Let us inquire, then, what was the limit to the exercise of this power before the constitution of 1844? By the act of the legislature relative to roads, surveyors are authorised to lay out a public highway over private lands, pursuant to an application for that purpose, if they should deem such highway necessary, and of this they are the judges. And in the exercise of that power, they are required so to locate it, as to them shall appear best calculated to pro-

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mote public and private convenience, having regard to the best ground, the shortest distance, and the least injury to private property. These are the only statutory limits to their discretion. And if that discretion should be ignorantly or corruptly exercised, the act provides that chosen freeholders shall be appointed, at the instance of a party aggrieved, to review the proceedings of the surveyors, and affirm or set them aside, as they may see proper. I know of no other restriction or limitation to this power. The act gives power to lay roads over private lands without compensation, and it does not limit the power to unimproved lands, nor does it define what improvements on land may or may not be taken for public use, further than that the act shall not extend to pulling down or removing any dwelling house, market house, or other public building, heretofore erected. If improved lands are to be exempted from the operation of this act, and are not liable to be taken for public roads, we may well inquire into the nature and extent of the improvement which will cause the exemption. Will the improvement of the soil, the erection of fences or an outbuilding, the planting of fruit or forest trees, the construction of walks and avenues, constitute such improvement as to exempt the land from necessary public use? I apprehend not. Such has never been the practice, nor do I understand it to be the law.

In the case of *The State* v. *Stites and others*, 1 *Green* 176, the court said, "there was good reason for the protection of a man's castle (his dwelling house), but there was no statute, nor any solid argument, which would render more sacred, or less liable to intrusion, a bark house or tan yard, than a field, an orchard, or a garden."

I know of no improvement upon land which, according to practice or according to law, will constitute a bar in New Jersey to its appropriation to a public highway, except a dwelling house, or market house, or other public building. I do not mean to say that this court would sanction the act of a board of surveyors, were they to lay out a public road over and upon the line of an established turnpike or railroad, belonging to an incorporated company, invested with the right of taking

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tolls and burthened with the duty of keeping it in repair. Nor would we sanction the laying out a road through a public cemetery; yet I apprehend that before this court is called upon to interpose its authority in such cases, and set aside the proceedings of surveyors, on the ground of an abuse of legal discretion, the chosen freeholders ought first to be called on to review those proceedings.

What is there, then, in this case to warrant the interference of this court with the return? The land taken is to all intents private property, as much and no more so, than the adjacent lands. It is not now a public road nor a turnpike road, nor has it any franchise annexed to it. And what are the improvements that render it too sacred for public necessity? A dilapidated bridge and a dilapidated building. These, in my opinion, are no legal impediments to laying out the road, nor any legal objection to the return. If the owner sees fit to remove the materials of which they are composed, and which now constitute their essential value, he has the legal right to do so.

But, it is said, he is entitled to compensation for this property before it can be devoted to a public highway. This is equivalent to saying, that whatever may be the public convenience or necessity for these lands, they cannot be taken at all for a public highway, for the law has made no provision for such compensation. What would be the extent of the compensation to be made? Would it be for the fee simple of the lands, or only for the use of the lands while occupied as a road? If for the use only, is it to be an annual sum, or are the parties to guess at the probable period of such occupation? Who is to make the assessment, and who are to pay it; and, when made, where is the law requiring the owner to accept the amount assessed in satisfaction of the compensation claimed? All these are serious questions, and must be answered before I can consent to set aside this return for this reason. I regret the necessity which constrains me to differ with my brethren on this point, but thinking as I do, I would not fulfil my trust were I to yield my opinion before I was convinced.

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CARPENTER and OGDEN, Justices, concurred with the Chief Justice.

Return of surveyors set aside. (*a*)

(*a*) In this case a rule was entered, on part of the caveator, to set aside the return of the surveyors, with *costs*, to be paid by the applicant to the caveator. At the next term, *Zabriskie*, for applicant, moved to set aside so much of the rule as regarded costs, costs not having been ordered by the court. *Vroom*, for caveator, opposed the motion.

The court, upon deliberation, held that costs could not be awarded in such a case as this, it not being authorized by any statute or settled practice. Rule amended accordingly.

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CASES DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW JERSEY,

AT JANUARY TERM, 1850.

FINLEY v. SIMPSON.

If a deed *inter partes*, whereby an estate is conveyed to the grantee, and the estate conveyed is accepted by the grantee, although only signed and sealed by the grantor, it is the deed of both parties, and the grantee is bound by the covenants therein contained on his part, and can be held in an action of covenant for the breach of them.

This was an action of covenant, brought by the plaintiff against the defendant, and was tried, at the May term of the Essex Circuit Court, before the Chief Justice.

The declaration sets out, in substance, that on the eleventh day of May, 1835, the plaintiff was seized of a certain lot of land, situate in Newark; and being indebted to one Elisha Whitaker in the sum of two hundred and thirteen dollars and seventy-five cents, gave to him his bond therefor, dated May 1, 1835, payable in four years; and that on the same day he gave a mortgage on the said land, and continued in the seizin of said lot subject to said mortgage, until the execution of the indenture next mentioned.

And the declaration then proceeds as follows: "And whereas, the said plaintiff being so seized, afterwards, and before

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the payment of the said sum of two hundred and thirteen dollars and seventy-five cents, or any part thereof, *to wit*, on the ninth day of April, in the year 1836, by a certain other indenture of bargain and sale, then and there made between the said plaintiff, of the one part, and the said defendant, of the other part, he, the said plaintiff, for and in consideration of a certain sum of money, *to wit*, the sum of three hundred and twenty-six dollars and twenty-five cents, therefor, then and there paid by the defendant to the plaintiff, and the further sum of two hundred and thirteen dollars and seventy-five cents (the principal sum of the said bond and mortgage) to be paid by the defendant, with interest, as herein after mentioned, amounting in the whole to the sum of five hundred and forty dollars, did bargain and sell to the defendant the said lot of land and premises, with the appurtenances, in and by which said last mentioned indenture it was then and there declared, covenanted, and agreed by the defendant, that the said lot of land and premises, with the appurtenances; were on that occasion conveyed by the plaintiff to the defendant, subject to the said mortgage; and the said mortgage, or the principal sum thereof, was computed as so much of the said sum of five hundred and forty dollars consideration money, and that the defendant would pay the said principal sum of the said mortgage, with the interest which should thereafter accrue thereon: one part of which said indenture, sealed with the seal of the plaintiff, was then and there delivered by the plaintiff to the defendant, and then and there accepted and received by the defendant; by virtue of which said bargain, and by force of the statute for transferring uses into possession, the defendant then and there became and was seized in his demesne as of fee of and in the said lot of land and premises, with the appurtenances. And the plaintiff then avers, that the defendant did not pay the said principal sum of the said mortgage, and that the plaintiff was obliged and did pay the same, and that the defendant has not kept his covenant. The defendant pleaded "*non est factum*", as to the said indenture last mentioned.

The plaintiff, on the trial, offered in evidence the record of the indenture mentioned in his declaration, which purported

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to be made between the plaintiff, of the one part, and the defendant, of the other part, and which was recorded in book G 4 of deeds for Essex county, in pages 482, &c., and was an ordinary indenture of bargain and sale in fee simple, with the usual covenants and warranty, conveying to the defendant, for the consideration, as expressed, of five hundred and forty dollars, a certain lot of land therein described; and, after the description of the land, contained these words: "The above premises are conveyed subject to a certain mortgage thereon, given by the said William M. Simpson to the said Elisha Whitaker, for two hundred and thirteen dollars and seventy-five cents, dated May 11th, 1835, which mortgage, or the principal sum thereof, is computed as so much of the above consideration money, and which, with the interest thereon hereafter accruing, the said Alexander Finley assumes to pay;" which deed was signed and sealed by the plaintiff, but not by the defendant. The defendant, under his plea of "*non est factum*," objected to the admission of this indenture in evidence as his deed, or as containing any covenant of the defendant, and raised the question, whether the plaintiff could sustain his action upon it. The court, without deciding the question, admitted the said deed in evidence.

The plaintiff then proved his own seizin of the land, and the giving of the said bond and mortgage, as set out in his declaration; also, that the defendant accepted the said deed, and became seized and possessed of the said property under it; and that the defendant repeatedly, by letters produced and proven on the trial, promised to pay to the plaintiff the amount of the said bond and mortgage.

The plaintiff also proved that the defendant, having neglected to pay the said bond and mortgage when they became due, the plaintiff was obliged, and did pay the same to the holder thereof.

The plaintiff having rested, the defendant moved a nonsuit. The court overruled the motion, and directed a verdict to be taken for the plaintiff, subject to the opinion of the Supreme Court on the question of the admissibility of the said deed in evidence, as containing the covenant of the defendant, as al-

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eged by the plaintiff, and suggested that the defendant should be at liberty to enter a rule to show cause, &c., at the next term of said court as of course, to which both parties assented.

The argument was had before GREEN, C. J., and RANDOLPH and OGDEN, Justices, by *Hubbell*, for defendant, and *Bradley*, for plaintiff.

Mr. Hubbell, for defendant.

1st point. Covenant cannot be created but by *deed*, with two or three exceptions: 1st, by custom of London; 2d, in cases of the king's lessee by patent. *Platt on Covenant* 5, 9.

2d point. Covenant cannot be sustained, unless the instrument on which action is brought has been actually signed and sealed by the party, or by his authority.

The word covenant implies a *deed*, and it is not necessary to allege in a declaration that the deed containing the covenant was under defendant's seal; the circumstance of sealing must be inferred. *Platt on Covenant* 5, 9.

The case of *Smith* v. *Emery*, in our courts, referred to hereafter, seems to establish a different rule as to the allegation. The older authorities sustain the position, that it is not the deed of the party, unless he actually seals, &c. *Co. Lit.* § 373. "For if in the indenture, made in the third person or in the first person, mention is made that the grantor, *only*, has put his seal, and not the grantee, then is the indenture only the deed of the grantor," &c. 2 *Com. Dig.* 325, *Fait A* 2. The seal is essential to the deed, and therefore, regularly, it is not the deed of him who has not sealed it. 2 *Com. Dig.*, *Covenant A* 1. Covenant lies when a man covenants with another by *deed* to do some thing, and does it not, &c. 2 *Esp. N. P.* 114, 115, *Covenant*, is to the same effect. 1 *Chit. Pl.* 5 *Am. ed.*, *Covenant*, 108–9, which shows that the action of covenant can only be sustained upon an instrument sealed by the party. So also *Com. Dig.*, *Pleader* 2, *V* 2; 1 *Arch. N. P.* 250. Assumpsit, and not covenant, is the proper remedy where the plaintiff has executed a deed, and the defendant has not. 2 *Ld. Ray.* 1536, *Moore and Wife* v. *Jones*, which shows that covenant cannot be maintained upon a deed, unless the de-

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fendant has sealed it: and it must be so alleged in the declaration.

2 *M. & W. Rep.* 111, *Cardwell* v. *Lucas.* Covenant on a lease not signed by lessor, but executed by defendant, held that the action could not be sustained. 6 *M. & S.* 75, *Metcalf* v. *Rycroft*; *Ib.* 341, *Wilson et al.* v. *Woolfrye.* In covenant, the plaintiffs declare that A., B., C., and D., by indenture, demised to defendant, and make profert of the counterpart. Plea *non est factum*, two of the lessees only executed, held the action would not lie. In 5 *B. & C.* 589, (12 *Com. L. R.* 327), *Burnet* v. *Lynch*, an action on the case, C. J. Abbott, 331, said covenant would not lie. Holroyd, J., 324, says, only an action on the case would lie. Littledale, J., says, "there is no instance of any such action in any of the books," &c., 335. In this case covenant cannot be maintained. This is the case quoted to sustain the position of *Co. Lit.* 281. See *Platt on Covenants* 10, 11, &c., *Law Library*, vol. 3.

If we look at the American cases. In 2 *Halst. Rep.* 142; *Emery et al.* v. *Neighbour et al.*, in debt, articles of agreement, signed and sealed by husband and wife, but not by trustees; they acted under it. The court say it was no covenant. This case meets fully the proposition of the plaintiff, that the acceptance of a deed, and acting under it, makes it the defendant's deed and his covenant. 7 *Halst. Rep.* 53, *Smith* v. *Emery*, demurrer. This case shews the same principle, the deed must be sealed by the covenantor. 1 *Penn.* 40, top of page, *Ludlam* v. *Wood*, is to the same effect. 2 *Halst. Rep.* 64, *Bilderback* v. *Powner.*

6 *Cowen's Rep.* 445, *Gale* v. *Nixon.* Covenant will be only when the instrument is actually signed and sealed by the party, or by his authority. A mere recognition of the contract, though under seal, will not sustain the action. 1 *Wend. Rep.* 164, *Le Page* v. *McCrea*, instrument executed by creditors, and not by the debtor, a composition deed by which the creditors agreed to take fifty per cent. of McCrea and his partner, and each creditor to look to the members of the firm individually. This action was brought by a creditor against defendant, held that it could not be sustained, because defendant had

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not executed the agreement. 12 *Johns. Rep.* 197, *Van Santvoord et al.* v. *Sandford.*

To the proposition, that defendant's acceptance makes it his *deed*, and is *equivalent to his sealing*, our reply is, that the clause inserted in the deed upon which this action is brought is no part of the deed, it is perfect without it. The plaintiff could convey subject to the mortgage, as a condition, and to give notice of the encumbrance. But this is an attempt to turn it into a personal obligation in the shape of an absolute covenant; it is therefore in gross, and no part of the deed, or defendant's deed.

A note in *Co. Lit.* to § 374, is in point. "But if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross; if he does not put his seal to the deed, though he is party to the lease he is not party to the condition." See, also, § 374. If the principle contended for in this case is sanctioned, a deed may be made with a variety of obligations and covenants on the part of the grantee. The grantor may convey subject to payment of his own debt, or for a horse, or farming utensils, or for the performance of some personal duty, and, upon failure, bring an action of covenant.

3d point. It has been repeatedly decided that covenant cannot be sustained upon a *deed poll*, and it is hardly necessary to quote authorities. Is there in principle such difference between an *indenture* and a *deed poll* as to make such decisions inapplicable?

By both a fee is conveyed, although it is said to be *inter partes*. Is an indenture in fact any more evidence of an agreement than the other? A deed poll presupposes an agreement, and binds both parties, for the grantee accepting becomes in fact a party. We retain the form of an indenture in words, while it is no indenture in fact. In England both parties seal, usually by originals and counterparts. *Co. Lit.* § 370, Ld. Coke says, "A deed may be an indenture *without words*, but not by *words without indenting*." And he gives the forms and the modes of conducting, &c. 2 *Doug.* 764, *Chancellor* v. *Poole.* And see previous cases.

4th point. In the deed from the plaintiff is an absolute cove-

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nant, that the land is free of all encumbrance, mortgage, &c. Is not the plaintiff estopped by his covenant from setting up a covenant to pay off one, and this, too, when he only executes the deed? If it is answered, that the prior words control, it is replied, that a pointed covenant should control words put in by the grantor, which he alone signs and seals, and particularly when those words are turned into a binding covenant on the part of the defendant.

5th point. It would be unsafe, and a source of litigation, if words put into a deed by the grantor are to be taken as the covenant of the grantee, upon which an action could be sustained, &c.

Mr. Bradley, for plaintiff.

I. The *facts* of the case show not only a *legal*, but a *just* ground of action, in favor of the plaintiff against the defendant, for the amount rendered by the jury in this case. The defendant ought to have paid off the mortgage. The amount of it formed part of the purchase money of the property. He agreed, expressly, that he *would* pay it off. The deed which he accepted is *evidence*, if not in one form of action, certainly in another, of such express agreement. He did *not pay* it. The plaintiff was, in consequence, *obliged* to pay it. A clearer right to recover the amount *cannot* be made out. The only question is, as to the *form of the remedy*. The substantial justice of the case is with the plaintiff.

This being so, the defendant, in case he shall be found to have mispleaded, cannot demand a repleader: first, because the court will not award a repleader, excepting where complete justice cannot be answered without it; secondly, because it is not grantable in favor of the person who made the first fault in pleading. 1 *Chitty on Pleading* 656, *ed.* 1844; *Goodtwine* v. *Bowman*, 9 *Bing.* 532.

II. Not only had the plaintiff, *according to the facts of the case*, a right of action against the defendant for the amount claimed, *before coming into court*, but his *declaration sets out and discloses those facts*. It discloses a full and complete cause of action. *In substance* it is sufficient. If wrong in any respect,

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it is *so only in matter of form*. It may be that in form the action should have been *assumpsit*, and not *covenant*. If so, the defendant, by *special demurrer*, may have availed himself of the error. By the statute of *Amendments and Jeofails*, (*Rev. Stat.* 989, § 12,) the legislature is painfully anxious that the court, on demurrer, (by which all legalities of pleading and proceeding are brought in question) shall give judgment *according as the very right of the cause and matter in law shall appear unto them, repeating* the injunction, that "*the court shall give judgment according to the very right of the cause,*" unless the party objecting set down specially his causes of demurrer. By the same act (§ 8), all "mispleading" and "misconceiving of process" after verdict shall be cured.

Now apply these principles to the case in hand.

The declaration, in its introduction, *recites* a summons to *answer of a plea of covenant broken*. It then sets out the exact circumstances of the case, how that the plaintiff owned a certain lot of land, mortgaged the same to secure the payment of his own bond, and afterwards conveyed the same to the defendant, upon consideration of the defendant's paying him a certain sum of money, and also paying off this bond and mortgage; that the deed which the defendant accepted contained a stipulation, on his part, to pay off said bond and mortgage; that he entered into possession of the property under that deed; that he neglected to pay the debt, and that thereupon plaintiff *had* to pay it: concluding with the charge, that the defendant *had not kept his covenant*.

Now leaving out the formal clauses relating to the action of covenant, at the commencement and end of the declaration, as surplusage, if you please, there is still enough left to show a cause of action. There is an agreement upon a valid consideration, and a failure to perform that agreement. Be it, that those formal expressions are inconsistent with the case disclosed in the body of the declaration, is it, after all, any thing more than an error *in form*, in *form alone?* To declare in *trespass* when the action should be *case*, may, perhaps, be error in substance; because the measure of damages is different in the two actions. But it is not so with *covenant* and *as-*

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sumpsit. In these actions, the measure of damages is the same. It may be thought that the cause of action which we have disclosed is one of *case* and not *covenant*, be it so; the error is only one of form, and being such, the proper remedy of the defendant would have been a *special demurrer.*

I say *a special demurrer*, not the plea of *non est factum.* We *did not allege that it was his deed.* We set out the case as it was. We alleged that it was an indenture, that it was sealed with the seal of *the plaintiff*, that it was delivered to the defendant. We did not allege that the defendant sealed it, or *that it was his deed.* The defendant should have *demurred* to the declaration.

We set out the facts, and left it for the court to infer whether the deed was or was not the defendant's deed. The defendant had no right to plead *non est factum.* 1st, because we did not say "*factum suum*"; 2d, because whether it was his deed or not was immaterial, a mere question of *curious law*, having reference to the *form* of the remedy, and not to the *gist* of the action.

I therefore say he should have put in a *special demurrer.* Not having so done, but having pleaded over, we are entitled to judgment, either *upon verdict* or *non obstante verdicto.*

Our having taken issue on the plea does not alter the case. It *would* alter it, if the justice of the case were not with us, for then the defendant would be entitled to a *repleader.* But as the case is, he is *not* entitled to it.

III. But we contend that the action *was rightly conceived;* that the *deed was* the defendant's deed; that the stipulations therein contained, on his part, were his covenants, and that the verdict, upon the issue of *non est factum*, was properly rendered for the plaintiff.

This is so technically, as well as equitably, according to the common law and the books which have the *force of authority* in New Jersey.

The deed containing the stipulation on which the action was brought was an indenture, both in *name* and in *character*, and is therefore invested with all the incidents and implications of an indenture. It was so in name. It was so in character, in

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its *essential nature*. *Co. Lit.* 229, *a*. "An indenture is a writing containing a conveyance, bargain, contract, covenants, or agreements, between two or more, *and is indented at the top*," &c. The latter requisite, of actual indentation, has become obsolete. The main requisites at this day are, that it be styled an indenture, and be a contract or agreement *between two or more parties*, in other words, a *mutual agreement inter partes*. A bargain and sale of lands is *precisely of this character*. Many crude notions exist on the character of a bargain and sale.

In all transfers of real estate at common law, whether by livery or grant, the *bargain* or *agreement* of the parties *preceded* that livery or grant. The livery or grant itself was the mere *instrument of conveyance* used for *carrying out* and *executing* the previous agreement. It was not the agreement, nor any part of it, but was the consummation of the agreement on the part of one of the parties. Hence a livery or grant was the act of one party, and, *ex propria natura*, was the subject of a deed poll.

The charter of feoffment or the grant might, it is true, have incorporated with it, in the same instruments, mutual stipulations or conditions respecting the estate conveyed. In such cases an indenture would be proper. But, used simply as evidences of *conveyance*, they were deeds poll, even when they rehearsed the consideration on which they were founded.

The *bargain* of the parties respecting the sale of land was always a distinct thing from the *conveyance* of the land by which the bargain was complied with.

The original *bargain* might be of one character or of another character. It might be for a *sale* of the land, (which implied a pecuniary price) or for a gift of it, in consideration of blood, or for an exchange, or for a conveyance as a mere gratuity. When it was for a *sale*, the contract was called a *bargain and sale*, meaning a *bargain of sale* or a *bargain for a sale*. The phraseology employed was something analogous to that which we use when we say "trespass and assault," "trespass and false imprisonment." "trespass *de bonis asportatis*," or "trespass and ejectment," where our meaning is, respectively, *trespass by assaulting*, *trespass by ejecting*, &c.

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By a *bargain and sale*, then was meant a *bargain of sale*. Such a bargain could be made with respect to goods, as well as with respect to lands. And in relation to goods, it changed the title. But it required the artificial solemnities of conveyance by livery or grant to change the title to lands. Therefore, if I bought your farm, and paid you the money for it, there was indeed a bargain and sale between us, but there was no passing of the title from you to me.

Now this bargain and sale could be by word of mouth, or might be put into writing, or in the form of a deed. It was equally a *bargain and sale*.

But the courts of law could not recognise it as transferring the title to the land sold. The Court of Chancery, however, recognised it, so far as to compel the seller to allow the buyer to have the *use* of the land. The statute of uses (27 *Hen.* 8, *c.* 10) carried the *estate and possession to the use*, in all cases where the bargain and sale was put into the *form* of an *indenture* and enrolled. Thus the statute obviated the necessity of a *conveyance*. Its own operation had the effect of a conveyance, and a bargain and sale by the operation of the statute came to have the *effect* of a conveyance. But it remained, in its own proper nature, just what it was before, a *bargain and sale*.

Now there is an old proverb, which might be raised to the dignity of a maxim of law, that it takes *two* to make a *bargain*.

The court will, therefore, see what I mean when I say, that a *bargain and sale* is, in its essential nature and character, a *mutual contract or agreement between two or more parties*. It is *necessarily* such. One party agrees to sell, and the other agrees to buy. There can be no *bargain and sale* unless both are agreed. If a bargain and sale is expressed in a deed, or evidenced by a deed, that deed must necessarily, or at least ought, upon every sound legal principle, to be an indenture. An indenture is *the* fit and proper form of the deed. And when a deed of *bargain and sale purports* to be an indenture, and is accepted and acted under as such by both parties,

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the law will give it all the effects and consequences of an *indenture*, a technical indenture.

I have made these observations because it may be said, on the other side, that although called an indenture, the deed in the case at bar is *simply a conveyance*, and is not an indenture of its own proper nature. Deed and statute together have the effect of a conveyance undoubtedly; but it must be remembered that the statute can only act on a use, and a use can only be raised by the bargain, and that can properly be expressed by deed only in the form of an indenture.

The deed is then an *indenture*, both in name and in its essential character, both *substantially and technically*. Being such, the point I contend for is this, that although the defendant did not seal and deliver the instrument, yet, *inasmuch as he accepted this deed as an indenture*, and *accepted the estate bargained for therein*, and *took possession under the deed*, it is *his deed* as well as that of the plaintiff who *did* seal it.

An indenture is, and must be a mutual deed, *i. e.* the deed of both parties, or else it ceases to be an indenture. It is a deed *inter partes*, or, as Lord Coke says, "A writing containing a conveyance, bargain, contract, &c., *between* two or more," and, as the learned Sir Henry Finch says, "An indenture is the mutual deed of both." If one party is bound by it, the other ought to be equally bound by it; and the obligation of each ought to stand upon the same point of solemnity. Public policy, it seems to me, so requires it.

All the *parts* of an indenture form but one deed in law, and every part is of as great force and effect as all the parts together be, that is to say, each part is by itself equal evidence with all the other parts of what *the one indenture is, and of its existence.*

"A party to an indenture, having accepted it, and gone into possession of land under it, is estopped from repudiating the indenture." It is an estoppel *in pais.* He cannot deny it to be his deed.

For confirmation of the principles which I have now laid down, I refer the court to the following authorities: 38 *Ed.*

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3, 8, *a; Littleton*, § 370, 374, 666, 667; *Co. Lit.* 231, *a; Finch's Law* 109; *Shep. Touch.* 177; *Com. Dig. Tit. Covenant A* 1, *pl.* 5, 6; *Ib. Tit. Fait, A* 2, *pl.* 13; *C* 2, *pl.* 2; *Vin. Ab. Tit. Condition* (*I, a* 2); 4 *Cr. Dig.* 393; *Butler's Dig., note* (1) *to Co. Lit.* 230, *C; Thomas' edit. Co. Lit., vol.* 2, 230, *note;* Lord Eldon, *in* 1 *Ves. & B.* 14, *Staines* v. *Morris; Sir W. Grant,* 1 *Meriv.* 265, *Wilkins* v. *Fry; C. J. Abbott,* 5 *Barn. & Cr.* 589, 602, *Burnett* v. *Lynch.*

Against this array of authority, the only opposing voice is Mr. Platt's, in his *Treatise on Covenants,* whose views I shall discuss hereafter.

The case from the Year Books was an action of debt, but, as I shall show, establishes the principle contended for as applicable to actions of covenant, as well as debt. The note of this case, in *Co. Lit.* 231, *a,* is more full and satisfactory than that in the printed book itself. It is well known that the Year Books long remained in manuscript, and that the old lawyers and the inns of court had their own manuscript copies of them; and that the printed editions contain large gaps, which are to this day supplied by the manuscript copies in England. It is necessary to advert to this fact, to show why I deem Lord Coke's note of the case as reliable as that in the printed Year Books.

The case was thus: An indenture of lease was made between A., the lessor, and D. and R., the lessees. Only one of the lessees, D., executed the counterpart of the lease, but both went into possession. The lease contained a covenant, on the part of the lessees, to pay twenty pounds, if certain conditions, named in the deed, were not performed. For breach of these conditions, the lessor sued D. alone *for this penalty.* D. pleaded the non-joinder of R., his co-lessee, in abatement.

The plaintiff replied, that R. did never seal and deliver the indenture, and so his writ was good against D. sole. And the counsel of the plaintiff took a diversity between a rent reserved, which is parallel of the lease, and the land charged therewith, and a sum in gross, as here the twenty pounds is; for, as to the rent, they agreed, that by the agreement of R. to the lease, he was bound to pay it; but for the twenty pounds,

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which is a sum in gross, and collateral to the lease, and not annexed to the land, *and groweth due only by the deed*, R. said that he was not chargeable therewith, for that he had not sealed and delivered the deed. But *inasmuch as he had agreed to the lease, which was made by indenture, he was chargeable by the indenture for the same sum in gross.* And for that R. was not named in the writ, it was adjudged that the writ did abate.

The report of the case in the printed Year Books states precisely the same facts and the same judgment of the court, but does not so fully show the course of the argument at bar.

1. This case establishes the entire principle for which we contend. It *charges the deed upon a man who did not seal it:* 1st, because the deed was an *indenture*, to which the person thus charged was a party; 2d, because it conveyed to him an interest in land, which he accepted and enjoyed under and by virtue of the deed. 2. It will not do to say that he was charged with an action of *debt* upon the whole transaction, but was not charged with the *deed.* The debt was only a collateral penalty, which could not be charged upon him without his being charged with the deed. If the deed was not his deed, he could not have been subjected to the penalty. He *might*, in such case, have been liable to an action on the case for breaking the covenants, which the penalty was intended to secure the performance of. The covenants might then have fallen upon him in the shape of assumpsits. But the *penalty* could not have attached to him. It is evident from the whole case, when carefully considered, that the court deemed the action proper to the case, a pure action of *debt on specialty;* and such an action can no more be supported without deed than covenant can. *Non est factum* may be equally pleaded in each; and, if pleaded, the plaintiff is equally bound, in each, to counter-prove the plea. I take it, therefore, that the principle of the case is equally applicable to actions of covenant as to actions of debt, for it goes to establish the deed itself, which is the foundation of both actions. In this way it was understood by Lord Coke, and by all who have succeeded him (with the single exception of Mr. Platt), as the subsequent

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authorities will show. It is from a misconception of this very point that Mr. Platt withdraws his assent from the common understanding of the profession. And herein is the fallacy of his whole argument.

3. Again, it will not do to say, that the non-executing lessee in this case was bound by the deed, because his co-lessee sealed and delivered it. His co-lessee did not seal and deliver it for him, and as his deed, but only for himself, and as his own deed. There is a large class of cases in which a man is deemed to have executed a deed where it has not been executed *propria manu*, but has been executed in his name and on his account, by some one authorized by him to do so, or by some one for him, whose act was afterwards either expressly or impliedly confirmed by him. But these cases are a class by themselves, and the case in the Year Books is not one of them. It stands on an entirely different footing and different principles, and is so understood by all the authorities. No stress is any where laid upon the fact of the other lessee having executed the deed. And even Mr. Platt, while he admits that the case, properly understood and applied, is good law, does not attempt to confine its operation to those cases alone in which a co-party *has* executed the deed. And there is no where else a lisp of such a thing. The case is often cited, it is true, according to its circumstances; but whenever the abstract principle involved in it is attempted to be stated in full, this accidental circumstance is omitted. If the case is authority at all, it is authority for the broad principle, that any party to such an indenture, by accepting it, and entering upon the enjoyment of the estate under it, makes it his deed. To stop short of this point would be an *evasion of the case*.

Again, I wish it clearly understood that I do not stand upon this ancient case alone, irrespective of subsequent authorities. I shall presently show that the whole course of opinion, from that time down to the present, is to the same point. But inasmuch as this is the leading case to which the subsequent authorities seem directly or indirectly to point, and inasmuch as it has been asserted that the principle contended for by us is not involved in the case itself, I have been the more particular

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in the examination of it, while, at the same time, I by no means relinquish the credit which is justly due to the other authorities referred to, from their own intrinsic weight. An opinion of Chief Baron Comyn on a point of common law has almost as much weight at this day as an adjudged case in the Year Books.

To show, now, that I am right in the foregoing observations on the point and bearing of the case in 38 *Edw.* 3, and in my view of what has been deemed the common law, as applicable to the case at bar, for centuries, I shall make several extracts from the authorities which I cited above, presenting them in chronological order.

1. *Lord Coke.* (1,) the whole tone and bearing of his note of the case in 38 *Edw.* 3, contained in *Co. Lit.* 231, *a*, which I have already quoted, especially the language used in the conclusion, "*inasmuch as he agreed to the lease which was made by indenture, he was chargeable by the indenture for the sum in gross.*" (2,) In *Brett* v. *Cumberland*, 1 *Rolles' Rep.* 359, and *S. C.* 3 *Bulstrode* 163, 164, one question was, whether the king's lessee by patent, not having put his seal thereto, (as no counterparts are made of patents) is liable in *covenant* on the stipulations on the part of the lessee, it was clearly held that he is. I do not cite the *decision* in this case (though, perhaps, I might properly do so,) for the purpose of proving my point; because the liability of the king's lessee to the covenants in a patent, is commonly put on the ground of the patent being a record. But I cite the case, because *Coke*, C. J., in giving his assent to the lessee's liability in such case, cited and relied on the case in 38 *Edw.* 3, which shows his view of the bearing of that case.

2. *Sir Henry Finch* (1614), one of the profoundest lawyers of his age, in his Book of the Law, 109, on the different kinds of deeds, says: "A deed is a deed poll or indenture. Poll, that which is the only deed of the grantor. Indenture, that which is the mutual deed of both: yet the deed of the grantor is the principal, and the other is but a counterpart. *And, therefore, if the lessor seal, and not the lessee, it is as good against him as if both had sealed.*"

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3. *Mr. Justice Doderidge*, (Lord Coke's associate on the bench, and author of Sheppard's Touchstone) in page 177 of that work, under the head, "Who shall be bound and charged by a covenant, and against whom a writ of covenant doth lie, and where or not," says: "If a feoffment or lease be made to two, or to a man and his wife, and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, or the wife doth, or doth not seal during the coverture, and he or she that doth not seal, doth, notwithstanding, accept of the estate, and occupy the lands conveyed or demised, in these cases, as touching all inherent covenants, as for payment of rent, and the accessaries thereof, reparations and the like, they are bound by these covenants as much as if they do seal the deed." So a remainder man, though he do not seal the deed which created his remainder. So the king's patentee, &c. "But, *quere* of *collateral* covenants, for therein the feoffee or lessee is not bound. And yet it is said, that if an *indenture* be made between A., of the one part, and B. and C., of the other part, and therein there is a lease made by A. to B. and C., on certain conditions, and B. and C. are bound to A., by the indenture, in twenty pounds to perform the conditions, and B. only doth seal the deed, and not C., yet in this case if C. accept of the estate, he is *bound by the covenants*, and one of them cannot be sued without the other whilst they are both living. *Qui sentit commodum sentire debet et onus.*"

4. *Chief Baron Comyn, Dig., Tit. Covenant, A* 1, *pl.* 5, 6. "If a lease be to A. and B. by indenture, and A. seals a counterpart, and B. agrees to the lease, but does not seal, yet B. may be charged for *a covenant broken.* Though the covenant be collateral and not annexed to the land." He cites *Co. Lit.* 231, *a; 2 Rolles R.* 63; *Com. Dig., Tit. Fait, A* 2, *pl.* 13. "If an indenture be between A., of the one part, and B. and C., of the other, whereby A. demises to B. and C., who covenant with A., if B. seals the counterpart, but C. does not seal, yet if C. agreed to the lease, *it shall be his deed, and he shall be bound by the covenants. Co. Lit.* 231, *a.*" *Com. Dig. Tit. Fait. C* 2, *pl.* 2, the same thing repeated.

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5. *Mr. Cruise.* "Where lands are conveyed *by indenture* to two persons, and one of them does not seal the deed, yet if he enters upon the land, and accepts the deed, in other matters he will be bound by the covenants contained in it." And so with a remainder man. 4 *Cru. Dig.* 393, *Tit.* 32, *Deed, c.* 25, § 4.

6. *Lord Eldon,* 1 *Ves. & B.* 14, *Staines* v. *Morris.* One of the questions in this case was, whether Sir W. Staines was liable to indemnify a lessee (who had assigned the lease to him by deed poll) against the rents and covenants in the original lease, the assignment containing a stipulation that he *should,* but he not having executed it. Lord Eldon, on the authority of the cases above mentioned, and not attending to the distinction between a deed poll and an indenture, held as follows: "Here is an express covenant that Sir William will pay the rent and perform the covenants; and *even a court of law,* certainly this court, *would not suffer him to avail himself of the circumstance,* that he had not executed the instrument."

7. *Sir William Grant,* 1 *Meriv.* 265, *Wilkins* v. *Fry.* "In the case of *Staines* v. *Morris,* the Lord C. J. held that Sir William Staines was bound by an express covenant, though he had not executed the instrument in which it was contained. He took the estate under that instrument, and therefore took it subject to the accompanying covenant."

8. *C. J. Abbott,* 5 *B. & C.* 589, *Burnett et al.* v. *Lynch.* Burnett was a lessee, and assigned the term to Lynch by *deed poll,* he to pay the rents, &c. He failed to pay, and Burnett brought an action on the case against him. The defendant, among other things, contended that the action should have been *covenant. C. J. Abbott.* I think that *an action of covenant* is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person who by himself, or some other person acting on his behalf, has executed a deed under seal, *or who under some very peculiar circumstances (such as those mentioned in Co. Litt.* 231, *a,*) *has agreed by deed to do a certain thing.* Here the defendant has not engaged by deed to perform the covenants, and consequently covenant will not lie."

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I ask, now, do not these authorities establish all that we contend for? In a case like ours, can the answer be doubtful to the question, "what was the received law in England, when we became an independent nation?"

Mr. Platt, himself, admits that the principle had been held in its full extent. He says, "A proposition has been advanced, and *received without scruple by the profession*, that a person may, by certain acts of his own, such as his acceptance of an interest conveyed by a deed which he never executed, bind himself to perform all the covenants and conditions therein contained, as effectually as if he had in a formal manner sealed and delivered the instrument. On page 10, he further admits, that "the principle has been transcribed from book to book, and has at different times been adopted in the works of gentlemen highly distinguished for their legal attainments, and that he felt considerable diffidence in venturing to deviate from the beaten track, and to submit his own views in opposition to the opinions entertained by more experienced members of the profession." His whole argument is based on the notion, that all those "highly distinguished" and "experienced" gentlemen, to whom he refers, had misconceived the principle involved in the case in 38 *Edw.* 3, in supposing it applicable to actions of *covenant, as well as debt.*

I think I have shown that they understood the point of that case better than Mr. Platt himself seems to have done.

The conclusion of his examination of the point is worthy of remark: "Perhaps, however," he says, "the doctrine has been too long sanctioned to be now reversed; at all events, it is an introduction of an equitable principle into a court of law, the acceptance of a deed being considered equivalent to an actual execution by the lessee."—Page 18.

It is, no doubt, the usual and almost invariable rule, that a man cannot be charged in covenant with a deed, unless he by himself, or another, seal it. The great generalness of the rule, goes far to raise a prejudice against an exception to it. The desire to simplify rules, and clear them of exceptions, is common to us all. It seems to be the case with Mr. Platt. His love of absolute uniformity leads him to overlook the equal import-

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ance of well judged exceptions. In this spirit is conceived his observation, on page 17, that "on a plea of *non est factum* in such a case, where the bare question is *deed or no deed*, it would seem impossible to establish an indenture against the defendant who never sealed, so as to render him liable in covenant." This is the very question he is discussing. He begs the very question at issue. We contend that it *is* the defendant's deed; that it is a proper indenture, the mutual deed of both parties; that defendant is estopped by his own act from denying it to be such; that it does not lie in his mouth to say, *non est factum.*

But besides all the authorities directly in point, (as we deem them to be), there are analogous cases, in which we think the same principle is involved, and which would infallibly lead to the conclusion to which we have come. I refer to the cases of the *king's lessees* by patent and of *remainder men*, to which reference has already been made. In these cases an action of covenant lies against those who have never executed a deed, although it cannot be said that the deed is their deed. In such cases *non est factum* would be an immaterial plea, and judgment would be rendered for the plaintiff *non obstante veredicto.* The case of remainder men is referred to by *Littleton*, § 374; *Co. Lit.* 231, *a; Shep. Touch.* 177, and nearly all the other authorities above cited. They are held liable to the covenants entered into by the particular tenant by indenture, if they accept the estate in remainder on the determination of the particular estate. And this, although they never sealed the deed. The deed cannot be called their deed, because they are not named party to it. Yet they are liable to the covenants.

So in our case, if the court should think that *we* are not entitled to the verdict on the plea of *non est factum*, we still contend that our *action of covenant* is right, and that the plea is an immaterial one, and that consequently we are entitled to judgment *non obstante veredicto.*

I see nothing in the cases cited by defendant's counsel on the trial which requires any comment. They were either cases of deeds poll, or mere personal contracts, or decided without re-

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ference to the long train of authorities on which we rely. The case in 6 *Cowen* 445, was not an *indenture, but* mere articles of agreement; no estate passed, and the said authorities were not adverted to.

The Chief Justice delivered the opinion of the court.

The general principle, that an action of covenant can only be sustained where the instrument upon which the action is brought has been actually signed and sealed by the party, or by his authority, is abundantly sustained by the authorities cited by the counsel of the defendant. There are, however, exceptions, of which actions upon the custom of London, actions against the king's lessee by patent, and against remainder men, are admitted instances.

The only inquiry is, whether an indenture of bargain and sale, purporting to be *inter partes*, by which an estate is conveyed to the grantee, if the grantee accept the deed, and the estate therein conveyed, though the indenture be not sealed and delivered by him, is not *his* deed, as well as the deed of the grantor.

The affirmative of the proposition is sustained by the following authorities, cited, with many others, in the brief of the plaintiff's counsel: *Co. Lit.* 231, *a*, 230, *C*, *note* 1; *Sheppard's Touch.* 177; 4 *Cruise Dig.* 393, "*Deed*," *Tit.* 32, *c.* 25, § 4; 3 *Com. Dig.*, "*Covenant*," *A* 1, "*Fait*," *A* 2, *C* 2; *Vin. A. C.* "*Condition*," *I*, *a* 2; *Burnett* v. *Lynch*, 5 *Barn. & Cress.* 589; *Dyer* 13, *C*, *pl.* 66.

A modern elementary writer, of high reputation, denies the doctrine deduced from these cases, and insists that the action of covenant, unless it be founded on the custom of London, or on a contract between the king and a subject, can ever be supported against a person who by himself, or some other person acting on his behalf, has executed a deed under seal. *Platt on Covenants* 18.

He admits, however, that the contrary doctrine has been received without scruple by the profession, has been adopted by writers distinguished for their legal attainments, and that, perhaps, it has been too long established to be now reversed.

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There is, in our judgment, no reason why the doctrine should be reversed.

In the present case the verdict ought not to be disturbed, if it can be sustained consistently with legal principle. It is manifestly in accordance with the truth and justice of the case. The objection goes to the form of the remedy, rather than to the substantial right of the party, or to the title of the plaintiff to redress. The nature of the covenant, moreover, is fully stated upon the face of the declaration. Whether the facts there stated did or did not constitute a covenant on the part of the defendant, was a question of law, which might well have been raised by demurrer. To give the defendant the benefit of the exception now may operate utterly to defeat the claim of the plaintiff. It is consistent neither with law nor justice that the defendant should hold the title without paying the price. These considerations cannot affect the legal principle, but if the verdict be in accordance with a doctrine long established, and often recognised, they afford strong reasons why that doctrine should not lightly be disturbed.

The rule to show cause must be discharged.

HANNESS v. SMITH AND BONNEL.

1. If there be an attachment against A. and another against A. and B. in the hands of the same sheriff who attaches the goods of A. on both writs, it is irregular on dissolving the attachments to take one bond for the return of the goods attached in both suits. There should be a separate bond in each suit. But this does not vitiate the bond; the recital of the second writ will be considered surplusage.

2. If a creditor in attachment, to whom such bond is assigned, in declaring thereon, allege that he applied to the court, and obtained judgment against A., in such proceeding it is a sufficient averment, that he applied in the suit against A. alone.

3. It is not necessary that it should be averred in such suit, that the plaintiff applied to the court before the attachment was dissolved; the defendant is precluded from disputing that, by accepting a declaration in the attachment suit.

4. The bond, on the dissolution of an attachment, is for the benefit of, and can be prosecuted by any other creditor applying, as well as the plaintiff in attachment: the amount recovered is for the benefit of all applying creditors.

5. A breach is sufficiently set forth, if laid in the words of the condition.

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Debt on attachment bond.

The declaration was as follows:

For that whereas heretofore, *to wit*, on March 11, 1847, one Patrick O'Hagan sued and prosecuted, out of the Supreme Court of Judicature of the state of New Jersey, against the said Charles Smith, a certain writ of attachment, directed to the sheriff of the county of Morris, whereby the said sheriff of, &c., was commanded to attach the said C. S., by all his goods and chattels, rights and credits, moneys and effects, lands and tenements, &c., and them safely keep, so that he be and appear before the justices of the Supreme Court of Judicature, at Trenton, on the first Tuesday of April, to answer to the said P. O'H. of a plea, &c.; which said writ of attachment was afterwards, *to wit*, at Trenton aforesaid, in due form of law, delivered to H. D. F., esq., sheriff of, &c., to be executed according to law; by virtue of which said writ of attachment, the said H. D. F., so being sheriff as aforesaid, afterwards, and before the return of the said writ, on March 13, 1847, at M., in the county of M., according to the form of the statute in such case made and provided, did seize and attach certain personal property of the said C. S., *to wit*, (enumerating the goods attached); which said goods and chattels were, by the said sheriff and one discreet and impartial freeholder, justly and truly inventoried and appraised, according to the statute, at the sum of $3404.34, as by the said inventory and appraisement, reference being thereunto had, will more fully appear. And *whereas, also*, afterwards, *to wit*, on March 18, 1847, one John O. Condict sued and prosecuted, out of the said Supreme Court of Judicature, against the said C. S. and one Patrick O'Hagan, a certain other writ of attachment, directed to the said sheriff of, &c., whereby the said sheriff of, &c., was commanded to attach the said C. S. and P. O'H., by all their goods and chattels, rights and credits, moneys and effects, lands and tenements, and them safely keep, so that they be and appear before the justices of the said Supreme Court of Judicature, at Trenton aforesaid, on the second Tuesday of April then next, to answer unto the said J. O. C. of a plea, &c.; which said writ of attachment was afterwards, *to wit*, at

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Trenton aforesaid, duly in due form of law delivered to the said H. D. F., sheriff of, &c., to be executed according to law.

By virtue of which said writ of attachment, last mentioned, the said H. D. F., so being sheriff as aforesaid, and before the return of the said writ of attachment, *to wit*, on March 19, 1847, at &c., according to the form of the statute in such case made and provided, did seize and attach the said personal property of the said C. S., above mentioned, and also all the right, interest, claims, and demands which the said P. O'H. then had in the said first mentioned attachment against the said C. S., and also all the lien and claim of the said P. O'H. in and upon the property, goods, and chattels levied, seized, and taken by the said sheriff by virtue of the said writ of attachment first mentioned, as by the return of the said sheriff, and the inventory and appraisement annexed to and returned with the said last mentioned writ of attachment, reference thereunto being had, will more fully and at large appear; which said property, including the said right, interest, claims, and demands, and lien, were, by the said sheriff and one discreet and impartial freeholder, justly and truly inventoried and appraised, according to the statute, at the sum of $3415.34.

And at the return of the said writs of attachment, above mentioned, the said defendant, C. S., intending to appear to the said attachments, according to the form of the statutes in such case made and provided, the said defendant, C. S., and the said Jonathan C. Bonnel, then and there, *to wit*, on April 6, 1847, at Trenton aforesaid, by their certain writing obligatory, sealed with their seals, and now shown to our said court, the date whereof is a certain day, therein mentioned, *to wit*, the day and year last aforesaid, made and executed, in pursuance of the statute in such case made and provided, acknowledged themselves to be held and bound unto the said H. D. F., sheriff of, &c., in the said sum of $7000, to be paid to the said H. D. F., his executors, administrators, and assigns; which said writing obligatory was and is subject to a certain condition, thereunder written, whereby, after reciting to the effect following, *to wit*, that whereas a certain writ of attachment had then lately issued out of the Supreme Court of Ju-

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dicature of the state of New Jersey, at the suit of P. O'H., against the said C. S., by virtue whereof the said sheriff of the said county did seize and attach certain personal property of the said C. S., *to wit*, &c., which had been appraised and valued at $3414.14. And whereas, also, a certain other writ of attachment had then lately issued out of the said court against the said C. S., at the suit of J. O. C., by virtue whereof the said sheriff did seize and attach the said personal property of the said C. S., above (in the said bond) mentioned, and also all the right, interest, claim, and demand which the said P. O'H. then had in the said first mentioned attachment against the said C. S., and also all the lien and claim of the said P. O. H. in and upon the property, goods, and chattels levied, seized, and taken by the said sheriff by virtue of the said writ of attachment first mentioned; which said property, including the said right, interest, claim, demand, and lien, were appraised at the sum of $3415.34. And whereas the said C. S. intended to appear to the said attachments, it was conditioned that if the said C. S., his executors or administrators, should return the goods and chattels, rights and credits, moneys and effects, seized and attached by virtue of such writs of attachment, in case judgment should be rendered for the plaintiffs, or either of them, the said obligation to be void, otherwise to remain in force, as by the said writing obligatory, and the condition thereof, reference thereunto had, will more fully and at large appear.

And the plaintiff in fact saith, that the said defendant, C. S., having entered his appearance to the said attachment, and given bond, pursuant to the statute in such case made and provided, the said writs of attachment, and all the proceedings thereon, were by the said Supreme Court afterwards, *to wit*, in the term of April, in the year of our Lord 1847, set aside, and the property held in the hands of the said sheriff, under such attachment, was discharged from the custody of the said sheriff.

And the plaintiff further in fact saith, that afterwards, *to wit*, at the term of April, in the year of our Lord 1847, at Trenton aforesaid, the said C. S. did appear and accept a de-

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claration, at the suit of James Hanness, the plaintiff, one of the creditors of the said C. S., and who had applied to the said court to audit and adjust the demands of him, the said J. H., against the said C. S.; the said C. S. having entered into bonds, as aforesaid, the said writs of attachment, and all proceedings thereon, as to the suit of the said J. H. against the said C. S., and wherein and to which said suit the appearance of the said C. S., as aforesaid, was entered, were then and there set aside.

And such proceedings were thereupon had, in the said suit of the said J. H. against the said C. S., in our said Supreme Court of Judicature, at Trenton aforesaid, that afterwards, *to wit*, in the term of April, in the year of our Lord 1848, in our said Supreme Court of Judicature, at Trenton aforesaid, by the consideration and judgment of the same court, the said J. H. did recover, against the said C. S., the sum of $488.32, which, in and by the said court, were adjudged to the said J. H., the plaintiff, for his damages which he had sustained, as well by occasion of the non-performance, by the said C. S., of certain promises and undertakings then lately made by the said defendant, C. S., to the said J. H., as for his costs, &c., whereof the said defendant, C. S., was convicted, as by the record thereof, remaining in our said Supreme Court of Judicature, at Trenton aforesaid, more fully appears; which said judgment still remains in full force, not reversed, satisfied, or otherwise vacated.

And although judgment hath been given in the said cause in the said Supreme Court of Judicature, at Trenton aforesaid, against the said C. S., and in favor of the said J. H., a creditor of the said C. S., under the said attachments, and to whose suit the said C. S. did appear, and accept a declaration as aforesaid; and although the said judgment of the said J. H. against the said C. S. yet remains in our said Supreme Court of Judicature, at Trenton aforesaid, in full force, not reversed, satisfied, or otherwise vacated, yet the said C. S. hath not returned the goods and chattels, rights and credits, moneys and effects, seized and attached by virtue of the said writs of attachment in the said writing obligatory mentioned, but the said C. S. hath hitherto wholly neglected and refused, and

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still doth neglect and refuse, so to do, by means of which said several premises the said writing obligatory hath become forfeited.

And the said plaintiff further saith, that the said writing obligatory, being so forfeited as aforesaid, and the moneys therein specified remaining unpaid and unsatisfied to the said sheriff, he, the said H. D. F., so being sheriff of, &c., afterwards, *to wit*, on February 7, 1849, *to wit*, at Trenton aforesaid, on the application of the said J. H., an applying creditor of the said debtor, C. S., the defendant in the said attachments, by an endorsement on the said writing obligatory, duly made and attested in the presence of, and attested by two credible witnesses, and sealed with the seal of the said H. D. F., sheriff of, &c., assigned the said writing obligatory, by the order and direction of the said Supreme Court of Judicature, made at the term of January, in the year of our Lord 1849, and without fee or reward to the said J. H., according to the form of the statute in such case made and provided, as by the said assignment, endorsed on the said writing obligatory as aforesaid, and now to the court here shown, the date whereof is the same day and year last aforesaid, reference being thereunto had will more fully and at large appear; by means whereof, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, assignee as aforesaid, to demand and have of and from the the said defendants the said sum of $7000, above demanded; yet the said defendants, although often requested so to do, have not, as yet, paid the said sum of $7000, above demanded, or any part thereof, to the said H. D. F. before the said assignment, or to the said plaintiff or the said H. D. F., or either of them, since the said assignment, but have hitherto wholly neglected and refused so to do, and still do neglect and refuse to pay the same, or any part thereof, to the plaintiff, assignee as aforesaid, to the damage of the said J. H., the plaintiff, of $7000, and therefore he brings suit, &c.

The defendant, Bonnel, filed a general demurrer to the plaintiff's declaration, and upon the issue formed by this, the argument came on before the Chief Justice and Carpenter, J.

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J. J. Scofield, in support of the demurrer.

The bond must be taken strictly. The condition is, that the goods shall be returned, if judgment should be rendered for the plaintiff. It does not appear that any judgment was rendered in favor of the plaintiff in the attachment. Although the bond is taken for the benefit of all creditors, the suit can only be maintained in case the plaintiff should recover. The court will not resort to construction for the purpose of charging a surety. As in other cases, the rights of the other creditors are staked on the success of the plaintiff in attachment, who may fail in his action or be non-prossed. The 28th section (*Rev. Stat.* 54) guards against a discontinuance, but not against a non-pros.

2. It does not appear that Hanness filed his claim, or that Smith appeared prior to setting aside the writ of attachment. The time is not stated when Hanness filed his claim.

3. It does not appear that any execution was ever issued, or any legal demand made for the property before this suit was brought. There is no breach until a delivery has been refused to an officer entitled to receive them, under and by virtue of a writ of execution. Until such writ issues upon the judgment, there is no possibility of a return, for there is no one entitled to receive them. They could not be tendered to the creditor. The bond was for a return of the goods to the officer to satisfy an ascertained claim, of which the officer could know nothing until the writ was first placed in his hands.

4. There were two writs of attachment issued, and it does not appear under which Hanness filed his claim.

5. It does not appear what creditors presented their claims, or what action was had on them, if presented. This is necessary, because there can be but one breach, and the whole damages must be at one time assigned. There can be but one recovery for the benefit of all the creditors. There can be but one breach, failure to return the goods, and the damages cannot exceed the appraised, or at any rate the real value of the goods. Until judgment in any suit, the bond cannot be prosecuted, because there is no way of ascertaining how much is

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due to each creditor but by the judgment. Is the money to be had, and the court then to appropriate?

There is serious embarrassment in this case, from one bond having been given upon two different writs, but no question is now intended to be raised upon this point.

J. Wilson, contra.

At the April term, 1847, of the Supreme Court, two writs of attachment were returned: 1st, *O'Hagan* v. *Smith*, and 2d, *Condit* v. *Smith and O'Hagan*. At that term several creditors applied and filed claims, among them was James Hanness. At the same term Charles Smith appeared, and desired to have the attachment against him set aside. He tendered a bond, which the court approved, and the property attached was ordered to be delivered up.

Hanness came in and filed his declaration, which Smith accepted and pleaded to. O'Hagan did not come in, and no notice was taken of him. [*Scofield.* The declaration shows that O'Hagan's property was given up.] There was no property of O'Hagan's to be given up, unless his rights under the first writ.

The suit upon the issue between Hanness and Smith went down to the circuit for trial, when Smith gave a *relicta*, damages to be assessed at bar, which was accordingly done. Upon the judgment thereupon rendered an execution issued, directed to the coroners, to which a return *nulla bona* was made. Application was then made to this court to order the bond to be assigned for the benefit of the creditors, it being shown, by affidavit, that a notice had been served on Bonnel, reciting the judgment and execution, and requiring a redelivery of the property, and his refusal. The bond was tendered by the defendants without the knowledge of the creditors, and approved by the court. If objectionable in form, or because it recites two writs, still the defendants ought not to be permitted to object to its validity. The creditor was appointed assignee by the court, for the purpose of bringing this suit. Judgment was taken by default against Smith at the last term. The surety has filed a general demurrer.

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1. I deny the narrow construction contended for. The last section of the act *(Rev. Stat.* 63*)* says, it shall be construed in the most liberal manner, for the detection of fraud, the advancement of justice, and the benefit of the creditors. The writ is issued for the benefit of all the creditors. The bond is taken for the benefit of all the creditors, the property being given up, and it is for their return in case judgment should be given for any plaintiff who, having first duly applied, files his declaration.

2. It does appear that Hanness had applied prior to setting aside the writ: certainly it sufficiently appears upon general demurrer.

3. As to the third ground, the breach is laid as broad as the condition, and according to the terms of the statute. The matter, if necessary, is matter of evidence at the trial. But the parties are bound to take notice of the judgment. The condition of the bond was to return the goods, if judgment should be rendered for the plaintiff.

4. It is not necessary that it should appear in which writ the appearance was made. Perhaps it does appear in this case.

5. It is attempted to be urged, that each and every creditor must wait for all the other creditors. But the condition of the bond is broken, and the bond is forfeited, and consequently an action may be maintained as soon as a recovery has been had by any one creditor. The court will hold the fund for the benefit of all the creditors.

Carpenter, J., delivered the opinion of the court.

The declaration in this case is upon an attachment bond given by Smith and his surety, Bonnel, upon the appearance by the former to two several writs of attachment issued out of this court, one against Smith alone, the other against Smith and one O'Hagan. The proceeding undoubtedly was not a little irregular. A bond should have been given in each suit, and the appearance in the second suit should regularly have been by both defendants in the writ of attachment, and not by Smith alone. The second writ of attachment must necessarily have

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proceeded upon the ground of a joint indebtedness by Smith and O'Hagan to the plaintiff in that writ, and the writ should have been dissolved upon the appearance of both defendants, and after giving such bond, as is prescribed by the statute. But by some oversight, upon the *ex parte* application of Smith, this bond was accepted and approved by the court, and the property attached was ordered to be delivered up. We do not, however, see why it may not be considered as a valid bond, at any rate under the first writ against Smith alone. The bond having been so imposed upon the creditors of Smith, who have applied under that writ, certainly the court will not permit him or his surety to dispute its validity, if, upon any reasonable construction, it can be sustained. If the condition be within the provisions of the statute, it will not be vitiated because of the unnecessary or improper recital of another writ, or because it also contains provisions applicable to such writ. Surplusage will not vitiate.

If the bond be good, and indeed its validity has not been questioned, then the inquiry is, has it been forfeited? One Hanness, a creditor of Smith, applied to this court, at the same term of April, to have his claim audited and adjusted. It is said it does not appear under which writ he applied. We apprehend that it does appear. The writs of attachment were dissolved, upon the condition that the defendant, Smith, would appear and accept a declaration at the suit of each applying creditor. He did in fact appear and accept a declaration of Hanness, who had previously applied to have his demand audited and adjusted. Demand against whom? Not against Smith and O'Hagan, but against Smith alone, and therefore necessarily under the first writ of attachment issued against Smith. The declaration (as well as the recitals in the bond) is encumbered by irrelevant and improper statements in regard to the second writ of attachment, but we are disposed to consider these statements as surplusage, and the declaration in this respect good on general demurrer.

There is nothing in the objection taken, that it does not appear when Hanness applied, or that it was before the giving of the bond. Smith, the defendant, according to the condition

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of the bond, accepted a declaration at his suit, and it is too late now to raise any objection as to the time and mode of the application. If, however, any objection could be taken to the averment in the declaration, it is merely formal, and cannot be raised on general demurrer.

The act is to be construed liberally. The bond was taken, not for the security only of the plaintiff named in the writ, but of all the applying creditors. Such construction is to be adopted as will effectuate the object of the statute, if consistent with its terms. The condition is for the return of the goods, &c., seized under the writ, in case judgment should be rendered for the plaintiff. Upon the obvious intent of the statute, it may reasonably be held to mean any plaintiff, who, as an applying creditor, may have filed his declaration, and whose suit has proceeded to judgment. The objection, therefore, will not avail, that it does not appear that the plaintiff named in the writ of attachment had recovered a judgment.

Nor is the objection valid, that it does not appear what creditors have applied, or what action was had on their claims. The suit, it is true, is brought for the benefit of all the creditors, the bond being sued upon for their use by such person as the court may have directed, and to whom the bond is assigned for that purpose. The recovery of the damages is of course limited to the value of the goods, &c., to secure the return of which the bond was given. The bond is forfeited if the goods are not returned, judgment having been secured in any one suit. The recovery being had, the appropriation will be a matter for the court in some subsequent proceeding, upon application by those creditors who may be entitled to share the proceeds.

The breach laid in the declaration is in the words of the condition, and sufficient as a question of pleading. If it is necessary to issue an execution before the return of the goods can be legally demanded, it seems, as urged by the counsel of the plaintiff, to be a matter of evidence, and not of pleading.

The demurrer must be overruled, and judgment for the plaintiff, unless the defendant shall ask leave to withdraw the demurrer on the usual terms.

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BAY v. COOK.

1. A justice's order for relief is absolutely necessary to make the township liable on the contracts of an overseer of the poor for the support of a pauper, or to make the board of freeholders or trustees of the poor house liable where there is a county poor house. An order of removal is not sufficient without the order for relief.

2. Where an overseer of the poor, or any other agent, makes contracts without sufficient authority legally to bind the township or his principal, he is personally responsible, although the contract may be in the name of the principal, and credit given to the principal.

3. A book of account is admissible in evidence, even where the items on the face of the book are not charged on the same day when the services were rendered, if the charge be made in the usual course of such business.

4. A charge in a book of accounts is sufficient, even where it mixes up several items in the same general charge, and does not give any information as to the amount or value of each or of either of the items charged.

5. It is no variance from the bill of particulars rendered if the book of accounts charge to A. B., overseer of the poor, &c., items which in the bill are rendered as charged to A. B.

6. It is not a fatal objection to a physician's bill or charge in his book, that it contains well known and usual abbreviations.

Error to Morris Circuit Court.

This was an action of assumpsit, brought against the defendant below, who was an overseer of the poor of the township of Washington, in the county of Morris. It was brought against him to recover compensation for medical attendance, &c., rendered by the plaintiff below, who is a physician, to a pauper who was a charge upon that township. The services were rendered while the pauper was in the township of Independence, in the county of Warren; but after an order of removal had been obtained, the situation of the pauper, who was exceedingly ill, not admitting of his immediate removal. The order of removal was obtained April 8, 1845, and served the next day on the overseer of Washington, who took charge of him. The plaintiff had previously attended the patient, and after the order he was requested by the overseer to continue his services and to attend him strictly. No nurse was employed, and the physician was promised by the overseer that he should be remunerated for the assistance he might render to the patient's wife in dressing his diseased limb.

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The bill against the overseer for these services was presented to the trustees of the poor house of Morris, but not paid. After a fruitless action against the township, in which the plaintiff was nonsuited, this suit was then commenced against the overseer.

Upon the trial of the cause in the Morris county Circuit Court, before Justice Whitehead, ten bills of exception were taken by the defendant below, and sealed, upon which the errors in this court were assigned.

The first five bills of exception were to the admission of the plaintiff's books of account, for the reasons—1st. That they varied from the bill of particulars furnished, in charging to "A. Bay, overseer of the poor, &c., Dr.," when the bill of particulars charged to "A. Bay, Dr." 2d. That they were indefinite, charging as follows: "April 8, 1845, to visits, medicine, &c., $.75." 3d. That they were not charged on the day when services were rendered, were unintelligible, and did not distinguish the amount charged for each item, as in this charge:

1845, April 16. For Wm. Sharp for vts iij & medicine
Best P. Barks ℥j Elixir vitriol ℥j to day $2.00
vts iij & medicine 13th 14th & 15th inst $5.00

The sixth bill of exception was to the admission of the testimony of J. H. D., that the defendant had requested him to furnish necessary groceries for the pauper, and had paid him for the same.

The seventh bill of exception was to the refusal, by the court, to permit the defendant to prove that the trustees of the poor house recognised their liability to pay the bill, and why they refused to pay it.

The eighth bill of exception was to the admission of evidence as to the rate of charges allowed by the fee bill of the state medical society.

The ninth bill of exception was to the charge of the court, which was as follows:

That there were two questions in this case.

First. Is the defendant, under the evidence, personally liable to pay the plaintiff what he may be reasonably entitled to receive for his services? Had the defendant, when he em-

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ployed the plaintiff to render his professional services to the pauper, complied with the requirements of the statute, so as to render the township of which he was overseer liable, he would be exempt from personal liability. In order to render a township liable for services to a pauper, upon the application or request of the overseer, it is necessary there should be an order for relief under the provisions of the ninth section of the act concerning the poor. *Revised Statutes* 882. If the overseer omits to procure this order, the township is not liable for any services rendered the pauper. It was for the want of this order that this plaintiff was nonsuited in an action prosecuted against the township of Washington for the recovery of this account. Although the services of the plaintiff were rendered at the request of the defendant, as overseer of the poor, yet his township is not liable, by reason of the neglect on his part in procuring the order. For this neglect he has become personally liable. When applied to by the defendant to render his services to the pauper, the plaintiff had a right to presume, that as overseer of the poor, he had done all his duty, so as to make his principal liable.

Again. No action will lie for the recovery of this account against the trustees of the county poor house or against the board of chosen freeholders of the county, as has been contended by the defendant's counsel. If the defendant became personally liable, his liability continued notwithstanding what afterwards took place between the trustees and the defendant, and between these parties and the defendant and the trustees. Assuming that all the evidence is true in relation to the organization of the county poor house, and the several interviews between the defendant and the trustees, and the communication had between the plaintiff and the trustees, or their president, Mr. Bryant, there is nothing in it which will discharge the defendant from his liability, or which will render the board of chosen freeholders of the county liable.

Second. The other question in the cause is, what amount is the plaintiff reasonably entitled to receive? This is a question for the consideration of the jury. The jury have before them the plaintiff's books of account, and, in ascertaining the amount.

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they should be governed by them, in connection with the testimony of the witnesses, who have testified to the condition of the pauper, and the evidence of the physicians, as to what would be an allowance for the services rendered, and whether the amount of services claimed were necessary. As the plaintiff had charged much less for services than what is allowed for like services by the state medical society, the jury were instructed to lay out of view entirely the evidence of the plaintiff of the fees allowed by that society. It was manifest, from the evidence, that the plaintiff, in making his charges, had not been governed by the rules or regulations of the society in reference to the amount charged.

The jury were further instructed, that neither party should be prejudiced by the non-production of the fee bill of the medical society of the county of Warren.

In determining the amount, the jury were instructed not to allow the plaintiff any charges contained in the bill of particulars furnished in the cause not written in plain English words. To all of the said charge, so given under title first, collectively, and to each portion and subject matter of the first of said charge, separately, the defendant excepted.

The tenth bill of exception was to the refusal of the court to charge the jury on sixteen points, submitted in writing by the defendant's counsel, the judge holding that they, or so much of them as were relative to the issue, were substantially included in the charge already given.

The cause was argued before the Chief Justice and Justices Nevius and Carpenter.

J. J. Scofield, for plaintiff in error.

The overseer of the poor, the agent of the township, is sought to be personally held liable upon an implied assumpsit, because he had neglected to obtain an order of relief, which seems to have been supposed necessary to bind the township. But no order of relief was in fact necessary in order to make the township liable. Yet, if otherwise, still the overseer is not personally responsible. Sharp, the patient, was a county pauper, and an order of relief, such as may charge a township, is

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not necessary where there is a county poor house, as in Morris, and the county has assumed the support of the poor. It is inconsistent with the proceedings in such a case. The trustees of the poor house are the judges of the amount of care and attention which a pauper is in such case to receive. *Rev. L.* 323; *Rev. Stat.* 189.

An order of relief is not always necessary. 1 *Wend.* 493, 501; 4 *Harr.* 53, 60; 1 *John.* 486; 1 *H. Black.* 253; 4 *Halst.* 276.

The trustees of the poor house were liable. They have recognised their liability; no assumpsit can therefore be implied against the overseer and agent. *Chit. Contr.* 79, *and cases;* 12 *Wend.* 180; 12 *John.* 447; 1 *Am. Lead. Cas.* 458.

The overseer was a public officer, who might be indicted for any neglect of public duty, but is not liable to this action. 2 *Pen.* 806; 1 *Halst.* 118; 1 *T. R.* 172; 1 *Cranch* 145; 5 *Cow.* 646; 6 *Ib.* 280; 18 *John.* 123; 19 *Ib.* 262.

The liability of agents, because of want of power to bind principal, is a principle which does not apply to public agents. *Story on Agency* §§ 280 to 285; *Paley on Agency* 374, 376; 2 *Kent* 632 *(5th ed.)*

A public officer is not to be held personally liable for error of judgment. 1 *Denio* 595; 3 *How. S. C. Rep.* 87.

As to the books of account. The charges are against Bay, as overseer, and not against him individually.

They are illegal in character, being lumping charges, as for instance, one charge for three different visits on as many days.

The charges in the book are not specific and intelligible, nor in plain English words. 1 *South.* 370; 2 *Cow. Phil. Ev.* 693, 699, *and cases;* 2 *Bouv. Law Dict. Tit.* "*Original entry.*"

Whelpley, contra.

The overseer requested the physician, after the order of removal was obtained, to continue his attendance; not only so, but he gave him directions to give strict and special attention. The charges were made against the overseer, but, at his request, the bill for the services so rendered was presented to the county board, who offered to pay the pitiful sum of

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$40. An action was then brought against the township of Washington, but the plaintiff was nonsuited, because there had been no order for relief, which was held necessary in order to charge the township. This action was then brought.

An order of relief was necessary; just as much so, as if there had been no prior order of removal. An order not only establishes the neeessity of relief, but it settles the amount. A pauper may be removed, and yet possibly no relief may be necessary. 4 *Harr.* 58; *Pen.* 76; *Ib.* 806; 3 *Halst.* 166; *Ib.* 193; 5 *Cow.* 644.

The trustees are not liable. They are a mere committee of the board of chosen freeholders, and are only authorized to relieve in cases where some township is bound; and none was bound in this instance, because there had been no order of relief obtained. The township, however, is primarily liable, notwithstanding the establishment of a county poor house, as is evident from the practice on orders of removal, which are not to the county at large, but to some particular township.

The contract was actually made with the overseer. He is the agent of the township, but he failed to perform such part of his duty as was necessary to relieve himself and charge the township. He did not act within the scope of his authority, and is therefore personally liable. It is no answer, that he was a public officer, for such officer is only protected while acting within the scope of his authority. There is no difference, in this respect, between public and private agents.

A public agent is bound when he does not disclose his agency, and also when he expressly assumes a personal responsibility.

The overseer was not the agent of the trustees, but of the township, and he exceeded his authority. The tenth section of the act (*Rev. Stat.* 882) shows it to be the policy of the law to make the overseer personally responsible, when he exceeds his authority. He is to forfeit any money expended without an order.

This is not the case of an agent of the supreme power in a state, to which the doctrine of public agent applies. The overseer is the agent of a mere municipal corporation liable to suit.

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The contract was personal, and the overseer is personally bound. 3 *John. Cas.* 70; 13 *John.* 307; 7 *Wend.* 106; *Ib.* 315; 2 *Kent* 631, *and note;* 2 *Greenl. Rep.* 358; 9 *S. & R.* 212.

In regard to the charges, the account rendered was, according to the statute, "in plain English words, or as nearly so as the articles will admit." *Rev. Stat.* 510. Physician's charges were formerly in Latin, and it was the design of the statute to reform this practice. Certainly the ordinary abbreviations may be used for pound, ounce, drachm, &c., which are known in mercantile usage. So if the ordinary name of the article sold be Latin, it may be so charged.

The mode of charging was usual and proper under the circumstances. Every mechanic is in the habit, at the end of two or three days or a week, as the case may be, of charging for the work of several days at once; so may a physician enter his charges in like manner.

Nevius, J. This case is presented to us in voluminous form, embracing ten bills of exceptions, taken and sealed at the trial, and the assignment of twenty-three errors in the proceedings of the court below. To consider all these separately would lead to a more protracted discussion than the law or merits of the case, in my opinion, call for. I will, therefore, briefly state so much of the case as I deem necessary for a full understanding of the questions really involved in it, and which we are called to decide.

The defendant in error, a practising physician, brought his action against the plaintiff in error, who was an overseer of the poor for the township of Washington, in the county of Morris, to recover for medicine, attendance, and nursing, found and provided for one William F. Sharp, a pauper, whose legal settlement was in said township. The pauper fell sick, and became a public charge in the township of Independence, in the county of Warren, and an order of removal was legally made out, to have him and his family removed to the township where his legal settlement was. But being too sick to be removed, the plaintiff in error employed the defendant to administer to his necessities, and afford him such medicine, at-

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tendance, and nursing as his case might require. It is under this employment that the services were rendered for which this action is brought. The charges in the plaintiff's book were made against *Andrew Bay, overseer of the poor of Washington township*, Morris county. It further appears, that in the county of Morris there is a county poor house, where, by law, the poor of said county are to be sent, and kept at the expense of the county. And it also appears that the plaintiff below first brought his suit against "the Inhabitants of Washington" for the recovery of his bill, but was defeated in that action, on the ground, that the township was not liable, no order for relief having been made, as required by the "act for the settlement of the poor."

With this brief statement of the material facts in the case, I proceed to consider such of the errors assigned as are entitled to weight in our final decision.

In the first place, it is insisted that the plaintiff's remedy, if he has one, is against the trustees of the county poor house, or if not against them, then against the inhabitants of the township of Washington, where the pauper had his legal settlement, and not against the defendant, and, more especially, not against him in his individual capacity. That the defendant, being an overseer of the poor, was the agent both of the trustees of the poor house and of the township and in the employment of the plaintiff, acted in that capacity, and with the knowledge of the plaintiff, and therefore is not personally liable. It is clear that the services and attendance for which the action is brought were *rendered* by the plaintiff; that they were rendered to a pauper, legally chargeable to the township of W., and that they were rendered at the instance of the defendant. It will not, therefore, be denied that the plaintiff is entitled to remuneration for such services from some source, and that the law ought to provide him a remedy. Is that remedy against the trustees of the poor house or the board of chosen freeholders of the county, who, by statute, have the direction, superintendence, and government of such poor house? I think not. For although the statute provides that the poor of the county shall be sent to, and kept in such poor house, at the

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expense of the county, this pauper had not been sent there, and had not been recognised by the freeholders, or their trustees or officers, as chargeable to the county when the services were performed, nor did the defendant act as their agent, nor was he their agent in employing the plaintiff, nor was there any evidence that the plaintiff gave the credit to the board of freeholders, or that the services were rendered upon their credit. It is true that the trustees, on some occasion after the bill had been contracted, offered the plaintiff to pay it, on condition that he would abate about two-thirds of the amount; but such offer, not being accepted, would in no wise make them liable, or give the plaintiff a remedy against them. It was voluntary on their part, without legal consideration, and the plaintiff was not bound to accept it; and if his charges were fair and lawful, the offer was an unworthy attempt at a compromise.

Has the plaintiff a legal remedy against the township? This may be answered by the fact, that a court of competent jurisdiction has already decided that the township was not liable. But if that question were still open, I am of opinion that the court was right in that decision. By the ninth section of the "act for the relief and settlement of the poor," *Rev. Stat.* 882, it is provided, "that on application for relief by any poor person to any overseer, the latter shall apply to a justice, who, with the overseer, shall inquire into the state and circumstances of such poor person; and if it appear to said justice that he is in such circumstances as to deserve relief, the justice shall give an order in writing to such overseer to make such allowance, &c.; and the said overseer shall make no other or further allowance." The township cannot be liable, then, without such order for the payment of the plaintiff's bill. In the case of *Perth Amboy* ads. *Smith*, 4 *Harr.* 58, the court said, "It may be questionable whether in any case, however emergent, an overseer of the poor can make any advances or engagements upon the credit of the township, without the previous order of a justice of the peace." And it is there further said, "that such is the doctrine held by the New York courts, in several cases, under a like statute."

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The question then recurs, is the defendant legally responsible under the circumstances of this case? He contends that he is not, because the credit was not given to him in his individual and personal character; that the charges were made against him in his official capacity, as overseer of the poor, by the plaintiff, and if liable at all, it is in such official capacity; and secondly, that being a public agent of the township, and such agency being known to the plaintiff at the time of his employment, and the subject matter of the contract being a provision for a pauper of the township, the township must be liable, and not he. Neither of these answers can avail him. The charge was substantially against the defendant, and the addition of the words "overseer of the poor" may be esteemed as descriptive of the person. The defendant employed the plaintiff to render the service, and required that it should be rendered with special care, and the plaintiff had a right to charge him in the manner he did, and to look to him personally for compensation, unless the latter can defend himself on the ground of his public agency. This, I apprehend, he cannot do. If an agent, either public or private, exceeds his authority in making a contract, he is personally liable for its performances, for the law will esteem him as acting in his individual capacity, rather than suffer the contract to fail. It is not the business of the party with whom such contract is made to inquire whether the professed agent is acting within or without the scope of his agency. I fully approve the principles laid down by Justice Sutherland, in the case of *Mott* v. *Hicks*, 1 *Cow.* 536, "that if a person undertake to contract, as agent, for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible; and the agent, when sued upon such contract, can exonerate himself from personal responsibility, only by showing his authority to bind those for whom he has undertaken to act." In this case the defendant failed to make his principal legally liable, by omitting to obtain the order for relief, as required by the statute; and, upon the principles above mentioned, must be personally responsible. The action, I think, was properly brought.

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Another exception taken at the trial, and relied upon here for the reversal of this judgment, is, that the account, or book of account, produced at the trial did not correspond with the bill of particulars furnished to the defendant, inasmuch as the bill did not show the charge against him to be as "overseer of the poor." This is no such variance as was calculated to mislead the defendant. He was sued in his individual capacity, declared against in that capacity, and the form of the entry in the book, at the heading of the account, cannot be material. Even if the charge in the book had been made against the township, I am of opinion that, upon the evidence in this case, as now before us, the plaintiff would have been entitled to recover against the defendant, although in his bill of particulars it was stated as a charge made against the defendant himself.

It is further objected, that the bill or account of the plaintiff is not wholly in the English language, and that it contains charges, without specifying distinctly for what services. In examining the bill of particulars furnished, I find no such defect in language as will vitiate the claim under the statute, which does not prohibit abbreviations, or require every item of charge to be in English. The act requires that the bill of particulars shall be "in plain English words, or as nearly so as the articles will admit," and I cannot say that in this respect the act has been violated. The charges of $5, in several instances, embracing services of two or three days, are neither contrary to law nor the practice that prevails with men who keep their books of account at home, while their labor and services are rendered elsewhere. But it must be borne in mind that there was other evidence in support of these charges produced at the trial besides the plaintiff's books, and the legal inference is, that they were fully maintained.

There are numerous other errors assigned in this case, but they have not been urged in the argument, and on a careful examination of them, they will be found of an extremely technical character, and ought not to prevail against the manifest justice of the verdict and judgment below.

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The judgment of the Circuit Court should, in my opinion, be affirmed with costs.

CARPENTER, J. Our statute authorizes the board of chosen freeholders of each county, if they deem it necessary, to establish a county poor house, and to make ordinances and by-laws for its regulation and government. *Rev. Stat.* 189. A poor house was established in the county of Morris, and by-laws were adopted regulating the admission of the poor of the county, for whose benefit it was intended. These rules, it seems, did not require any formal order of relief after an order of removal; but the overseer of any township, in the county to which a pauper had been removed, was authorized to take such pauper to the poor house without further order. Perhaps, therefore, the general law, as to special orders for the support of paupers and the entries in the overseer's book, may not in all instances be applicable to a county poor house establishment, being superseded by other provisions. Still each township is primarily liable for the maintenance of its paupers, notwithstanding there may be a county poor house, where, after being sent, they can be maintained. It is only so far as the duty is performed by the county, that the township is relieved from its liability for the support of its poor. But, in order to bind the township, an order of relief is generally necessary, even although there may have been a prior order of removal. It was so held in a suit by this plaintiff (defendant in error) against the township, and he was nonsuited on the trial because unable to show such order. A person may be removed to his place of legal settlement, when only *likely to become chargeable elsewhere. Rev. Stat.* 886. The order must therefore be obtained, as well to show that relief is necessary, as also to ascertain the amount of relief to be afforded.

An order of removal had been obtained in this case, and the pauper had become chargeable upon the township of Washington; the overseer, therefore, being notified, was then bound to provide for his relief. Had the pauper been fit to remove, the duty of the overseer might have been discharged, according to the by-laws referred to, by conveying him immediately

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to the poor house. He was not in a fit state to remove, and it was therefore his duty to sustain him at the place where he was confined by disease. The overseer did provide for the pauper, but he neglected to obtain any order of relief. He requested the plaintiff to attend upon him strictly, and to render those services which were so absolutely necessary in his diseased and helpless condition. His act would have bound the township, had it been made within the scope of his authority and after obtaining the proper order, but the officer had no authority to bind the township, except in the mode prescribed by the statute. Now it was the duty of the overseer, and not of the physician, to obtain that order, and made so by the express provisions of the statute. *Rev. Stat.* 882, § 9. The statute, in terms, directs that he should extend relief at the public charge no further than directed by the order; without it, he was to receive no allowance for any money or goods paid or distributed to any poor person. Without the order there could be no resort to the township; and can it be doubted that the overseer, who directs the services, must be personally accountable? The services may have been, and probably were performed upon the expectation of remuneration from the public, but resort to the township was unavailing from the default of the overseer. The case is not within the rule which exempts public agents contracting for the government, and when there is no liability on the part of the principal, the agent is himself responsible.

As to the character of the charges in the book, which formed the ground of a subsequent exception, I think a sufficient answer has been given to the objection by the counsel of the defendant in error. It does not seem to be necessary that the charges should always be made in the book on the very day on which rendered; in many employments this would be impracticable, and I see no difficulty in this case because the services of three days are charged at one time. Nor do I think the statute referred to will exclude the use of ordinary and known abbreviations.

GREEN, C. J., concurred.

Judgment affirmed.

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CASES DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW JERSEY,

AT APRIL TERM, 1850.

PERRINE v. FARR.

1. Those allegations, only, in pleadings that are wholly foreign or irrelevant to the issue, and which need not to have been made at all, can be treated as surplusage.

2. A private road, laid out under the statute of this state, is not a private way, or right of way, which is a species of real property known to the common law, but is open to the use of all the public.

3. To justify under the proceedings of any special tribunal, its *past action* must be first shown; it cannot be presumed.

4. The authority of three chosen freeholders, as to opening by-roads, depends upon the fact, that there had existed before a by-road, used as such by the inhabitants: they have no power to determine that *there is* a by-road, but only to order it to be opened; and their authority can only be exercised where the obstruction is recent.

5. A private road, although open to the use of the public, is not a *public highway*, and therefore, not being within the exception in art. 1, § 13, of the constitution, private roads cannot now be laid out without providing compensation to the land owner.—*Per* GREEN, *C. J.*

Rule to show cause.

This was an action of trespass *quare clausum fregit.* To the declaration, in the usual form, the defendant pleaded several pleas, but it is only necessary to state shortly the fifth and sixth, upon which the defence rested. In these pleas the defendant

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justified, because that the place where the trespasses were to have been committed, at and before, &c., was parcel of a certain by-road, then heretofore used, as such, by the inhabitants of the state, which had been shut up and rendered impassable, whereby the defendant, one of the inhabitants, had been put to immediate inconvenience and difficulty, &c.; that he had applied in writing to three of the chosen freeholders of the county nearest to the said by-road, to lay out and open the said road, and that they did lay out and open the same, &c.

To these pleas the plaintiff replied *precludi non*, because, &c., that the said place, in which, &c., was not before, &c., a by-road, used as such by the inhabitants of this state, and rendered impassable, whereby the said inhabitants were put to immediate inconvenience and difficulty, &c.

The cause was tried at the Middlesex circuit, in December, 1847. It appeared, on the trial, that the plaintiff was the owner of one hundred acres of land, lying on the south side of a public road, in the township of South Brunswick, in said county. The defendant owned two hundred acres of wood land, lying immediately in the rear of the land of the plaintiff. Both tracts were formerly the property of one Mrs. Lott, being three hundred acres, set off to her by commissioners, as one of the heirs of her brother, John Wetherill, deceased, upon the partition of his real estate in 1823. Mrs. Lott and her husband conveyed to the plaintiff the land now owned by him, on 16th March, 1827, and to the defendant his land on the 23d April, 1828. After the plaintiff had purchased, in the progress of clearing and improving his land, he finally shut up the road in question, which was one of several wood roads crossing his premises, and leading to the wood land of the defendant and others in his rear. The defendant at length, in 1838 or 1839, called freeholders for the purpose of opening the road. The three chosen freeholders did not open it, as requested, but, it seems, attempted to lay out another road, twenty-five feet wide, on ground supposed to be more convenient to the plaintiff. Nothing further, however, was done under this proceeding, but the defendant subsequently procured surveyors to be appointed for the purpose of laying out a private road under the sta-

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tute, which was done. The proceedings of the surveyors, it is said, were set aside for irregularity, and then the defendant again, in 1844, made application in writing to three chosen freeholders to open and lay out the supposed by-road, which had been closed, alleging himself to be aggrieved and put to immediate inconvenience. The freeholders met on 30th September, 1844, and ordered the road to be opened, making out and signing a formal certificate of their proceedings. It is under these proceedings that the defendant sought to justify the taking down of the fence of the plaintiff, and passing over his premises. The defendant owned another tract of land, adjoining that already referred to, as well as the premises of the plaintiff, by which he might have access to the public road, though by a way supposed to be less convenient than that across the plaintiff's land.

The judge directed the jury, that if the freeholders did lay out the road in question, and the act complained of was committed in opening that road under their order, that then their verdict should be for the defendant. The jury found a verdict, under the fifth and sixth pleas, for the defendant, and the plaintiff subsequently obtained a rule to show cause why that verdict should not be set aside; which was argued before the CHIEF JUSTICE and Justices NEVIUS and CARPENTER.

Blauvelt and *Vroom*, for plaintiff.

The defendant attempts to justify under the action of the three freeholders, under whose sanction, he says, he entered and tore down the plaintiff's fence. It is the party who here seeks to justify, not an officer acting under the writ or order of any tribunal, general or special.

The freeholders, under the act, (*Rev. Stat.* 522, § 19,) form a tribunal of very special and limited jurisdiction for a special and temporary purpose. They can only act under a particular exigency. They have no general jurisdiction over our by-roads, as assumed on the other side; if they do not act under the statute their proceedings are void. 6 *Co.* 76; 2 *Bin.* 209; *Willes* 30; *Ib.* 122; 4 *Vin.* 334, § 12; 3 *Cranch* 331; 15 *John.* 141; 19 *Ib.* 33; 2 *Stark. Ev.* 588 (*Phil. ed.* 1842).

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Those who justify under such tribunal must show the jurisdiction; the presumption is against it. 3 *Gr.* 57; 2 *Salk.* 522; 4 *Dal.* 8; 4 *Halst.* 20; 1 *Gr.* 308; 3 *Ib.* 341; 2 *Harr.* 25.

The statute will show what is necessary to support the jurisdiction. The party was bound to show a by-road *heretofore used;* that it had been shut up to the *immediate inconvenience* of some persons, and that application had been made, by some *one aggrieved,* to the freeholders *nearest* the place. These matters are essential to the jurisdiction, and must be shown in pleading and in evidence, according as the justification may be presented.

A certificate has been produced, and this, if competent, defective, and does not show all these particulars. But it is not authorized by the statute, and is not evidence at all.

The jurisdiction was not shown by parol evidence. No *by-road,* in the sense of the statute, was shown to have previously existed; mere temporary wood road, once opened by the previous owner of the whole tract for his own use, and long since closed. No recent inconvenience was shown; the road had been closed for thirteen or fourteen years. The authority of the freeholders was merely to open the former road at the *peril of the parties concerned;* they attempt, as shown by the certificate, to lay out a road, in part new, twenty feet wide. Besides, freeholders had been called years before, who had refused to open the road. The power was exhausted, and the application could not be renewed.

Hageman and *Field,* contra.

The case seems to present but one question, had the freeholders jurisdiction? Were those proceedings void or voidable? The best rule is that stated in *Case of the Marshalsea,* 10 *Co.* 76: wherever the court has jurisdiction over the subject matter the officer is not a trespasser, unless want of jurisdiction, as to the person or place, appears on the face of the proceedings. See 1 *Caines* 92; 8 *John.* 69; 3 *Wend.* 42; 11 *Ib.* 91.

There is jurisdiction over the subject matter in this case. The road had been shut up. It was the case provided for by the statute. However erroneous the judgment, it was in regard

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to by-roads over which the jurisdiction, in this respect, extended.

It is not policy to declare these proceedings void. There are two remedies, an application to vacate and the writ of *certiorari.*

This was a by-road, a private or obscure road, existing in fact, and not because laid out by law. Opened by the freeholders, "it is to remain *as a private road.*"

It is said the by-road must be one recently shut up. Perhaps so, but the freeholders had jurisdiction to settle that question. There had been no acquiescence by Mr. Farr, on the contrary, a perpetual struggle.

The Chief Justice. To an action of trespass *quare clausum fregit*, the defendant pleaded, that the *locus in quo* was a by-road, heretofore used as such by the inhabitants of this state; and that the said road, having been shut up and rendered impassable, whereby the defendant, one of the said inhabitants of this state, was put to immediate inconvenience and difficulty. Three of the chosen freeholders of the county of Middlesex, upon the application of the defendant, on the 30th of September, 1844, opened the said road. That the trespass complained of was the act of the defendant, in removing obstructions from the said road, and passing along the same, as he had a right to do. Upon this plea issue was joined.

On the trial, the plaintiff's counsel insisted that the act of the freeholders was null and void, there being no evidence to prove, that at the time the road was opened by the freeholders, there was a by-road there, "heretofore used as such by the inhabitants of the state," and which had been shut up and rendered impassable, whereby the inhabitants had been put to immediate inconvenience or difficulty. The judge charged the jury, that if they found that the freeholders did lay out the road in question, and that the act complained of was committed in removing obstructions from the road thus laid out, their verdict ought to be for the defendant.

The road is alleged to have been laid out by three freeholders, under the provisions of the thirteenth section of the act of

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1818. *Rev. L.* 615. The propriety of the charge, if lawful, must rest on the assumed ground, that the only material averment in the plea is the fact, that the *locus in quo* was a private road, and that of that fact the action of the freeholders was conclusive evidence. It is very obvious that the learned and accurate counsel, by whom the pleadings in this cause were prepared, and the trial, on the part of the defendant, conducted, did not so regard it. On the contrary, he has, with great care and precision, spread upon the face of his plea every circumstance declared necessary by the statute to warrant the action of the freeholders, and on the trial he attempted to establish them by proof, but failed in so doing. Can those averments now be treated as wholly immaterial, and rejected as surplusage? If they cannot, then the defendant, by well settled rules, was bound to sustain them by proof, and, failing in this, he failed to support his plea. The rule is, that if the matter unnecessarily stated be wholly foreign and irrelevant to the issue, so that no allegation whatever on the subject was necessary, the averment will be rejected as surplusage, and need not be proved. 1 *Chitty's Pl.* (*7th ed.*) 262, 580; *Steph. on Pl.* 419.

Could these averments be struck out, and the pleadings stand? That is the test question. *Gould's Pl.* 154, *c.* 3, § 170; *Chitty's Pl.* 263.

In the form of pleading adopted in this cause, it can scarcely be pretended that the averments in question can be struck out, and the plea be valid. The pleader has not contented himself simply by averring that the "*locus in quo*" was a private road. That fact is, indeed, not at all averred directly. But he has spread upon the face of his plea, in detail, those facts which the law had made essential to constitute a private road. In this form of pleading it is obvious that each of these facts is essential to the validity of the plea. No one fact can be treated as irrelevant or foreign to the issue, and must therefore be proved as laid in the plea. On this ground alone, if there were no other, I am of opinion that the charge was erroneous.

I regard the peculiar form of pleading in this case worthy of more attention, because it is in accordance with approved precedents, and therefore strongly indicative of the judgment

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of the profession upon the true construction of the act now under consideration. If the construction of the statute, contended for by counsel upon the argument, be the true one, then the proceedings under it is simply one of the modes provided by the statute for laying out a private road; and it would be sufficient, in pleading, simply to aver that the *locus in quo* was a private road, without stating upon the plea the particular mode in which the road was laid out.

It is material to observe, that private roads under our statute have no analogy to what are termed in law private ways, but are more analogous to the public highways or the common ways known to the common law. 2 *B. C.* 35.

A private road cannot be claimed by grant, prescription, necessity, or in any other mode in which title to a private way is acquired; nor is the right, when it exists, a private right. It is neither a right vested in the applicant for the road, nor appurtenant to his land, but is essentially a public right. This will appear more clearly by a brief reference to the legislation upon this subject.

By the first section of the act of 1716, 1 *Nevill* 48, certain roads and highways, of six and four rods broad, are confirmed as common public roads and highways. By the third section, provision is made for laying out roads "from one town, or division, to another, or to any public landing or market, or mill, or from any town, to the king's highway." These roads are to be four rods broad. By the sixth section, provision is made for the laying out of roads, "upon the application of any person or persons, to the said person's plantation, or to any other plantation." These latter roads are to be one or two rods wide. They are to be cleared and maintained by the inhabitants who require them, and the owners of the land through which they pass may hang swinging gates upon them. These two sections constitute the germs of what are now denominated public and private roads. They will be found incorporated, with various modifications, in the act of 1760, sections three and twenty-one (2 *Nevill* 345); of 1774, sections 3 and 23 (*Allinson* 386); of 1794, sections 1 and 4 (*Pamph. Laws* 904); of 1799, sections 1 and 8 (*Pat.* 387); of 1818,

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sections 1 and 4 (*Rev. Laws* 615), and of the existing law of 1846, sections 2 and 4 (*Rev. Stat.* 515). The distinction between the two classes of roads, usually denominated public and private, is coeval with the earliest legislation of the state upon the subject. But the term *private*, as applied to either, is of comparatively modern origin. They are, in fact, both *public* roads, so far as the *right* to use them is concerned. The act of 1716, which prescribes the mode of laying out both classes of roads, is entitled, "An act for the better laying out, regulating, and preserving *public roads* and highways." The acts of 1760 and of 1774 authorized the roads now called private to be laid out one or two rods wide, and enacted that all such roads of one rod wide only, should be cleared and maintained by the applicants, and if of two rods wide, to be maintained as other *public roads* are; and all the said roads of one or two rods wide shall be deemed lawful roads; and any person who shall stop or lessen the same, are declared subject to all the penalties prescribed for lessening and stopping the public highways. The term *private road* first occurs in the act of 1794, and appears to have been introduced as a convenient and brief mode of designating the class of roads laid out on the application of one or more individuals, for the accommodation of their lands. But the *name* did not alter the essential character of the *thing*. The land was taken, and the road opened, not for the applicants alone, but for the public, and every inhabitant had a right to use it. The twelfth section of the act in question (*Rev. Laws* 620) enacts, that every private road shall be cleared, worked, repaired, and maintained by the applicants and such other persons as commonly make use of the same, or, in case of neglect, it shall be lawful for any person who may have occasion to use the road, to clear, work, and maintain the same. The land, when taken, is dedicated, not to private, but to public use. By what right, indeed, could the legislature have taken the land of A. and appropriated it to the private use of B.?

Private roads must be laid out on the application of an individual, for the more immediate benefit of his own property: they are not to exceed thirty feet in width; they are to

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be opened, worked, and maintained not at the public expense, but by the persons having occasion to use them, they may be encumbered with swinging gates. In these respects they differ from public roads. But like public roads, they are open to public use. The right to use them rests precisely upon the same foundation, the law of the legislature and the action of the public functionaries authorized to lay them out. The use of a private road is not acquired as a private right, nor should it be pleaded as a private right of way. It should be pleaded in the same manner as the right to use a *public* road is pleaded.

If this view be correct, it would seem that the only proper mode of pleading would be analogous to that adopted in the case of a public highway. An averment of the fact, that the *locus in quo* was part of a private road, would be sufficient. The particular mode in which the road was laid out can, upon principle, be no more material in the case of a private, than of a public road; and if the mere action of the freeholders is all that is necessary to constitute a private road under the thirteenth section of the act, as is now contended by the defendant, it can be no more necessary to aver, in pleading, the statute by which that road is laid out, than if it were laid out by surveyors in the mode pointed out in the fourth section of the act. The mode of pleading, therefore, adopted, not only in this case but in other cases under the section in question, is strong evidence of what the pleader regarded as the true construction of the act.

The principal question discussed upon the argument was, whether the evidence in the cause, aside from any technical point arising out of the pleadings, proved the existence of a private way over the premises in question? This presents the simple inquiry, whether the proceedings of freeholders, laying out or opening a road under the thirteenth section of the act, do of themselves, independently of any other proof, establish the existence of a private road?

It was insisted, on the part of the plaintiff, that the action of the freeholders was unauthorized, because there was no evidence showing that the road in question was used as a by-road before the 19th of February, 1818, when the act was passed,

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and that it could not therefore have been, in the language of the act, *heretofore* used as such by the inhabitants of this state. The term "heretofore" has reference not to the date of the passage of the act, but to the time of opening the road. This is obvious, by reference to the section, as originally enacted, in the act of 1794 (*Pamph. Laws* 904). It there reads as follows: "When any person shall shut up, or otherwise prevent the use of any by-road, heretofore accustomed to be used by the inhabitants of this state, although not laid out agreeably to the directions of *this* or the before recited act," &c. It is plain that, in this section, the term "*heretofore*" cannot refer to the time of the passage of the act, because at that time no road could, by possibility, have been laid out agreeably to the directions of the act. It must, of necessity, be referred to some future period, which could only be the time of opening the road.

The same phrase, *heretofore*, occurs in the twenty-eighth section of the act of 1818, and it has been held, in that connection, to refer not to the time of the passage of the law, but to the time of the doing of the act prohibited. *State* v. *Stites*, 1 *Green* 176.

The question is not whether the proceedings of the freeholders were irregular, but whether they were void for want of jurisdiction. Jurisdiction is power. A question of jurisdiction is a question of power; and the question is, whether, upon the evidence in the case, it appears that the freeholders had power, under the statute, to lay out the road in question.

The freeholders exercised a special statutory authority of the most limited kind. They had no general power of laying out roads, whenever and wherever they saw fit; but they are empowered to act only in a given case, under special designated circumstances. If those circumstances do not exist they have no jurisdiction. They have no power to lay out a *new* road, but to remove obstructions from an *old* one, and that must be a road "heretofore" used as such; and it must have been shut up, to the *immediate* inconvenience and difficulty of the inhabitants. This language is used as a limitation of the power of the freeholders, in regard to which they can exercise no discretion.

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No principle is better settled, than that an officer exercising special statutory authority, or a tribunal of limited jurisdiction, must *show* its authority. If the case is not shown to be within the jurisdiction, it is presumed to be without it.

The person relying upon the acts of sueh tribunal as a justification, must aver and prove all circumstances necessary to give jurisdiction. It was so understood by the pleader in this cause, and the facts are all properly averred. But the jury were instructed that these facts need not be proved, but that the mere fact that the freeholders had *exercised* the power, was conclusive proof that they had the power. The whole error of the argument, on the part of the defendant, consists in assuming that the freeholders had jurisdiction of the *subject matter* of laying out the road; but whether it was to be exercised or not, depended upon the question, whether, in their opinion, the road had previously been used, and had been shut up, to the immediate inconvenience of the inhabitants; whereas the fact of the road having been heretofore used, and its being shut up, to the immediate injury of the inhabitants, were the very facts upon which depended the power of the freeholders to act in the premises. The decision of the freeholders upon that point was of no avail. They are not to construe the limitation of their own powers. *Jurisdiction* must be shown by evidence, independent of the action of the tribunal itself. If it had appeared in evidence that there never had been a road upon the spot where the present road is opened, it could scarcely be contended that the proceedings of the freeholders were not void. The case is not materially altered by proof that a road had once existed, but that it had been shut up for at least ten years, and, at the time of the action of the freeholders, was enclosed and cultivated. The whole section shows clearly that the freeholders are to open an existing road which is closed or obstructed, not to relay a road, every trace of which is extinct.

If there existed a doubt as to the true construction of the act, I am of opinion that no such conclusive effect, as is contended for, should be given to the act of the freeholders.

1. Because the whole frame and policy of the act forbids

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such a construction. The legislature had, in previous sections, provided the mode in which private roads should be laid out. The surveyors are to be selected by the court, upon due notice of the application. The court are to reject, in their discretion, all persons interested, or who for other cause ought not to be appointed. Notice must be given of the time and place of the meeting of the surveyors, that the landholder may have an opportunity of being heard. The route of the road is to be accurately surveyed, mapped, returned, and recorded. If the landholder is dissatisfied, he may have the decision reviewed by another tribunal. The rights of the landholder are cautiously guarded, and the courts have construed these provisions most strictly in his favor.

And yet, upon the construction now sought to be given to the thirteenth section of the act, all these safeguards are entirely disregarded, and the rights of the landholder exposed to destruction without the possibility of redress.

The freeholders who are to open the road are designated by law; they may be directly interested in the application, or under the influence of the applicants, or hostile to the landholder. They meet at the instance of the applicants, and may act exclusively upon *ex parte* representations. They take no oath to act impartially; no notice of the time and place of meeting is required to be given. The landholder has no opportunity of being heard and no right of review. No survey or map of the road is required to be made; no record of the proceedings to be kept or recorded. There is nothing in the character of the proceeding to invest it with the dignity of a judicial investigation or of a fair and impartial trial. Its inevitable effect would be to deprive the landholder of his property without a trial, and to conclude his rights without an opportunity of a hearing or the possibility of redress. Such construction ought not to be given to the statute, except upon the clearest rule of construction.

But the evil designed to be remedied requires no such construction. A method had been provided by law for laying out private roads. The evil to be remedied by this provision was the shutting up of by-roads already opened, though not laid

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out agreeably to law, by which the inhabitants were put to immediate inconvenience and difficulty. Such an evil, it is obvious, demanded a prompt and immediate remedy. It brooked no delay. The object was not to lay out a road, in the proper sense of the term, but to open a road already in use. At the time of the original adoption of this provision there were in this state many by-roads, extending from plantation to plantation, which had never been laid out agreeably to law. Public roads were comparatively rare. As the country became settled, many dwellings were erected remote from public highways, and resort was had to by-roads, extending over adjoining plantations, for the convenience of the inhabitants. But in many cases these roads were permissive merely. They had not ripened into right. In such a state of things there was an obvious propriety in guarding against the difficulty and inconvenience which must have arisen from the shutting up of these roads. The object of the provision, it is obvious, would however be fully accomplished simply by removing the obstruction, and leaving the landholder to his action for damages, or, at the utmost, by permitting the action of the freeholders to consummate a right otherwise imperfect.

Although the act has now been in operation more than half a century, and its aid repeatedly invoked, no such efficacy, as is now imputed to the act of the freeholders, has ever before been held to exist. It has more than once been held otherwise at the circuits. In the case of *Black* v. *Pullen*, tried at the Burlington circuit, at May term, 1837, upon an issue similar to the present, Justice Ryerson charged the jury, that "the defendant could not justify under the act of the freeholders; unless he showed a right of way independent of the act of the freeholders, he had no right at all."

A decisive consideration against the construction contended for is, that it will render the section unconstitutional. By the 16th clause, art. 1, of the constitution, it is provided, that "private property shall not be taken for public use without just compensation, but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made." A private road, though taken for public use, is not a

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public highway. The phrase in the constitution must be construed according to its well known settled signification. A private road is not, either in its legal sense or popular signification, a public highway. Under the present constitution, land cannot be taken for a private road without just compensation to the owner. To permit the action of the freeholders to operate *per se*, as a laying out of the road, would be a direct and palpable infringement of the constitution. It would be taking private property for public use without compensation. The road in question was laid out by the freeholders after the present constitution went into operation, and if its operation is to give the defendant a *right* to the use of the plaintiff's property, it is unconstitutional and void.

I think the verdict should be set aside, and a new trial granted.

CARPENTER, J. The defendant attempts to justify the alleged trespass in passing across the premises, and pulling down the fence of the plaintiff, in order to open a passage for his wagons and horses, under the action of three chosen freeholders, and the opening of a by-road by them, upon his application. The statute provides, "that if any by-road, heretofore used as such by the inhabitants of this state, although not laid out agreeably to law, shall be shut up or rendered impassable, whereby the said inhabitants may be put to immediate inconvenience or difficulty, then any person so aggrieved may apply in writing to three of the chosen freeholders of the county nearest the road, and the said freeholders are hereby authorized to lay out the same, which shall remain as a private road, until it be vacated or altered, as in the manner directed in the fourth section of this act." *Rev. Stat.* 522, § 19. The three freeholders, who were called by the defendant, ordered the road which had been shut up to be opened, and made a formal certificate in writing of their proceedings. The act evidently contemplates a more summary proceeding in cases where the shutting up of a by-road puts persons who have been accustomed to use it, to immediate and serious inconvenience. It authorizes no record to be made of such pro-

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ceeding, and the certificate may therefore be laid out of the question, which in no case could serve any purpose, unless as it might be used as a memorandum to refresh the minds of the freeholders when called as witnesses. It may be proper to add, that it appears, from this certificate, that these freeholders so far mistook their authority as not merely to lay out or open this road, as it had previously been used, but one twenty-five feet in width, by courses and distances not exactly corresponding with the former by-road, thus, in fact, attempting to lay out a new road. The judge, on the trial, treated the proceedings of these freeholders as the judgment of a special tribunal erected for the particular case and conclusive, and the main question on this motion is, whether he was right in this direction.

The proposition of the defendant's counsel is unquestionably correct, that where the matter adjudicated upon is within the jurisdiction of the court, but the want of jurisdiction is as to person or place, unless such defect appears on the face of the process, the officer who executes it is not a trespasser; though when the subject matter is not within the jurisdiction, there every thing done is void, and the officer may be treated as a trespasser. 10 *Co.* 76; *Hard.* 480; *Bul. N. P.* 82.

But it will be noticed that this is not the case of an officer relying, as a justification, upon the order or process of any tribunal, in regard to a matter within its jurisdiction. In most cases process regular on its face will be sufficient for the protection of the officer; and upon right reason, for it would be unreasonable to hold an officer answerable for executing process, which, as the minister of the court, he dare not disregard. This is not the case of the freeholders, who, within certain limits, would doubtless be exonerated from any responsibility, their action having been invoked by a proper and formal application under the statute. It is the case of the party by whom the proceeding was originated, and upon whose application the freeholders undertook to act in the premises. An officer has a protection that the party has not, and that whether the court from which the process issues is a court of general or limited jurisdiction. The same process which might be suffi-

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cient for the protection of the officer may be void as to the party by whom it was issued, who, when he attempts to justify under it, must show the foundation on which it issued. So the party who relies upon the proceedings of an inferior tribunal must aver and prove that the subject matter arose within its jurisdiction, and this may be denied by the other party. *Bul. N. P.* 83; *Higginson* v. *Martin*, 2 *Mod.* 195; *Evans* v. *Munkley*, 4 *Taunt.* 48; *Andrews* v. *Maris*, 1 *Q. B.* 16; *Savacoor* v. *Boughton*, 5 *Wend.* 170; *Com. Dig., Pl.* 3, *M* 24; *Browne on Parties to Action* 269 (*Law Lib.*)

It was open then, upon these principles, for the plaintiff to deny in his replication any thing upon which the jurisdiction of the freeholders rested. The application was *ex parte* by the defendant. The statute requires no notice to the other party; the proceeding is summary, in order to remedy an immediate and pressing inconvenience, and if the truth of the facts in the application, upon which the jurisdiction of the freeholders depends, be denied, the defendant must support his plea by proof, or his justification will fail.

But, in truth, the proceedings under this section are rather in the nature of a special authority vested in the chosen freeholders, upon the application of the party aggrieved, and hence the necessity of setting out the proceedings at length in the plea. When any *by-road heretofore used*, &c., *shall be shut up*, whereby any of the inhabitants of the state are put to *immediate inconvenience*, then any person aggrieved may call the freeholders, and the discretion vested in the freeholders seems to be to judge, in such case, whether the inconvenience is such as that the road ought to be summarily opened. It is not of course, because a by-road previously used has been closed, that therefore it must be opened, but having been recently closed, the freeholders in such case are to judge whether the inconvenience is so great to those by whom the road had been previously used, as that it ought to be opened, and remain open until other provision can be made for their necessity. The applicant acts under their order at his peril. If sued in trespass, he must aver and prove, so far as the averments

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in his plea are put in issue, the facts necessary to give jurisdiction.

A by-road is defined by Webster and Johnson to be a private, unfrequented, or obscure road. The word seems to be used in the statute in opposition to a private road laid out according to law, which latter may be for the use of a single adjoining proprietor. The difficulty in this case does not seem to be in the failure to show the previous existence and use of such by-road, as is contemplated in the act; it is in the fact that the shutting up of road was not recent. It had been closed for several years before this application. It was not the exigency provided for when the freeholders were authorized to judge as to the *extent* of the inconvenience. It is not necessary to say how promptly the application must be made; but after such lapse of time as had occurred in the present instance, there can be no pretence to say that the inconvenience was immediate. The subject has been discussed before us without reference to the technical character of the pleadings, upon which, therefore, no opinion is now expressed. I am of the opinion that the verdict ought to be set aside, and a new trial granted.

NEVIUS, J., concurred in setting aside the verdict.

Rule absolute.

MERSHON ET AL. v. HOBENSACK.

1. It is no ground of error that, on the trial, the court permits a leading question to be put to a witness, by the party calling him.

2. Every person who undertakes to carry, for compensation, the goods of all persons, indifferently, is a *common carrier*.

3. A judgment will not be reversed because the court improperly refused to nonsuit, if the evidence subsequently adduced in the course of the trial is sufficient to sustain the plaintiff's case.

4. Persons giving out themselves as partners, will be held liable as such, although they really are not.

5. The non-joinder of defendants can be taken advantage of only by plea in abatement.

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6. Common carriers, where there is no special contract, are in the nature of insurers, and liable for the safe delivery of the goods taken by them, unless prevented by the act of God or the public enemy. It is no excuse that they were guilty of no negligence.

Error to Mercer Circuit Court.

This was an action of assumpsit, by Joseph Hobensack against Abner and Thomas Mershon, to recover the value of goods alleged to have been received by the defendants below, as common carriers between Philadelphia and Trenton, and lost upon the transit. The vessel upon which the goods were placed was sunk in the Delaware, upon the passage, by coming in collision with a steamer.

The declaration contained four counts.

The 1st count charges, that defendants, at the time of the delivery of the goods and chattels to them, were common carriers between Philadelphia and Trenton, and then, and still are *partners* in said business, and that while they were such, *to wit*, in the first of February, 1848, the plaintiff delivered to them, and they accepted, certain goods (setting them out), to be safely and securely carried from Philadelphia to South Trenton, and, in consideration of a certain reward to the said defendants in that behalf, they being such carriers, undertook to carry and convey them safely; but, notwithstanding their promise, they so *carelessly and negligently* behaved and conducted themselves, that, by and through the mere negligence and improper conduct of the said defendants and their servants, the said goods were wholly lost.

2d count. That in consideration that the plaintiff, at the special instance and request of the said defendants, had then and there caused to be delivered to the said defendants divers other goods, to be taken care of and safely and securely carried and conveyed by said defendants, in and on board of a certain vessel, from the city of Philadelphia to South Trenton aforesaid, and then and there to be securely delivered for the said plaintiff for certain freight and reward to the defendants in that behalf, they, the said defendants undertook and faithfully promised the said plaintiff to take proper care of the said last mentioned goods and chattels, and, although the defend-

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ants had received the said last mentioned goods for the purpose aforesaid, yet the said defendants, not regarding their duty in that behalf, nor their last mentioned promise and undertaking, took so *little and bad care* of them, that, by and through the mere *carelessness and negligence* of the said defendants, the said last mentioned goods and chattels were wholly lost.

3d count. That in consideration that the said defendants, at their special instance and request, then had the care and custody of divers goods and chattels of said plaintiff, they, the said defendants, then and there faithfully promised the said plaintiff to take due and proper care thereof, while the said defendants so had the care and custody of the same; yet the said defendants, not regarding their promise, but intending to injure and defraud the plaintiff in this behalf, while the said defendants had the care and custody of said goods, took so little and such *bad and improper care* thereof, that the same afterwards were greatly damaged and wholly lost.

4th count. For goods sold and delivered, money had and received, &c.

Plea not guilty.

Several bills of exceptions were sealed in the progress of the trial, the grounds of which will sufficiently appear in the opinion delivered. The cause was argued before the CHIEF JUSTICE and CARPENTER, J.

W. Halsted, for plaintiff in error.

The question, "whether, in the whole conversation, the defendants did not speak of the loss as a joint loss," the object being to prove a partnership, was too leading. It plainly suggested the answer which the party wished to get from the witness. 4 *Wend.* 247; *Phil. Ev.* 270; 2 *Greenl. Ev.* § 434. [The court inquired if there was any authority to show that such error could be remedied in this mode, and subsequently stopped the opposite counsel on this point.]

There ought to have been a nonsuit. When the plaintiff rested, we submit that there was no proof of partnership between the father and son, as common carriers. A share of

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freight, by way of compensation for his services as captain, did not constitute the son a partner with the father, who was the owner of the boat. 1 *Campb.* 329; *Ib.* 331, *note;* 3 *Pick.* 435; *Collyer on Partn.* 15, *et seq.*

But, the nonsuit refused, we showed that Thomas Mershon was not even the captain of the boat, being only in charge during that trip. The evidence of one witness fully repelled the idea of an actual partnership between Abner and Thomas. To rebut this evidence, the plaintiff offered receipts, proved to have been given in some instances by Abner, and in others by Thomas Mershon, signed "Abner Mershon & Sons," which were objected to, because they went to show a partnership between the father and two or more of his sons. In an action against two or three partners, it is true the defendants may not defeat the action by proof that all the partners have not been sued: the defence must be raised by plea in abatement. 2 *John. Cas.* 382. But here the evidence was offered by the plaintiff himself, who must prove his case as he laid it. 2 *John.* 213, 219; 3 *T. R.* 363; 4 *Cow. Phil. Ev., note* 370, *p.* 230; 2 *Stark. Ev.* 804, *Tit.* "*Partners,*" *note;* 1 *Doug.* 371; 7 *B. & C.* 409; 1 *Stark. R.* 272; 3 *Wend.* 161; 2 *Show.* 478; 1 *Ld. Ray.* 29, 101; *Rosc. Ev.* 278; 1 *Chit. Pl.* 4, 5, 6, *&c.*

The second and third counts do not allege the defendants to be common carriers, and upon these counts they are not liable upon the custom of the realm, but upon their undertaking only. They are not liable upon these counts for loss occurring by inevitable accident. Negligence is averred, and must be proved. But even if negligence may be presumed, it was competent for the defendants to show that the loss occurred by inevitable accident, and that there was no want of due care. This defendants offered to prove, but the evidence was overruled. 2 *Ld. Raym.* 909; 1 *Wend.* 272; 6 *Taunt* 577; 12 *John.* 232; 12 *S. & R.* 232; 3 *Bing.* 319; 4 *C. & P.* 106; *Jones on Bailment (by Halsted)* 108, *note; Ib.* 118.

In case of collision, liability depends upon care, and if it could not be avoided, it is a peril of the sea. 3 *Esp. R.* 67; 4 *Taunt.* 126. The strictness of the common law may be admitted, but the question of negligence was put in issue by the form of the pleadings.

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Beasley and *Vroom*, contra.

The defendants below were not entitled to offer evidence that there had been no negligence. This is said to have been offered under the second and third counts, upon the supposition of the other side as to the effect of the pleadings. A *prima facie* case had been made under the first count, to which the evidence offered was no answer. Upon that count, certainly, the question of negligence was not in issue.

But, in truth, we look upon the pleadings differently. The defendants might be treated as common carriers under either of the special counts, and negligence was not in issue upon the evidence of the plaintiff under either count. Negligence is always averred in assumpsit against common carriers, being an inference of law, and, unless in two excepted cases, is proved by evidence of the peculiar character. In order to charge defendants as common carriers, it is not necessary to aver them to be such. *Dale* v. *Hall*, 1 *Wils.* 281.

As to responsibility of common carriers, see 1 *Wend.* 190; 2 *Kent* 597, (*5th ed.*); 1 *Smith's L. Cas.* 158.

2. The defendants were shown to have held themselves out to the public as partners, and it is of little consequence whether they were such in fact. 2 *Greenl. Ev.* § 483; *Story on Partnership*, § 64 *and cases.*

3. The defendants had signed receipts in different ways, and the receipts were competent to show, that as part of the proof of partnership as against them. The case falls within the rule, that if there is another partner not joined as defendant, it can be taken advantage of only by plea in abatement. 1 *Smith's L. Cases* 287; 5 *Burr.* 2611.

Carpenter, J., delivered the opinion of the court.

At the trial in the court below various bills of exception were sealed, upon objections to the ruling of the judge, upon which error has been assigned in this court. The first bill was upon the exception taken because the judge refused to overrule a question objected to as too leading, and which was said to suggest the answer desired or expected. If the objection was well taken, as to which it is not intended to express

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any opinion, yet the error cannot be remedied in this mode. The form of a question rests very much in the discretion of the judge, and if that discretion is improperly exercised, redress can only be obtained by application to the court for a new trial. It is not the subject of an assignment of error. It was so held in *Chambers* v. *Hunt*, lately decided in the Court of Errors.

The refusal to nonsuit formed the ground of the second bill of exceptions. The action is assumpsit, and the first count alleges the defendants to have been, at the time of the delivery of the goods, common carriers between Philadelphia and Trenton, and partners in said business. The goods lost, and for which the action was brought, were proved to have been purchased by the plaintiff below in Philadelphia, and delivered to Captain Mershon, one of the defendants, on board the Trenton Packet "Two Sisters," in order to be carried to Trenton. There was no question as to the fact of the vessel being engaged in the freighting business generally, and that those for whose benefit she was run came within the definition of common carriers, and were subject to the liabilities incident to that character. Every person who undertakes to carry, for a compensation, the goods of all persons indifferently, is, as to the liability, to be considered a common carrier. Evidence was given by the plaintiff to prove that the defendants were partners, and that they employed the said vessel in the freighting business between the two places. The joint liability rested upon this evidence, no proof of any special contract being made on the trial. The goods were delivered generally to be carried to their place of destination. When the plaintiff rested, the counsel of the defendants moved to nonsuit, because, as alleged, there was no sufficient evidence of the partnership. But even if the judge erred, which it is not intended to intimate, yet this court will not reverse, if sufficient evidence of the partnership was subsequently given. Passing by the argument of the counsel on this point, we will then simply inquire as to the proof of partnership appearing in the whole case, and which has been brought before us by bills of exception, afterwards sealed in the progress of the trial.

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The court having refused to nonsuit, the defendant produced and examined a witness, who stated that the vessel in question, as well as another engaged in the same business, was owned by Abner Mershon alone; that another son of the said Abner was the captain of the boat, who received a share of the gross earnings or freight, by way of compensation for his services; and further, that Thomas was not the captain of that boat, but only accidentally in charge of her during the trip. But in the evidence offered by the plaintiff, he did not rely merely on proof of an actual partnership of the defendants as common carriers. The case made by the plaintiff was, that the defendants held themselves out to the public as partners, and were chargeable, as such, to third persons, who gave them credit accordingly. If such case was supported by sufficient evidence, it was all that was necessary. They will be held responsible, not upon the ground of the real relation between them, but upon principles of general policy, to prevent the frauds to which third persons would be liable who might give credit upon the faith of such supposed connection. The doctrine is too obvious and too well established to need the citation of authority.

The evidence showed that divers individuals, about the time when this controversy occurred, had had dealings with the defendants, as freighters on the Delaware, and settled with them indiscriminately; that they were regarded by these persons and others as partners; that on payment of freight by these persons, and on other occasions, each, at different times, gave receipts; that the receipts given by them were signed "Abner Mershon & Son," or "Abner Mershon & Sons," and sometimes "Abner & Thomas Mershon." Thomas Mershon, as well as his father, was proved to have given such receipts, and to have spoken of the business in terms which implied that he was jointly concerned with his father. Thomas Mershon was not only proved to have given receipts, but to have kept the accounts, and taken a leading part in the transaction of the business connected with the boats. Both the defendants, at different times, spoke of the loss from the accident, which gave rise to this action, as one in which they were jointly con-

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cerned. It will not be attempted to recapitulate the testimony in detail, and it will be sufficient in general to say, that much evidence of this character was produced to show that the defendants held themselves out to the public as partners, were so reputed, and were dealt with accordingly. Enough was shown to warrant the judge in submitting the question to the jury. We must suppose it was fairly submitted upon proper instructions, as no exception was taken to the ruling of the judge.

In the progress of the trial, the plaintiff offered to read in evidence certain receipts, some proved to have been signed by Thomas Mershon, and others by Abner Mershon, for the purpose of establishing a partnership between them. The receipts now referred to were signed "A. Mershon & Sons." The admission of these receipts was objected to, and, the objection being overruled, another bill was sealed.

It was said that the receipts so offered went to show, not a partnership between the defendants merely, but between Abner and two or more of his sons. Admitting that the defendants, in a suit against two partners, cannot on the trial turn the plaintiff out of court by proof of another partner, against whom the action ought also to have been brought, but that advantage of the omission can only be taken by plea in abatement, the objection was, that the plaintiff, in his evidence, must be confined to the case as he has laid it. That, in order to prove a partnership against two, he cannot be permitted to prove a partnership between three persons.

The rule in regard to non-joinder is well settled, and has not been questioned since the case of *Rice* v. *Shute*, 5 *Burr.* 2611. It is essential in an action against partners, and so against other joint contractors in an action *ex contractu*, that the evidence of the joint liability should extend to all the defendants, otherwise the plaintiff must be nonsuited. But if all the partners are not made defendants the case stands on a different footing. If the defendant would take advantage of the non-joinder, he must do it at the proper time by a plea in abatement. By forcing defendants to plead this in abatement, or waive it entirely, they cannot turn the plaintiff round more

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than once, by setting up fresh partners upon every new action. They must plead the whole truth of the case, and give the plaintiff a better writ. It seems to be immaterial how the fact of non-joinder is presented. Although it should appear, on the evidence produced on the part of the plaintiff, as by the bond or other written contract, that other persons are liable as joint contractors with the defendant, this is not a material variance, and the plaintiff will be entitled to recover. The only point in *Rice* v. *Shute* and other subsequent cases is, that a contract alleged to have been made by a sole defendant might be supported by a proof of a joint contract made by him and others. The court would not permit the objection to be raised at the trial to the variance between the case made by the plaintiff and his proof. It has even been held, that in debt on judgment against one, and *nul tiel record* pleaded, it could not be objected as variance that the judgment was in fact against the defendant and others, but that the objection in such case must also be taken by plea in abatement. *Cocks* v. *Brewer*, 11 *M. & W.* 51. See also *Mount Stephen* v. *Brooke*, 1 *B. & Ald.* 224; 2 *Phil. Ev.* 132; 1 *Wms. Saund.* 291, *note* 4.

Lastly. On the trial, the defendants offered to prove that there had been no mismanagement or want of care on the part of those having charge of the vessel at the time the accident happened by which the goods were lost; that they did all that careful men could do to avoid collision with the steamer, but that the accident was inevitable. This evidence was overruled, and the defendants again excepted.

Common carriers are in the nature of insurers, and the causes which will excuse them for the non-delivery of goods committed to their charge must be events falling within the meaning of the expression, act of God or public enemies; or they must arise upon some event provided for by the contract between the parties, as by exceptions in the receipt, bill of lading, or other instrument employed in the transaction. 3 *Kent* 216; 2 *Ib.* 598. In this case the goods were not receipted for, there was no bill of lading or other instrument of contract, and the liability of the defendants, therefore, depends upon general principles, and not upon the meaning of any

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particular words of exception. There was no pretence to say that the accident in this case happened by the act of God, the disclaimer being simply, that it did not happen through the negligence of those having charge of the boat of the defendants. It would seem as if it was imputed to the want of due care by those on board the steamer, as the defendants, in a conversation with a witness, expressed their intention to apply to the railroad company, to whom the steamer belonged, for redress. As between the carriers and the owners of goods, the negligence or misconduct of a third person will not excuse the former, since a remedy lies over against the party so offending. A collision which may accrue through natural causes alone, as by the violence of the wind, may be called the act of God, and excuse; but when it occurs through the negligence of either party, it can by no sound reasoning be brought within the meaning of that expression. The one implies a natural necessity, and that the accident was inevitable, the other relates to human action merely. If negligence was imputable to either party, the defendants are not excused. Now the offer was to prove due care on the part of the defendants, not to show that the collision was the result of natural causes beyond the reach or control of skill and care on the part of those having charge of both vessels. The offer did not go far enough to form any defence.

But if the strict rule as to common carriers were admitted, and that under the general doctrine this might form no defence, yet it was urged that this evidence was admissible under the second and third counts, under which, it was said, the defendants were charged upon their special undertaking. It was said, that in these counts the declaration not being upon the common law liability as common carriers, but upon their special undertaking, in which negligence was charged in the breach, negligence was put in issue.

It is not clear that the counsel of the defendants is right as to the necessity and effect of an averment of the employment of the defendants upon which the duty arises. In suits against common carriers the plaintiff may declare in case or assumpsit at his election, the former mode being sometimes

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advisable in order to avoid the very difficulty which has been so much pressed in this case. When the plaintiff proceeds in case for breach of the duty to which the defendants may be subject in respect of their employment as common carriers, it seems necessary to state the character from which the duty arises. 1 *Chit. Pl.* 334 *(Phil. ed.* 1828*)*; 2 *Ib.* 357, *note*; *Pozzi* v. *Skipton*, 8 *Ad. & Ell.* 963. In assumpsit, however, it has been held that it is not necessary to commence with an inducement of the defendants being common carriers. It seems to be supposed that it will suffice if the declaration merely states the delivery, &c., and the undertaking to carry accordingly. In *Dale* v. *Hall*, 1 *Wils.* 281, upon this every objection, there being no averment that the defendant was a common carrier, it was held that it might be proved that he was a common carrier, and that, under such declaration, he was answerable for all goods delivered to his care, unless within the two excepted cases. It was held that direct proof of negligence was not necessary to charge him, nor would the disproof of negligence relieve him from his liability. See 2 *Chit. Pl.* 357, *note*; *Bac. Abr.*, *Tit.* "*Carriers*" *a*, &c. The case has been questioned, as to the form of the pleadings, by a late eminent jurist, but no direct authority has been produced to the contrary. The cases cited by the author referred to are rather as to the character of the evidence necessary to support the action, than upon the application of the evidence to the pleadings. See *Story on Bailments*, § 504.

But assuming, as urged, that the plaintiff could not proceed upon the second and third counts upon the mere proof of the public employment of the defendants, but that a special undertaking must have been shown, yet the evidence was still incompetent. In the first count, the defendants were charged as common carriers; proof of that character, and of delivery and reception of the goods, had been given to the satisfaction of the jury, and upon this the law raised the duty to deliver them at the point of destination. The plaintiff had proved his case upon the first count, and it can be no defence to such a case to offer evidence against a supposed case on other counts of the same declaration, upon which the plaintiff has not pro-

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ceeded. The evidence offered was no answer to the case made by the plaintiff upon the first count, and, as to the second and third counts, it was entirely immaterial.

Judgment affirmed.

THE PRINCETON BANK v. CROZER & MOORE.

1. Shares of stock in a bank, or other incorporated company, are not bound by the delivery of a *fi. fa.* against their owner to the sheriff, but may be transferred before an actual levy.

2. It is not a sufficient levy on stock to make an inventory of it, and return it with the *fi. fa.* but to bind it, the sheriff must go to some proper officer of the company (and it would seem to the defendant also) and give notice of the levy; nor would the delivery of a *fi. fa.*, or making a levy by inventory bind *bank notes.* Of such property the officer must take actual or constructive possession.

Argued before NEVIUS and OGDEN, Justices.

Justice OGDEN delivered the opinion of the court.

This controversy originated in the court for the trial of small causes.

Crozer & Moore prosecuted the Princeton Bank, before Samuel Evans, esquire, a justice of the peace in the county of Mercer, to recover from them certain semi-annual dividends, that had been declared upon six shares of the capital stock of the bank, from the 1st of November, 1845, to the 1st of May, 1847, both inclusive.

The justice rendered a judgment in favor of the plaintiffs for the amount of the dividends. The bank appealed to the Court of Common Pleas, and, upon a re-trial, that court also rendered judgment against them.

This *certiorari* is brought to reverse the judgment of the Court of Common Pleas.

A state of facts, agreed upon by the parties, compresses the question in dispute within a small compass.

It appears by it, that Henry Clow, of Princeton, on or before the twelfth day of April, 1845, owned six shares of the

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stock of the Princeton Bank, on each of which the sum of thirty dollars had been paid.

That, in the term of March, 1845, of the Mercer county Circuit Court, one Richard Warren had recovered against Clow a judgment for $641.54, and that an execution was issued thereon against his goods and chattels, lands and tenements, and was delivered to the sheriff on the 5th day of April, 1845; that, on the 12th of April, a levy was made by the sheriff on the real and personal property of the defendant, Clow, and an inventory thereof made, and annexed to the execution, and returned with it, in which inventory is, among other things, the following description: "six shares capital stock of the Princeton Bank, value $30 per share."

"That a short time after the date of the levy, a sale was duly made, by the sheriff, of the property of the defendant, and that the six shares of stock in question were purchased by the said Richard Warren, for $25 a share, and a receipt for the amount was given by him to the sheriff, on account of the said execution; and that a notice in writing was subsequently given by the said Warren to the bank, not to pay the dividends to Crozer & Moore."

It was also agreed that no notice of the levy or of the sale was given to the cashier of the bank, until some time after a transfer of the shares had been made by Clow to Crozer & Moore.

It does not appear in the case, whether the sale by the sheriff took place before or after the said transfer.

The foregoing facts exhibit the ground upon which the bank relied, in refusing to pay over the dividends to Crozer & Moore.

The case also shows, "that Crozer & Moore's claim to the stock and to the dividends in question arose in this wise: One of the firm, before the 10th of May, 1845, called at the bank, having in his possession a certificate for six shares of their stock in favor of Henry Clow, and inquired of the cashier, if the stock was clear, and could be transferred. The cashier examined, and found no lien against it on the part of the bank; and not having *then* received notice or information, in *any*

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way, that there was any bar to its being legally transferred by Clow, responding accordingly; that shortly after this, and on the 10th of May, 1845, Henry Clow appeared in person at the bank, and transferred, upon the transfer book thereof, to Crozer & Moore six shares of the capital stock of the bank; and on the same day the cashier issued a certificate for the same to the said Crozer & Moore."

"It was agreed between the parties, that if, upon the foregoing state of the case, this court shall be of opinion that the levy was insufficient, and the plaintiffs below were entitled to recover, then the judgment of the Court of Common Pleas shall be affirmed; but if the court shall be of opinion that the levy was sufficient, and the plaintiffs were not entitled to recover, then the judgment shall be reversed."

It will be readily perceived that the case turns upon the point, whether Warren, in virtue of his execution against Clow, and of the proceedings thereon by the sheriff, acquired such a lien upon, and right to the stock, as should in law prevail against the transfer made by Clow to Crozer & Moore.

In New Jersey, that species of property was first subjected to levy upon an execution at common law, by an act of the legislature, passed on the 9th of March, 1842, entitled, "An act to abolish imprisonment for debt."

It is enacted, in the fifth section, that any share or interest of a defendant in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this state, may be taken and sold under the writ of *fi. fa.*, in the same manner as in the case of goods and chattels.

In the sixth section it is provided, that if the person having the charge of the books of any such company be shown the writ by an officer, he shall be bound to give to the officer a true certificate of the number of shares or amount of interest held by a defendant in such company.

How did the sheriff *take* the stock in this instance?

He did not go to the banking house to make a levy, and there, under the authority of the act, obtain a certificate, or notify any officer of the institution that he claimed to have a

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lien on those shares. He did not inform the defendant in execution that he had levied upon his stock, or seek a delivery over of his certificate, but he simply entered "six shares of the stock" upon his inventory, and made a return thereof with the excution.

Could that act constitute a sufficient levy upon the stock?

My opinion is, that it could not. Stock is an intangible right or property, the shares being distinguishable from each other, *only*, by their respective owners. A certificate is usually issued by the company, showing the number of shares held by a person, and the amount paid thereon, which paper is recognised in mercantile transactions as evidence of the property it represents, and is surrendered when a transfer or sale is made.

Although the strictness of some of the rules of common law respecting levies upon goods and chattels has been relaxed in this state by courts considering defendants in execution as agents or storekeepers of the sheriff, yet neither the reason for such lenity, nor its practicability, can be applied to property of this nature.

The interests of justice demand that levies should have *sufficient certainty* and *publicity*, and that, for the purposes of a sale and consequent delivery, the officer should have the property *actually* or *constructively* under his control.

In cases like that now under examination, public policy and commercial convenience plainly require that the officer should inform a defendant, if within his jurisdiction, that he takes his stock under the writ; also, that he should go to the office of the company, and, by giving notice of his execution there to some officer, and requiring a certificate, as secured to him by the fifth section of the act, he should obtain a control over the shares, and should demonstrate his intention from that time forward to appropriate them, in obedience to the command of his writ.

Without such ostensible and certain appropriation of the property, an inventory and return should not sufficiently indicate a levy upon this species of effects. They might lead to great losses and to frauds, and materially embarrass the sales and transfers of stock.

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Such would not be a *taking* of the property, within either the letter or the spirit of the act.

The Revised Statutes of 1846 make bank notes belonging to a defendant in execution liable to be taken upon a *fi. fa.*

Would an officer make a sufficient levy upon a one hundred dollar bank bill, so as to hold it against a transferee of the debtor, by an inventory and return, the money remaining in the debtor's possession subject to his control? Such a doctrine could not be gravely insisted on.

In the case before us, the sheriff having omitted to do those acts which were requisite to make his levy sufficient, I am of opinion that Crozer & Moore were entitled to recover the dividends declared upon the six shares of stock, after their purchase of them from Clow.

Let the judgment of the Common Pleas be affirmed, with costs.

FLANIGAN AND CARPENTER v. FEURING.

A supplement to the Camden lien law extended the law over the whole city, and repealed the section which exonerated from the operation of the lien buildings built by contract, on filing the written contract in the county clerk's office: a second supplement repealed the repealing section of the first supplement; by this the exonerating section is revived, and extended, with the act, over the whole city.

This case was certified from the Circuit Court of the county of Camden, and arises upon a *scire facias* upon a lien filed in the office of the clerk of General Quarter Sessions of the city of Camden, under the Camden lien law, by the plaintiffs, against two three story frame dwelling houses, situate on the north side of Cooper street, between Fifth and Sixth streets, in the city of Camden, for lumber found and provided by said plaintiffs to Middleton and Brick, the builders and contractors in and about the erection of the said houses owned by the by the said William Feuring.

The declaration is filed against the said William Feuring,

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the owner, and the said Middleton and Brick, the contractors, and is in the usual form.

The defendant, Feuring, severed, and pleaded, that the said buildings were erected by contract, &c., and that the said contract was filed, &c., in the clerk's office of Gloucester county, and also in the clerk's office of Camden county.

It is admitted that the lien is properly filed, and that the amount due thereon is $241.62, with legal interest on the same from the 6th day of August, 1845, and that the said houses are not in that part of the said city of Camden which was embraced in the Camden lien law at the time of its passage, and that the said contract has never been filed in the office of the clerk of General Quarter Sessions of the city of Camden. If the Supreme Court shall be of opinion that filing the contract did not discharge the buildings from liens (the said buildings not being situate in that part of said city embraced in the lien law at the time of its passage), or that the said contract was not filed in the proper office, then, in either case, judgment shall be rendered for the plaintiffs for the amount of their claim or lien, with costs, otherwise for the defendant, with his costs; and that either party have leave to turn this case into a special verdict, and bring a writ of error thereon within one term after judgment.

Argued, January Term, 1850, before the CHIEF JUSTICE and CARPENTER and RANDOLPH, Justices.

Dudley and *Halsted*, for plaintiffs in error.
Browning, for defendant in error.

Dudley and *W. Halsted* for plaintiffs.

There are but two points which arise under the case, as certified. The first is, whether the fourth section of the act of 1820 (*Pam. Laws* 128) was revived by the repeal of the repealing clause. The fourth section of the act of 1820, generally designated as Sharp's lien law, was repealed by the second section of the act of 1830 (*Pam. Laws* 163), and when revived by the act of 1844 (*Pam. Laws* 177), it was revived precisely as it stood previous to its repeal. 21 *Pick.* 409; 2 *Metc.* 418;

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12 *Co. R.* 7; 7 *Cow.* 576; 7 *Cranch.* 382. Previous to its repeal, it applied only to that part of Camden embraced in the provisions of the original act. The peculiar phraseology of the first section of the act of 1830, extending the operation of the act of 1830, shows that this construction must be given to those acts. A strict construction must be given to the acts, and the court should confine itself strictly to its language. If inconvenient, the result is not absurd. The intent is to govern, and the argument, *ab inconvenienti*, can only have weight when the construction is doubtful. Counsel cited *Smith on Statutory* and *Constitutional Construction* 628, 651, 909, &c.; 2 *Kent* 462; *Broom's Max.* 248; 1 *Chit. R.* 63, *note; Dwarris on Statutes* 708; 1 *Har. R.* 293; 21 *Pick.* 409; 2 *Metc.* 118; 12 *Co.* 7; 7 *Cow.* 536.

But, secondly, the contract was not filed in the proper office, and therefore the defence fails. The filing of the contract followed the filing of the lien, and the place of filing the former was therefore changed by implication. If, however, the judge below was right in his opinion on this point, under a strict construction of the acts, we insist that he is evidently mistaken on the first point.

Browning, contra.

The opinion of the court was delivered by

Randolph, J. The plaintiffs were material men, who furnished lumber for Middleton and Brick to build, for Fuering, a house in that part of the city of Camden not embraced in the original lien law of 1820. The lien was filed with the clerk of the General Quarter Sessions of Camden, and the contract under which the building was erected was filed with the clerk of the Common Pleas of Gloucester county. The question for the court to determine is, whether this filing of the contract exempts the building, or its owner, Feuring, from the plaintiff's lien? The original lien law of February 25, 1820, (*Pam. Laws* 124) only applied to a particular portion of Camden, therein described, and the fourth section of that act directs, that whenever a building is erected "within

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the tract of land above described by contract, the payment, according to the terms of the contract, should fully discharge the building from all liens for work and materials, provided the said contract be in writing, and filed, *as aforesaid*, forthwith after the same shall have been made and executed." The term "as aforesaid" here refers to the filing with the clerk of the Common Pleas of Gloucester county. The act of February 19, 1830, (*Pam. Laws* 103) extends the lien law of 1820 to the whole city of Camden, but repeals its fourth section and such other parts as conflict with the act of 1830. The act of March 7, 1844, (*Pam. Laws* 177) directs that all liens "be thereafter filed and recorded with the clerk of the Quarter Sessions of the city of Camden, and repeals so much of the prior act as requires the *liens* to be filed with the clerk of the Gloucester Pleas, and also the second section of the act of 1831, which is the one that repeals the fourth section of the act of 1820, and which fourth section is, of course, thereby revived. The act of 1846 authorizes the *scire facias* to be issued out of the Camden, instead of the Gloucester Pleas. This is the state in which the statutes were when the case now under consideration arose; and in construing the acts, we must take them all in *pari materia*. These acts, then, direct that the lien be filed with the clerk of the Quarter Sessions of Camden, which is done accordingly in this case, and the *scire facias* is also issued in accordance with the law. The entire act of 1820, including its fourth section, by the act of 1844, stands in full force, and, by the supplement of 1830, is extended to the whole city of Camden, including the place where the defendant's house is situated. Not only the lien is thus extended, but the fourth section is also extended, which discharges from the lien by filing the contract with the clerk of Gloucester county, which was done in the present case. The filing, then, the lien with the clerk of the Camden Sessions creates or fixes the lien on the premises, and the filing of the written contract with the clerk of Gloucester county, and fulfilling the same, discharged the house from the operation of the lien, so that neither it or its owner, Feuring, is at all liable to the plaintiffs

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for the materials furnished the builders. Judgment must therefore be affirmed, with costs.

CARPENTER, J., in concurring in the decision, referred to his opinion delivered in the Circuit Court, which is annexed.

CAMDEN CIRCUIT COURT, May Term, 1848.

Flanigan and Carpenter v. Feuring and others. *Scire facias* on mechanics' lien.

The writ was against Feuring, owner, and Middleton and Brick, builders, to enforce a lien for materials furnished in and about the erection of two dwelling houses on Cooper street, in the city of Camden.

Feuring appeared, and pleaded that the houses were erected under written contract between the owner and the builders; that the contract was duly filed, as directed by the statute (*not stating how filed and when*), and that payment was duly made according to contract, &c.

The plaintiffs demurred specially, for causes which will sufficiently appear in the opinion delivered by the court.

Dudley, for plaintiffs, *Browning* and *Jeffers*, for defendant.

CARPENTER, J. One objection, taken by the counsel of the plaintiffs, goes to the whole substance of the plea. It is said that the section of the act of 1820, in regard to buildings erected by contract, under which this plea has been framed, does not apply to all the land within the territorial limits of Camden, but that it still applies only to that part originally embraced within the provisions of that act. The first lien law, passed 25th February, 1820, (*Private Laws* 124) applied only to a particular tract of land, therein designated. This act gave a lien for work and labor done, and materials furnished, in and about the construction of houses, &c., within the limits to which the act applied, provided a claim should be duly filed in the clerk's office of Gloucester county, agreeably to its provisions. The fourth section then enacts, "that whenever, within the tract of land above described, any building shall be erected by contract, then, and in such case, payment, ac-

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cording to such contract, by the owner or owners of the building to the contractor or contractors shall fully and entirely discharge such building from all lien for work done and materials furnished; *provided*, the said contract be in writing, and filed, as aforesaid, forthwith after the same shall have been made and executed."

The city of Camden was incorporated by act of the 13th February, 1828, and its limits defined. It was soon thought expedient that the provisions of the lien law should apply to the extent of those territorial limits. By the act of 19th February, 1830, (*Pam. Laws* 103) it was enacted that the prior act, "except so far as altered by this act," should extend to, and operate upon all dwelling houses and other buildings erected within the limits of the city of Camden; and, by the second section, the fourth section of the act of 1820 was repealed. Thus the law remained without any provision for the security of owners in case of buildings erected by contract, until the act of 7th March, 1844, (*Pam. Laws* 177) which required liens to be filed and recorded in the clerk's office of the Court of Quarter Sessions of Camden, and repealed the repealing section of the act of 1830, thus reviving the fourth section of the original act above referred to. It is contended that this, &c., the section thus revived, was revived precisely as it stood previous to the act of 1830, prior to which act it applied only to that part of Camden particularly described in the first act, and that, therefore, it does not reach the present case, the buildings in question not being within those limits. But the effect of the revival of an original act, or part of an act, by the repeal of a repealing clause, is not necessarily such as is supposed by counsel. The repeal of the repealing section undoubtedly revived the fourth section of the original act, and the two acts, which are *in pari materia*, then remain to be construed in connection with each other, as if the second section of the act of 1830 had never existed. Of consequence the entire act of 1820 became operative to the extent of the entire bounds of the city of Camden. There is nothing in the peculiar phraseology of the first section of the act of 1830 which militates against this construction. It would only be because

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constrained by language which could not be overcome, that the court could adopt any other construction, for it cannot be presumed that the legislature intended to apply different rules to different portions of the same town, without any apparent reason for such distinction. The defendant, therefore, is entitled to the benefit of the fourth section of act of 1820, if his case in other respects will bring him within the scope of its provisions.

Under this view of the Camden lien law, and its supplements, it becomes necessary to consider the other objections to the plea.

Perhaps the conclusion of the plea, which is to the action, is somewhat informal; it should be "if the plaintiffs ought to have their *execution*," &c. Still, though informal, such conclusion will not vitiate. *Grey* v. *Jones*, 2 *Wils.* 251.

The same fourth section of the act of 1820, so often referred to, discharges the lien in case of buildings erected by contract, "*provided* the said contract be in writing, and *filed as aforesaid*," that is to say, as claims are directed to be filed in the office of the clerk of the Inferior Court of Common Pleas of the said county of Gloucester, "forthwith after the same shall have been made and executed." If, then, the owner of buildings, so erected in the city of Camden, against which claims have been duly filed and recorded, intends to rely on this fourth section for protection, he must bring himself, in his plea, within its terms. He must set out the contract, and aver that it was filed forthwith after it was made and executed. He must aver the *time* when, and the *place* where filed, in order that it may appear to the court that the terms of that part of the statute have been complied with. The contract, so filed, becomes notice to those who may afterwards furnish lumber, &c., to contractors, and who might otherwise rely upon their supposed lien; but it cannot be notice, unless filed when and as prescribed by the statute. This point is too plain to require additional remark, and the plea is therefore deficient in this respect, as well upon the proper construction of the statute as upon general principles applicable to all pleading.

The claim in this case was filed, and the contract made

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subsequent to the act of 1844, by which act *liens* are directed to be filed and recorded in the office of the clerk of the Sessions at Camden; and the counsel differ as to the place where the *contract* should be filed since that act.

The first section of the act of 1820, which gives the lien, required the *claim* to be filed in the office of the clerk of the Inferior Court of Common Pleas of the county of Gloucester. The fourth section, already referred to at large, required the contract to be in writing, and *filed as aforesaid*, that is to say, filed as the claims were required to be filed, and consequently in the same office. The act of 1844, which revived this fourth section, directed that all *liens* thereafter filed, pursuant to the act of 1820, should be filed *and recorded* in a book kept for that purpose in the office of the clerk of the Court of Quarter Sessions of the city of Camden; but the writ of *scire facias* was still to issue out of the Court of Common Pleas of the county of Gloucester. This act changed the act of 1820 in two particulars: first, it required the liens (claims) to be filed in a different office from that first designated; and secondly, it required those liens (claims) to be recorded; but it was a provision which applied to claims alone: contracts therefore, it would seem, were not affected, and the rule with regard to them remained unchanged. If the place of filing was changed, the direction with regard to *recording* must also have applied, and the owner must then have forthwith filed and recorded his contract. But the act of 1844 went farther, it legislated expressly with regard to the fourth section, which it revived by repealing the repealing clause of the act of 1830, yet, thus operating on this very matter, it provides no new rule. I cannot resist the conclusion, that the place of filing the contract still remained as directed in the original act.

The new county of Camden was erected by the act of 13th March, 1844, (*Pamph. Laws* 237). Up to that time, and under the act of 7th March, 1844, I find nothing which requires the contract to be filed in the office before referred to in the city of Camden. In examing the act erecting the county of Camden, I am unable to find any provision by which the special directions of the lien law in regard to filing contracts

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were even then controlled. Indeed, the construction contended for by the plaintiff's counsel has not placed him upon that act, but upon the prior act of 7th March, 1844. The county act does not, indeed, even prescribe any new rule in relation to writs of *scire facias* upon claims filed and recorded in Camden, and under this hasty and ill digested legislation it may be doubtful whether any action could have been had on liens so situated. The incongruity was at length seen, and by the act of the 29th January, 1846, (*Pamph. Laws* 4) it was made lawful to issue writs of *scire facias*, either out of the Circuit Court or the Inferior Court of Common Pleas of the county of Camden; and the act declared valid judgments previously obtained in the Camden Pleas on liens duly filed and recorded. Still even this act left the filing of contracts untouched, which still stood upon the fourth section of the original act, as revived by the act of 1844, which directed them to be filed, as claims were first directed to be filed, in the clerk's office of the county of Gloucester. And the addition was therefore made to the singularly incoherent legislation on this subject by the act of 17th April, 1846, (*Pamph. Laws* 171) which repealed the fourth section of the act of 1820, and, in terms, provided that in case of buildings erected by contract, in order for the protection of the owner, the contract should be *filed and recorded* in the clerk's office of the Quarter Sessions of Camden. This legislation was singular. It directed liens or claims to be filed in the clerk's office of a criminal court at Camden, while it directed the writs of *scire facias* upon those liens, first and until 1846, to issue out of Gloucester Pleas, and then out of Camden Pleas or Camden Circuit Court; and it left the contracts having so important an operation to be filed in the clerk's office of Gloucester, even after the division of the county, until the passage of the act last referred to. I am anxious to give these acts such construction as will best subserve the intent with which they were passed; but still, after an attentive consideration, I am unable to come, in regard to them, to any other result.

Unless the defendant shall ask leave to amend, judgment will be for the plaintiffs.

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REEVES ET AL., EXECUTORS OF REEVES, v. TOWNSEND ET AL., ADMINISTRATORS OF TOWNSEND.

1. After the Orphans' Court have, upon application of executors or administrators, regularly declared an estate to be insolvent, no action can be brought and maintained against the executor or administrator, except upon a claim presented and disputed for the purpose of adjusting it; and the decree of insolvency may be pleaded in bar.

2. In pleading the proceedings of a court of limited jurisdiction, it is necessary only to allege such facts as are necessary to show the jurisdiction and the final decree. If the jurisdiction appears, the proceedings will be presumed to be regular.

Demurrer to plea.

This was an action of debt, brought by the executors of Henry Reeves, deceased, against the administrators of Isaac Townsend, jun., deceased, upon the bond of the intestate. The defendants, after oyer of the conditions of the said bond, (which was conditioned for the payment of $1100 and interest in two years from the date) pleaded—1st, payment; 2d, *actio non*, &c., because, that heretofore, *to wit*, on the 30th November, 1843, at B., in the county of C., the said defendants, administrators of the said I. T., deceased, did, by application in writing, represent to the Orphans' Court of the county of Cumberland, being the county wherein the said decedent had his domicil at the time of his decease, and being the proper county, on their affirmation, duly taken and made, that the personal and real estate of the said I. T. was insufficient to pay his debts, according to the best of their knowledge and belief; and the said court did thereupon, at a regular term, then and there held, direct the defendants to give public notice to the creditors of said estate to exhibit to these defendants, under oath or affirmation, their claims and demands against the said estate, within six months thereafter, by setting up notice according to the form and effect of the act entitled, "An act concerning the estates of persons who die insolvent." And these defendants in fact say, that they gave notice to the said creditors to exhibit their demands in pursuance of the direction of the court and the act aforesaid. And the said Benjamin F. Reeves, one of the plaintiffs, within the time directed and appointed by the said court, and after the death of said Henry

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Reeves, presented to defendants, under oath, a claim for the said sum of $1100, in the said condition of the said writing obligatory; and these defendants afterwards, at the next term of the said court, after the time directed and limited as aforesaid had expired, having first given notice of their intention so to do, according to the form and effect of the act aforesaid, made report to the said court of the several claims and demands exhibited against said estate; and defendants did *also* exhibit to said court, under their affirmation, a true and just account of the moneys, goods, chattels, rights, and credits of the said decedent, which had come to their knowledge, hands, or possession, and an inventory of the real estate of said decedent, under affirmation, according to the form and effect of the act aforesaid. And these defendants further in fact say, that no exceptions were filed against the said claims and demands exhibited against said estate, or any part thereof: and thereupon the said court, at a regular term thereof, held at B., in the county of C., on the 28th September, 1844, and before the commencement of this suit, did, upon consideration of the amount of the personal and real estate of said decedent, and value thereof, it appearing to the court that the real and personal estate was insufficient to pay the debts of said decedent, and that the estate was likely to be insolvent, decree, order, and direct, that these defendants, administrators as aforesaid, should proceed as if the estate of said I. T. was insolvent, and make sale of the whole of the said real estate, according to the form of the statute in such case made and provided; which said decree of the said court remains, and is in full force and effect, and has not been in any respect annulled or set aside: and this they, the said defendants, are ready to verify. Wherefore, &c.

The defendants demurred specially to the second plea.

Argued before the CHIEF JUSTICE and Justices CARPENTER and RANDOLPH.

W. Halsted, for plaintiff.

The plea blends matter of law and of fact, attempting to put matter of law in issue before the jury. Whether Cumber-

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land was the proper county, or the oath was *duly* taken, or the notice was given *pursuant* to the statute, are matters of law, and not issuable. 2 *Halst.* 98; 4 *Day.* 323; *Steph. Pl.* 343; 2 *H. Bl.* 128; 2 *Saund.* 178.

Material facts are alleged, without time and place.

It is not alleged that the inventory of the real estate of the decedent, exhibited by the administrators at the time of making their report, contained the *value* of the said real estate. *Rev. Stat.* 347, § 5. Nor that it was an inventory of all the real estate which may have come to their knowledge "according to the form of the statute," is not sufficient.

It is not alleged that the administrators did proceed as if the estate was insolvent, &c. *Rev. Stat.* 348, § 7.

But the chief point is as to the effect of the order by the Orphans' Court. The plea sets up a decree of the Orphans' Court declaring the estate of the intestate insolvent; and it is urged that the effect of the decree, the plaintiffs having presented their claim under oath to the administrators, and no exceptions having been filed, is to bar the plaintiffs from proceeding at law in this action.

The plea does not allege that the claim had been *adjusted*, and, therefore, the plea seems insufficient fairly to present the question. But the statute means by *adjusted*, simply settled as to amount. The statute simply bars execution, and there may be many other remedies, as in chancery, where judgment creditor may file bill in order to reach land or equitable assets. But a judgment may be necessary, as the basis of such proceeding.

A judgment may be necessary to prevent a bar by the statute of limitations. Suppose assets should be discovered after six years had elapsed?

The settlement of the account in the Orphans' Court is not conclusive as to assets which may afterwards come into the hands of the administrators.

These are lands in Cape May, and how can we reach them, unless we can obtain a judgment at law? See *Rev. Stat.* 210, § 15. [It was suggested that the difficulty seemed provided

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for in a late enactment. *Rev. Stat.* 350, § 14.] See *Howell* v. *Potts*, *Spenc.* 570.

L. Q. C. Elmer, for defendants.

According to the true construction of that act, the proceedings of the plaintiff and of the Orphans' Court are a bar to any action.

By the the eighth section (*Rev. Stat.* 348), it is provided, that if a claim is presented, and excepted to, the creditor may elect to proceed at law: there was no exception to this claim, and there was no election to sue.

By the twelfth section, if an action is pending against the administrator at the time of making the application, or if an action shall afterwards be brought, the plaintiff may proceed to final judgment, "*unless the claim shall be adjusted, as is herein before directed, or otherwise;*" but no execution is to issue.

It is insisted that these words, "*unless the claim shall be adjusted*, &c.," amount to a provision, that if the claim has been adjusted, the action shall not proceed. The claim presented by the plaintiff, not having been excepted to, was in effect "*adjusted.*" The sixth section provides, that in case no exception is made against a claim duly presented, "*it shall be held and deemed justly due;*" and, by the tenth section, the administrator is to pay it, under the direction, and subject to the control of the Orphans' Court.

From the moment a claim is presented pursuant to the act, the whole case is *sub judice*, and belongs to the Orphans' Court. No action can be maintained at law, otherwise than in pursuance of the eighth section, after exception taken.

Indeed (although it is not necessary for the decision of this case), I do not see how it can be held, that an action can be brought otherwise than under the eighth section, at any time after the decree of the Orphans' Court prescribed by the third section. To entitle the claimant to any share of the estate, he must present his claim to the administrator under oath, and to allow a suit for money he could not in any way collect would be a strange proceeding.

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For what purpose shall the action proceed? Not to ascertain the amount to be paid; that is already adjusted. The eighth and twelfth sections of the act are in harmony, and cover the whole case. The eighth, allows the option of a suit at law after the claim excepted to. The twelfth, provides for the case of an action commenced before the application for insolvency, and for the case of an action commenced afterwards, by virtue of the eighth section. The sole purpose of an action is to ascertain the amount due; that being done, a suit would be wholly fruitless.

I am not aware that this question has been heretofore raised in the courts of this state. In *Howell's Administrators* v. *Potts*, *Spenc.* 570, there had been *a judgment* at common law before the proceedings in the Orphans' Court. In *Holmes* v. *Price*, *Spenc.* 480, this court held the plea of *plene administravit* a good plea, notwithstanding the statute, leaving the effect of that statute to operate upon the evidence under the plea, and not upon the form of the pleading itself. The well considered and very satisfactory opinion delivered in that case steers entirely clear of the questions now involved.

It may be argued, however, that the court ought to leave the defendant to avail himself of the facts set forth in this plea under a plea of *plene administravit*, and thus leave it open to the plaintiff to show that he has received assets not administered. But this will take the distribution of those assets from the tribunal to which it exclusively belongs, *viz.*, the Orphans' Court, or rather would do so if the plaintiff could make any use of his judgment, after he has obtained it. But he is expressly prohibited from issuing execution.

The facts contained in the plea amount to more than proof of *plene administravit*. They show, in effect, on what the law makes equivalent, a judgment against the administrator, as to this subject matter, in a court of peculiar, but of general jurisdiction. It does not belong to this court to enforce the judgments of the Orphans' Court, any more than those of the Court of Chancery. The plaintiff voluntarily withdrew himself from the common law courts, and resorted to a better and more summary remedy. Henceforth his remedy in the other

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court is full and adequate. A judgment of assets *quando acciderent* would be of no avail, because he would have no executions to reach them. Nor ought he to have: they are not to be administered at common law, but by the decree of the Orphans' Court, according to the statute. Nor will it avail the plaintiffs any thing to obtain a judgment, for the purpose of enabling them to oblige the defendant to sell the lands of the intestate, if any there be unsold, according to the provisions of the fifteenth section of the Orphans' Court act (*Rev. Stat.* 210), because when they get their judgment they can issue no execution, as that section expressly requires.

Several special causes of demurrer have been assigned. It is not deemed necessary to answer them separately. It is submitted that none of them are valid. They seem founded on the idea, that the bar arises out of the acts in *pais of defendants*, whereas it is the act of the Orphans' Court in a case clearly within its jurisdiction. That court is not limited, but of general powers, whose acts are to be presumed legal. *Den* v. *Hammel*, 3 *Harr.* 73. There is surplusage in the plea, but this does not vitiate. It is not double—all the acts stated make but one entire defence.

It is sufficiently averred, that the court, at a date given, made an order that creditors present their claims *under oath*, &c. The previous ground of that order need not have been stated at all; this court would presume it sufficient. But if it was necessary, it is stated that defendants made the oath in the words of the act. The legality of the oath is not thereby put in issue, nor would a replication on that part of the plea be good. It is sufficiently set forth, that plaintiffs presented their claim pursuant to the act. Having done so, they are stopped from questioning the legality of the previous proceedings. It is also set forth, that no exceptions were made to the claim, and that subsequently the Orphans' Court decreed the estate, in the words of the act, "likely to be insolvent." All besides is immaterial. It is not matter of trial here what was done, or whether the proceedings before or after were correct. That belongs to the Orphans' Court, and in this action must be presumed to be right.

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But if the court think the plea defective, leave is asked to amend.

CARPENTER, J., delivered the opinion of the court.

The defendants set up, in bar of this action, proceedings in the Orphans' Court of Cumberland, under the act concerning the estates of persons who die insolvent. (*Rev. L.* 766; *Rev. Stat.* 346). The question raised by the demurrer is, whether a suit at law can be maintained against the administrators of an insolvent estate, by creditors who have presented their claims under the statute, no exceptions having been filed to the account, and the insolvency of the estate having been decreed by the Orphans' Court?

By the third section of the act, executors or administrators, who have reason to believe that the estate of the decedent will prove insolvent, may apply to the Orphans' Court of the proper county, and procure an order requiring creditors, after notice, to exhibit to the executor or administrator, under oath or affirmation, their claims against the estate. The eleventh section provides, that any creditor who fails duly to exhibit his claim shall be barred from prosecuting or recovering the same, unless the estate shall prove sufficient, after all debts exhibited and allowed are fully satisfied, or the creditor shall find property not inventoried or accounted for by the executor or administrator before distribution; in which case such creditor shall receive his ratable proportion out of the same. The statute thus enforces the exhibition of claims by creditors, by making neglect in this particular the subject of a statutory bar, except in the cases specified.

If the creditor duly presents his claim, a course of proceeding is prescribed applicable to such case. The executor or administrator, or other person interested, may file exceptions to such claim, which will then be adjudicated upon and settled by the Orphans' Court, unless the creditor, within a given time, shall elect to proceed at common law or in equity, in preference to having the same determined by the said court. The effect of a judgment obtained in another court, if the creditor should so elect, is settled in a subsequent section. If

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no exception is filed to the claim of the creditor, the statute declares that it shall be held and deemed as justly due. If upon the *adjustment* of the claims (as we take it, whether upon contestation or by acquiescence,) the estate appears to be insolvent, the court shall so decree, and direct the administrator or executor to proceed accordingly. The proceeds of the estate, real and personal, after payment of the preferred debts and expenses of administration, are to be distributed ratably among the applying creditors, under the direction of the Orphans' Court, which is invested with power to enforce its orders.

By the twelfth section it is provided, that if any action shall be pending against the administrator at the time of making the application under the third section, or any action shall be brought after the making of the application, the plaintiff may proceed to final judgment, *unless the claim shall be adjusted*, as before directed, or otherwise; but no execution shall in any case issue after the making of the said application, it being further provided, that the plaintiff shall be paid out of the estate ratably, in proportion to the amount of judgment recovered.

The policy of the act seems to be, to draw the settlement of such estates within the summary and convenient jurisdiction of the Orphans' Court, not only to give in that forum a complete remedy to the creditor who may only exhibit his claim, but, under its provisions, to protect the administrator or executor who fully complies with its directions in the administration of the estate. The creditor is barred from his action, unless he exhibits his claim to the administrator who has made application to have the estate declared insolvent. If the creditor exhibits the claim, and it is *adjusted* under the act, he is entitled to receive ratably according to the amount of his claim.

The act provides for two cases in which actions may be brought and prosecuted to judgment, and, by strong implication, seems to deny them in all others, the effect of the judgments in both cases being simply to ascertain or adjust the amount when the claim is valid, the plaintiff in no case,

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the estate having been declared insolvent, being permitted to issue execution upon his judgment.

The first case in which the plaintiff is permitted to proceed to judgment, is when the action has been previously brought, and is pending at the time of the application. In this case it is not defeated by the action of the administrator, but the plaintiff, if his claim can be sustained at law, may proceed to establish its amount by the judgment of the court in which he had brought suit. The second, is when the action has been brought after the making of the application; and if permitted to proceed to judgment the effect is the same as in the other case. This must apply, however, to the case only of an election by the creditor, under the third section, to seek another forum, exceptions having been filed to his account. It seems necessary so to construe the twelfth section, in order to harmonize the provisions of the statute. For what purpose should an action be brought in any other case? No execution can be taken out, and the judgment can serve no purpose but to adjust the amount of the claim. The section, therefore, which regulates the prosecution of an action in the cases specified, permits the plaintiff to proceed to judgment, unless the claim has been adjusted. This language seems to imply, that if *adjusted*, then the plaintiff shall not be permitted to proceed. When the claim has been exhibited, and no exceptions have been filed, it has been adjusted by the very terms of the act: in such case it is expressly provided that it shall be *held and deemed as justly due.* No exceptions were filed in this case, and the amount, therefore, has been conclusively settled by the simple acquiescence of those interested. We think that after the application no action can be maintained, except in pursuance of the provisions of the eighth section, and that the plea is a bar to the action.

Several objections have been made to the form of the plea, but which we consider immaterial. The plaintiffs having exhibited their claim to the administrators, it would seem that it ought not to be open to them to deny that due notice had been given to them, &c.; matters, therefore, which if not traversable, need not be alleged with particularity as to time and place.

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But the application under oath to the Orphans' Court, which is the foundation of the proceedings in that court, is averred in the words of the act, and with due particularity. The foundation being so laid, (which seems necessary as a question of pleading, in order to give the court jurisdiction,) every intendment must be made in favor of the validity of the proceedings. Upon the mode of pleading now adopted in cases in courts of particular jurisdiction, and applying them to this case, it is sufficient, after a short statement of these matters of inducement, which seem necessary to show the character and effect of the decree, to aver the final decree of insolvency.

It was not necessary to go farther, and show what action had been had by the administrators upon the decree of insolvency. The estate having been declared insolvent upon their application, they may be held responsible for its due administration, but it must be in another mode.

Demurrer overruled.

GREGORY v. FREEMAN.

1. It is not necessary that the assignment of a bond, when made under seal, should show any consideration.

2. It is not necessary to make profert of an assignment of a bond, even though under seal, because the seal is not necessary to the validity of the assignment.

3. The breach in a declaration on an assigned bond is bad, if it does not allege non-payment to the obligee as well as to the plaintiff.

This was an action of debt against one of two obligors of a sealed bill, dated July 12, 1831, by which they became jointly and severally bound to pay to one Abram Coursen, or his assigns, $750 in one year, with interest. The declaration was in the usual form, and, after making profert of the bill, further averred the several assignments from the obligee, &c., and so to the plaintiff, as follows: "And the said plaintiff avers, that the said A. C. afterwards, and before the payment of the said

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sum of money in the said sealed bill specified, or any part thereof, *to wit*, on February 1, 1832, at, &c., by his certain assignment in writing, endorsed upon the said sealed bill, assigned the said sealed bill to one R. S., and then and there delivered the same to the said R. S.," &c., and so, in similar terms, successive assignments: September 2, 1840, to one P. S. B.; September 16, 1843, to one S. S. G., "for value received, without recourse;" and, finally, an assignment by the said S. S. G., under his hand and seal, "for value received, without recourse," on January 28, 1847, to the plaintiff." By reason whereof, and by force of the statute, &c., the defendant then and there became liable to pay, &c., to the said plaintiff; yet the said defendant, although often requested so to do, hath not paid the sum of money, &c., nor any part thereof, to the plaintiff, but hath wholly neglected and refused, and still doth neglect and refuse," &c. There was a second count exactly similar, except that it made profert of the last assignment.

The defendant demurred specially. The causes assigned will sufficiently appear in the reasons urged by the counsel of the defendant. The case was argued before the CHIEF JUSTICE and Justice CARPENTER.

J. J. Scofield, for defendant.

The declaration does not show any consideration for the supposed assignments. The statement, as to one or more of the assignments, that it was for "value received," is not sufficient. An assignment without a consideration will not support an action in the name of the assignee. The statute (*Rev. Stat.* 801) extends the remedy at law only as far as it previously existed in equity. In equity, no suit could be sustained without a consideration for the assignment. 2 *Story Eq.* § 793, *a*, 1040; *Edwards* v. *Jones*, 1 *M. & Craig* 226; *Tufnel* v. *Constable*, 8 *Simons* 69; *Hornblower, C. J., Spenc.* 72; *De Forest* v. *Frary*, 6 *Cow.* 151; *Perkins* v. *Parker*, 1 *Mass.* 117.

2. The breach is not sufficiently averred. It may have been paid to the obligee before notice of the assignment. 1 *Chit. Pl.* 332.

3. There is no profert in the first count of the last assign-

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ment, which was under seal. Wherever a party pleading a deed, derives title under it, he must make profert.

Wilson, contra, cited *Allen* v. *Pancoast*, *Spenc.* 68.

CARPENTER, J., delivered the opinion of the court.

The special cause of demurrer urged by the counsel of the defendant is, that the declaration does not aver any consideration for the several assignments. It is true that a mere equitable assignment of a chose in action, as an executory contract, must have a consideration to support it. Such an assignment is said to be a declaration of trust, with an agreement to permit the assignee to sue in the name of the assignor, (*Co. Lit.* 232 *b*, *note* 1,) and which, available only in equity, would only be enforced so far as there was a good consideration. But it has long been held that the assignment of a bond, as a chose in action, carried with it, by implication, a right to use the name of the assignor, even against his consent, and courts of law will notice and protect the rights of the assignee. The assignment of such chose in action, susceptible of delivery, when completed by delivery, under this doctrine, is scarcely to be called an *executory* contract. Even, independent of our statute, if the transfer was consummated by delivery, it might take effect as a gift. *Licey* v. *Licey*, 7 *Barr.* 251; 2 *Kent* 439. But the statute (*Rev. Stat.* 801, § 2,) provides that assignments of bonds and other writings obligatory shall be good and effectual at law: it gives a legal title to the instrument transferred, and, under its operation, the assignment, when completed by delivery, is clearly a contract executed. Here the declaration not only sets out the mode of the assignment, that it was by writing endorsed upon the bill, but avers that the said bill was then and there delivered to the assignee. Such formal assignment, so carried into effect, is sufficient at law under our statute, without the aid of any consideration.

That there is no profert of the last assignment, applies only to the first count of the declaration. It is said that a profert must be made whenever the party pleading a deed makes title under it, but this is not universally true. The rule is confined to cases where the party relies on the direct and intrinsic ope-

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ration of the deed. Thus, in pleading a feoffment, no profert is necessary, for the estate passes, not by the deed, but by the livery. Neither is it necessary in pleading an award under seal, though the latter, it seems, is not technically a deed. *Steph. Pl.* 437–8; *Ib.* 374, &c. The case of an assignment, which though under seal, yet derives none of its effect from that formality, seems to fall within the rule laid down in *Bellamy's case*, 6 *Co.* 38. It was there held "that when a deed is requisite *ex institutione legis*, then it ought to be shown in court, although it concerns a lateral thing, and transfers or conveys nothing." But when a deed is requisite *ex provisione hominis*, then the provision of man shall not change the judgment of law in such case; as if a man makes a lease for years of land to A., on condition that he shall not assign it over but by deed only, and not by parol. In this case, *ex provisione hominis*, the assignment ought to be by deed, but because *ex institutione legis*, a deed is not necessary to the assignee; he may plead the assignment without showing the deed. The declaration is sufficient in this respect.

But the breach is not sufficiently averred. The breach of the contract, which is governed by the nature of the stipulation, is essential to the cause of action, and must be properly stated. If money is to be paid to a man, or his assigns, and the action is brought by the assignee, obviously it must be averred in proper terms, that the defendant did not pay to obligee before the assignment, or to the assignees, or either of them, since the assignment. The declaration very unnecessarily notices the other joint and several obligor or maker, which seems to render it necessary to aver that the bill had not been paid, either by him or by the defendant.

Upon this last objection, unless the plaintiff shall ask leave to amend, judgment will go for the defendant.

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RIDGWAY AND WIFE v. EXECUTORS OF ENGLISH.

1. Assumpsit by husband and wife against the executors of the wife's father, to recover compensation for services performed by the daughter, the promises being laid to have been made by the father to her while yet sole. The defendants having pleaded the statute of limitations, *held*, that a promise by the father in his lifetime, but after the marriage of the daughter, did not support the issue. The subsequent promise to take the case out of the statute must be conformable to, and maintain the promise, as laid in the declaration.

2. When a daughter, after arriving of age, continues to reside in her father's family, supported by him, and performing useful services in return, the law will not, except under special circumstances, imply a promise on the part of the father to pay for such services. If she demand pay, it is incumbent on her to show affirmatively that compensation was to be made, and that it was so expected by both parties, or that the services were performed under such circumstances as that the expectation was reasonable and proper.

Rule to show cause.

This was an action of assumpsit against the executors of Thomas English, deceased, brought to recover compensation for services alleged to have been rendered by the wife to the decedent, who was her father, before her marriage. The declaration contained two counts only. The first was in the common form of *indebitatus assumpsit* for work and labor, care and diligence, &c.; the second was for a *quantum meruit;* and both averred the promises to have been made by the testator to the daughter while sole and unmarried. The defendants pleaded *non assumpsit* and the statute of limitations. The replication to the second plea was, that the testator did, within six years next before, &c., undertake and promise, in manner, &c.

Upon the trial at the Mercer circuit, in June, 1849, before the Chief Justice, it appeared in evidence that the testator's first wife died August 13, 1836, and that the daughter, a woman who had attained the age of majority, and then resided with her father, took charge of his family, and acted as housekeeper until his second marriage, in February, 1841. The testator was a farmer, who worked the farm upon which he resided. His family consisted of the daughter, two grand daughters, who also resided with him, and assisted in the domestic services, a girl, one, and sometimes two bound boys, and a

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hired laborer. The daughter seems to have discharged the duties which she assumed to the satisfaction of the father. No agreement in regard to compensation appears to have been made. She was married to Thomas Ridgway October 22, 1840, and left her father's house shortly after the marriage. The father died June 29, 1849, and this action was brought by writ returnable to the term of October, 1848, of the Supreme Court.

The plaintiffs relied upon declarations made by the testator subsequent to the marriage of the daughter, to support the action, and to take the case out of the statute of limitations. It seems unnecessary further to state the evidence, as the character of these declarations will sufficiently appear in the opinion delivered.

The court refused at the trial to nonsuit the plaintiffs, but reserved the questions raised for the opinion of the court at bar, when the rule was argued before the CHIEF JUSTICE and Justices CARPENTER and RANDOLPH.

Ten Eyck and *W. Halsted*, for rule.

1. There was no evidence of such promise by the deceased as that laid in the declaration, either proved or implied, within six years before suit brought. The suit was brought more than seven years after the last day's services claimed for. The claim comes down to March 29, 1841, and he died June 29, 1847, more than six years after that period.

The promises are laid to be to Mary, while sole and unmarried. There was no evidence of such promises, and there could have been none so made which could avail in this suit. She was married October 22, 1840, more than six years before suit brought. If any, which is denied, it must have been after the marriage. Such promise, if proved, would not correspond with the declaration. 2 *Stark. Ev.* 670 (*Phil.* 1842); 2 *Cow. Phil. Ev.* 511, *notes;* 5 *Conn.* 273; *Angell Lim. c.* 24, § 2, 288.

2. There was no proof of any promise by the deceased, or of facts from which the law would imply a promise, at any rate not within six years.

Certainly there was no evidence of any express promise.

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The services were rendered by a daughter to a father, who, on the other hand, maintained her according to her station in life, and the law in such case will not imply a promise. 17 *Vermont* 556; 3 *B. Munroe* 647; 4 *Dal.* 111; *U. S. Dig.* 187; 20 *John.* 28.

There was no such acknowledgment as, under any pleadings, would take the case out of the statute. 2 *Greenl. Ev.* § 440; *Saxton* 404; 6 *Gill & Johnson* 309.

Beasley and *Vroom*, for plaintiffs, contra. We regard the questions of fact as settled by the jury. There was enough evidence to go to the jury, and we submit that there is but a question as to the alleged variance under the pleadings.

Is the promise proved different from that laid? The objection is technical, and it raises the inquiry, whether the recovery is upon the original or the subsequent promise. We submit that the subsequent promise is not the basis of the action, but it is only evidence that the bar of the statute is waived. The new doctrine does not obtain in England, and so is the weight of authority in this country. 1 *Smith's L. Cas.* 318, *et seq.* (429, 434, *&c.*, *Phil. ed.* 1844,); 2 *Bingh. N. Cas.* 713; 2 *Burr.* 1099; 1 *Russ. & My.* 199; 5 *Wend.* 257; 7 *Cow.* 653; *Spenc.* 280; 7 *Halst.* 256.

The new promise waives the statutory bar, but the cause of action only rests on the original consideration. Here the declaration properly sets forth the original consideration, and the subsequent promises are only relied on to show such waiver. The new promise averred in the replication is merely formal. In England, however, the rule of pleading requires the promises in the pleadings to correspond, as to the person, with the proof: thus, the statute being pleaded, a promise to an executor will not support an averment of a promise to the testator. 2 *Ld. Ray.* 1101; 6 *Taunt.* 210; 1 *B. & C.* 248; 16 *East* 420. But this ground must rest on the new promise; and how far that may lead, will be seen by a reference to the cases, when such view has been taken. See 1 *Smith's L. Cas.*, *note by Mr. Hare*, 440, *&c.* (*Phil. ed.*)

The rule in Massachusetts, upon principle, seems to be the

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correct rule, where it is held, that in such case no special count is necessary. 8 *Mass.* 133; 16 *Ib.* 429; 9 *Pick.* 488; 14 *Ib.* 387.

GREEN, C. J. Two questions are involved in the consideration of the motion to set aside the verdict in this cause.

I. Was the evidence offered at the trial on the part of the plaintiff relevant to the issue? If it was, then—

II. Was it sufficient to support the issue on the part of the plaintiff.

I. The action was brought by Ridgway and wife to recover from the executors of her father's estate compensation for services rendered by the wife to her father, while she was sole and unmarried. The declaration avers that the testator, being indebted to the plaintiff's wife for work and labor, undertook and promised the wife, while she was sole and unmarried, to pay, &c. The plea is the general issue and the statute of limitations. Upon this plea issue is joined. Upon the trial, it appeared that the wife had been married more than six years before the commencement of the suit, and the promises relied upon to take the case out of the statute were made not while the wife was sole, but during her coverture, and, consequently, enured not to the wife alone, but to the husband and wife.

It seems well settled that evidence of an acknowledgment *by* an executor or administrator within six years, will not support a count laying the promise to have been made *by* the testator or intestate, nor will evidence of an acknowledgment made to an executor or administrator support a count laying the promise to have been made to the testator or intestate. Hence, when it is intended to rely upon a promise made by or to an executor to take a case out of the statute, it is necessary to insert in the declaration a count charging the promise in that form. *Executors of Marlborough* v. *Widmore*, 2 *Stran.* 890; *Green* v. *Crane*, 2 *Ld. Ray.* 1101; *Salk.* 28; *Hickman* v. *Walker*, *Willes* 29; *Sarrell* v. *Wine*, 3 *East* 409; *Ward and wife* v. *Hunter*, 6 *Taunt.* 210; *Short* v. *McCarthy*, 3 *Barn. & Ald.* 626; *Jones* v. *Moore*, 5 *Binney* 573; 1 *Chit. Pl.* (*7th ed.*) 234, 392; 2 *Ib.* 102, 140, 142.

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In such cases the declaration is not framed upon the new promise, as a distinct substantive cause of action; but the original contract or cause of action is set forth, and the new promise counted on in such form as to correspond with the evidence intended to be produced. The necessity for the practice rests upon the broad principle, that the allegation and proof must correspond.

In *Tanner* v. *Smart*, 6 *Barn. & Cress.* 603, Lord Tenterden, Chief Justice, said, "The only principle upon which an acknowledgment can be held to be an answer to the statute is this: that an acknowledgment is evidence of a new promise, and, as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them (though it may clearly show that the debt has never been paid, but is still a subsisting debt,) the plaintiff fails. After citing a number of earlier cases, he added: "all these cases proceed upon the principle, that, under the ordinary issue on the statute of limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect.

In accordance with this doctrine, when an action was brought against Foster and John Norris and Mary his wife, upon a promissory note made by Foster and Mary Norris, while the latter was sole, laying the promises to have been made by Foster and Mary, while she was sole and unmarried, upon a plea of the statute of limitations, the evidence being only of an acknowledgment by Foster, after the marriage of Mary, the plaintiff was nonsuited, on the ground that the evidence did not sustain the issue. *Pittam* v. *Foster et al.*, 1 *Barn. & C.* 248.

So in *Bonnel* v. *Taintor's executors*, 5 *Conn.* 273, it was held that a promise to the husband and wife, jointly, would

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not sustain an allegation of a promise to the wife before marriage.

The present case is directly within the principle of the two cases last cited. It is true that in the case of *Pittam* v. *Foster* there was an additional difficulty, one of the defendants, at the time of the acknowledgment proved, being a *feme covert*, and incapable, therefore, of making a contract.

In *Hayden* v. *Williams*, 7 *Bing*. 163, Tindal, C. J., alluding to the decision of the court in *Tanner* v. *Smart*, 6 *Barn. & C.* 603, said, the principle laid down by the court in that case, and which is deduced from the former decisions, was, that the promise which is given in evidence, under the general replication to the statute of limitations, must be one which is consistent with the promises laid in the declaration, and consequently that evidence of a *conditional*, will not support an *absolute* promise in the declaration. So here, also, we think the promise to pay by the defendant, being guarded with a condition, *whether it is taken as a new promise, or a revival of the former*, is a departure from the absolute promise laid in the declaration.

The result of these cases does not, as was supposed by counsel upon the argument, rest upon the theory adopted by the English courts, that the new promise is the foundation of the action, and that the declaration must consequently be framed in accordance with the terms of that promise. On the contrary, in *Hayden* v. *Williams*, the court expressly waived the decision of that point, and held that the promise *proved*, whether regarded as a *new* promise, or as a revival of the former, was a departure from the promise laid in the declaration.

So it is held by the English courts, that where there is a promise or an acknowledgment made by the defendant to the original creditor within six years, it is not necessary to count upon the new promise, but it is sufficient to declare upon the original contract. 1 *Chit. Pl.* 392. The reason is, that in such case the evidence of an acknowledgment by the defendant corresponds with the promise laid in the declaration. There is no conflict between the allegation and the proof. Thus, in a declaration upon a promissory note, falling due more than six

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years before the commencement of the suit, upon the general replication to a plea of the statute of limitations, the question is not whether the note was actually made within six years before the commencement of the suit. It is apparent, upon the face of the record, that it was not. But the plaintiff, by his declaration, avers that the defendant, being indebted upon the note, promised the plaintiff to pay it; and if, upon the trial, he shows a promise by the defendant, or an acknowledgment from which the law will imply a promise within six years, he supports by proof the promise laid in the declaration.

The test principle, which pervades the cases, is not whether the declaration is framed upon the old promise or the new, not whether the new promise operates as a renewal of the old contract or as a revival of the remedy, or as a waiver of the bar of the statute, or as a substantive contract, but whether the proof made corresponds with the promise laid in the declaration. If it does not, the evidence is inadmissible.

In whatever mode the new promise may be held to operate, in order to take the case out of the statute of limitations, (and upon this point there has long been much conflict of opinion) it seems safe to affirm, both upon principle and upon authority, that, in order to be effectual, the new promise (or the acknowledgment from which the promise is to be presumed) must be made by a party competent to make it, to or in favor of a party in existence to receive it, and must correspond with the promise laid in the declaration. *Ward and wife* v. *Hunter*, 6 *Taunt.* 210; *Pittam* v. *Foster*, 1 *Barn. & C.* 248; *Kline* v. *Guthart*, 2 *Penn. R.* 490; *Powers* v. *Southgate*, 15 *Verm.* 471; *Tanner* v. *Smart*, 6 *Barn. & C.* 603.

But, admitting the competency and relevancy of the evidence, does it sustain the issue? It appeared in evidence that the wife of the plaintiff continued to reside with her father, as a member of his family, after she was twenty-one years of age, until her marriage, a period of about twelve years. Her mother died about four years before the marriage of the plaintiff. The plaintiffs sought to recover for the services of the wife for the period intervening between the death of the mother and her own marriage. The fact, that she was a member of

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her father's family, and rendering service during this period, was proved. But it is admitted that from this fact alone, as between parent and child, the law will not presume a contract of hiring or a promise to pay. In ordinary cases, the law raises the presumption of a promise to pay, from the mere fact of service. Such is presumed to be the understanding of the parties. But the law will never imply a contract to pay for services contrary to the intention and understanding of the parties. After the age of twenty-one, the child may continue in her father's house—1, either as a hired servant, where she would be entitled to wages; or 2, as a boarder, where she would be bound to pay for her maintenance; or 3, as a child unemancipated in fact, in which case she is neither entitled to wages nor liable for her board.

In the latter character she is presumed to remain, unless there be evidence to the contrary. The law will not presume any change in the existing relation of the parties from the mere fact that the child is twenty-one. This is the well settled law, at least in this state, and was not questioned at the trial or upon the argument.

The plaintiffs, therefore, could not rely upon the mere fact of service rendered to entitle them to a verdict. They were bound to go farther, and to show either an express contract, or circumstances from which a contract might be presumed.

There was no evidence whatever of an express contract, or of any claim for services by the daughter, during her father's lifetime, or within six years after she had left his service. There was no evidence that one word, even, passed between the father and daughter, either before or during the continuance of the service, or afterwards. The plaintiffs relied exclusively upon the declarations made, not to the daughter, or in her presence, but to others, after the determination of the service. These declarations were relied on, both to prove the contract of hiring, and to take the case out of the statute of limitations. One of the witnesses testified that she had heard the testator declare, when speaking of his daughter, "that she had not been paid, and she should be well paid; he meant to portion her out, but had not yet done it; when she got her

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house built, he was going to furnish out her parlor." Another witness testified that the testator said, "it was his intention to have given her an outfit; but things had turned out differently, and now he intended she should be well paid."

By other witnesses it was proved that the testator said "his daughter had been a good housekeeper; she had never been paid, but he intended she should be." Are these acknowledgments, standing alone, sufficient to raise the presumption of a contract between the father and daughter? There is no admission of a *debt due*, or of an obligation to pay it. There is no promise to pay. There is a simple declaration of an intention, on his part, to remunerate his daughter for services, which any father might naturally make respecting a dutiful child, without the existence of any contract or obligation. Indeed, the expressions used by the father, on more than one occasion, that he intended to have given his daughter an outfit, (that he was going to furnish her parlor), but that things had turned out differently, and now he intended she should be well paid, would seem, of necessity, to exclude all idea of contract or obligation. If there had been previous evidence of a contract and "of an obligation to pay, this evidence might raise a fair presumption that the debt had not been discharged. But if it proves any contract, and shows the existence of any obligation, what contract and what obligation does it show? The plaintiff claimed for the services of his wife from the death of her mother; but if he had claimed from the time that the wife came of age, the evidence would have been precisely as applicable to the one case as to the other. No previous contract having been shown, no definite period to which the evidence was to apply having been made out, it is obvious that the evidence is in the last degree vague and indefinite. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subisting debt, to which the party is liable, and willing to pay. *Bell* v. *Morrison*, 1 *Peters* 362, 411.

In *Bell* v. *Morrison*, one of the defendants admitted that

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the partnership was owing the plaintiff, but, as he had not the books, he could not settle, the court said, if this evidence stood alone it would be too loose to entitle the plaintiff to recover any thing. The language might be equally true, whether the debt were one dollar or ten thousand dollars. It is indispensable for the plaintiff to go farther, and to establish, by independent evidence, the extent of the balance due him before there can arise any promise to pay it as a subsisting debt. 1 *Peters* 366.

In the present case there was no independent evidence to show the balance due: no book had been kept, no account was rendered, no contract had been proved. The whole case rested upon an acknowledgment of the most vague and indefinite character. There was in reality no evidence from which a jury could lawfully have inferred a promise to take the case out of the statute, and the court ought so to have declared.

Chief Justice Ewing, in delivering the opinion of the court in *Belles* v. *Belles*, said, "The court also erred in omitting to charge that there was no evidence from which the jury ought to infer a new promise, to take the case out of the statute. The facts, or amount of evidence, from which such an inference may be drawn, or, in other words, the nature and extent of the admission or acknowledgment which will raise a new promise, is a question of law. An answer to this question, the court, if required, should give to the jury. 7 *Halst.* 341.

Being a question of law, the court are equally bound to decide it upon a motion to nonsuit.

I am of opinion that the judge at the circuit erred in refusing to nonsuit—1st, because the evidence offered was irrelevant, and not within the issue; and, 2d, because, if relevant, it was not sufficient to raise the presumption of a new promise, and to take the case out of the statute of limitations.

The verdict must be set aside, and judgment of nonsuit entered.

Carpenter, J. This action is brought by husband and wife, against the executors of the wife's father, to recover compensation for services performed by the daughter. The declaration

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is for work and labor alleged to have been done by the daughter for the father, in his lifetime, and the promises are laid by him to her while she was yet sole and unmarried. The pleas are *non assumpsit* and the statute of limitations. The plaintiffs reply to the second plea, that the testator did promise within six years, &c. There can be no pretence of a promise made to her while sole, within that period, for she was married more than six years before the commencement of the suit. It is urged, therefore, that under these pleadings the verdict cannot stand independent of the objection, which goes to the cause of action itself.

It is now settled that in this action, in order to take the case out of the statute of limitations, there must be a promise to pay, or so clear an admission of a subsisting debt, as that a promise must necessarily be implied. The idea seems formerly to have been, that the bar of the statute was founded on the mere presumption of payment, and that whatever would repel such presumption, would be an answer to the statute. An acknowledgment, though accompanied by a refusal to pay, has been held sufficient. But it is now held, and upon sound principle, that when an acknowledgment is relied on, if there is any thing said at the time of making the admission to repel the inference of a promise, the case will not be taken out of the statute. With whatever clearness the debt be acknowledged, if the debtor at the same time expresses an intention not to pay, there can be no recovery. And so even on a contingent or conditional promise, unless the condition or contingency be shown to have occurred or been performed. *Belles* v. *Belles*, 7 *Halst.* 339; *A'Court* v. *Cross*, 3 *Bing.* 329; *Waters* v. *Earl of Thanet*, 2 *Q. B.* 757; *Tanner* v. *Smart*, 6 *B. & C.* 603.

So far the law is now clearly settled, as well in England as in this country; but whether such promise is available as a new cause of action, or whether the recovery, which depends upon the new promise, is still upon the original indebtedness, is a subject which has given rise to many conflicting decisions. It is scarcely possible to reconcile the modern doctrine of a new cause of action springing from the new promise with the

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admitted principle, that the statute was only intended to bar the remedy, and not to discharge or extinguish the original debt. *Higgins* v. *Scott*, 2 *B. & Ad.* 413. It seems equally difficult to reconcile it with the established forms of pleading, said, by a great judge, to be of greater authority than even adjudged cases. *Lord Kenyon, in Farr* v. *Newman*, 4 *T. R.* 648.

The declaration is upon the original consideration. To this, when the lapse of time is relied on in bar of the action, the defendant pleads the statute. If the plaintiff can rely only on the new promise as a new cause of action, if he must so treat it, it would seem, as has been said, that he ought, according to the rules of pleading, to new assign such new cause and fresh promise, and thereby distinguish it from the old ground of action, to which the defendant has pointed his plea. *Smith on Contracts* 315, *note*, (*Phil.* 1847). The only reason why a new assignment is not required in such case seems to be, because the acknowledgment or promise is not a new cause of action, but a recognition of a subsisting debt.

If the issue turned upon the new promise as a new cause of action, it would require a new consideration to support it, if the theory is pursued to the legitimate results. Thus, it has been held, by sound inference from the doctrine, that an executor or administrator, who is answerable in his official capacity for no cause of action not created by the decedent himself, cannot be made liable, even upon an express promise, under the ordinary counts against him as such executor or adminstrator. It has been held that the estate cannot be charged upon his promises, and that he can only be made liable in a special action upon them as a new cause of action, when such promises have been made upon a sufficient consideration. *Fritz* v. *Thomas*, 1 *Whart.* 66; *Reynolds* v. *Hamilton*, 7 *Watts* 420, cited in *Mr. Hare's note;* 1 *Smith's L. Cas.* 437. Yet many cases have established the principle, that the estate of a decedent may be charged, or, rather that the bar of the statute may be waived, by proof of an *express* promise by the executor, though not by an acknowledgment merely. *Angell on Lim.* 290, *and cases.*

But it is of less importance to adopt a theory than it is to

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submit to the authority of adjudged cases, and leave undisturbed a settled course of decision. Whatever doubts have been raised as to some questions under the plea of the statute of limitations, yet it has always been held that the subsequent promise to take the case out of the statute must be conformable to, and maintain the promise, as laid in the declaration. Assuming that the original debt remains, and the remedy only is gone, the plaintiff, as between the original parties to the contract, may declare on the original promise, and rely on the subsequent acknowledgment. But when the promise relied on is by other persons, as by the representatives of the deceased debtor, it is necessary to declare specially and set out such promise. It is now too well settled to be lightly disturbed by any theory, that the new promise must accord with the averments in the declaration, and appear to have been made between the parties therein set forth. Thus, in assumpsit by an executor or administrator upon a promise to the decedent, to which the statute is pleaded, it has often been held that the action cannot be maintained by proof of a promise to the representative, six years having elapsed since the death of the testator or intestate. The promise to the executor is not within the issue. So if the action be *against* an executor or administrator, on a debt contracted by the decedent more than six years before the commencement of the suit, it cannot be taken out of the statute by proof of a promise by the representative, unless so laid in the declaration. If the plaintiff means to rely on such subsequent promise, the declaration should contain a count or counts accordingly. *Green* v. *Crane*, 2 *Ld. Ray.* 1101; *S. C. nom. Dean* v. *Crane*, 1 *Salk.* 28; *Ward* v. *Hunter*, 6 *Taunt.* 210; *Savell* v. *Wine*, 3 *East* 409; *Executors of Marlborough* v. *Widmore*, 2 *Str.* 890; *Saltar* v. *Saltar*, 1 *Halst.* 405; *Ewing, C. J.*, 6 *Halst.* 164; *Kinder* v. *Pavis*, 2 *H. Bl.* 562; *Browning* v. *Pavis*, 5 *M. & W.* 120; *Hickman* v. *Walker*, *Willes* 27; *Steph. Pl.* 410; *Gould* 453; 2 *Saund.* 63, *note;* 2 *Stark. Ev.* 670, (*Phil.* 1842).

The same principles were adopted in *Pittam* v. *Foster*, 1 *B. & C.* 248, a case closely analogous to the present, where the question was also held to depend upon the form of the

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promise laid in the declaration. The action was upon a promise made by Foster and one Mary Norris, before the marriage of the latter. Mary married more than six years before the action brought. The statute being pleaded, the evidence relied on was a promise by Foster, after the marriage of the woman, which was held not to sustain the issue. But, besides, in that case the wife had been married above six years, so that there could not have been a promise by her *dum sola* within six years, which fact alone, said Holroyd, J., would have decided the question. In a late case the rule was recognised by Erle, J., who said, that the new promise, to constitute an answer to the plea of the statute, must be consistent with the original one, as in cases where questions have arisen after the marriage of a female contractor. *Kemps* v. *Gibbon*, 9 *Q. B.* 611. Under these principles, as to the conformity of the evidence with the promises laid, which prevail not only in England, but, perhaps, in every state in the Union, except Massachusetts and New Hampshire, it is obvious that the verdict cannot possibly be sustained. The evidence was incompetent, and the plaintiffs should have been nonsuited: having been received, the verdict must be set aside.

What has already been said is sufficient to dispose of this case, so far as the present motion is concerned. It will be proper, however, to notice the remaining objection. It is the ordinary presumption between strangers, that upon the performance of useful services by one in the family of another, it is upon the implied promise to pay as much as such services are reasonably worth, when there has been no express agreement on the subject. But the rule stands on a very different footing where the relation subsists of parent and child, and the latter prolongs a residence in the family of the parent, performing a share in the ordinary labors of the family, and receiving protection and supplies suitable to the station in life of the parties in return. Especially may the remark be applied to the case of a daughter, who, after majority, continues to reside in the family of her father the same as before, where the services rendered and the support and comforts received may well be accounted for upon considerations of mutual kindness and mu-

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tual comfort and convenience, without presuming that there was any understanding or expectation of pecuniary compensation to be made by the one party to the other. The law in such case, without special circumstances to warrant the presumption, will not imply a promise by the parent to pay for the services of the child, any more than, from the mere residence of the child with her parent, it would imply a promise on the part of the child to pay for her board and maintenance. If the child bring suit for pay, it is incumbent upon her to show affirmatively that compensation was to be made, and that it was so expected by both parties, or that the services were performed by her under such circumstances as that the expectation was reasonable and proper. *Andrus and wife* v. *Foster*, 17 *Verm.* 556; *Guild* v. *Guild*, 15 *Pick.* 129.

What circumstances will authorize a jury to infer a promise, must necessarily vary with the circumstances of each particular case. The state and condition of the family; the character of the services rendered prior and subsequent to the time from whence the claim for compensation commences; the conduct of the other daughters, &c., and whether they shared in the labors of the family and with or without compensation; and the declarations of the parent on the subject: these are some of the circumstances which, it has been said, may be made the proper subject and source of inquiry for a jury, under proper direction from the court, and will doubtless ordinarily lead to a just result.

In this case this daughter, and two grand daughters who were previously in the family of the testator, continued to reside with him after the death of his wife, were suitably maintained by him, and rendered various domestic services in return. The daughter of mature age, as was natural and proper, took charge of the family as housekeeper, and so acted until her father's second marriage, which took place shortly after her own. No proof of any previous agreement on his part to pay her wages is shown, nor on hers of expectation that such compensation would be made. The services rendered, though doubtless useful and meritorious, are of a character not unusual between persons so related and of such condition in life. It is the mere case of an unmarried daughter remaining in her

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father's house after arriving at the age of twenty-one years, performing such services as it is customary for a daughter to perform, and supported by the father in return. Upon the case so far, I think, a verdict for the plaintiffs would not be warranted by the evidence. If there is any thing to support the verdict, it must be in the subsequent declarations of the father.

It is proved that subsequent to the marriage of the daughter, and after she had left his house, he expressed himself satisfied with her services; said that she had been a good housekeeper, and had never been paid for those services, but that he intended she should be. He said, that when she married he had intended to portion her out, to furnish her house, and to pay her well. Again, that she had rendered him important services; that it was his intention to have given her an outfit, but things had turned out differently, and now he intended she should be well paid. If these declarations had been proved to have been also made prior to or during the rendering of those services, and to have been the inducement by which he had retained her in his family in the capacity which she assumed, they would go far in making a case entitling the daughter to such compensation as her services might be reasonably worth. Such evidence would repel the idea that they were given gratuitously. *Jewry* v. *Burk*, 5 *Taunt.* 302; *Jacobson* v. *Le Grange*, 3 *John.* 199. But there is great difficulty in construing these declarations as any thing more than expressions of the kind intentions of the father towards his daughter. He had failed to give her such outfit as he had at one time intended, and then he proposed to provide for her in some other way.

It is clear that the verdict must be set aside.

Rule absolute.

THE NORTH RIVER MEADOW COMPANY v. CHRIST CHURCH AT SHREWSBURY.

1. A decision upon a *certiorari*, as to the validity of an assessment, is conclusive in a suit to recover the assessment where the parties to the suit are substantially the same as to the *certiorari*, though in name different.

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2. When an assessment, not required by law to be in writing, is declared upon as made by three managers, it is no variance that a written assessment is produced signed only by two, if it purports to have been made, and was made, by all three.

3. The books of a corporation, or of the managers of a corporation, are competent evidence of the proceedings of the corporation; and although not usually evidence against third persons, yet are evidence of such proceedings in cases where it is competent or necessary to prove them.

4. An alteration, apparent upon the face of a writing, is presumed to have been made before execution. It is incumbent upon the party objecting on that account to show that it was not.

5. The rate of interest on money, due before 1824, though not due by contract, is seven per cent.

6. Interest cannot be recovered on a debt under a count for money borrowed, but must be assessed as damages for the detention.

7. A verdict taken erroneously in point of *form*, will be corrected by amending the *postea*.

This was an action of debt, brought to recover assessments made under the plaintiff's charter, upon lands belonging to the defendants within the tract authorized to be improved by the charter. Upon the trial before Justice Nevius, at the Monmouth circuit, in October, 1843, the plaintiffs offered in evidence their book of minutes and the book of assessments of the managers. To these books the defendants objected, and excepted to the decision of the court admitting them in evidence. Parol evidence of the organization of the meadow company and of the appointment of the managers was given by the plaintiffs. They also offered in evidence the record of the decision of the Supreme Court and of the Court of Errors upon the legality of this assessment, which had been removed into the Supreme Court by a *certiorari*, sued out on the prosecution of the defendants, to test the validity of the assessments, and in which this assessment was confirmed as valid. To the admission of this record the defendants objected, and excepted to the ruling of the circuit judge admitting it.

The defendants moved to nonsuit the plaintiffs, because they had not proved such an assessment as that stated in their declaration, which purported to be made by the three managers, that produced being signed by two only; which motion was denied.

The court overruled evidence of the defendants, offered to

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show that their land was not benefited by the improvement. This was overruled by the court, on the ground that the decision in the *certiorari* settled that point conclusively.

The court charged the jury that the decision upon the *certiorari* was *conclusive* as to the legality of the assessment, and that the assessment, being made in 1823, would carry with it interest at the rate of seven per cent.

A verdict was rendered for the plaintiffs for $462.28¾. The cause came up now on a rule to show cause why a new trial should not be had.

Argued before the CHIEF JUSTICE and NEVIUS and CARPENTER, Justices, by *Wall* and *Vroom*, for rule, and *Vredenburgh* and *Dayton*, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Several of the reasons assigned for a new trial in this cause relate to the validity of the law organizing the meadow company, and the regularity of the proceedings under it. Another reason relied upon is, that the record of the proceedings and judgment upon a writ of *certiorari*, prosecuted by the defendants in this cause in the name of the state, directed to the plaintiffs, were improperly admitted in evidence.

The *certiorari* referred to in the reasons assigned, was prosecuted for the purpose of testing directly the validity of the proceedings under the act incorporating the meadow company. The constitutionality and validity of the law itself, the regularity of the proceedings under it, and their binding operation upon the defendants in this cause, are all put directly in issue by the proceeding. The return made by the meadow company to the *certiorari* sets out those proceedings at length. The reasons assigned by the Shrewsbury Church for vacating and making void the assessments concerning the church lands, embrace all the points of objection suggested upon the trial of this cause, and now urged as reasons for a new trial. The proceedings were in all things affirmed by this court, and that judgment was, upon writ of error, affirmed in the Court of Appeals. That decision necessarily involved the adjudication of all the reasons assigned for reversal. It must have proceed-

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ed upon the ground that there was no error in the proceedings. These points must be considered as authoritatively settled, and no longer open for litigation.

The record in that cause was virtually between the same parties, in relation to the same subject matter, now sought, in a collateral way, to be inquired into. It is true that in the title of the cause the church appears both as prosecutor and as defendant. This, however, is a mere formal matter. It might have been entitled between the parties in this cause, without affecting the regularity or the substance of the proceeding. *State* v. *Hanford*, 6 *Halst.* 71.

If it were otherwise, upon principle, the record would be competent to show that the validity of the statute, and the regularity of the proceedings under it, had been expressly adjudicated by the court in the last resort. The decision of that court upon all the questions of law involved in the case were justly held to be conclusive upon the court and jury at the trial. It is equally binding upon this court. This disposes of the most material and embarrassing questions involved in the controversy, and leaves but two or three points of minor importance to be disposed of here.

One of the reasons relied upon for a new trial is, that the assessment set forth in the declaration is alleged to be made by *three* commissioners, whereas the assessment offered in evidence is signed by *two* commissioners only. This, it is insisted, is a fatal variance between the allegation and the proof.

The declaration avers the assessment to have been *made* by Reuben Shreve, William Truex, and John Taylor. The assessment offered in evidence was in writing, with the following caption prefixed: "Assessment made this twenty-first day of November, eighteen hundred and twenty, by Reuben Shreve, William Truex, and John A. Taylor, managers of the North River Meadow Company, as follows, to wit." It is *signed* by two of the managers only, and hence it is insisted that it was made by two only. But this conclusion is not warranted. The assessment, upon its face, purports to have been made by all the commissioners. It is signed, it is true, but by two. But *signing* is no essential part of the *making* of the assessment.

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It would have been valid though but one name had signed, or even if it were entirely without signature. The law does not require that it should be signed at all. If the law had directed that the assessment should be signed by the managers, or a majority of them, it would then have been deemed the act only of those who signed it. But the statute contains no such direction, and the assessment must be deemed to have been made, as it purports to be, by all three managers. The case is clearly distinguishable from the case of a promissory note, an award, or the return of a road, to which it was likened upon the argument. The signing of a note, is technically and essentially the making of it; an award is usually required to be under the hands of the arbitrators; the return of a road, is required to be signed by the persons making it. In either case the signing is an essential ingredient of the act done, and the award or the return can be deemed the act of those only who sign it. The declaration does not aver that the assessment was *signed* by three managers, but that it was made by three, and so is the proof. In this respect there is no variance between the allegation and the proof.

2. Another ground of exception is, that the books containing the assessments of the managers, and the book of minutes of the company, were incompetent and inadmissible as evidence. The assessment is expressly declared by the act to be admissible in evidence. That it was written in a book cannot impair its validity, and the book, it is to be presumed, was offered merely for the purpose of showing the assessment. The books and minutes of a corporation, though not usually evidence against third persons, are competent evidence of the proceedings of the corporation. In the *Highland Turnpike Company* v. *McKean* (10 *John. R.* 162) the court say, "the general rule is (and it is a rule of evidence essential to public convenience), that corporation books are evidence of the proceedings of the corporation." *Owings* v. *Speed*, 5 *Wheaton* 420; *Wood* v. *Jefferson County Bank*, 9 *Cowen* 194.

3. It was not incumbent upon the plaintiffs to prove that the alteration apparent upon the face of the assessment was made before the assessment was signed. The presumption is

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not against, but in favor of the validity of the writing. It is incumbent upon the party charging the instrument to be void by reason of an alteration subsequently made, to sustain the averment by clear proof.

4. The only remaining exception is, that the judge erred in charging the jury to allow seven per cent. interest after the 4th of July, 1824. The charge, in regard to the rate of interest, was correct. The assessment, when made, imposed a debt upon the defendants, to be sued for and recovered as such. The act of 1823, changing the rate of interest, operated only upon contracts made, and debts incurred after the law went into operation. It did not affect the rate of interest upon debts subsisting previous to the 4th of July, 1824. The statute, though in terms purporting to regulate the rate of interest upon contracts only, regulates the interest upon all debts due, whether by statute, judgment, or agreement of parties. *Verree et al.* v. *Hughes*, 6 *Halst.* 91.

The rule to show cause must be discharged.

The *form* of the verdict, as returned upon the *postea*, is erroneous. The first two counts of the plaintiff's declaration are for the two assessments specifically, amounting together to $191.47¾. The third count is for $308.53, money borrowed, being the balance of $500, the entire debt demanded. There was no evidence to support the last count. Interest, as such, cannot be recovered under it. To support a count for money lent there must have been a loan of money. 1 *Chit. Pl.* (*7th ed.*) 384. The verdict appears to have been rendered for $462.28¼ *debt*. It should have been for $191.47¾ of debt, and the residue of the amount, being the interest recovered, should be in the shape of damages for the detention of the debt. 1 *Saund.* 201, *a, note n; Osborn* v. *Hosier*, 6 *Mod.* 167; *Watkins* v. *Morgan*, 6 *Car. & P.* 661; *Sayre* v. *Austin*, 3 *Wend.* 496.

The *postea* should be amended accordingly.

NEVIUS and CARPENTER, Justices, concurred.

Rule refused.

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MOREHOUSE v. COTHEAL.

A testator gave to S. A., and her heirs for ever, all the residue of his real and personal estate; but if S. A. should depart this life *without leaving lawful issue*, then to A. R. and E. W. H., and their heirs, as tenants in common. This limitation over is upon an indefinite failure of issue, and fails as an executory devise; S. A., therefore, would, under the statute *de donis*, take an estate tail, and in New Jersey an estate for life, with remainder to her children.

This was an action of waste. The title of the demandants, as set out in their count, will be found substantially stated in the report of the case, when previously before this court. (1 *Zab.* 480.) The demandants claimed to have a vested remainder in the premises in question, under the will of Elizabeth Wilmurt. As stated in the count, she devised the premises to her daughter, Elizabeth Ann Wilmurt, and her heirs for ever, and, by the same will, she further gave to S. A. R. and E. W. H., and their heirs, &c., for ever, the reversion of the same lands, &c., in case her daughter, S. A. W., should depart this life without leaving lawful issue. The case set up by the demandants was, that by this devise the daughter took an estate, which under the statute *de donis* would be an estate tail, but that under the act of 1820, (*Rev. L.* 774) it became an estate for life only, with a vested remainder to her children.

The defendants pleaded—1st. That the said defendants, at, &c., did not make any waste, sale, and destruction, in manner and form, &c., concluding to the country.

2d. *Actio non*, because, they say, that the said last will and testament of the said Elizabeth Wilmurt was duly made and published by the said E. W., and duly executed and attested to pass real estate, on the 7th day of March, 1835, *to wit*, at, &c.; in and by which said last will and testament the said E. W., after directing the debts and funeral expenses to be in the first place paid out of her personal estate by her executors, and after giving and bequeathing to her son, Thomas Wilmurt, the sum of $100, to be raised out of her personal estate, after her debts and funeral expenses should be paid, if there should so much thereof be left for that purpose, to be

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paid by her executors within one year after her decease, did devise as follows, *to wit:* "I give, devise, and bequeath unto my daughter, Sarah Ann Wilmurt, and her heirs for ever, all the rest and residue of my estate, *both real and personal,* whatsoever and wheresoever. But if it should so happen that my said daughter, Sarah Ann, *should depart this life without leaving lawful issue,* then and in that case I give, devise, and bequeath unto Ann Rose, daughter of William Rose, late of South Amboy, deceased, and to Elizabeth Wilmurt Hyer, daughter of William Hyer, of the city of Trenton, in the county of Hunterdon, and state of New Jersey, and to their and each of their heirs for ever, all my real and personal estate, whatsoever and wheresoever, that I now possess or may hereafter possess, to be held by the said Ann Rose and Elizabeth Wilmurt Hyer as tenants in common, and not as joint tenants. *And my will further* is, that if my said daughter, Sarah Ann, should *not marry, and should depart this life before my decease,* then I will, *that all my personal estate,* after the payment of my debts and funeral expenses, and the legacy of $100, bequeathed to my son, Thomas Wilmurt, be equally divided between the said Ann Rose and Elizabeth Wilmurt Hyer, share and share alike, in addition to the above devise of my real estate to them and to their heirs, in the event of my daughter, Sarah Ann, dying without lawful issue," as in and by said last will and testament of said E. W., filed, &c., will fully appear.

And the said Henry Cotheal and David Cotheal further say: that after the decease of the said Elizabeth Wilmurt, as mentioned in the said plaintiff's said declaration, the said Sarah Ann thereupon, under and by virtue of the said will, became and was seized of the said premises, with the appurtenances, according to the said will, and afterwards, *to wit,* at the time and place in the said declaration mentioned, intermarried with the said Andrew K. Morehouse; whereupon, and by virtue of the said will of the said E. W., the said Andrew K. Morehouse and the said Sarah Ann his wife, in the right of the said Sarah Ann, became and were seized of the same tenements, with the appurtenances, in their demesne as of fee, *to*

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wit, to them and to the heirs of the said Sarah Ann, of an estate therein, defeasible only upon the event of the said Sarah Ann dying and leaving no issue her surviving at the time of her death, with this, that the said H. C. and D. C. will aver that the said Sarah Ann is yet surviving and alive, *to wit*, at, &c. And the said H. C. and D. C. further say: that afterwards, *to wit*, on the 13th day of July, 1830, at, &c., the said Andrew K. Morehouse and Sarah Ann his wife, being so seized as aforesaid, by a certain indenture of bargain and sale, then and there made between the said A. K. M. and S. A. his wife, of the one part, and the said H. C. and D. C., of the other part, and duly acknowledged by the said S. A., so as to pass her estate and interest (making profert) for the consideration therein mentioned, the said A. K. M. and S. A. his wife bargained, sold, and conveyed the equal undivided moiety of the said premises, with the appurtenances, to the said H. C. and D. C. in fee simple, as by the said indenture more fully appears; whereupon the said H. C. and D. C. then and there became and were seized thereof in their demesne as of fee, *to wit*, of an estate therein in fee simple, defeasible only upon the event of the said S. A. dying and leaving no issue her surviving at the time of her death. And afterwards, *to wit*, on the 19th day of October, 1831, at, &c., Andrew Snowhill, then being sheriff of the county of M., &c., by his certain deed of conveyance, then and there duly made and delivered under and by virtue of the special authority to him for that purpose duly and particularly recited in the said deed, (making profert of said deed) did bargain and sell, and convey unto the said H. C. and D. C., the other moiety of the said premises, with the appurtenances, in fee simple, and all the estate, right, title, and interest of the said A. K. M. and S. A. his wife in and to the same, as by the said deed of conveyance more fully appears; whereupon the said H. C. and D. C. then and there became and were seized thereof in their demesne as of fee, *to wit*, of an estate therein in fee simple, defeasible only upon the event of the said S. A. dying and leaving no issue her surviving at the time of her death, without this, that upon the death of said E. W. the said S. A., under and by virtue of the

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said will, into the said tenements, with the appurtenances, entered and was thereof seized in her own demesne as of freehold for the term of her life.

And the said Virginia W., Josephine B., and Elizabeth, also, by virtue of the said will and of the statute in the said declaration mentioned and recited, then and there became, and remain *as yet*, solely seized of the same lands and tenements, with the appurtenances, in vested remainder in fee and of right, in manner and form as the said plaintiffs have above alleged; and this the said Henry Cotheal and David Cotheal are ready to verify, whereof they pray judgment if the said *demandants* ought to have or maintain their aforesaid action thereof against them, &c.

The plaintiff demurred specially to the second plea, and assigned the following causes of demurrer:

1st. For that the said plea hath not confessed and avoided, traversed or denied, the causes of action alleged in said declaration, nor hath the said plea recited or stated any thing from the last will and testament of Elizabeth Wilmurt inconsistent with the title alleged in said declaration, or as creating any such estate in the said defendants or their grantors, as is alleged and supposed by said plea.

2d. For that the said plea doth not pretend to recite the whole will of Elizabeth Wilmurt, or in any manner deny but that the said will contains the very devise mentioned in said declaration, both in form and effect, as therein stated and set forth.

3d. The said plea is inartificially pleaded, and in other respects uncertain.

Argued before the CHIEF JUSTICE and Justices CARPENTER and RANDOLPH.

B. Williamson, for demandants.

The traverse is evidently bad. It is not only upon a mere matter of law, but also upon a matter not alleged. But the more important question is, what estate did Sarah Ann take under the will of her mother, the devise being fully set out in the plea? The words "depart this life without leaving lawful

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issue" have a technical meaning, and import an indefinite failure of issue. If so, there is an end of the argument, and the plaintiffs must recover.

There is no expression to control the technical meaning of the phrase, as in *Den* v. *Allaire* (*Spenc.* 6) and other cases cited. There is no distinction in the application of the words to real and personal estate, and the cases in which it has been set up have been overruled. 3 *Paige* 30; 11 *Wend.* 260, 283, *and cases;* 1 *Spenc.* 151; *Ib.* 411, 415; 2 *South.* 418, *Den* v. *Shepherd;* 4 *Kent.* 273.

Leupp and *Vroom*, contra.

Sarah Ann took a fee simple, the limitation over is not too remote. 2 *South.* 414, *Den* v. *Shepherd;* 3 *Halst.* 39, *Den* v. *Schenck; Saxt.* 314; 1 *Spenc.* 6, *Den* v. *Allaire; Ib.* 223; 1 *P. Wms.* 666; *Forth* v. *Chapman;* 3 *Ath.* 288; 2 *T. R.* 720; 3 *T. R.* 143, *Porter* v. *Bradley;* 7 *T. R.* 589, *Roe* v. *Jeffreys;* 3 *Dessau* 256, *Cudworth* v. *Hall; Pollexfen* 645, *Price* v. *Hunt;* 1 *Taunt.* 174; 3 *Bing.* 15; *Cro. Jac.* 590; 6 *Kent* 281; 11 *Johns.* 388, *Jackson* v. *Staats;* 2 *Mumford* 479.

Carpenter, J. As I take the plea to be defective in substance, it is unnecessary to advert to any supposed defect in its form. The plea more fully sets out the devise, the substance of which only is stated in the count, and the argument of the counsel of the defendants has been directed to the object of showing that the title of the plaintiffs is not such as will support this action. The case, upon the argument, has been made to turn entirely upon the question, whether the limitation over depends upon a definite or an indefinite failure of issue. In the one case the result would be an estate tail in the daughter, which it is said, under our statute, becomes in her an estate for life only, with a vested remainder in fee in her children; in the other, an estate in fee simple in the daughter, defeasible in case of her dying without issue, with remainder over by way of executory devise. If a defeasible fee in the daughter, the plaintiffs have no vested estate of inheritance, and cannot maintain the present action.

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The devise, as stated in the count, is to S. A. W. and her heirs for ever, and in case she should *depart this life without leaving lawful issue*, then over. On a former occasion, on demurrer to the count, we held that under the statute *de donis* this gave an estate tail to the daughter, the limitation over being dependent upon an indefinite failure of issue. The words dying *without issue*, or *without leaving lawful issue*, and the like, unless there are such words in the will as will control their legal meaning, always import an indefinite failure of issue. The authorities so far are uniform, and the rule has been so often discussed as to make it unnecessary to add any additional remark to what was then said. It will be sufficient to examine whether any thing appears in the devise, as more fully set out in the plea, which will vary the meaning of the technical expression referred to, and authorize us to give it a different construction.

The testatrix, after directing her debts and funeral expenses, and a legacy of $100 to her son, to be paid out of her personal estate, then devises and bequeaths as follows: She gives to her daughter, Sarah Ann Wilmurt, and her heirs for ever all the residue of her estate, *real and personal;* but if her said daughter should depart this life *without leaving lawful issue*, then and in that case she devises and bequeaths to Ann Rose and Elizabeth W. Hyer, and to their, and each of their heirs for ever, all her real and personal estate, as tenants in common, &c. And further, she declares her will to be, that if her said daughter, S. A. W., should not marry, and should depart this life before the decease of the testatrix, then that all the personal estate, after the payment of her debts and funeral expenses, and the legacy of $100, should be equally divided between the said A. R. and E. W. H., share and share alike, in addition to the above devise to them of her real estate, in the event of the daughter, S. A. W., dying without lawful issue. This is the substance of the devise, as set forth at length in the plea, and I have not been able to see in the whole provision, so stated, any thing which will take the case out of the general rule.

A bequest of personal property is included in the disposition,

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and is given by the same words as those which devise the real estate. It is not necessary to examine the validity of the disposition, as to the effect of the words "dying without issue," &c., when applied to the disposition of personal property. The courts seem disposed to lay hold of slighter circumstances in bequests of chattels than in devises of real estate, as indicating an intention to confine the limitation over to the event of the first taker dying without issue living at his death. But it is difficult to conceive, when, in the same will, the disposition of real and personal property is by the same words and the manifest intention is that they should be enjoyed together, how the words should be taken in different senses. In such case, it is said by Chancellor Kent, the importance of uniformity in the construction of wills relative to the disposition of real property has in a great degree prevailed over the distinction. 4 *Kent* 281, *and note.* The disposition of the real and personal property being blended together, and the intention being obvious that they should be enjoyed together, I take it that the same legal construction must be given to the phraseology. If the limitation over of the real estate is held to be on an indefinite failure of issue, and the devise in fee tail in the daughter, the same words applied to the personal property vest the whole interest absolutely in the first taker.

The language of the devise is not connected with any of those phrases supposed to indicate an intention to control the technical meaning of the words, and to take the case out of the general rule. There are no phrases such as "leaving no issue *behind* her," or "*alive*," or the like, upon which stress has sometimes been laid; nor does the word "survivor" intervene to bring this case within another class of decisions. Nor is the limitation over connected with any contingency collateral to the devise, as not only dying without issue, but also before attaining the age of twenty-one, &c. I think, therefore, that the first clause, standing alone, is susceptible of no other construction consistent with the authorities, than that the devise over is upon an indefinite failure of issue. But the subsequent clause seems to have been added in contemplation of a contingency which might occur upon this very construction. In this, provision is made for the contingency of the daughter

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dying unmarried and before the death of the testatrix. As the daughter, if she took an estate tail in the real estate, would take an absolute interest in the personal property, and the limitation over of the latter would be void, this subsequent clause seems to have been adopted in order to guard against the possibility of a lapse of the personal property. It was necessary for this purpose, and seems to be superogatory for every other. The devise then, in my judgment, would give under the statute *de donis* an estate tail to the daughter, but which, by our act, is cut down to an estate for life, with a remainder in fee to her children. The plea shows no other or different estate than that set up in the count, and must be overruled.

But for the decision to the contrary in a late case *(a)* in the Court of Errors, I should be of the opinion that the remainder created by the operation of our statute was a contingent, and not a vested remainder. On the former argument, it was assumed by counsel to be a vested remainder; no question was raised as to the construction of the statute, and this part, therefore, passed without observation on the part of the court.

Randolph, J. This is an action of waste, in which the plaintiffs, claiming to be the owners of the premises in fee in remainder after the death of Sarah Ann Morehouse, late Wilmurt, their mother, seek to recover damages under the statute against the defendants, as tenants for life. The defendants plead—first, the general issue, and *secondly*, that by the last will and testament of Elizabeth Wilmurt, deceased, the premises were devised to her daughter Sarah Ann in fee, and that defendants claim to hold the premises in fee by deed from her and her husband for the one half, and by deed from the sheriff of Middlesex, on a sale under an execution against said Sarah Ann and her husband for the other half. To this plea plaintiffs have filed a demurrer. The question arising under the pleadings is, what estate did Sarah Ann Morehouse, late Wilmurt, take under the will of her mother? If a fee simple, the estate of the defendants being the same as hers, the plea, and defence set up under it, is good; but if only a life estate, as

(a) Demarest v. *Den d. Hopper*, post.

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contended for by the plaintiffs, then the demurrer must be sustained. The clause of the will relied on, as set forth in the plea, is thus: "I give, devise, and bequeath unto my daughter, Sarah Ann Wilmurt, her heirs for ever, all the rest and residue of my estate, both real and personal, whatsoever and wheresoever. But if it should so happen that my said daughter Sarah Ann should depart this life without leaving lawful issue, then and in that case the property is given over to Ann Rose and Elizabeth Wilmurt Hyer, their heirs and assigns for ever."

The point is too well settled, both in England and in this country, to require argument, that when an estate devised to the first devisee, in such terms as would give him a fee simple, has annexed to the devise a condition or proviso, that if the first devisee die without issue, then the estate is to go over to a third person; that in consequence of such proviso or condition the estate of the first devisee is cut down to an estate tail at common law, or a life estate under our statute; and that the devise over, being on an indefinite failure of issue, is too remote for an executory devise to take effect, and is a contingent remainder. 4 *Kent* 17, 271; 3 *Halst.* 39; *Spenc.* 6.

But, in order to carry into effect the intention of the testator, courts have seized on very slight circumstances or alteration in the phraseology, as going to show an intention that the devise over was to take effect on the death of the first taker, without his leaving issue, and not on the death of a remote descendant or all his issue; and this being a definite failure of issue, the first devisee would take a fee, and the devise over would be an executory devise. Thus in *Pells* v. *Brown*, *Cro. Jac.* 590, where the qualification was if the devisee died without issue, leaving W., then to W. in fee, W. took an executory devise on a definite failure of issue. So in *Porter* v. *Bradley et al.*, 3 *T. R.* 143, die leaving no issue behind him, was held to be a definite failure, and a devise over good. And the same was the decision in *Den* v. *Schenck*, 3 *Halst.* 39, on the words die without issue alive, and in *Den* v. *Snitcher*, 3 *Green* 53, on the phrase die without issue, that then, at his decease, the estate to go over. The cases qualifying the general term of dying without issue are exceedingly numerous, and it is not necessary for them to be specified here. The defendants contend

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that the word *leaving* die without *leaving lawful issue, then* the estate to go over, changes the effect of the present devise, or rather the qualification thereto. The terms die without issue and die without leaving issue are precisely the same in effect; without issue necessarily implies without leaving issue, and the one no more shows the intention of the testatrix, that the devise over should take effect immediately on her death, than the other, nor that it should not take effect until all her issue should die or run out, and so the courts have considered the matter. In *Forth* v. *Chapman*, 1 *P. Wms.* 666, the term die without issue was held to designate an indefinite failure of issue, when applied to a freehold estate, though when it operated on a leasehold estate it passed the absolute interest to the first taker. See, also, 1 *P. Wms.* 564; *Den* v. *Regden*, 2 *T. R.* 720; 3 *Ath.* 288; 2 *Ib.* 88 (1); 4 *Kent* 275. In *Mortimer* v. *West*, 2 *Sim.* 274, the devise was to three, and if either of them die without leaving issue, then his share should go over to the survivors, &c.; held that each took an estate tail with cross-remainders. So in *Franks* v. *Price*, 5 *Bing. N. C.* 37, 6 *Scott* 710, devise to M. and N., and if either die without leaving issue male, the whole to go over to the survivors; held that each took an estate tail.

So, also, in *Dansey* v. *Griffiths*, 4 *M. & S.* 61, devise to R. D. and his heirs, and if he die and leave no issue, then over, R. D. took an estate tail. In *Patterson* v. *Ellis*, 11 *Wend.* 260, a legacy was given to A., &c., but if she died without leaving lawful issue, then over; and it was held to vest absolutely in the first taker, upon the distinction taken by Lord Mansfield in *Forth* v. *Chapman*, that when the words used would create an estate tail in real estate, if applied to personalty, they would vest the absolute interest in the first taker, because personalty cannot be limited over after an indefinite failure of issue, or the courts will not so construe the intention of the testator. In *Osborne* v. *Shrieve*, 3 *Mason* 391, the term used is die leaving no male heir. In *Nightingale* v. *Burrell*, 15 *Pick.* 104, it was die and leave no children. In *Ide* v. *Ide*, 5 *Mass.* 500, it was die without issue, or without leaving issue, and the same in *Hawly* v. *Northampton*, 8 *Ib.* 3; and in

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Den v. *Laquear*, 1 *South.* 301, it was should die and leave no issue; and in all of these cases it was held to refer to an indefinite failure of issue, and that the first devisee took an estate tail. There is a class of cases where the term leave or leaving is used, yet the courts have held the devise over to be good, resting their decisions either upon some other part of the limitation clause, or the particular or general interest appearing from some other part of the will. Thus, in *Porter* v. *Bradley et al.*, 3 *T. R.* 143, the words die leaving no issue behind him, were held to designate a definite failure of issue at testator's death. So in *Roe* v. *Jeffrey*, 7 *T. R.* 589, die and leave no issue, then over, was held by Lord Kenyon to create an executory devise, upon the ground of intention of the testator, "on looking through the whole will," and because "the persons to whom it is given over were then in existence, and life estates are only given to them," (page 596). And so, also, in *Den* v. *Taylor and Shepherd*, 2 *South.* 418, die before he arrived at lawful age or leave lawful issue, the first devisee took a fee under the first clause of the limitation; hence the chancellor, in *Saxton* 318, says, leaving no issue *living* creates a fee. It is manifest that the word leaving was used in the present devise without any intention or understanding of the testatrix that she in the least changed the force of the term die without issue, for in the subsequent part of the will, where this devise is recited by way of reference, omitting the word leaving, it stands thus: "the above devise of my real estate to them and to their heirs, in the event of my daughter Sarah Ann dying without lawful issue."

There can be no doubt but Sarah Ann took only an estate tail with remainder over, and that this estate tail is reduced by our statute to an estate for her life, and that being the extent of the defendant's estate, they are liable to an action of waste under the statute. Of course the defendant's plea must be overruled, and the demurrer sustained with costs.

The Chief Justice concurred.

Judgment for plaintiff. *(a)*.

(a) The judgment of the Supreme Court in this case was reversed by the Court of Errors, at the April term, 1851.

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CASES DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW JERSEY,

AT JULY TERM, 1850.

GOUGH v. BELL.

1. At common law, the right of the owner of lands along the shore of the sea, or of navigable waters in which the tide ebbs and flows, extends only *to* the shore or ordinary high water mark; the shore, which is the land between ordinary high water mark and ordinary low water mark, and the lands under water, belong to the state, and are part of the sovereignty.

2. But in New Jersey *(a)* the owner of lands along the shore of tide waters may extend his improvements by wharves or filling up, *over* the shore in front of his lands to low water mark, unless prevented by the state, provided he do it so as not to interfere injuriously with navigation; and when he has so improved or reclaimed the shore, his title will extend to *actual* high water mark; and the state cannot grant the shore so recovered, nor appropriate it to public use without adequate compensation.

3. Whether the owner of lands on tide water has such *right* to the use of the water, that the state cannot authorize any improvements in front of his lands, which will destroy or abridge that right without compensation, *quere?*

In trespass *quare clausum fregit.*

The declaration of the plaintiff described the close, situate in the township of Van Vorst, in the county of Hudson, as "a close abutting on the north, lands of John B. Coles, Isaac

(a) This matter is now regulated by statute, passed March 18, 1851. See *Pamph. Laws* 335.

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U. Coles, and William F. Coles (the devisees of John B. Coles, deceased); on the east by the Hudson river and other lands of the said devisees; on the south by the road, street, or avenue, commonly called Pavonia avenue, and by the dock or wharf, commonly called Coles' dock; and on the west by the street or road, commonly called Provost street." The defendant pleaded *liberum tenementum*. There were two pleas, but they were substantially the same, and issue was joined upon the usual replication.

The action was brought in 1843. Upon the first trial of the cause at the Hudson Circuit, December, 1844, a verdict was rendered for the plaintiff; but it was set aside on the ground of misdirection, the judge having overruled the whole evidence offered by the defendant of title, and directed the jury to find for the plaintiff. (1 *Zabr.* 157).

The case again went down for trial, and came on to be heard before the Chief Justice, in the Hudson Circuit, November term, 1848, when the following title was set up by the defendant:

1. A survey, by the proprietors of East Jersey to Elisha Boudinot, dated May 21, 1802, for 53½ acres of land (then lying below high water mark) along the beach on west side of Hudson's river, and running into the same between Paulus Hook and Hoboken, and adjoining land (then) of Robert Kennedy, in the township and county of Bergen, of which the *locus in quo* was proved to be part, since filled in.

2. A deed from Elisha Boudinot to Nathaniel Budd, the father of the defendant, dated January 2, 1804, conveying in fee the same 53½ acres of land.

3. A deed for the same 53½ acres, from Nathaniel Budd *et ux.* to Willis Hall, dated October 1, 1835; consideration set out in the deed $25,000.

4. A mortgage deed from Willis Hall to Nathaniel Budd, dated October 1, 1835, to secure the sum of $21,000 on the same 53½ acres.

5. A deed from Willis Hall to the New Jersey Harbor Company, dated May 31, 1837; "received the same day for the 53½ acres of land the sum of $120,733.33."

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6. A certified copy of the act of incorporation of New Jersey Harbor Company, passed March 13, 1837.

7. Proceedings in Chancery, wherein Joseph Budd, administrator of N. Budd, deceased, and Benson Milledoler were complainants, and the New Jersey Harbor Company defendants, and decree of foreclosure, dated October 18, 1840, and execution issued for sale of mortgaged premises, dated January 7, 1841.

8. A deed for said mortgaged premises, from Henry Newkirk, sheriff of Hudson, to Mary Bell, dated August 7, 1841, for the consideration of $6771.

9. Act of the legislature of New Jersey, passed November 8, 1836, vesting the right and title of the state of New Jersey to the said 53½ acres described in the deed from Boudinot to Budd. [Objected to by the plaintiff, as incompetent evidence.]

10. Act of the legislature of New Jersey, passed November 22, 1802, to authorize the laying out of a road to Budd's dock, and to authorize Budd to erect a ferry from the said dock to the city of New York. (The dock and ground intended to be used for the purpose of the ferry were held by said Budd, as tenant under the Kennedy title, since vested in the plaintiff).

11. Original map, indicating boundaries of the township of Bergen, location of patents and grants, and general partition of the common lands, made by Charles Clinton and others, commissioners appointed by the legislature, by act of December 7, 1763, to divide the common lands of Bergen; filed in clerk's office of Bergen county, March 2, 1765. Also field book and report of commissioners; description of lot No. 6, on map, (see p. 5); designation of lot No. 5, on map, (see p. 7, &c.)

In support of his title, the plaintiff offered, and read in evidence—

1st. Copy of patent of charter granted to the town and freeholders of Bergen, by Governor Philip Carterett and council, under Carterett and Berkely, the lords proprietors, dated September 22, 1668. The grant begins at the north, at a place "on the west side of Hudson's river," called Mordanis' meadow; thence, into the interior westwardly, till it comes to Hackensack river; thence, along that river, till it comes to a

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point opposite Staten Island, in Arthur Cull bay; thence to run eastward along the river called Kill Van Cull, that parts Staten Island and the main, to a point or neck of land called Constable's point, &c.; and from thence to run up, northward, all along the bay up *into* Hudson's river, till it comes to Mordanis' meadow aforesaid; and the grant describes the whole tract as bounded *on the east by Hudson's river*, &c.; "the whole, both upland and meadows and waist land" containing, according to the survey, 11,520 acres, English measure; which said limits and bounds, together with all rivers, ponds, creeks, islands, inlets, bays, fishing, hawking, hunting, and all other appurtenances whatsoever, &c., the half part of the gold and silver mines, and the royaltie of lords proprietors only excepted: the said corporation submitting themselves to the lords proprietors and the government of the province.

2. Deed of the trustees of Bergen to John B. Coles, dated February 4, 1804.

3. Deed of John Kennedy and Robert Kennedy (by their attorney, Robert Watts,) to John B. Coles, dated February 4, 1804, with the powers of attorney to Watts.

4. Last will and testament of John B. Coles, dated January 11, 1826.

5. A certified copy of an act of the legislature of New Jersey, passed December 7, 1763, appointing commissioners to divide the common lands of the town of Bergen.

6. Commission to London to examine Robert Lemon, clerk in the state paper office, and return to prove examined copy of the colonial act.

The plaintiff further proved that the *locus in quo* was, in 1804, part of the shore or land between low and high water mark in front of, and adjoining his land upon the Hudson river, and that it had been reclaimed or filled in by him, or those under whom he holds, prior to 1836, the date of the act of the legislature granting the 53½ acre tract to Nathaniel Budd, under whom the defendant claims; and that the trespass complained of was committed wholly *within* this reclaimed *shore*.

On the close of the evidence, the counsel of the respective parties agreed that a case should be made, to embody the tes-

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timony, for the decision of the court at bar, and the jury was thereupon discharged. Leave was reserved to either party, if dissatisfied, to turn the case into a special verdict.

The cause was argued before the CHIEF JUSTICE and Justices CARPENTER and RANDOLPH, by *A. Whitehead* and *Dayton*, for the plaintiff, and by *B. Williamson* and *Vroom*, for defendant.

Whitehead and *Dayton*, for plaintiff.

The paper title of the plaintiff includes the shore of the river. The plaintiff shows a title under J. B. Coles, in whom vested both the Kennedy title and the claim of the trustees of Bergen. The title through the trustees commences with a grant from Governor Carteret and council, 22 September, 1668, for 11,520 acres; and 16 December, 1672, the proprietors of East Jersey confirmed all grants prior to 28 July, 1672. (See *Leaming & Spicer* 35).

January 14, 1713–14, Governor Hunter and council granted a patent to the freeholders of Bergen, incorporating them by the name of "the trustees of the freeholders, inhabitants of the township of Bergen," recognising the grant of Governor Carteret, and authorizing them to make by-laws for the improvement and preservation of their common lands, and to sell and to dispose of them at discretion. It cannot be controverted but that Governor Carteret and council had the right to grant the bed of the river and other royalties, because they represented the proprietors, in whom the right of government, as well as the ownership of the soil, was then vested. See *Leaming & Spicer* 19, § 7; *Ib.* 33, § 3; *Ib.* 34, § 4, *et passim.* The terms of the charter, which was of a municipal corporation, as well as a grant of land, cannot be satisfied but by including a portion of the river in its boundaries. Its terms are "up along the bay *into* Hudson's river, till it comes to Mordanis' meadow aforesaid," &c.

The trustees of Bergen conveyed their right to the premises, being part of the tract known as the West India farm, to John B. Coles, February 4, 1804. On the same day he acquired the conflicting title, by deed, from John and Robert Kennedy,

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they being previously in possession. The deed of the trustees, in the description of the boundaries, runs "*into*" the river. The sense of those interested under the Bergen grants may be seen by the report of the commissioners. In the description and location of two small patents, lying adjoining this shore, it is added by the commissioners—"together with all land lying in front down to low water mark." (See *Field book, p.* 68, &c.)

There has been always an adverse possession of the shore by Coles, and those under whom he claimed, which, if not conclusive, must add great weight to the question of construction, as well as to the reasons to be urged, that a local rule here exists, which carries title to low water mark. It is admitted that Coles was the owner of the upland bounded by the river: he and those under whom he claimed have been there, at least, since 1790. An act of the legislature, passed in 1802, authorized Budd, who then held under the Kennedy title, to lay out a road from the Newark road to Budd's dock, and to establish a ferry on the land now held by the plaintiff. Budd built this dock under the Kennedy title, at any rate extended it. The position of the dock will be seen on Mangin's map. Jarvis, who held under the same title subsequently vested in Coles, built a dock, and filled up that shore below high water mark; and these erections, which are recognised in the act referred to as existing, were built without any special grant for that purpose. This erection or filling in was at a cost of $3500, and went 700 or 800 feet into the river, within the bounds of the survey to Boudinot.

In 1814 or 1815, Coles, who then owned the entire tract, commenced "Long Dock," a wharf which extends 1300 feet into the cove, and was completed in 1818. This dock is 80 feet in width, and, at its end, has an addition forming an L, which is 200 feet in length, extending from the end of the wharf up the river, and actually enclosing the part of the premises since filled in by Coles, upon which the alleged trespass was committed. This dock was used for all purposes by its owners until 1836, when it became necessary to repair it. It was then rebuilt, at a heavy expense, with stone walls. Be-

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sides the dock, Mr. Coles filled in a large amount of the shore immediately north of this dock, at a cost of $12,000; the expense of rebuilding the dock and filling in the shore, in all, amounting to more than $28,000. All this was substantially completed before the passage of the act of November 8, 1836, by which, it is alleged, all these valuable improvements, with the title to the shore, were divested out of Coles, and granted to Budd. The legislature was imposed upon. The glaring injustice of this case, however, is a pregnant proof of the impolicy of the rule contended for by the defendant. When the act passed, the owner had reclaimed five or six acres of the shore, at a great expense, besides "Long Dock," over and above the expenditures by Jarvis, &c., under his title; and yet all this was conveyed, if the grant is valid.

The maxim *nullum tempus occurrit regi* does not apply to the grantee of the state. *Angell Lim.* 37, § 5; *Runn. Eject.* 59.

It is perfectly obvious that the defendant has no title under the survey of Boudinot; if any, it rests entirely upon the act of November 8, 1836. *Arnold* v. *Mundy*, 1 *Halst.* 1; *Martin* v. *Waddell*, 16 *Pet.* 367. He came under that act, as any other individual might have come, asking of the legislature a grant in derogation of the rights of the riparian owner. He asked and obtained the grant upon a false suggestion, that the flats were in front of his wharf: the misrepresentation appears on the face of the act, and the law is void. 2 *B. C.* 348; *Freeman* 172; *Comming* v. *Forrester*, 2 *Jac. & W.* 342; *Needler* v. *Winchester*, *Hob.* 229; 2 *Har. Dig.* 3152, *tit.* "*Grant*"; *Com. Dig.* "*Grant*" (*G.* 8, 9); 17 *Vin.* 100, 104, &c.; 5 *Wheeler* 293; 9 *Pet.* 668.

Even if the act were not void, construed in connection with the title and preamble, the act would convey only ground covered with water at the time when passed.

But can the legislature, in this state, make a grant to private use in front of the riparian owner, and shut him out from the water? He has rights arising out of his position, of which he is not to be deprived, even for public purposes, without just compensation. It is legislation against reason and common

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right to appropriate the property of one man to the use of another.

The public have a right to the shore, the space between high and low water mark, for public purposes only. It has been said in England to be held by the sovereign, who there represents the state, for the use of the public. It may be doubtful how far the doctrine is applicable here, but was it ever before supposed that the shore could be granted by the state, in derogation of the rights of the riparian owner? Can the state grant reclaimed land? It is remarkable how little is to be found on the subject beyond general principles of the common law inapplicable to the state of things in this country. Certainly courts will not here apply those principles so as to be subversive of established rights, and in a way that is obviously unjust. Much was said in regard to the title of the shore on a previous occasion, and the *dicta* went farther than the case required, but the principal question is still open for decision.

But supposing the common law to be as contended for, it has been much modified in this country. There is in this, as in other states of this country, a local common law, which ought to be regarded. The riparian owner here has always been understood to have the right to the use of the water, and the right of making docks, wharves, &c., as the necessities of commerce and business may require, to an extent not inconsistent with the public rights of navigation, &c. The exclusive right of fishing on the shore belongs to the riparian owner; originating in the well established usage of the state, it has long since been recognised by law. A vast amount of improvement on our navigable waters rests upon the same title which it is here sought to impeach in the hands of the plaintiff. Not an act of the legislature can be found to sanction a vast many of these improvements, and yet when they interfere with no public right, who ever before doubted the title of those by whom made? Wharves, landings, meadows, enclosed below high water mark. The usage in this state has been universal. What is such an exercise of right, on the part of the riparian owner, but an indication of our common law? This usage, as in Rhode Island, may have grown out of some old ordinance

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or grant, perhaps, yet to be found in the paper office in London or elsewhere, but it has existed from the origin of the province.

The use of the shore by the plaintiff, and those under whom he holds, is sufficient to warrant the presumption of a grant. In 1802, dock erected by Budd under the same title. So in 1806, dock erected and land filled in by Jarvis. In 1814, 1815, 1836, &c., dock erected and improvements made by Coles.

The doctrine contended for by the plaintiff has become the common law of this country, and no case can be found to justify cutting off the riparian owner from the contiguous water. *Bowman's devisees* v. *Waltham*, 2 *McLean's C. C. R.* 376; *Harrison* v. *Sterrett*, 4 *H. & McHen.* 540; *Angell on Tide Waters* 171, 175, 182, 196, &c., (*ed.* 1847). See cases in Maine, Massachusetts, Connecticut, Rhode Island, Pennsylvania, South Carolina, Ohio, Maryland, &c., there cited, in all which the shore owner goes to low water mark. So it would seem in New York. In some states, it is true, this may have grown out of old ordinances, but, upon the whole, it seems to have become our common law in this country.

In case of encroachment, the remedy of the government is by information for purprestre or by indictment. The state may seize in such legal mode for the purpose of maintaining the public rights, as of navigation, but it cannot delegate such powers to its alienee.

It is said that the alienee of the state may hold, subject to the public use, the right of passing and repassing; but this is an English notion, which grew out of their peculiar prerogative doctrines, and is here inapplicable.

The counsel of the plaintiff also cited *Blundell* v. *Catterall*, 5 *B. & Ald.* 268; *Duke of Somerset* v. *Fogwell*, 5 *B. & C.* 875; 3 *Kent* 425, 427, &c., (*5th ed.*); *Handly's lessee* v. *Anthony*, 5 *Wheat.* 374; *Storer* v. *Freeman*, 6 *Mass.* 435, 438; *Marcy* v. *Darling*, 8 *Pick.* 283; *East Haven* v. *Hemmingway*, 7 *Conn.* 186, 202; *Chapman* v. *Kimball*, 9 *Ib.* 38; *Rex* v. *Pegham*, 8 *B. & C.* 355.

The defendant claims title to the whole premises described

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in the plaintiff's declaration; to a part she has no pretence of title, and therefore judgment should be given for the plaintiff.

Williamson and *Vroom*, for defendant.

The plaintiff shows no title by grant to the land in dispute under the terms of his grant; his rights are simply those of a riparian owner. His title comes under Kennedy by deed, February 4, 1804, but that deed does not contain the words relied on, "into" Hudson's river, &c.; but he sets up a deed from the trustees of Bergen to John B. Coles. This is but a quit-claim deed, referring to the Kennedy title, bearing the same date with the Kennedy deed, and releasing the right or claim of the trustees to the premises. It did not intend to convey any land covered by water, and it is doubtful if such land could be conveyed by the general words used.

But the grant under the charter of incorporation (September 28, 1668,) contains no grant of the bed of the river, and the trustees had no rights in the river to convey. The commissioners appointed by the legislature, in 1763, to divide the common land of Bergen, in their report say, they find no patent for the Kennedy property, known as the "West India farm," and which they describe as "binding on Hudson's river," though lying at the bottom of the cove. *(See Field book)*. As to the construction of these deeds, and that the grants extend to the water only, see argument of Mr. Bayard, *Pea Patch case* 131, and cases cited; *Corfield* v. *Coryell*, 4 *Wash. C. C. R.* 384; Mr. Wood's argument in *Martin* v. *Waddell*, 16 *Pet.* 381, &c.; cases cited by Justice Randolph, 1 *Zab.* 162. The expressions in the charter to the trustees, granting all rivers, fisheries, and other royalties, must be confined to those within the boundaries of the grant. 4 *Wash. C. C. R.* 384.

The defendant claims—first, under the proprietors of East Jersey, her title being derived from Elisha Boudinot, to whom a survey of 53½ acres, covering the *locus in quo*, was made May 21, 1803. When the survey was made, it was upon land covered by water, a portion of which, including the *locus in*

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quo, has been since raised, by labor, above water. We say the soil so raised enures to the benefit of the proprietors.

But, secondly, we claim under grant from the state, by act November 8, 1836, (*Pamph. Laws* 13). At the date of this act, the title was in Willis Hall, by virtue of a deed from N. Budd, and any benefit to Budd enures to his grantee holding by warranty. 1 *Paige* 473; *Carver* v. *Jackson*, 4 *Pet.* 85; *Jackson* v. *Stevens*, 13 *John.* 315; 1 *Zab.* 164.

It is alleged that the grant is void, because of fraud. But the plaintiff is a total stranger, and cannot set up this to impeach the grant.

Fraud must be proved, and cannot be presumed.

There is no fraud apparent upon the face of the preamble; no false suggestions appear. But can this be set up in a court of law at all? In the case supposed the king's grants are said to be *relieved against*, which is a technical expression, and looks to another forum.

Did the act of 1836 pass the title of the *locus in quo*, and, if so, was it subject to any claim by the riparian owner for raising land at his pleasure, and converting it to his own use? The question is not, whether we can raise the land, or how we can use it, but it is, whether, against the state or the grantee of the state, the plaintiff can convert it to his own use, and, by filling up, extinguish both public and private rights.

In New Jersey, the title to land under navigable waters is in the state. By common law, the title of the riparian owner extends only to high water, unless claimed by grant from the sovereign power or by prescription, which supposes a grant. In England, the shore is in the king and his assigns, the very right of property in the soil itself, (*Angell on Tide Waters* 20) it is said, as the representative of the public. It does not alter this case; he can convey the right of soil to an individual. The right was never questioned, either before or since *magna charta*, though his power, since *magna charta*, to grant the right of exclusive fishery has been questioned. The soil, says Best, Justice, in *Blundell* v. *Cotterall*, can only be transferred subject to the public trust. *Angell* 23, 27, 40, &c., and cases. It was so far admitted in *Martin* v. *Waddell*.

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The king, then, or the sovereign power, has the right to convey the soil under tide waters, subject to public rights. It must be something beneficial. May the grantee, then, not set up the grant against all the world, except those in the exercise of the public rights, to which the grant is subject? All piers, &c., are held at the pleasure of the state, and besides indictment may be claimed by the state in a legal way.

But when has it been questioned that parliament can convey these common rights at will? What the king held was as trustee for the people, but the acts of parliament are the acts of the people themselves. The people, by their representatives, may convey a public right, unless the act be repugnant to some constitutional and supreme law. We interfere here with no rights not common to all citizens. *Bennett* v. *Boggs*, *Baldw.* 75; Taney, C. J., in *Martin* v. *Waddell.*

The act interferes with no rights of the riparian owner, it but conveys the rights of the state. We have not interfered with the rights of the riparian owner: when we shall attempt to raise the soil, it will be time enough to decide as to the extent of the grant. We stand in the place of the state as to right of soil. The owner of the shore has no right to disturb the rights of the state.

If a gold mine were below high water mark, it would not belong to the owner of the shore, and yet it has been covered up by him against right and without the permission of the state. [C. J. Mr. Coles owned marsh covered by the tide in the rear of this grant. How far does the right of the state extend, and could this be granted?] The legislature gave right to dock out at Jersey City; the land necessarily followed the right, and became private property.

Again, the riparian owner has no right to wharf out, so as to acquire title against the state, without its consent. There is a difference between the mere permissive privilege to dock and the right to dock. Individuals cannot interfere, except as it becomes a nuisance, but the state may. If a wharf interferes with the navigation, no doubt but an indictment will lie, but without indictment the state may interfere by direct action, because of title to the soil. An erection below high water

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mark is a purpresture, which the king may seize or destroy at will. *Angell* 198, 199, 200. The rights of the state are of property and of conservation. The state may interfere by information of intrusion or by information at the suit of the attorney general in equity. *Eden on Injunc.* 260; *Angell* 200; *Comw.* v. *Wright* cited *Angell* 206. But the right of property may be indicated by direct action, either in her own hands or in those of her grantee.

This alienation by the state is valid, unless the plaintiff has a right under some well established usage, which has ripened into law. If such usage exists, it must be shown by the plaintiff. It must be proved by judicial decision, legislative recognition, or the continued exercise of right. But even such exercise is here of no avail, because it is consistent with the privilege at common law. It has received no sanction, but legislative action and judicial decision have been to the contrary. See *oyster laws of* 1824–5, (*Pamph.* 58); *Corfield* v. *Coryell*, 4 *Wash. C. C. R.* 386; *Angell* 63; *Ib.* 249, *et seq.; Report of commissioners on the extent and value of lands under water in Hudson, January* 25, 1849.

Green, C. J. To an action of trespass for breaking and entering the plaintiff's close, and cutting and carrying away the grass there growing, the defendant pleaded *liberum tenementum*, upon which plea issue was joined.

Upon this issue, it became incumbent upon the defendant to establish her title to the *locus in quo.* It was not necessary, however, that she should prove title to the whole close described in the declaration. The plea of *liberum tenementum* is construed to mean, not that the whole close described in the declaration is the soil and freehold of the defendant, but merely that part of the close in which the alleged trespass was committed. And the rule is the same, whether the close is described in the declaration by name or by metes and bounds; and the record of a judgment upon such issue, in favor of the defendant, will be evidence, not that the whole close, but that part of it only where the trespass was committed, is his freehold.

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This construction, it must be admitted, is not in conformity to the language of the plea, nor to the general rule, which requires the allegations and proof to correspond. But it is entirely consistent with the design of the plea, which is to test the title to the particular place where the alleged trespass was committed. *Smith* v. *Royston*, 8 *Mees & W.* 381; *Richards* v. *Peake*, 2 *Barn. & C.* 918; *Tapley* v. *Wainwright*, 5 *Barn. & Ad.* 395; *Bassett* v. *Mitchell*, 2 *Barn. & Ad.* 99; 1 *Archb. N. P.* 331; *Phillips* v. *Phillips*, 1 *Zab.* 42.

The inquiry, then, upon the issue in this cause is, not whether the defendant has shown title to the entire close described in the declaration, which she obviously has not done, but whether she has shown title to the particular place where the trespass is shown to have been committed.

I. In support of her claim of title, the defendant relies—*first*, upon a survey of 53½ acres, strict measure, made by the proprietors of East Jersey to Elisha Boudinot, on the 21st of May, 1803, and title thence deduced through a chain of mesne conveyances to herself.

In the survey, the tract is described as "all that tract of unappropriated land situate along the beach on the west side of Hudson river, and running into the same, between Powles Hook and Hoboken, and adjoining land of Robert Kennedy." Upon the evidence, it appears that the entire survey, at the time of the location, was below ordinary high water mark in a cove or bay, commonly called Harsimus bay, opening into the Hudson river between Jersey City and Hoboken. The *locus in quo*, at the time of the location of the survey, was between ordinary high and low water mark; but at the time of the alleged trespass it had been filled up, and raised above the flow of the tide, by the owners of the land adjoining the shore, and was occupied by the plaintiff as meadow or grass land.

This evidence shows no title in the defendant. The right of property in the soil covered by tide waters, in all navigable rivers and arms of the sea within the limits of the state of New Jersey, is vested in the state. At the date of the survey to Boudinot there was no title in the grantors, to the premises therein described, which could pass by the grant. This can

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no longer be treated as an open question. It has been decided, upon the most learned and elaborate arguments, and after mature consideration, both by the Supreme Court of this state and by the Supreme Court of the United States. *Arnold* v. *Mundy*, 1 *Halst.* 1; *Martin* v. *Waddell*, 16 *Peters* 367.

II. The defendant further, in support of her claim of title, relies upon a title derived from the state of New Jersey, under and by virtue of an act of the legislature, passed on the 8th of November, 1836. *Pamph. Laws* 13.

In deciding the effect of this act upon the rights of the parties, it will be necessary to consider—

1. The extent of the title of the state to the soil of navigable rivers, and its limits.

2. The power of the legislature to convey that title.

3. Whether, in fact, title to the premises in dispute passed to Nathaniel Budd under the act of 1836.

1. The ancient rule of the common law is, that the title of owners of land bounded by the sea, or by navigable rivers where the tide ebbs and flows, extends to ordinary high water mark only. The title to the *shore* between ordinary high and low water mark, as well as the title to the soil under the water, belongs, *prima facie*, to the sovereign. *Hale de Jure Maris, part* 1, *cap.* 4; *case of the River Banne, Davies* 152; *Woolrych on Waters* 20; 3 *Kent Com.* (*2d ed.*) 427, 431; *Arnold* v. *Mundy*, 1 *Halst.* 67; *Martin* v. *Waddell*, 16 *Peters*, 367; *Pollard's lessee* v. *Hagan*, 3 *Howard* 212.

This title, which by the common law of England is vested in the king, upon the revolution, became vested in the people of the state. With this modification, growing out of the form of government, the rule of the common law prevails here, except so far as it has been modified by statute or by local common law. In this state, the rule of the common law, as to the limits of the right, remains unaltered. High water mark constitutes the boundary between the proprietary and the sovereign titles. This point is fully settled by the cases already cited. *Arnold* v. *Mundy*, 1 *Halst.* 1; *Martin* v. *Waddell*, 16 *Peters* 367.

It has been suggested, with truth, that the question, as to

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the extent or limits of the *sovereign* title, did not necessarily arise in either of the cases last cited.

In *Arnold* v. *Mundy*, the premises in dispute are stated to have been below ordinary low water mark, although one of the counsel, in argument, represented the fact differently. 1 *Halst.* 2, 44. And in *Martin* v. *Waddell*, the special verdict states that the premises in dispute are situated beneath the waters of the Raritan river and bay, where the tide ebbs and flows, but whether above or below low water mark, does not appear. In the argument of *Pollard's lessee* v. *Hagan*, 3 *Howard* 218, counsel insisted that the decision in *Martin* v. *Waddell* did not touch the question of title to the land between high and low water mark, and that such construction of the decision would be a surprise to the people of this state.

In *Arnold* v. *Mundy*, the question, as to the limits of the right, was fully argued, and the question came directly before the court, under a claim of the plaintiff to the possession of the premises in dispute by virtue of his possession of the adjoining land; and upon that point the Chief Justice explicitly recognised the doctrine of the common law. He said, "that a grant of land, bounded upon a river or other water which is navigable, and where the tide does ebb and flow, extends to the edge of the water only, that is to say, to high water mark, and no farther. All pretence of possession, therefore, in this case, as being connected with and appurtenant to the adjacent land, must fail. The grant for that could extend only to high water mark, and it could, therefore, carry with it no part of the adjacent land covered with water." I regard this case as authoritatively settling not only the title to the soil under navigable waters, but also the limits of that title upon the shore.

The title to the *shore* of navigable rivers, where the tide ebbs and flows between ordinary high and low water mark, being vested in the state, have the legislature a right to convey the soil so as to invest the freehold in an individual?

It is said in the books, that the title to the soil of navigable rivers, and to the shores of the sea, and of the arms of the sea, is a branch of the king's prerogative, of which he cannot divest himself; that the title is in him in trust for the public;

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that the rights of navigation and of fishery, and the use of the shores of the sea, are common rights, of which the people cannot be divested, except by their consent. Hence they cannot be aliened by the crown. *Hale de Jure Maris* 11; *Angell on Tide Waters* 21, 24, 25; *Brown* v. *Kennedy*, 5 *Har. & J.* 203.

The authorities, upon this point, are by no means uniform, though the better opinion appears to be, that, since *magna charta*, the English sovereign has no power to alien the public domain.

Whatever doubts may exist in regard to the power of the king to dispose of common rights, there exists none in regard to the power of parliament. Parliament not only may, but does exercise the power of aliening the public domain, of disposing of common rights, and of converting arms of the sea, where the tide ebbs and flows, into arable land, to the utter destruction of the common rights of navigation and fishing. *Lowe* v. *Govett*, 3 *Barn. & Ad.* 863; *The King* v. *Montague*, 4 *Barn. & C.* 598.

This power is attributed to the omnipotence of parliament, and it is said that no such omnipotence is vested in the legislature. The legislature, it is true, is not omnipotent in the sense in which parliament is so. It is restrained by constitutional provisions. Its powers are abridged by fundamental laws. But it would seem clear, upon principle, that in every political existence, in every organized government, whatever may be its form, there must be vested somewhere ultimate dominion, the absolute power of disposing of the property of every citizen. In this consists eminent domain, which is an inseparable attribute of sovereignty. This constitutes the omnipotence of parliament. If the legislature may dispose of the property of each individual citizen for the public good, it would seem to be no greater exercise of power to dispose of public property or the common rights of all the people for the same end. The objection to an alienation of the public domain by the king is, that he is but a trustee for the community. But the legislature are not mere trustees of common rights for the people. These rights are vested in the people themselves; the legislature, in disposing of them, act as their representatives, in their name and in their stead. The act of the legislature is the act of the

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people, not that of a mere trustee holding the legal title for the public good.

The principles regulating the alienation of public property to individuals are thus clearly stated by Vattel:

"The nation, being the sole mistress of the property in its possession, may dispose of it as she thinks proper, alienate it or lawfully mortgage it. This right is a necessary consequence of the full and absolute domain. Those who think otherwise cannot allege any solid reason for their opinion, and it follows, from their principles, that no safe contract can be entered into with any nation, which attacks the foundation of all public treaties. But it is very just to say, that the nation ought to preserve its public property with great care, to make a proper use of it, and not to dispose of it but for good reasons, nor to alienate or mortgage it but for its manifest advantage or in case of a pressing necessity. This is an evident consequence of the duties a nation owes to itself. The public property is of great use, and even necessary, and it cannot dissipate it improperly without manifestly hurting and injuring itself. I speak of the public property, strictly so called, or the domain of the state. Alienating its revenues, is cutting the nerves of government. As to the property common to all the citizens, the nation does an injury to those who receive advantage from it, if it alienate it without necessity or without good reason. It has a right to do this, as proprietor of these possessions, but it ought to do it only in such a manner as is agreeable to the duties of the body towards its members."

"The prince or the superior of the society, whatever he is, being no more than the administrator, and not the proprietor of the state, his authority, as sovereign or head of the nation, does not of itself give him a right to alienate or dispose of the public property, as to its substance." "The nation, having the free disposal of all the property belonging to it, it may convey this right to the sovereign, and consequently confer upon him that of alienating and mortgaging the public property." *Vattel, book* I, *c.* xxi, § 257, 258, 260, 261.

In *Arnold* v. *Mundy* (1 *Halst.* 78), the Chief Justice said, "The sovereign power itself cannot, consistently with the law

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of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."

If, by this proposition, it is meant only to assert that a grant of all the waters of the state, to the utter destruction of the rights of navigation and fishery, would be an insufferable grievance, it is undoubtedly true. It might have been added, that such grant would have been an infringement of the constitution of the United States. But if it be intended to deny the power of the legislature, by grant, to limit common rights or to appropriate lands covered by water to individual enjoyment, to the exclusion of the public common rights of navigation or fishery, the position is too broadly stated.

The contrary doctrine is supported by numerous authorities. "We cannot doubt," says Chief Justice Shaw, in delivering the opinion of the Supreme Court of Massachusetts, "that a navigable stream may cease to be such, by the appropriation of the soil under legislative authority to other purposes," as if the legislature were to erect a solid dam across a navigable creek, and permit the land to be wholly filled up and converted into house lots. *Charlestown* v. *Middlesex*, 3 *Metc.* 202; *Wilson* v. *The Blackbird Creek Co.*, 2 *Peters* 245.

The view, moreover, expressed by the Chief Justice, in *Arnold* v. *Mundy*, is incompatible with very numerous acts passed by the legislature of this state. The acts which authorize the erection of dams or bridges across navigable streams, which are found upon the statute book from a very early period, the laws authorizing the erection of piers and docks, and the laws authorizing the exclusive appropriation of oyster beds to private use, are all grants or appropriations of the waters of the state destructive to some extent of common rights.

In *Martin* v. *Waddell*, Justice Thompson, in reference to the view of the Chief Justice in *Arnold* v. *Mundy*, remarked, that "if this be the received doctrine in New Jersey, in relation to the navigable waters of that state and the oyster fisheries, they remain common to all the citizens of New Jersey, and never can be appropriated to any private or individual

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use; and all laws having such object in view must be utterly null and void."

These views in relation to the title of the state to the soil under navigable rivers below high water mark, and the power of the legislature to grant it, were expressed, as the opinion of this court, when this case was formerly before us upon a motion for a new trial. I should have deemed it unnecessary at this time to add any thing to what was then said by Justice Randolph, in whose views I concurred, but for the great importance of the questions in their influence both upon public and private rights, and the fact that they were discussed by counsel upon the argument, as open questions.

It remains to inquire, upon the evidence in this cause, whether any title to the *locus in quo* did or could pass to Nathaniel Budd by operation of the act of the 8th of November, 1836.

It appears, by the evidence, that the heirs of Coles, under whom the plaintiff occupied the premises in question, are the undisputed owners of the upland adjoining the cove above high water mark; that John B. Coles acquired the title by the union of two conflicting claims, in 1804, and that he and those claiming under him have since been the undisputed owners of the soil bounded by the river; that, as early as 1814 or 1815, he commenced the erection of a wharf, extending from his own land towards the channel of the river a distance of over one thousand feet, which was completed before the passage of the law in question. He also reclaimed a part of the mud flats in front of his land lying between high and low water mark, by filling them in with earth and raising them above the level of the tide. The spot where the grass was cut, which forms the subject of dispute, was filled in between April and November, 1836. At the time of the passage of the law, the place where the trespass was committed was not subject to the flow and reflow of the tide. No complaint is made of these erections as nuisances. There is no pretence that they were so: a useless mud flat had been reclaimed, and a wharf beneficial to commerce erected, and the question presented is, whether title to the land thus circumstanced passed

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by the act. It is admitted to be within the bounds of the grant, but had the legislature power to grant it?

Was the title to the *locus in quo* in the state at the time of the passage of the act? The answer to that question involves another, of much more moment, *viz:* whether the title to all improvements hitherto made in the state of New Jersey by the riparian proprietors, below the original high water line on tide waters, without the expressed assent of the legislature, still remains in the state, liable to be aliened at the pleasure of the legislature; whether all wharves, store houses, dwellings, improvements of every description, made upon lands reclaimed from the tide, or below the original high water line, are held without title in the supposed owners, who are mere squatters upon the public domain. It is obvious that the inquiry affects property to an incalculable amount, and involves vast interests, which ought not to be disturbed, except upon the clearest principle. If the title to land thus reclaimed remains in the state, and if it be true, as was held by the Chief Justice in *Arnold* v. *Mundy*, that there can be no title by *prescription* in New Jersey, it is clear that no length of quiet enjoyment will perfect the title in the hands of the occupant, for lapse of time is no bar to the state.

Undoubtedly every such intrusion into the public domain may, at the common law, be relieved against, whether it amount to a nuisance or not. But it is worthy of notice that the claim of the state of New Jersey to land flowed by the tide is in no sense *proprietary*. It is strictly a *sovereign* right. The proprietary rights were at an early period severed from the sovereignty, and were vested in the proprietors, in whom, and in their grantees, they still remain. The only title which the state claims to the soil is by virtue of its sovereignty, for the protection of the public or common rights. But where the soil of navigable rivers is permanently appropriated without prejudice to the public rights, and where the state tacitly acquiesces in such appropriation, there would seem to be but little reason in her setting up a title as proprietor of the soil for no public use.

Notwithstanding the acknowledged title of the state, in her

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sovereign capacity, to the soil of navigable rivers below high water mark, there has undoubtedly existed, from a very early period, rights of the riparian proprietors, which have been recognised by the legislature, inconsistent with the idea of that exclusive property in the state sanctioned by the rule of the common law.

The convention of 1783, between the state of Pennsylvania and New Jersey, for settling the jurisdiction of the Delaware, guarantees to each state the right of guarding the fisheries on the river annexed to their respective shores. The act of the 13th of June, 1799, (*Pat.* 416, § 9,) shows clearly that the legislature of this state understood this clause of the agreement as relating to fisheries below the head of tide water, which were the subject of private ownership and individual occupancy. It subjects the person having command of any ship, vessel, or raft, who shall anchor upon any fishing ground where shad are usually taken, and shall not immediately remove from the fishing ground, if such removal can be effected with safety, upon the request of the owner or occupier of such fishery, to a penalty of $60, to be recovered, with costs, by said owner or occupier. The right of the riparian proprietors to fisheries in the river Delaware are also clearly recognised by the act of 26th November, 1808, (*Bloomfield* 204), of 9th February, 1819, (*Rev. Laws* 65), of 15th February, 1819, (*Rev. Laws* 659), and by the existing law of 26th November, 1808, (*Rev. Stat.* 480). The tenth section of the last mentioned act provides, that if any person shall cast or lay out any seine into the river Delaware, within the jurisdiction of this state, beyond the right angle of the shore of the river, and *where his line strikes the river at low water mark going out*, or suffer it to swing beyond the right angle of the shore of the river, and *where his line strikes it at low water mark coming in*, except by unavoidable accident, every person so offending, and being thereof convicted, shall forfeit and pay, for every offence, $25 *to the person against whose land such trespass shall be committed.*

The act of 27th December, 1826, (*Rev. Stat.* 479) which prohibits nonresidents from fishing in any of the bays, flats,

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rivers, or waters within the jurisdiction of this state, contains a proviso, that nothing in the act shall be so construed as to affect the right or privilege of any owner or tenant, not resident in this state, from fishing upon or opposite to his own shore in this state. Such repeated and unequivocal legislative recognitions of a right, furnish proof of its existence which cannot be disregarded. In treating of fisheries, Mr. Griffith says, "this species of property, from the earliest times, has been the subject of exclusive enjoyment and alienation, like any other;" our courts of justice have always recognised the rights of several fishery. Trespass is sustained for intrusions and ejectments upon the possession and title, as in other cases and estates. *Griffith's Annual Law Reg.* 1290, *note* 1.

In the case of *Den ex dem. Bispham* v. *Rice*, which was decided in this court at September term, 1825, the principal object of the action was the recovery of a valuable fishery on the river Delaware. Part of the premises are described in the declaration as "a fishery." The plaintiff recovered, although this cause was tried after the decision in *Arnold* v. *Mundy*, and was earnestly litigated under the guidance of the ablest counsel, most of whom were engaged in that cause. I am not aware that a doubt was expressed as to the right or title to the fishery, in either of the parties, by reason of the paramount title of the state.

In *Bennett* v. *Boggs* (*Baldw.* 60), the Circuit Court of the United States recognised the existence of rights of fishery in the riparian proprietors upon the river Delaware within the jurisdiction of this state, and sustained the validity and constitutionality of the laws regulating and protecting them.

This right of fishery, so far at least as it regards the river Delaware, cannot rest upon any actual or supposed proprietary grant. The title of the proprietors of New Jersey never extended beyond low water mark upon the Delaware. The title of the state previous to the revolution was limited by that boundary. *Bennett* v. *Boggs* (*Baldw.* 60).

Nor does it depend upon any statute law of the state conferring the right. The earliest legislation upon the subject of

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the fisheries in the Delaware recognises the title of the riparian proprietor as an existing right.

Nor can the claim rest on prescription. If a title by prescription can exist at all in this state, many of these fisheries are of modern origin, and cannot be prescribed for.

This claim, it is clear, is totally irreconcilable with the rules of the ancient common law touching the property in the soil and shores of navigable rivers. In *Yard* v. *Carman* (*Penn.* 936), Justice Pennington expressed himself strongly against the existence of an exclusive fishery in the river Delaware, as a violation of the principles of the common law. If the claim rested for its support alone upon the principles of the common law of England, it cannot be sustained.

The right of the riparian proprietors to an exclusive right of fishery in the tide waters of New Jersey in front of their land must rest, it is apprehended, in custom or local usage variant from the common law. There is then, I conceive unquestionably, in New Jersey a local common law affecting the title of riparian proprietors upon tide waters, and conferring upon them rights and privileges unknown to the common law of England. I use the term riparian proprietors, not in its strictly appropriate common law sense, as indicating the owner of the *ripa* or bank of streams not navigable, but in the sense in which it is frequently used in the books to indicate the owner of the land adjoining the shore of tide waters above the ordinary flow of the tide.

It remains to inquire whether this extension of the rights of the riparian proprietor, in derogation of the principles of the common law, is limited to the right of fishery, or whether it extends beyond it. It is a fact, not controverted, that, from a very early period in the history of the state, the riparian proprietors upon navigable streams have enjoyed the privilege or exercised the right of appropriating the shore in front of their lands between high and low water mark to their own use, by the erection of docks and wharves, and by filling in and reclaiming the ground from the dominion of the water. These improvements are found upon the shores of the Hudson and the Delaware, of the Raritan, the Passaic, and the Hacken-

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sack, and probably of all the numerous navigable tide waters that intersect the larger portion of the state. In very many instances, it may be presumed, all traces of the original high water line are long since obliterated. No public inconvenience has resulted from the practice, and no serious detriment has been occasioned to the common rights of the people of the state; on the contrary, the facilities of commerce and navigation have been increased, lands, which otherwise would have remained worthless, have been by private enterprise reclaimed and made available, and property of great and increasing value has been added to the wealth of the state. The lands thus improved have been held and enjoyed as private property, and have been taxed as such, without a doubt being entertained as to the validity of the title.

The practice must have originated here. It had no common law origin, nor could it have been derived from the Dutch settlers, for by the civil law which prevails in Holland the title of the sovereign extends as far as the highest winter flood. It may possibly, as was suggested upon the argument, have had its origin, as in other states, in some early ordinance or statute which is now lost. It is, perhaps, more probable that the practice originated in the fact, that all titles were derived from the proprietors; that their grants upon navigable streams, in some cases in express terms, extended to low water mark, and were always understood to cover the entire shore. The proprietors both of East and West Jersey, by their original concessions, granted convenient portions of land for wharves and keys, as well as for streets and other public purposes. *Leaming & Spicer* 20, 391.

And in East Jersey these public landings and ferries were laid out and appointed, as were highways and bridges, by persons in the several counties, designated for that purpose by the legislature. In these grants, made when the sovereign and proprietary titles were united in the lords proprietors, the public wharves and docks undoubtedly had their origin.

Prior to the decision in *Arnold* v. *Mundy*, no instance, it is believed, can be found of a law passed for the mere purpose

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of authorizing a riparian proprietor to construct wharves, or otherwise to improve land, below high water mark.

The very numerous meadow acts, both public and private, to be found upon the statute book, are not regarded as an exception to the truth of this remark. They do not purport to authorize the riparian proprietors to appropriate to their use any part of the public domain. On the contrary, they authorize the owners of meadows to improve their own land, and for this purpose they subject a body of landholders to common regulations, and, in some instances, authorize the construction of dams across navigable streams. The great body of meadow thus to be improved lay above ordinary high water mark, or did not properly constitute the shore of navigable streams. These acts, therefore, cannot with propriety be regarded either as a recognition by the legislature of the title of the proprietors to land lying between high and low water mark, nor, on the other hand, as a grant of a right to the exclusive appropriation of the public domain.

There are also laws creating corporations with extensive powers and conferring upon them the right, among others, of constructing piers and wharves, and otherwise occupying the land below high water mark. Aside from these acts, which, I repeat, constitute no exception to the truth of the remark, upon a careful examination of all the statutes, public and private, under the proprietary, the colonial, and the state governments, I find, prior to the decision in *Arnold* v. *Mundy*, no statute conferring upon the riparian proprietor the right of appropriating the shore between high and low water mark to his own use, by reclaiming the land, the erection of wharves, or in other modes.

During this period, there are found repeated recognitions of the existence of wharves constructed by the riparian proprietor. Thus, by the preamble of the act of 22d November, 1802, it appears that Nathaniel Budd, who then occupied the shore adjoining the premises now in dispute, had built a dock and ferry stairs on the river, and the legislature thereupon authorized the construction of a road to the dock, and the erection of a ferry from the dock to the city of New York. It does not

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seem to have been apprehended, either by Budd or by the legislature, that any legislative authority for the construction of the dock or any express recognition of the right was at all necessary.

The earliest act which authorizes the riparian proprietor to build a dock in front of his land, was passed on the 28th of February, 1839. This act, as well as most others recently passed, confers upon the proprietor the right of constructing a dock or pier below low water mark, or some other power, for which legislative sanction may be deemed essential. The right of the riparian proprietor to occupy the shore in front of his land, does not appear to have originated in any legislative grant, public or private, nor has legislative sanction been deemed essential to its exercise.

On the trial of *Arnold* v. *Mundy*, the Chief Justice, in charging the jury, said, "the intermediate space between high and low water mark may be exclusively appropriated by the owner of the adjoining land, by building thereon docks, wharves, store houses, salt pans, or other structures which exclude the reflow of the water." This remark, it is true, was made in connection with another, which proved to be erroneous, *viz:* that the title of the adjacent owner extended to the water's edge, and fluctuated with the ebb and flow of the tide. But the remark is entitled to much consideration, as exhibiting the view of that learned and experienced judge, of what the law of the state was, before his impression had been affected by a reference to foreign authorities. Indeed it does not appear that he ever changed his opinion upon the particular point in question.

In *Griffith's Annual Law Register* 1292–3, (1821–2) it is said, that "when the original proprietors of New Jersey have, by conveyance, survey, or otherwise, alienated any part of the proprietary or common land, such grantees possess the soil, whether dry land or land covered with water, (when the grants or surveys extend to or are bounded on rivers or waters) in as full right as such soil, rivers, and waters were held by the duke of York, or Berkley and Carteret, in 1663–4, subject to the *jus publicum*. All property in New Jersey, and

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whatever is the subject of property, in land or water, has some individual and exclusive owner, and such has ever been the understanding of our legislatures and courts of justice.

In a note to this passage, Mr. Griffith, in reference to the proprietary grants, says: "These grants describe the premises, and convey the fee, with all the rights and privileges of the original proprietors; but lands bordering on rivers, bays, and streams of water are usually described as bounded by such river, &c., or up or down the river: and this manner of describing boundaries is common to all rivers or waters, whether fresh or tide waters. The construction, as to the extent of such boundaries, has always been the same, both as to fresh and tide water rivers, in respect of *private* ownership and privileges, *viz:* that the middle of the channel was the line of property between them."

These opinions were overruled by the decision in *Arnold* v. *Mundy*, and they are not cited to show what the law is. But they are important, as showing the prevalent view of the profession in regard to the legality of the claim of the riparian proprietor to erect wharves, and to occupy the land to low water mark, without legislative authority for that purpose.

The counsel for the state of New Jersey, in arguing the case of *Martin* v. *Waddell* (16 *Peters* 387), said, "the right of the riparian proprietors to wharf out to the public river is a *local custom* in New Jersey." He also said, that, "by *long usage*, the shore fisheries have grown into private rights belonging to the riparian owner;" and these facts were relied upon in support of the view adopted by the court adverse to the claim of the proprietors.

This modification of the common law exists in other states, and the right of the adjoining proprietors to appropriate the shore between high and low water mark to their exclusive use is recognised and protected. It rests in some instances upon statute, in others upon custom on local common law.

Thus in Massachusetts, by an ordinance in 1681, it was provided that the proprietor of land adjoining the sea should hold to low water mark where the tide does not ebb and flow more than one hundred rods. The ordinance was subsequently an-

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nulled, but the usage still prevails, and has acquired the force of a local common law. This ordinance never extended to Plymouth as positive law, it has nevertheless become a settled rule of property throughout Massachusetts, and also in Maine. The right, therefore, is acquired not by force of the ordinance, but by custom or usage. *Storer* v. *Freeman*, 6 *Mass.* 435; *Sale* v. *Pratt*, 19 *Pick.* 191; *Angell* 225, 226.

So in Rhode Island, the custom has been general for the adjoining proprietor to augment his land by embanking in the water, without reference to an early colonial law, which has been ascertained to exist, sanctioning the custom. *Angell* 234.

In Connecticut, there is no statute abrogating the common law, yet the usage of the owners of the land to high water mark to wharf out against their own land, forms a part of the local common law, founded on immemorial usage. *Chapman* v. *Kimball*, 9 *Com.* 38; 1 *Swift's System* 341.

In Pennsylvania, the proprietor of the adjoining land has the ownership of the soil to low water mark. This has been adopted as the common law of the state, independent of the statute. *Hart* v. *Hill*, 1 *Wharton* 124; *Ball* v. *Slack*, 2 *Wharton* 508; 2 *Smith's Lead. Cas.* 147, *note.*

Most of the Atlantic states have, either by direct legislative enactment or by force of local usage, adopted the principle, that the title of the riparian proprietor extends to low water mark, or, the title remaining in the state, that the owner is entitled to the exclusive appropriation of the shore by wharfing out or by raising the land above the tide, and that upon such appropriation the title vests in the adjoining proprietor.

In New Jersey, as we have seen, the title of the state extends, as at common law, to high water mark, but it is to high water mark as it actually exists. Where the waters have receded by alluvion, or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high water line. That any encroachment upon the shore, or other part of the public domain, may at all times be restricted and controlled by legislation, is admitted. That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied. But in the absence of such legislative restriction,

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where no nuisance is created, the riparian proprietor may appropriate the shore between high and low water mark to his own use. The custom of making such appropriation, long enjoyed and universally acquiesced in, constitutes a local common law, which this court will recognise, and which it would be alike unsafe and unwise to disregard.

I am of opinion, therefore, that the act of the 8th of November, 1836, did and could convey to Nathaniel Budd no title to soil from which the flow and reflow of the tide had been excluded by the improvements of the riparian proprietors at the time of the passage of the law; and inasmuch as it appears, by the evidence, that the place where the trespass had been committed had been reclaimed prior to the passage of the act, and was not then subject to the flow and reflow of the tide, that the defendant has failed to sustain her plea, and that judgment must be rendered for the plaintiff. I have arrived at this conclusion not without anxious solicitude, increased by the fact that the bench are divided in opinion. It is a source of real satisfaction to know, that if I have fallen into error, that error may be redressed in a higher tribunal.

Carpenter, J. I do not suppose that any title has been successfully set up by the plaintiff, except what depends upon his rights as riparian owner. It is not necessary, on this point, to add to what has already been said in the opinion delivered by Justice Randolph on a previous occasion. The different grants, the titles to which became vested in J. B. Coles, under whom the plaintiff claims, extended to the river, but they were as clearly limited to the edge of the river. The plaintiff then stands, in relation to the premises, simply in the position of a riparian owner.

On the other hand, the title of the defendant rests solely on the validity and extent of the grant of the legislature, by the act of November 8, 1836. It is obvious that the survey to Boudinot is to be laid entirely out of the question. If titles derived under proprietary grants can, under the local law of this state, extend to low water mark, the survey can be of no avail in this controversy, for the plaintiff shows a prior title. If they

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extend to high water mark only, it is of as little avail, for the survey was laid upon land which, at the time it was made, was entirely covered with water. It forms no ground for the commencement of an adverse possession, for I am not aware, from any thing in the case, that the defendant, or those under whom she holds under color of title from that survey, ever made any improvements or reclaimed any land previously covered with water. Nathaniel Budd, who built or extended a wharf on the ground covered by the survey, and established, or attempted to establish a ferry, did all this, not under this survey, but under the authority of an act passed in 1802, prior to the survey, and while he held the ferry house and premises under the Kennedy title, which is now vested in the plaintiff.

The premises described in the plaintiff's declaration include some land not comprised within the bounds of the survey, as claimed by the defendant, being land which was above high water mark in 1804, when the survey was laid. The plaintiff seems to suppose, the plea of title being general to the whole premises described in the declaration, that he will therefore, at all events, be entitled to judgment in the present suit. But it is well settled otherwise, and the very point has, not long since, received the consideration of this court. The plaintiff is not bound to carry his proof of trespass to every part of the close mentioned in the declaration, nor is the defendant bound to support his justification to all parts. It is sufficient for the defendant if he show title to so much of the premises as includes that part on which the alleged trespass was committed. The record, it is said, would be decisive evidence in a future action; but it would be evidence only as to the part of the place in dispute, and it would be necessary to show by proof which part it was. *Phillips* v. *Phillips*, 1 *Zab.* 42; *Bassett* v. *Mitchell*, 2 *B. & Ad.* 99; *Smith* v. *Royston*, 8 *M. & W.* 381; *Dorman* v. *Long*, 2 *Barbour's (N. Y.) R.* 214.

The plaintiff, then, is a riparian owner, and it will be necessary to examine the extent and character of his rights to the shore, in order to test the validity of the title by grant set up by the defendant. This inquiry involves questions in which not

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only the rights of this plaintiff, but of many other citizens, to very valuable property in this state are involved. Wharves, docks, embanked meadows, &c., to a vast extent, have been erected and improved on the shores of our tide waters, in regard to few of which has any special authority been sought from the legislature, nor, until very lately, has it been supposed that such authority was necessary.

It must be admitted that, in the country from which we have chiefly drawn our rules of law, the doctrine now to be considered has long been well settled. According to the common law rule, the boundary of the riparian owner, in streams above the tide, extends *ad filum medium aquæ:* he is *prima facie* the proprietor of half the land covered by water. If the same person be the owner of lands on both sides of the river, he owns the whole river to the extent of the length of his lands, subject to the *jus publicum*, if the river be navigable and a highway. Again, on the seashore, the bays and arms of the sea, and in navigable rivers where the tide ebbs and flows, the title of the riparian owner (meaning by this the owner of land bounded by such waters), unless by royal grant or prescription, extends only to the shore or high water mark. The shore, or space between ordinary high and low water mark, as well as the bed of the river or arm of the sea, is said to be vested in the king, in trust for the common benefit of all his subjects. Whatever opinion may have formerly been entertained, it seems to be now settled, that though held by the king, and subject to be transferred by his grant since *magna charta*, the right of property in the bed or shore of the sea and its arms can only be transferred subject to the *jus publicum*, the common right of navigation, &c. While the soil of the shore is said to be the property of the crown, and has been communicated, in many instances, by grant to the subject, yet it can only be in subservience to the public right of the subjects of the realm. The private right of the crown may be disposed of, but the public right of the subject cannot, even if it be within the terms of the grant.

This prerogative notion of the *jus privatum*, which has for its object the personal aggrandisement and emolument of the

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king, is, however, there carried to a greater extent than can be deemed applicable to our situation or to the character of our institutions. The common law is adopted by us, not absolutely as it prevailed in England, or even here before the revolution, but as modified by our institutions. This doctrine probably originated in the policy of the law of England, to assign to every thing a certain legal proprietor. Those things not capable of being exclusively occupied and enjoyed naturally fall theoretically, and to some extent practically, under the dominion of the sovereign, from whom, by fiction of law, all titles are mediately or immediately derived. The doctrine may thus have been established, and the title of the king in the tide waters, or the land under them, which he held for the common benefit of the people, as their representative, while it served to carry out this fiction of his being the universal occupant of all property destitute of other owner, had also its obvious practical end. The public use of these highways was properly and effectually protected by thus placing them in an especial manner under the protection of the sovereign, as the general conservator of the public rights and immunities. Here though we may properly reject the mere doctrine of the *jus privatum*, yet still the title which the king held, as trustee for the people, may be considered as lodged in the sovereignty of the state.

But while in England the king holds the right of property in the beds and shores of tide waters, as the trustee of the people, and his grants are subject to public rights, yet parliament represents the people themselves, and, uncontrolled by any supreme constitutional law, may grant the rights of the people. Acts of parliament have, it is believed, in some instances been passed, by which the public rights to the shore have been transferred to individuals, in order to be reclaimed, the effect of which has been to cut off the adjacent owner from all access to the water. One instance of such legislation gave rise to the case of *Lowe* v. *Govett*, 3 *B. & Ad.* 863, in which not the validity, but the precise extent of such parliamentary grant was drawn in question.

But the omnipotent effect (if I may use the phrase) of an

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act of parliament, in the absence of any supreme law by which ordinary legislation can in that country be controlled, causes such grants to be there considered in a very different light from that in which they may be here considered, in reference to the rights of the riparian owner. Here, if he have any special and peculiar rights from his position as such owner, however derived, I think it may be assumed that they are within the protection given by the constitution, of which he can be divested, even for public use, only after due compensation. It is a principle, which may be assumed without questioning in the least the power of the legislature to grant or control mere public rights, compensation must be first made before the citizen can be required to give up his property for the benefit of the community at large, much less may the property of one person be taken without his consent, and given to another. Such legislation would be repugnant to the first principles of justice, and has been held void, not merely upon the special provision of constitutional law, but upon those great fundamental principles which support all government and property. Even in England these principles have been supposed, by many judges, to be sufficient to check and control the regulations of an act of parliament. But here it has often been ruled, upon grounds which cannot be gainsaid, that the government cannot take the property of one citizen, for the mere purpose of transferring it to another, even with compensation, when the public are not interested in such transfer. If property cannot be taken for private purposes, even with compensation, much less may it be taken without compensation. In either case, as has been said, the ruling is so evidently founded on principles of natural justice and reason, as not to need the aid of either argument or authority. *Rogers, J., in Lambertson* v. *Hogan*, 2 *Barr.* 24. See 1 *Kent* 451, 455, *and cases; Angell on Watercourses*, § 461 (*ed.* 1850); *Nevius, J.*, 3 *Harr.* 203; *Story, J.*, 2 *Peters* 658; 18 *Wend.* 14; *Ib.* 56; 1 *Barr.* 314; 5 *Ib.* 145; 10 *Ib.* 338; 4 *Hill* 140.

Independent of technical ownership, there are *dicta*, if not decisions, to show that the riparian owner in this country has peculiar rights, incident to his position, which will be protected

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and maintained. "He has," said Justice McLean, in *Bowman's devisees* v. *Waltham*, 2 *McLean* 376, (cited in *Angell on Tide Waters* 171) "the right of fishery, of ferry, and of every other right which is properly appendant to the owner of the soil, and he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The state cannot, either directly or indirectly, divest him of any of these rights, except by the constitutional exercise of the power to appropriate private property for public purposes; and any act of the state short of such appropriation, which attempts to transfer any of these rights to another, without the consent of the proprietor, is inoperative and void, and can afford no justification to the grantee in an action of trespass." Indeed access to the water was held, in a late case in Pennsylvania, to be a vested right of such owner, of which he could be deprived for a public purpose only after just compensation, and that an act would be unconstitutional which gave no equivalent for the value of the landing. *Pittsburgh* v. *Scott*, 1 *Barr*. 314, 315.

If the doctrine, as thus propounded, can be maintained, the right of fishing upon his shore, the right of ferry, the right of access to the water, and even the right of accretion, belong to the shore owner, as incident to his position; it would seem to follow, that no grant for a mere private purpose can be supported which interferes with the established rights of such owner: it would simply be to take the property of one citizen, in order to transfer it to another. But I do not intend to discuss whether this doctrine, as thus broadly stated, can be supported, as I believe it to be clear, that under the local law of this state, to which I am about to refer, the plaintiff has a title which is beyond the reach of such legislative grant.

It has, undoubtedly, been the policy of this state (as of other states in this country) to encourage embankment and improvement upon its shores, and particularly of the marshes and flats along its tide margin, which are entirely useless in their original condition without the aid of art and industry. The safest and best encouragement has been given to the expenditure of labor and capital, by permitting the riparian owner to extend

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his shore as far as expedient, and as far as it might be extended, without interfering with any public right. The public, under this policy, have been accommodated with landing places essential to commerce and to travel, and valuable and productive meadows have taken the place of offensive and useless wastes. In regard to wharves, it was said, by one of the learned counsel in *Martin* v. *Waddell* (16 *Pet.* 387), that the right of the riparian owner to wharf out into the public river was a local custom in New Jersey. The remark was an admission by counsel against their case, and recognised the existence of an usage, which I think unquestionable, in the local history of New Jersey. It explained a fact, which might otherwise, perhaps, have been used against them, by referring it to the local common law of the state, which by the explanation was limited in its application. The right of the owner of the adjacent land to appropriate the shore, by building wharves, docks, or other structures, by which the reflow of the water might be excluded, was recognised by Chief Justice Kirkpatrick, in *Arnold* v. *Mundy* (1 *Halst.* 10), though in different stages of that cause be seemed to vacillate between the local law of New Jersey and the common law rule. One of the counsel of the defendant, on the argument of this cause, was constrained to admit that such had been the practice and the privilege of the riparian owner, though he denied the right.

To the same policy we owe our successive meadow laws, which seem like so many recognitions of the right, as well as of the custom of the riparian owner, to embank the low grounds on the margin of our tide waters. They apply, in very terms, to those grounds "usually overflowed by the tide." *Rev. Laws* 82.

This right or privilege to wharf out or embank is undoubtedly subject to all the restrictions necessary to secure the rights of the public. Public rights, as of navigation for instance, are undoubtedly paramount, to which those of the riparian owner must yield when they come in conflict. The absolute rights of the state to control, regulate, and improve for public purposes the navigable waters within its limits, will not be disputed, by which the rights of such owner may be incidentally affected,

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perhaps, to some extent, without bringing his case within any constitutional restriction and without entitling him to compensation. And yet under the local law of this state, as I take it, the wharves and additions so made become part and parcel of the upland to which they are united, and the property of such owner, except against the state, when she proceeds in the legitimate mode of indictment or information for the protection of the public rights.

In England, if a wharf or other structure be extended into the stream below high water mark, it is considered a purpresture or encroachment, which, by the aid of legal process in the appropriate court, he may demolish or seize and arrest at his pleasure. It may not be necessarily a nuisance, though a purpresture. *Hale de Jure Maris, Hargr.* 85. The king may seize upon the encroachment, not, so far as I have been able to ascertain, by the direct action of himself or his alienee, but by information filed in the Court of Exchequer, for the protection of the *jus privatum.* The remedy for purpresture, it is laid down, is either by information of intrusion at common law, or by information at the suit of the attorney general in equity. The attorney general then, on the part of the crown, may proceed for the purpose of protecting either the *jus privatum* of the crown from purpresture, or the *jus publicum* from nuisance, by information in equity and personal decree. See *Angell on Tide Waters* 200; *Eden on Injunc.* 223, 260, *and cases.*

Undoubtedly here any encroachment may be prevented or arrested by the proper action of the state; or if made, and it interfere in any manner and to any extent, even the least, with public rights, it may be declared a nuisance, and abated. But rejecting the mere prerogative notions of the *jus privatum*, the state, after she permitted and encouraged the erection of wharves, docks, and other additions to the upland by the riparian owner, cannot then convert them to her own use without compensation, or transfer a title to some third person as her alienee. If wharves and docks be erected under the sanction of the local law of the state, it seems equally clear that their

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use and value cannot be destroyed by a grant in front or around them.

It is sufficient, to dispose of this case, to establish this modification of the common law, and that, under this local rule, the accessions to the upland of the plaintiff were lawfully made. In this I fully concur in the opinion delivered by the Chief Justice; but I do not feel at liberty to stop here. I am strongly impressed with the belief that, under our local law, the title of the riparian owner, as derived from proprietory grants, extends to low water mark. Of course, if so, it is to be understood in a qualified sense, and subject to the public rights of navigation, &c., as already more particularly remarked upon. If the local rule can be shown to go to this extent, the plaintiff shows a prior title, which it will not be pretended can be destroyed by mere legislative grant to another.

The common law in regard to the shore has been much modified in this country, not by statute merely, but by usage. It is not necessary to recur to the cases cited, which are mostly collected in *Angell on Tide Waters*, to show in how many of the states of this Union the title of such owner, subject to the *jus publicum*, is held to extend to low water mark. In many, the title of the owner on the margin of tide waters is held to reach to that extent, in so many indeed, that perhaps it may not be improper to state it as the general rule of this country. I am not aware that in this state, prior to this cause, the point has ever been distinctly presented for judicial consideration. In *Martin* v. *Waddell* and in *Arnold* v. *Mundy* there are *dicta*, but in neither case was it necessary to consider the title of the riparian owner, whether it went to low water mark or not; and the remarks of the judges in regard to the common law rule were merely incidental to the principal question, and ought not, therefore, to be considered as governing this case. The common law rule, as to the ownership of the shore, was correctly stated; but whether it had been adopted in this state, did not arise in either of those cases, and cannot therefore, in my judgment, be considered as decided. It will be seen, from the statement of the case in *Arnold* v. *Mundy* (1 *Halst.* 2), that the oyster bed which gave rise to the controversy was

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bare only at very low tides, but was below ordinary low water mark. The plaintiff claiming under a survey from the proprietors of East Jersey, it was sufficient to defeat his action that such title could extend only to the edge of the tide water, whether that margin was at high or at low water mark. Notwithstanding the *dicta* of Chief Justice Kirkpatrick, undoubtedly entitled to much weight from his learning and experience, but who seems at different stages of the cause, as already said, to have hesitated between the common law rule and the local usage of the state, the decision really goes no farther, than that a grant bounded upon a navigable river extends to the edge of the water only, and so is the syllabus of the reporter. It may be added, that the remark of the learned Chief Justice, argumentatively in his charge to the jury, that all pretence of possession, as being connected with, and appurtenant to the adjacent land, must fail, would be equally applicable whether the title extended to high or to low water mark, the contest being in regard to land below low water mark. In *Martin* v. *Waddell*, the jury found that the premises in dispute were situated beneath the waters of the Raritan river and bay, where the tide ebbs and flows. The jury further found that the defendants in the ejectment were in possession, and had complied with the regulations of the act of assembly, which regulated the setting apart land under water for the purpose of oysters. (See 16 *Peters* 379, 380). This, as well as the prior case, involved, as is well known, the right of the proprietors to make grants of land covered by the tide waters of the Raritan bay and river; but in neither was the question as to the margin in relation to the rights of riparian owners drawn directly in question. What was said on that point was, in both cases, only incidental to the main question.

In *Bennett* v. *Boggs*, *Baldw.* 60, it seems to have been taken for granted, by the counsel on both sides and by the court, that the rights of the proprietors, as riparian owners, extended to low water mark in the Delaware, though no farther, and that to that extent they might claim title. The same rule has been sometimes otherwise incidentally recognised, in regard to which the meadow laws may be again referred to.

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The titles of the holders under proprietary grants are recognised, and they, or a majority of them, are enabled to act in concert for the improvement of their meadows, under regulations specially provided for in those laws. So, also, the act, passed February 20, 1830, to secure the public revenue arising from lands let for planting and taking oysters, which in the ninth section saves certain rights to persons claiming from the shore to low water mark, under and by virtue of a grant from the proprietors. *Comp.* 306.

Shore fisheries belonging to the riparian owner, and annexed to his soil, except as separated by conveyance or devise, and thus turned to an easement, have by long usage become the unquestioned subjects of private property. They are closely connected with the local law in regard to the shore, and the title to this species of property has been repeatedly recognised by legislative acts and judicial decisions.

But all this is referred to merely in corroboration of the inference which I would draw from the universal understanding of the profession and others, as to the local rule previous to the construction lately given to the cases of *Arnold* v. *Mundy* and *Martin* v. *Waddell.* Until of late, it was universally supposed that in this state the title of the riparian owner extended to low water mark. The usage in regard to proprietary grants, so far as I have been able to learn, has been in accordance with that understanding. In the many original surveys and subsequent conveyances of land bounding on the tide waters of the Delaware and its tributaries, which have come under my observation, I have no recollection that I have ever seen an instance in which, if the margin was defined, the document did not call for low water mark. I have made considerable inquiry of experienced surveyors and scriveners in the lower part of the state, and have been informed that in that section titles to land on tide waters extend to low water mark, and that such is invariably the case when the description defines the margin. *(a)* The flats on the shore, previous to embank-

(a) The surveyors general of East Jersey and of West Jersey, it is understood, have made like answers to inquiries addressed to them by the Chief Justice. *T. P. C.*

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ment, have always been held by such title, and until of late, since the supposed adoption of the common law rule, I have never heard of even an attempt to defend, in trespass or other action, on the ground that the title of the plaintiff, as riparian owner, did not extend below high water mark.

The origin of this local rule does not seem difficult of conjecture. The first surveys were made by the proprietors, when they held both the government and ownership of the soil, and when their power to grant to low water mark will not be questioned. The royal grants to the proprietors, through the duke of York, conveyed a title to low water mark on the exterior tide waters of the province, certainly on those of the Delaware. As a question of jurisdiction, those grants were unquestionably to that extent, and subject to the *jus publicum*. I suppose the right of the proprietors to the soil, to the same extent, to be equally clear. They granted titles to the same extent. The policy and usage of the state I have before referred to. In 1702, the proprietors surrendered to the crown all the powers of government, but reserving all their rights of property in the soil. The construction of those grants and of this surrender is to be found in the uniform practice of the proprietors, never questioned by the state from that time to the present. The proprietors, and those holding under them, have so made grants to the present day, and, until of late, without question as to the title conferred. Vast improvements have been placed on the shore upon the faith of that title. It will astonish and alarm owners of land bounding on the tide waters of the state, if, after a usage such as I have referred to, they practically learn that they hold them only by the forbearance of the state. I have no personal knowledge of the usage in East Jersey, though from the character of two small surveys, in the survey of the common lands of Bergen, brought before us, as well as from other obvious considerations, I infer it to be the same as on the Delaware.

The act complained of in this case as a trespass, and justified on the ground of title in the defendant, a title resting on the alleged grant by the state, was done on ground reclaimed by the plaintiff, or those whom he represents. Large sums of

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money had been previously expended for the same object, but this spot had been reclaimed, as appears by the evidence stated in the case prior to the time when the act was passed by which it is contended this land was transferred to Budd. The title of the act under which the defendant claims purports to relate only to the right of the state to land under water, and the preamble speaks of it as land lying on each side, and in front of a ferry wharf. I do not doubt but that this act, by the aid of the title and preamble, might be so construed as to hold that, if intended as a conveyance at all, and not as a mere release, it was not intended to convey any land raised above water at the time of its passage, or even in progress of being raised. Deference to the legislature would seem to require such construction, for we cannot suppose they meant to transfer the land so raised by the capital and labor of one, by a mere arbitrary act of sovereign power, to another, with no public object in view, but for the mere private benefit of their alienee. We are not however, in order to escape such injustice, obliged to resort to any nice construction of the words of the act. If the riparian owner may lawfully extend his shore, then the plaintiff has a vested right, which is not the subject of such legislative grant, nor, under the act in question, can the grantee of the state exercise any right on that shore which will interfere with the established rights of the riparian owner. But if, as I strongly think, for the reasons I have endeavored to state, the title of the riparian owner under our local law technically extends to low water mark, still less can such grant be supported. In either case the judgment must be for the plaintiff.

But another point has been urged by the counsel of the plaintiff, which, perhaps, ought not to be passed without notice. It is said that the title set up by the defendant under the grant of the state must fail because of false suggestion, and the consequent imposition practised on the legislature, apparent on the face of the act.

It appears that Budd, who applied for the law, held, in 1802, under the heirs of Archibald Kennedy, a part of the premises now belonging to the plaintiff. The title of Kennedy was controverted by the trustees of the town of Bergen, but the titles

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or claims, both of Kennedy and of the trustees, were, on the 4th of February, 1804, purchased by J. B. Coles, and are now vested in the plaintiff. In 1802, Budd, a mere tenant, procured an act to be passed, which—reciting his tenancy under Kennedy—that he had built a dock or wharf for the purpose of a ferry, and established a ferry; that his undertaking was of general utility, but that he was unable to proceed in his contemplated improvements for that object in consequence of the controversy in regard to the title—authorized him to appropriate two acres of the property in dispute, then in his occupancy, for the purposes of a ferry, and to lay out a road to it from the Newark turnpike. Such legislation in favor of a mere tenant upon the rights of a landlord, without more explanation than appears, seems to be somewhat remarkable, even if there was a conflicting claim of title. The act, however, further provided a mode by which the value of the property appropriated by him for this supposed public purpose should be ascertained, and, when the controversy as to the title should be finally decided, then paid to those entitled to it. If those ascertained to be the owners should be unwilling to sell, they might retain the property, upon paying Budd the value of his improvements. *Act 22d November*, 1802, *Pamph.* 152. How long Budd maintained the ferry, under what circumstances or on what terms he abandoned the enterprise, does not appear in the case; but he did subsequently abandon it, and the premises, with the improvements, if any were made, were given up to the owners of the property. Budd, it seems, at the time of the passage of the act of 1836, did not own one foot of land adjoining the shore to which that act was intended to apply. It is true he had, on the 2d day of January, 1804, taken a deed from Elisha Boudinot for the survey, laid on 21st May, 1803, on the flats in front of the property belonging to Kennedy, and then in the tenancy of Budd. But this survey gave no title. As before said, if proprietary grants could extend only to high water mark, it was of no avail, for it was laid upon flats ordinarily covered by the flow of the tide. If such grants could extend to low water mark, then there was a prior title.

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The titles upon that shore, being in this situation, subsequently it seems to have been supposed that the dormant claim of Budd under the Boudinot survey might be made available for the purposes of speculation. The case shows that, on the 1st of October, 1835, he conveyed all his title to that survey to Willis Hall, the consideration, expressed on the face of the deed, being the large sum of $25,000. There is nothing in the case to show that Budd, when he made this conveyance, had the slightest pretence of title on that shore; except under this survey, and standing upon this alone, it is not seen how his claim could be worth as many cents. Coles, the riparian owner, and those under whom he held, had previously expended many thousand dollars upon the shore, and Coles, in 1836, was engaged in making additional expensive improvements. It is urged that, under such circumstances, in 1836, Budd applied to the legislature, and that his suggestions appear upon the face of the act which he obtained. It is said that he represented himself to be a riparian owner, and, also, to hold a doubtful title under the Boudinot survey to the flats in front of him. The preamble of the act, which is to be taken as the suggestion of the party, does seem to be capable of such construction. It states the representation to be, that Budd became seized and possessed of 53½ acres at Harsimus, by virtue of a deed from Boudinot, "which said tract of land was surveyed to the said Elisha Boudinot, and located by special order of the proprietors of New Jersey, in *front and on each side of the ferry wharf of Nathaniel Budd, at Harsimus*," &c., and that doubts had been suggested as to his title, by reason of some supposed title in the state of New Jersey. The state of New Jersey had never descended to speculate upon the accidental value of a shore in a particular locality. With that liberality which has always characterized her, and apparently intending to carry out her previous generous policy towards a supposed riparian owner, having a meritorious but doubtful title to the shore, by the act which follows this preamble, she conveyed, or, more properly speaking, released all her title in the survey referred to to Nathaniel Budd. I say released, for, notwithstanding the phraseology of the enacting

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clause, the legal character and effect is to be adjudged from its intent and meaning, rather than from the mere words employed, if that intent and meaning be obvious. It has been frequently so adjudged in regard to conveyances, *(a)* and this, as a private act, is to be treated as a mere instrument of conveyance, which binds only privies and not strangers. *Dwarris* 634–5; *Greenl. Cruise, Lib.* 3, *tit.* xxxiii, *secs.* 32, 39, &c. Possibly, then, this act might be construed simply as a release, as the recital seems to show that its intent was to confirm the doubtful title of Budd, by releasing any supposed or possible title of the state.

But, passing by what might be said as to the construction of the act in this respect, which it is unnecessary to consider, it is urged that the material matters so suggested were, as appears by the case, entirely untrue. Budd was never *seized or possessed* of the flats covered by that survey, either in fact or in law; he had no actual possession, none such is pretended, and the survey conveys no title upon which a possession by construction of law could be supposed to rest. But it is not upon this merely that the point is pressed. The preamble suggests, in direct terms, that the survey was located in front and on each side of *the ferry wharf of Budd.* In this connection, it is asserted that this is equivalent to an assertion that he was the owner of that wharf, and, as such, placed him before the legislature on strong grounds when he asked to be confirmed in his title to the flats in front of that wharf. If this be taken as the meaning of the suggestion, the evidence in the case certainly shows that it was utterly untrue, for Budd did not own that ferry wharf or one foot of the upland adjoining. The wharf which he had once held in possession for the use of the ferry, already referred to, and then projected, he had long before abandoned. The wharf, as well as the land adjoining, was the property of John B. Coles. It is alleged that a grant by private act obtained from the state by such misrepresentation is void.

Grants by the state by private acts, in regard to their validity, seem to stand much on the footing of grants by the king,

(a) See *Den* v. *Camp and Jessup*, 4 *Har.* 143.

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and the doctrine is well settled that the king's grants, if obtained by false suggestion, are void. 2 *B. C.* 348; *Com. Dig.* "*Grant*" (*C.* 8, 9); *Bac. Abr.* "*Prerog.*" (*F.* 2); *Chit. Prerog.* 397.

If it appears on the face of the grant that the king was deceived by false suggestions the grant may be treated as absolutely void, whenever the title is incidentally drawn in question, as in *Legat's case*, 10 *Co.* 109, where it was so ruled on ejectment. It does not seem necessary that it should be set aside or declared void by direct proceeding. See *Parmenter* v. *Gibbs*, 10 *Price* 412; 2 *Rol. Abr.* 191 *S. pl.* 2, *cited Chit. Prerog.* 330, *note.*

This doctrine in regard to private laws, when obtained by misrepresentation, is here of great importance, where special legislation is so readily obtained without notice to other parties to be affected. The mischief is one scarcely to be avoided under the facility which attends the most enlightened legislation, and private rights seem to need for their protection the application by the courts of these sound principles by which its inadvertencies may be corrected. In this case it seems difficult to resist the conclusion which is the object of the argument so presented to the court; but it is not necessary to express any decided opinion upon this point under the view taken of another part of the case.

Randolph, J. When this case was before us on a former occasion, it merely appeared that the *locus in quo* (where the alleged trespass was committed) was below what was formerly the high water line, and the conflict was between the rights of a riparian owner, who had docked or filled out below high water, and the grantee of the state below and up to that point. 1 *Zab.* 156. The court decided in favor of the latter, and allowed a new trial upon the common law principle, that the rights of the riparian owner did not extend below high water, and that the grant of the state was good and effectual to cover the premises. Neither of these positions, as I understand, are directly controverted at this time by the court; but, as the case now comes up from the circuit, the point of the alleged tres-

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pass is defined to be between high and low water line; and a local common law of New Jersey is urged as extending the rights of the plaintiff, the riparian owner, to low water line, either as owner of the soil or for the purpose of constructing thereon a dock. If the plaintiff has been successful in maintaining his position, it will enable him to recover in this suit, although the defendant's title to the whole of the fifty-three acre tract will be good, excepting so much thereof as lies above low water line or as is covered by the prior constructed wharf.

Although the opinions delivered in the cases of *Arnold* v. *Mundy*, *Martin* v. *Waddell*, and *Gough* v. *Bell*, covered this question, and considered the whole matter settled up to and below high water mark, yet, as the right to the shore between low and high water mark was not necessarily strictly involved in either case, it cannot be considered as definitely settled. If the case really depended on the priority of time between the date of the defendant's grant and the time of the filling out the plaintiff's dock, I should have some hesitation in giving judgment for the plaintiff on that ground; for the defendant's grant, which covers the *locus in quo*, is dated the 8th of November, 1836, while the evidence of plaintiff's right, acquired, if at all, only by filling out, reads thus: "Where the grass was cut, was done (*i. e.* filled out) between April and November, 1836, it was done by the 10th November, at any rate." But, according to the view which I shall take of the case, it will not depend on this question of priority. It is certainly correct that several of the states have adopted a rule different from that of the common law, in extending the rights of the riparian owner to low, instead of to high water line: thus in Massachusetts the rule has been adopted to extend the line to low water, provided it is not more than one hundred rods from high water mark; but this rule or law was settled by a colonial ordinance of 1641; and although it did not extend in terms to Plymouth or the province of Maine, and was in effect repealed by the repeal of the charter, yet it established the rule, which has ever since been followed in both Maine and Massachusetts. *Angell on Tide Waters* 224, 226. A similar rule was established in Rhode Island under the sta-

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tute of 1707, *Ib.* 236; and in Pennsylvania and Maryland they have also statutes on the subject, which permit the riparian owner to wharf out to low water. *Angell* 235, 247. Whether there is any statute in Connecticut, I have not been able to ascertain, but presume the rule adopted has been based on some early and definite action of the legislature or courts. In New Jersey we have no such statute, nor have I heard of any such rule being insisted on until the second argument of this cause. What was said by the learned counsel, in *Martin* v. *Waddell*, only referred to the practice, which had obtained in the state, of erecting wharves without an act of the legislature, and to no special custom which then existed, and under which a right was claimed. Until the decision of *Arnold* v. *Mundy* a very general impression prevailed that all the unlocated land in the state, whether under water or otherwise, belonged to the proprietors, and neither the state nor any of its citizens felt sufficiently interested to scrutinize the encroachments of the land owners upon the water; and as the proprietors sold their locations by the acre, it is presumed that they would extend the survey as far into the water as any purchaser desired to go. The survey of this very tract to Budd, in 1803, for fifty-three acres of land entirely under water, is evidence of the fact. Indeed the practice is, that the purchaser of the proprietary right of location places his survey where he pleases, the proprietors giving no warranty title; but this is considered evidence of no rule or common law, that the rights of either the proprietors or their grantees extend below high water mark. As a general rule, when the proprietors themselves made the deed or patent (as they formerly did), the bounds were not extended beyond high water; and in all three of the suits, when the riparian owner has claimed to go below high water, the claim has been not by the force of his boundary or description, but in consequence of his ownership of the upland. I have examined, in the office of the secretary of state, a large number of patents, and I have not found a single deed which calls for a line below high water; in general, they are merely bounded on the river or bay, as the plaintiff's deeds are in this case. Numerous deeds may be found

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describing the water line thus: "on the west side of Hudson river," "lying along on the west side of Hudson river," "lying and being on the west side of the bay that leads up into Hudson river, and so stretching along said bay," "along the east side of the Delaware river;" and the grant to the town of Woodbridge, in Middlesex county, is "bounded on the east side of Arthur Kull river, otherwise called the sound." It is dated in 1669, and under that line of description extends from the Raritan river around to the mouth of the Rahway river. And the deeds from which these descriptions are taken extend up each side of the plaintiff's land for many miles, showing that at that time there was no general custom or common law prevailing in that part of the state that riparian owners should go farther than the common law rule allowed.

These are all East Jersey deeds. With regard to those in West Jersey, I have not been successful in my investigation, but think it not improbable that some, perhaps many, may there be found which call for the low water line, for this reason, that the boundary of the state under the grant from the duke of York is different on the western, from what it is on the eastern side of the state. With the latter, it embraces all the water and water rights that a state can claim under a general boundary on the ocean, arm of the sea, bay, or navigable river, whereas on the west it is the land or country lying east of Delaware bay or river; and this description only extended the right of the proprietors or state under the grant to low water on the Delaware bay and river, though, by the declaration of independence and the compact with Pennsylvania, it was subsequently extended and settled to the middle of the bay or river. 1 *Chal. Opinions* 59; 4 *Wash. C. C.* 384, *Corfield* v. *Coryell;* 1 *Bald.* 140, *Bennet* v. *Boggs;* 5 *Wheat.* 374.

Then, as neither the sovereignty nor propriety of New Jersey on the Delaware extended beyond low water mark, it is not improbable that deeds would be made or considered as extending to that line, for the proprietors would have no object in leaving the shore without owning the land or river to which it might be attached. The common law jurisdiction would extend to low water, and convenience would extend the right of

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the soil as far, when another sovereign would be the owner of of all below that point. Indeed, although the proprietors, standing in the place of the king, might grant the shore by express words, though not by implication, *cum littore maris eidem adjacente. Hale de Jure Maris, ch.* 403; 3 *Kent.* 347; *Blundell* v. *Cottrell*, 5 *B. & Ald.* 268; *Davies* 149. Yet it may be doubted whether the right to the shore could originally exist, unless as dependent on the upland or the river.

These remarks have been made for the purpose of showing, that although along the Delaware there may be some reason for supposing that the common law rule may not prevail to its fullest extent, yet if it does not, that there are some special reasons operating, which do not exist in other parts of the state, particularly in the part where this controversy arises; and also, as showing a sufficient reason why the impressions of professional men and others in the western part of the state was, that the rule, as regarded the land owners, was the low, instead of high water line. Indeed, prior to the decision of *Arnold* v. *Mundy*, it was their impression that the entire bed of the river was private property. *Griffith* 1291.

It has also been urged, that the right of fishery, which exists in the Delaware, and perhaps some other rivers in the state, and the sanction which has been given them by the legislature, and also the legislative acts for the protection of low meadows sometimes covered by the tide, afford at least a persuasive evidence of the existence of a rule different from that of the common law. After a very full consideration, I am unable to give the argument the weight which is claimed for it; so far as it applies to the Delaware it may be embraced in the considerations already stated; in regard to the whole matter, the very fact that the authority of the legislature was constantly invoked, would seem to raise a doubt of the general or special common law authority. But although the right of fishery, like the right of way or the right of common, may be severed from the farm or manor, and any appropriate suit or action may be brought respecting it, yet it is dependent on the upland for its existence, and does not in fact exist, in gross or

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by any common law rule, detached from and independent of the land. *Griffith's Law Reg.* 1295, *note.*

Whether a man's land extends to high or to low water, he has the exclusive right of fishery and ferry appendant thereto, that is, the right of hauling seines or landing thereon. Any man may fish or sail his boat opposite; he only can fish and land on it, and without this latter privilege the fishing and boating are of little value; and hence his right of fishery. Whatever regulation the legislature may make does not affect the question under consideration: and so of the acts respecting the meadows, and perhaps some other statutes; although reference may be had to rights to low water mark, they must afford but weak and defective evidence of an existing, permanent, and general custom or rule of the place different from the well settled principles of the common law. But it is said the rights of the riparian owner extend to and in the water; that they are vested rights, of which he cannot be deprived. In the language of Judge McLean, in *Bowman's devisee* v. *Waltham*, 2 *McLean's C. R.* 376, "the right of fishery and ferry, and every other right which is properly appendant to the owner of the soil," the riparian owner holds "by as sacred a tenure as he holds the lands from which they emanate." No doubt a man's water rights are as sacred as those to his freehold, and a railroad or canal company, or an individual, can no more cut him off from the enjoyment of the one than from the use of the other; both are alike under the protection of the law and the constitution. But the question is, what are these appendant rights in salt water or navigable streams? Because a man bounds on the ocean or a canal, it does not follow that he has any greater right to appropriate the subject of his boundary in the one case than in the other. There is a vast difference between a right and a privilege. The owner of a newly created cottage may enjoy the privilege of opening his windows upon a view of his neighbor's beautiful gardens, lawns, and privacy, but he has no right to do so, and his view may be shut out at the pleasure of the owner. So a man bounding on a fresh water or non-navigable stream, may have not mere privileges, but rights to the stream and in the stream, of

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which he cannot be deprived, except by his consent or under the constitution; but if his boundary be on the sea or navigable waters, his rights extend only to high water mark; his privileges, as far as his senses can perceive or appreciate. What right has he beyond his boundary? All beyond belongs to the state; and although that may be slow to deprive him of any privilege, yet can it be disputed that the state would have a right to fill up in front of any riparian owner to high water mark, and erect thereon a fortification or light-house, or any other necessary object? And if no land was taken above high water, would any private property be taken for public use, any that the riparian owner must be paid for under the constitution? What is lawful for the state is lawful for its grantee, though it might seem very inexpedient and very unkind for either thus to interfere with valued privileges.

The land owner has a right to the alluvial, if its accretion be imperceptible, but if otherwise, in a body it belongs to the state, (*Angell* 149, 165) unless, when created by a sudden revulsion, it may be identified, as the case of the Goodwin estate, when it would still belong to the original owner. *Shults on Aquatic Rights* 116. And yet, in either case, the owner of the upland would be cut off from the water without remedy for his loss. Has the owner a right to fill or dock out in front of his upland, or will the sanction of time give him the right? His rights are circumscribed by his boundary, which is the high water line; any filling up or erection below that amounts to either a nuisance or a purpresture; if it interferes with the public rights of navigation and fishing it is a nuisance, which may be at once abated, or the individual causing it indicted and convicted; any building or encroachment, or intrusion, below high water, though not amounting to a nuisance, is a purpresture, which the state may demolish or seize at pleasure, or proceedings in chancery may be taken to prevent the wrong. *Angell* 199, 200. All these proceedings are based upon the idea that the land owner's rights terminate at high water; and although below that point is public property, he is just as liable for an injury done to that as if it had been private property, though the remedy may be slow and of a dif-

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ferent character. No doubt, since the settlement of the state, many wharves have been built without the sanction of law, and others with it, partly from the general impression that all the property belonged to the proprietors, and partly because, in nearly every case where a dock has been constructed, the state had very little interest in the matter; the soil that was filled in being worthless, except for a dock, the state took no notice of the act. But time runs not against the state, and no length of time can sanction a nuisance or encroachment on the public (*Angell* 237) or ripen the act into a right, much less can it change the principles of the law itself. Where a man has docked out on the public without a permissive statute, he has done it at his peril, having gone beyond his own boundary; yet, in nine times out of ten, he may feel himself perfectly safe in doing so, for the reasons before adverted to; but he cannot at any length of time turn around and claim his intrusion as an act of right, or as giving him a right. The same principle would convert the lands of the proprietors or of the United States from the true owners to be the property of any who might intrude upon them; and, under such a rule, of what value would they be to the lawful owner? So if we sanction a principle so at variance with the common law and the interests of the state, of what value will be the public oyster grounds or the flats in the vicinity of large cities, which, in one location only, have been estimated to be worth a half a million of dollars? Nay, if priority of occupation by the riparian owner, though but for a day or two perchance, as in this case, by filling out, will give a title paramount to the legislative grant of the state, of what value can such grant or such property be? If the race for title is between the tardy process by legislative grant, attainable for sixty or seventy days only in the year, and the stimulated vigilance of private enterprise, it will not be difficult to tell who will inevitably be the owner of a river flat or any portion of land covered with water, whenever it shall be likely to become valuable. I am at a loss to ascertain upon what possible principle such a claim can be founded. I know, if the state were to carry out the strict principle of the common law against all persons

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who have intruded their wharves into the public waters without license, that much inconvenience and some apparent injustice would arise; but there is great difference between the state yielding up a principle that must destroy all its public rights, and enforcing that principle where it might do much private injury without any public good; besides it is no sound reason against a correct principle, that evil might grow out of its execution: it is enough to meet evil as it arises; the power of the state is ample to protect the rights, and even the wrongs of all its citizens. And if, by possibility, any evil should arise by sustaining the common law doctrine, the legislature has ample authority to grant protection. And I am not prepared to affirm that this court has not the authority to say, that although time does not run against the state, yet after a wharf has been peaceably enjoyed for twenty years or more, they will presume that a deed or license has been granted, so as to quiet titles in future. 3 *Halst.* 176; 6 *East* 208; 1 *Am. Lead. Cases* 506. The grants for landings in the *Grants and Concessions of East and West Jersey* (*Leaming & Spicer* 25, 391) do not apply to the present question respecting rights below high water, but only to appropriations of upland "for churches, forts, wharves, keys, harbors, and for public houses."

This suit is brought by the riparian owner in the possession of the land filled up against the grantee of the state for a trespass. Had it been against any body else it might have been sustained, for the possession only is good against all the world, excepting the state and its grantee, the rightful owner, and as against his title the plaintiff, in my opinion, has failed, judgment should be rendered in favor of the defendant.

Judgment for plaintiff.

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THE SOMERVILLE AND EASTON RAILROAD COMPANY ads. JOSHUA DOUGHTY.

1. If a party, in cross-examining a witness of the other side, ask whether the party whose witness he is has had a conversation with him on a certain subject, without showing what was said, the party producing him has a right, on re-examination, to show what that conversation was. OGDEN, J., dissenting.

2. In assessing damages for crossing land by a railroad, the jury must take into consideration the deterioration in value of the adjacent parts of the same tract by the proximity of the railroad, either for agricultural purposes or for sale as building lots, the increased risk of and increased care required for family and stock, the risk of fire, the inconvenience caused by embankments and excavations, and the obstruction to the free use of the buildings. OGDEN, J., dissenting, as to risk to family and stock and by fire.

3. The present value of lands taken must be awarded, and damages to adjoining lots must be assessed on the basis of their present value: but, to ascertain the present value of lands, it is right to regard their location, and to judge by the probable uses to which they will be put, and for which they can be sold, in the same manner as their value would be fixed by a prudent seller or purchaser.

4. A jury, in assessing the value of lands, are not to be governed by the prices which they would bring at a forced cash sale, but by such price as they believe the lands would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale.

5. It is not competent to rebut the opinions of witnesses who think that the proximity of a railroad would injure the value of building lots, by showing that, in point of fact in other places, a like proximity has increased their value. It would raise too many collateral issues. OGDEN, J., dissenting.

On rule to show cause why verdict assessing value of land taken by the company, and damages done thereby, should not be set aside.

Argued before Justices NEVIUS, CARPENTER, and OGDEN, by *F. T. Frelinghuysen* and *Williamson*, for the rule, and *G. H. Brown* and *Vroom*, against it.

NEVIUS, J. This cause was tried upon a feigned issue, made in this court, before the Somerset Circuit, in the term of February, 1849, and a verdict rendered for the plaintiff for $6800. The defendants ask that this verdict shall be set aside, and a new trial granted, for reasons hereafter mentioned.

The defendants are a railroad company, incorporated by act of the legislature of this state on the 26th of February, 1847,

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with power to construct a railroad from the village of Somerville to the Delaware river. To carry out the object of their creation, their charter provides, that in case they cannot agree with the owner of lands necessary for the construction of said road, commissioners shall be appointed by a justice of this court, who shall examine and appraise the land required, and assess the damages of the owner, and make a just and equitable estimate of the value of the land and assessment of the damages. It further provides, that if either party shall be dissatisfied with the report of the commissioners, this court may, upon proper cause shown, set aside such report, and award a trial by jury. In this case it appears that the defendants required, for the location of their road, a part of the plaintiff's lands, situate in the village of Somerville, and, being unable to agree with him for the same, caused a particular description of it to be made in writing, under the oath of a proper agent or engineer, as required by their charter; and thereupon commissioners were appointed, who made their report of the value of the land thus required, and the damages which the plaintiff, as owner, would sustain, amounting in the whole to $3060. The plaintiff, not being satisfied with their report, applied to this court to set it aside, which, for proper cause shown, was done, and a trial by jury awarded. This trial, according to the requirements of the act, was to be before a select or struck jury, who were to have a view of the premises before trial. All these provisions, in the present case, were complied with. An issue was formed; a jury selected, who had a view of the premises; a trial was had; and, upon evidence, a verdict was rendered for the plaintiff for the sum above mentioned.

This verdict the company insist ought to be set aside, on the ground that it is exorbitant and excessive; and this general exception seems to include all other objections to it, because, they say, if the jury were not influenced by passion, prejudice, ignorance, or corruption, they were misled and misinstructed by the court, and, in either case, the verdict is wrong, and ought to be set aside.

The verdict, as I have said, is $6800, more than double the amount awarded by the commissioners, and it covers or in-

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cludes the estimate which the jury have made of the value of the land and materials taken, and the damages sustained by the plaintiff. This, it is insisted, is exorbitant and excessive, and evinces passion, prejudice, or corruption in the jury, or is evidence of some palpable mistake, into which they were either led by the court or accidentally fell in the progress of the trial.

The first and natural inquiry will be, whether there is to be found in the case, as here presented, any thing to impeach the conduct of the jury, or to excite a suspicion of their integrity or impartiality, except the mere amount of their verdict. They were selected from the most respectable class of freeholders in the county, as is ordinarily the case where questions of importance are to be submitted to the decision of such a tribunal. Each party exercised the right of striking twelve, from the panel of forty-eight jurors thus selected, leaving the remaining twenty-four to be summoned for the trial of the cause, the first twelve of whom that appeared were sworn to try this issue, no objections being made. Thus it may be said, that the parties had, to a great extent, their own choice in the tribunal which was to determine their case. Were they mistaken in the character, intelligence, or integrity of the men thus selected? There is no evidence of any misbehavior on the part of the jury, or that they did not attentively listen to the testimony of witnesses and the arguments of counsel during a protracted trial; nor is there any proof of bias, or passion, or prejudice, in their minds, unless it is found in their verdict. This court has the power to set aside this verdict; but we will not exercise that power, unless we are clearly satisfied that it is wrong, exorbitant, and oppressive, and so much so as to strike the mind of every reasonable man, at once, that the jury, from some cause, have done the defendants gross injustice. We cannot exercise this power rudely because we may think the verdict too high; we cannot convert ourselves into a tribunal of fact; the law has not invested us with that power, and if it had, we should be very incompetent to exercise it in this case, as we have had no view of the premises, nor seen the witnesses, nor heard the testimony, as given upon the trial. We could not,

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therefore, say, with any certainty, what is the true value of the land taken and the exact quantum of damages sustained.

Is this verdict then, upon its face, exorbitant and oppressive? Is it sustained by the evidence upon which it purports to be founded? We may pronounce on that question, and therefore will examine the evidence, as here presented. This shows that the land taken from the plaintiff is seventy-seven hundredths of an acre, carved out of a lot or tract of fifteen acres, situate in the village of Somerville. It appears, by a map exhibited on the trial, and produced here, that the line of the road crosses this tract in an oblique or diagonal direction, running through the plaintiff's court yard, attached to his mansion house, and within thirty-six feet from the corner of his house, destroying the regularity and symmetry of his grounds and ornamental improvements. It further appears, by the same map and the evidence, that this tract has already been laid out in lots, and is adapted for buildings, either for business or residence; that many of these lots had already been sold, and the remainder had been devoted by the plaintiff to such purposes, and were then in market, and offered for sale as building lots. The jury had a personal view of the premises, and were thereby enabled to apply and appreciate the value of the evidence of the witnesses, and determine the weight of their opinions, and the reasons assigned for them. The plaintiff produced a number of witnesses residing in the immediate vicinity of the premises, and acquainted with, or professing to be acquainted with their value. These witnesses estimated the value of the lands taken by the company and the damages sustained by the plaintiff in his adjacent lands at various amounts, extending from $9900, the lowest estimate, to $10,984, the highest. And in making their several estimates of the depreciation in the value of the plaintiff's adjoining land by means of this railroad, their attention was called to the effect, or probable effect of the road upon the value of the lots, as laid down on the map exhibited. It will be seen that, in the general results of their estimates, these witnesses differed materially; and, on a careful examination of their evidence, it will also be seen that they assigned different reasons for their general conclusions, and made dif-

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ferent estimates of the damages to the separate lots. These discrepancies are such, however, as might reasonably be expected in a case where there is no certain standard by which to measure damages or value, but where opinions of individuals, supposed to be acquainted with the subject, are necessarily resorted to as a guide to a decision. If such discrepancies had not occurred, the weight of the evidence would have been materially diminished, as it would have warranted a suspicion that there was concert, if not conspiracy, among the witnesses.

On the other side, the defendant also examined a number of witnesses, who estimated the value of the land taken and the damages sustained by the plaintiff at a sum far below the estimate of the witnesses for the plaintiff. But they, too, differ widely in their estimates, and the reasons given in support of them, the lowest being $2500, and the highest $3700. Some of these latter witnesses professed to know the value of these particular lands, having resided in their vicinity, and others were strangers to the price or value of lands in Somerville, and founded their opinions on estimates of lands in other places, supposed to be similarly situated on the line of a railroad. From this discordant testimony, it will be readily perceived, if the witnesses were equally intelligent and candid, and had equal opportunities of forming a correct judgment, that the duty of deciding between them would be no easy task for the jury. If the jury had attached implicit faith to the truth and soundness of the opinions expressed by the plaintiff's witnesses, their verdict must have been for a much larger sum; if they had taken the testimony of the defendants' witnesses as their guide, it would have been for a less sum. It seems that they did neither, but rendered a verdict for a sum intermediate these several estimates; and can we say, from this testimony, that they were wrong, and that their verdict is excessive? We have before us the evidence, in a state of the case prepared by the parties; and what, I ask, would be our verdict on that evidence, if called upon to render one? or could the members of this court agree upon a verdict at all? or if we could, what assurance would the parties or public have that it was more equitable and just, or more consistent with the

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evidence than that which has been already rendered by the proper and lawful tribunal to which the questions have been submitted? Upon the evidence, then, the verdict, in my opinion, should stand, for I find nothing in it indicating passion, prejudice, or corruption on the part of the jury, nor is there in the sum awarded any thing that impresses my mind with the conviction that it is exorbitant.

Unless, therefore, it is shown that there were errors committed in the progress of the trial, by which the jury were misled, or which were calculated to mislead them, the rule ought to be discharged. Such errors are imputed to the judge who tried the cause. Let us examine them.

It is assigned for error that the court admitted illegal evidence for the plaintiff on the trial, *to wit*, the declarations of the plaintiff himself. The facts connected with this charge are these: The plaintiff produced Mr. G. as a witness, who, after being examined by him, was turned over to the defendants for cross-examination. On such cross-examination, he was asked by the defendants' counsel, whether the plaintiff had at any time told him how his property was injured by the railroad. His answer was in the affirmative. And there the cross-examination of the witness ended. He was then asked, by the plaintiff's counsel, what the plaintiff had said to him, as to the mode or manner in which he was injured by the road. To this question objection was made, but the court permitted it to be put; and the witness answered, "that the plaintiff told him he was injured in the sale of his lots."

I think the court was right in so ruling. It was manifest that the question put by the defendants was calculated, if not designed, to impute to the plaintiff an improper attempt to influence the witness's opinions, and to impair the credit of the witness, by producing an impression on the minds of the jury that he had been, or was influenced by such attempt. The plaintiff therefore, in all fairness, was entitled to overcome or avoid such impression, by explaining what, in truth, he had said on the subject. The court and jury had a right to know, that they might judge fairly of the conduct of the party and the credit of the witness. The conversation between the plain-

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tiff and the witness was not in itself either unlawful or improper; and as it was introduced by the defendant, the plaintiff had a clear right to show what it was, that no false impressions should be left in the jury box touching his own conduct or the witness's conscience. There is no error in this ruling of the court, and for this reason the verdict should not be set aside.

The next ground urged for a new trial is, that the judge, in his charge, informed the jury "that they were authorized by law to ascertain and assess the damages sustained by the plaintiff to his other lands not taken and occupied by the defendants, to his dwelling house, and his other buildings and improvements, by reducing their value, changing their character, obstructing their free use, by subjecting his buildings to the hazard of fire, his family and stock to injury and obstruction in their necessary passage across the road, the inconvenience caused by embankments or excavations, and, in general, the effect of the railroad upon his adjacent lands, in deteriorating their value, in the condition they were found, whether adapted for agricultural purposes only, or for dwellings, stores, shops, or other like purposes.

On a careful review of this part of the charge, I cannot see that any legal principle was violated, or any unsound doctrine advanced. The charter provides that the jury shall assess the value of the land and materials taken by the company, and the damages. The damages here contemplated are not damages to the land actually occupied or covered by the road, but such damages as the owner may sustain in his other and adjacent lands not occupied by the company's road. His buildings may be reduced in value by the contiguity of the road, and the use of engines upon it. His lands and buildings, before adapted and used for particular purposes, may, from the same cause, become utterly unfit for such purposes. The owner may be incommoded by high embankments or deep excavations on the line of the road, his buildings subjected to greater hazard from fire, his household and stock to injury or destruction, unless guarded with more than ordinary care. It requires no special experience or sagacity to perceive that such are the

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usual and natural effects of railroads upon the adjoining lands, and which necessarily deteriorate not only their marketable, but their intrinsic value. The judge, therefore, did not exceed his duty in instructing the jury that these were proper subjects for their consideration, in estimating the damages which the plaintiff might sustain by reason of the location of this road upon and across his lands. It was not calculated to mislead the jury, but to direct them in the true line of inquiry upon the subject before them. The defendant's counsel, in their argument insisted, that the contingency of loss and destruction by fire from the use of the road ought not to have been taken into the estimate of damages, because, they say, if any such loss should occur from such cause, the defendants would be legally responsible for it. This answer is not satisfactory, for if such loss should arise without any culpable act, or any want of care on the part of the defendants or their agents in the lawful exercise of their franchise, it would be very questionable, to say the least, whether the owner would have a remedy by action against the company; but whether he would or not, if the hazard of fire is increased by the location and use of a railroad, then the value of adjacent buildings must be proportionably reduced.

Another error imputed to the charge of the court is, that they were instructed to compute prospective damages. On examining the charge which is before us, I find that the jury were told, in express terms, "to estimate the present value of the lands taken by the company and the present damages sustained by the plaintiff in his other lands, and not future or prospective damages;" but, in laying down and explaining the rule to be adopted in making such estimate, they were further told, "that they should first determine, from their own view of the premises and the evidence in the case, whether these lands were to be considered and treated as lands adapted only for agriculture or as better adapted for buildings, and if they found that the plaintiff had actually laid them out in building lots, and devoted them to that purpose, and that they were best fitted for that purpose, they might then estimate the damage to each separate lot, or the depreciation in the value

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of each, occasioned by the railroad. That, in making such estimate, they should not adopt the opinions of men who were sanguine in their estimate of value, nor of men who were over cautious, but of prudent and practical men, men of experience and thought and consideration, and who have had an opportunity of forming correct opinions of the value of "the lands and damages at present sustained."

I deem it unnecessary to advert to other parts of the charge on this point of the case. Its whole scope and tendency was to direct the jury to assess the present value of the lands taken and the present damages to the plaintiff's other lands. Whatever else was said on the subject, was only in amplification and enforcement of the principle before plainly laid down.

It is further objected, that the court erred in instructing the jury that, in estimating the value of the lots before the construction of the road, and their depreciation in value by means of such construction, they were not limited to what they might have brought at a cash sale before the road was made. With the explanation accompanying this remark, I think the court was entirely right. The jury were told that they were to put such a price on the lots as they could be purchased at, provided they were for sale, and the owner asked such prices as, in the opinion of the community, they were reasonably worth. That the question was not what they would bring at a forced cash sale, but what was their true intrinsic value in the hands of a man who could select the time and fix the conditions of his sales.

The company were taking compulsory, though legal possession of the plaintiff's lands, and were charged with injuring the value of lands adjacent and belonging to the plaintiff. The standard of that value was, not the price they would bring at a forced sale, but what, in the opinion of practical and judicious men, they were reasonably worth, taking in view their fitness for the purposes for which they were intended and the time when, according to the reasonable and natural progress of improvement and growth in that particular locality, they would be required for those purposes. Whatever may be said of the legality or policy of what are commonly called "stop

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laws," they are all founded upon the universal experience, that property will not always bring at a forced sale what it may be really worth. Again, the present value of lands must often depend upon the future and prospective use to which they may, and probably will, in the natural growth of business and increase of a town, be appropriated.

It is further objected to this verdict, that the judge erred in his charge, in telling the jury, "that they might award damages for lots of the plaintiff not intersected by the road, nor immediately adjacent to it." The direction was rather to the principle and mode of computing damages, than to the property upon which they were to be computed. It was the damages to the plaintiff's whole tract of fifteen acres which were to be assessed, and, whether assessed upon the tract as a whole, or upon different parts separately, the result would be the same if the jury considered the land, as laid out in lots, dedicated and designed for building, and best fitted and most valuable for that purpose. And in that case, by estimating the injury to each particular lot, the jury would arrive at a safe and more correct result than by estimating them on the whole as one entire tract.

It is also objected, that the court below overruled testimony, offered by the defendants, to prove the effect of railroads upon the value of lands at other places, and remote from the lands in question. I think this evidence was properly rejected; it was raising other and collateral issues, which would have led to an interminable trial, and cast little light on the true issue in this case. If the defendant had been permitted to prove the effect of a railroad upon lands at Plainfield, the plaintiff would have had an equal right to prove their effect on the value of lands at any other place, and such party would have been entitled to controvert the testimony of the other. This would have produced confusion, and distracted the minds of the jury, by leading them from the true issue, and could not have aided the cause of truth and justice.

Upon a careful review of the whole charge and of the trial below, I find nothing to justify our interference with this verdict.

Let the rule be discharged.

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Ogden, J. The judicial discretion of the court has been invoked in this case by the defendants, who allege that they were deprived of the benefit of lawful testimony; that the verdict is against the weight of evidence given in the cause, and is also contrary to law.

Upon applications for new trials, the action of courts should be controlled by precedent or by the peculiar circumstances of a case, so as best to promote substantial justice.

While, on the one hand, they observe great caution lest they should interfere with the appropriate province of the jury, on the other, they profess a willingness to interfere on all occasions where they are not satisfied that "there are strong probable grounds to suppose that the merits have not been fully and fairly discussed, and that the decision is not according to the truth and justice of the case." 2 *Green* 156.

For the purpose of understandingly disposing of the merits of this application, it is necessary that we should be possessed of the character of the issue, of the extent and nature of the evidence admitted and of that which was rejected, and, likewise, of the principles of law in which the jury were instructed by the court.

The legislature of New Jersey, by an act, approved on the 26th of February, 1847, incorporated the defendants, and invested them with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad, or lateral roads, from one or more suitable place or places in the village of Somerville to one or more suitable place or places within two miles of the Easton Delaware bridge, opposite to Easton, in the state of Pennsylvania. It is declared, in the said charter, to be lawful for them to enter at all times upon lands, for the purpose of exploring, surveying, levelling, laying out, and locating their route, doing no unnecessary injury to private property; and, after the route should be determined on, and a survey thereof be deposited in the office of the secretary of state, it was made lawful for them to enter upon and take possession of any such required land, and to construct and use their railroad thereon, upon the conditions, and subject to the compensation provided for in the charter.

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In case the company and a landholder are unable to agree for the use or purchase of any such required lands, the act provides for the appointment of three commissioners to examine the land, and to make a just and equitable estimate or appraisement of the value of the same, and assessment of damages, to be paid by the company for such lands and damages. In the event of either party being dissatisfied with the report of commissioners, power is conferred upon the Supreme Court, upon good cause shown, to set aside the report, and to direct a proper issue for the trial of the said controversy to be formed between the parties, a jury to be struck, a view of the premises to be had, and the issue to be tried at the next Circuit Court to be holden in the county wherein the land lies, in the same manner as other issues in the said court are tried. It is made the duty of such jury "to assess the value of the said land and damages sustained."

To obviate unnecessary delay in the construction of the railroad, it is provided, that an application to set aside a report of commissioners shall not prevent the company from taking and appropriating the land, upon their filing the report and accompanying papers in the clerk's office of the county in which such land lies.

Hence all acts of these defendants, done in conformity with the foregoing provisions, were lawful acts, prescribed by the supreme power of this state. Moreover, the company are required, in the seventeenth section of the charter, to execute the work contemplated in their creation within a limited period, on pain of forfeiting all their privileges.

While keeping within the lines of their act of incorporation, the company are neither *trespassers* nor *wrongdoers*. They approach and enter upon all lands by authority of law, and must be so viewed and dealt with by all tribunals within whose jurisdictions the charter has placed them.

This principle, repeatedly, has been declared by the justices of this court. Its observance lies at the foundation of all public improvements, and it behooves courts diligently to watch, lest its proper influence be disregarded, and punitive damages unjustly be assessed against aggregated capital.

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The tendency of the public mind is against developments through the agency of associated enterprise. There is an inclination to view all acts of incorporated companies, which conflict with individual opinions, or seemingly interfere with private rights, as aggressions upon social privileges; and hence experience shows that when persons are invested with power to settle disputed questions of right between citizens and such corporations, the latter incur the hazard of being viewed and judged through a false medium.

"It is the glorious principle of our political equality, that the rights, privileges, liabilities, and property of all stand upon the same law."

Upon complaint, properly made, that the law has been violated, this court, in the exercise of its long admitted superintending power, will examine the grounds of dissatisfaction, and if they are substantial, it will administer the appropriate relief.

In the case before us, the Somerville and Easton Railroad Company, in building the road sanctioned and required by their charter, surveyed, laid out, and located a portion of it over the land of Joshua Doughty in the village of Somerville, and on the 25th of January, 1848, they deposited the survey thereof in the office of the secretary of state.

Being unable to agree with Mr. Doughty for the use or purchase of his land, so required by them, they caused such proceedings to be had, under the seventh section of their charter, that commissioners, duly appointed for the purpose, acted in the premises, and awarded the sum of $3060, as a just and equitable estimate or appraisement of the value of the land and assessment of the damages. Mr. Doughty was dissatisfied with the report, and, on application made in his behalf, this court set it aside, and directed a proper issue to be formed between the parties. The issue, so formed, was carried down for trial by jury, at the term of February, 1849, of the Circuit Court, held in the county of Somerset; and the *postea*, returned by his Honor Justice Nevius, shows that a verdict was rendered thereon for the sum of $6800.

Upon the coming in of the *postea*, a rule was granted, on

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an application in behalf of the company, for the plaintiff to show cause why the verdict should not be set aside, and a new trial be awarded. Whether that rule shall be discharged, or be made absolute is now to be determined.

The justice, at the circuit, was employed several days in receiving the proofs, during which time twelve witnesses were examined on the part of the plaintiff, and eighteen on the part of the defendants, whose testimony has been furnished to us in a state of the case.

Three principal questions were raised upon the argument of the rule.

1st. Did the justice err in declaring the law to the jury?

2d. Was the verdict *clearly* against the weight of evidence and contrary to law?

3d. Was any testimony offered by the defendants improperly ruled out, or any unlawfully admitted on the part of the plaintiff?

As the two first questions are necessarily connected by the verdict, it may be impracticable to keep them separate in the examination which I propose to institute.

It appears that the land of the plaintiff which is intersected by this railroad is a portion of a property purchased by him, in 1836, for $11,000, consisting of several acres of outland, and of about fifteen acres in the upper portion of the village of Somerville, on which was a spacious mansion house, a barn, and other outbuildings.

This house plot was bounded by the main street of the village and the road leading from Somerville to Raritan, by lands of Col. Southard, by the Raritan river, and by lands of Mr. Miller. The plaintiff, considering that some portion of this part of the property would be more valuable for building purposes than for farming, has designed and appropriated for such improvements a parallelogram, about 800 feet in width, between Col. Southard's and Mr. Miller's lands, and about the same depth, from Main street to a line some 200 feet in the rear of the mansion house: and, in mapping it for sale and use, he has laid down along his western boundary a proposed street, about twenty-five feet wide, to run from Main street

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for some 300 feet towards the river; also a proposed street, about 50 feet wide, to commence at the terminus of the first mentioned proposed street, and to run to Mr. Southard's line. This street will pass within 100 feet of the front door of the mansion house, and be intersected by an avenue, about 48 feet wide, leading from the house to Main street, and also by a new street, already opened from Main street, 232 feet west of the avenue, and parallel with it. These streets and avenue will divide the plat into four blocks, which are designated as A, B, C, and D, the first three of which are laid out on the map into lots of various widths and depths.

The mansion house is on No. 7, in block C, and a lot is appropriated for it, 166 feet in front, and over 320 feet in depth.

It was alleged, by the plaintiff, that Col. Southard would have continued the street laid down in front of the mansion house through his lands.

The railroad location enters from Col. Southard's land upon the plaintiff's, a little below or south of the last mentioned proposed street, crosses a ravine of six or ten feet depth in lot 9, on block C, passes obliquely in front of the mansion house, its proximate line being 48 feet from the front door, occupies about 250 feet in length of the proposed street, in crossing the same, intersects and obliquely crosses both New street and the proposed western street, and thence passes off upon the lands of Mr. Miller.

Its entire length over the plaintiff's premises is about 850 feet, its width there is 40 feet. It occupies parts of nine lots, as plotted, including the front of the mansion house lot, appropriates .77 of an acre of the land, and the road laid there has required little if any excavation or embankment in its construction and use.

The plaintiff owns no building upon these premises which is within 100 feet of an outside line of the location of the railroad, excepting the main brick mansion house. A dwelling house on the same block, situate upon the lot facing the southern terminus of New street, and occupied by Mr. Gaston, appears, by the map and scale, to be some 120 feet from the nearest line of the railroad; and a lot and house of a Mr.

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Mundy intervene between the railroad and the houses of the plaintiff which are erected on block B.

The mansion house had recently been repaired, at a cost of about $800. The house occupied by Mr. Gaston had lately been erected for about $3000, and the plaintiff's houses on block B had cost about $900, each.

There was no evidence that any special or unnecessary injury was done to the premises during the surveys and location of the road, or that the plaintiff made any complaint upon that ground.

The simple questions of fact are, whether the jury have put an exorbitant valuation upon the land of the plaintiff appropriated by the company, or have made an excessive and unlawful assessment of the damages contemplated in the charter, or have erred in both these matters.

The two assessments are blended in the verdict, which deprives the court from obtaining any accurate knowledge of the items making up the aggregate assessment.

The price for the title to the land required should have been estimated by the jury according to its true value at the time, irrespective of any damages flowing or to flow from the construction or use of the road; and the real and actual damages, likewise, should have been assessed, not such as were ideal, imaginary, or speculative.

The jury should have been controlled, in reaching the compensation for the property taken, by the most valuable use which the plaintiff intended to make of it; and as it was evident that he had appropriated it as best adapted for building purposes, he was entitled to have the value settled by that standard.

The quantity of ground required by the company was .77 of an acre, capable of making, without allowance for streets, 13½ building lots, of 25 feet by 100 feet, or about six lots of the size of those mapped by the plaintiff on blocks A and B. There was no evidence of sales by the plaintiff out of that part of the property which could aid the jury, excepting of the sale of one lot, for $200, to Mr. Mundy, nor was there proof of any present demand for the purchase of those lots.

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If the jury were guided by the sale to Mr. Mundy, they must have fixed the value of the land required at twelve or fifteen hundred dollars; if they disregarded that sale, and placed their verdict upon the *opinions* of witnesses, we are met by the question, whether those *opinions* rested upon safe and legal foundations; whether the witnesses relied upon facts, or whether they testified upon speculative prospective value of the lots at future, and perhaps uncertain periods. The money becomes payable upon the rendition of a verdict; hence every mode of computation of value, which would lead to an appraisement beyond a present true and full compensation, must be grounded in error, and would render the *faithful* discharge of a juror's functions impracticable.

Who can judicially determine what the value of lots will be at a fixed postponed period? or who can settle the effect of contingencies with conscientious certainty?

Any departure from the principle, that the parties in such cases are to be held as vendors and vendees, differing only as to price, and that the price is to be determined by the criterion of the present true intrinsic value of the land, as designed for the most valuable use by the owner thereof, must result in an unsound verdict.

The company would be required to submit to an estimate, made at a time of actual sales, at inflated prices and under circumstances fortuitous for the landholder; and, upon principles of equal justice, they are entitled to have the land at its true value, when, in good faith and without seeking the benefits of a casual depression, they call for an appraisal. I do not mean to say that a company may take advantage of the market, and purposely have assessments made when business is prostrated, and property is unsaleable, with a view of obtaining their titles at depressed prices, because computations made upon such a state of business would not represent the intrinsic value of the property. A holder would not voluntarily sell under such circumstances, nor would a person purchase, unless with the belief that he was making a very favorable contract.

Assuming, however, that the proportion of the verdict which applied to the value of the land taken was made upon

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correct principles and consistently with the evidence, is there good and sufficient ground for determining that the jury have erred in reaching the assessment of the damages sustained?

It must be remembered that a portion of each lot that is intersected by the railroad has been compensated for in the estimate of value, and that damages, *as such*, could be assessed *only* for the depreciation of the remainder of each of those lots and of the residue of the property, or, in other words, after settling the price to be paid for the land actually appropriated by the company for their use, the jury were to inquire and determine how much less the entire property of the plaintiff, which was interfered with by the company, was worth to him, after the location and construction of the railroad than it was before.

That assessment must be just and equitable. It cannot be reached by arbitrary action. It should result from the *influence* of certain legal principles upon the evidence in the case, by which I mean not *simply* the opinions of witnesses, but *also* facts, so proved as to enable a jury to form a correct judgment of the value of those opinions.

While the amount should be sufficiently broad to cover all damages which may result from the natural and physical effects produced by the location, construction, and use of the railroad through the plaintiff's property, in deteriorating the value thereof, a jury should not attempt to reach, and to compensate for those imaginative damages which capricious and timid fancies may suggest, which cannot be measured by any certain criterion, and which need not *necessarily*, and probably never would be sustained.

It would be unsafe for the court to venture an enumeration of every species of injuries for which a land owner might be entitled to an assessment of damages, consequent upon the location, construction, and use of a railroad across his property; nevertheless there are some elements of damages which are undisputed, as, for instance, the obstruction of the free use of the party's other lands, by the formation of an embankment or an excavation which would require, on his part, an increase of motive power or an unprofitable diminution in load-

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ing in his necessary cartage over the same; the changing the character of his improvements; the impairment or destruction of some actual item of value; the expenses of erecting and maintaining two lines of fences along the length of the road, across his lands, for the purpose of perfectly protecting his premises, as well as his stock, from injury or destruction, and divers other items of damage, which "must depend upon the peculiar circumstances and situation of the land taken, and its relative position to other lands, property, or rights of the owner."

There are considerations, also, which should not enter the jury box, *to wit:* the interruption of a prospect; the noises occasioned by the passage of cars; the hazard of fire from the motive power usually employed; the risk of alarm to horses, and of destruction of vehicles, and of personal injury which might result therefrom; the danger that cattle and other live stock may be overtaken by the trains running upon the track, and be lamed or killed; the possibility that the land owner, his wife, his children, and domestics, or some one or more of them, may be maimed or crushed to death in their necessary passage across the railroad: these, and many other ideal, speculative, and unsubstantial elements of damages, are too contingent and casual in their natures to be susceptible of admeasurement, or of specific compensation, or of receiving just remunerative pecuniary equivalents for the injuries contemplated.

Entertaining these views, I respectfully must differ from parts of the doctrine held by the learned judge before whom the issue was tried, in that he instructed the jury, in his charge to them, that the damages intended by the legislature "must extend to all damages actually sustained by the owner to his other lands, to his dwelling house and the other buildings and improvements, by reducing their value and changing their character by obstructing their free use; by subjecting his buildings to the hazard of fire; his stock or the inmates of his house to injury or destruction in their necessary passage across the road;" and that those were fair legitimate subjects of con-

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sideration in making up their award as to the amount of the plaintiff's damages.

While some of the matters repeated by the judge were proper subjects of consideration by the jury, others of them, in my opinion, were incapable of being estimated upon any certain principles of correct judgment. If recognised, they would cast the jury upon an open sea of conjectures and loose opinions, without a beacon to direct them "to the haven where they would be." The extent of an apprehended fire cannot be measured, nor can lives be valued in money. No amount of gold could restore a bereaved husband or father, or widow or orphan, to their former condition.

The act clearly intends prospective damages to arise from the construction and use of the railroad; but to give to language, "*damages sustained,*" the broad construction that might be claimed for it upon the ruling at the circuit, would subject *us* to the reproof of just criticism, as well as remove from the *jury* all restraints upon speculative and unconscionable assessments.

It is true that witnesses of the plaintiff, who spoke to that point, fixed the value of the lands taken and the damages beyond the sum assessed by the jury, one naming $10,984, another $10,700, and another $10,625, another $10,450, another $9500, while those produced by the defendants ranged, in their estimates, from $2400 to $3800; but upon a close examination of the grounds given by the former for those opinions, I am entirely satisfied that they are unsubstantial, and are not supported by facts. For example: in the sale and purchase made in 1836, the entire plot, extending from Main street to the river, embracing fifteen acres of land, well arranged for a gentleman's retired establishment, with its pleasant fields, studded avenues, spacious, substantial, and convenient mansion, provided with stables and other improvements, was estimated by the plaintiff at $7000.

Before the railroad was located, its unity had been assailed and broken. It had been mapped into lots, and the desirable retired dwelling was designed to be circumscribed within a lot 166 feet wide, and by a public street, 100 feet from the

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front door, and yet those witnesses have estimated the house and lot, so hemmed in by building lots on either side, at prices varying from $6500 to $8000; and they have fixed the damage thereto at $3500, nay, one of them, at $4000, thus computing the injury by the railroad to this fraction of the property at a moiety of the assumed value of the whole plot in 1836. It is also observable, in their testimony, that, for the purpose of keeping up this scale of values and damages, they have estimated the property injured by the railroad, and upon which they have fixed more or less damages, at exceeding $25,000.

Upon what facts could such opinions have been based? Not upon actual sales and demand for lots in that tract, because none such appeared to any extent. Not upon values ascertained by the average selling price of land in the neighborhood of like quality, or by the prices at which other lots, in and about the village, were sold: because it was an established fact, that plots with dwellings, in the immediate vicinity, and also lots upon an opened business street, had recently been sold at very much less rates, and that lots were in market seeking purchasers.

Although this verdict must appear to every disinterested person to be strikingly large, yet I should not be willing, on that account alone, to disturb it; but when I have searched in vain for any solid ground on which to place the inflated opinions of the witnesses, and am satisfied that those opinions are at variance with the facts which *should truly* demonstrate the value of the plaintiff's property, I cannot escape the conclusion, that the verdict is not only *against* the evidence, but that it is unsustained by the facts proved or by any just mode of computation.

My mind being at rest upon this branch of the argument, I should fail in discharging my duty here, did I not rule that the verdict should be set aside, and a new trial be granted.

If, however, I did not feel clear upon that point, I am satisfied that the justice misdirected the jury on material legal principles; that his expressed view must necessarily have tend-

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ed to the prejudice of the defendants, and I think that, on this ground also, there should be a new trial.

Another objection remains to be considered:

It appears in the state of the case, that upon the cross-examination, by the counsel for the defendants, of Mr. Goltra, who had estimated the damages at $10,450, he testified, that Mr. Doughty had stated to him *how* he considered that the railroad injured him.

Upon a resumption of the examination in chief, he was asked "*what* Mr. Doughty said to him, as to the manner in which the road injured him." The question was objected to, upon the ground that the plaintiff was thereby efforting to give his own declarations in evidence. The objection was overruled, and the question was propounded and answered.

I am inclined to believe that the testimony was illegal. The defendants were not seeking for any part of that conversation, nor did they introduce any portion of it. It was proper for them to test the value of the witness's estimate, by showing *the fact*, that the plaintiff had expressed his views to the witness upon the question of his damages; but the establishment of *that fact* did not, in my judgment, make the plaintiff's own estimate of his damages *competent* proof before the jury.

The ruling at the circuit did not come within the principle, that a party is entitled to have an entire conversation, if his adversary introduces garbled portions of it.

The defendants have also complained that the justice rejected legal evidence offered by them.

It was very material that the jury should have every species of legal evidence that would enlighten them in reaching a proper estimate of the damages, which should be assessed for injuries to unimproved lots in the proximity of the railroad.

Witnesses for the plaintiff have established a scale of damages, diminishing in amount with the increase in distance from the track.

The defendants offered to prove, by Mr. Dunham, of Plainfield, that the railroad passes through a street in that village; and that since its construction, building lots fronting on the railroad have been sold, and dwelling houses erected on them,

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and that the lots *for building lots* had been enhanced in value. Objections were raised by the plaintiff to that offer, and were sustained by the justice.

I have not been able to discover wherein that testimony would have been incompetent, although its introduction might have prolonged the trial. If the witnesses of the plaintiff had supposed that a railroad must, of *necessity*, diminish the intrinsic value of unimproved lots in certain positions, it was competent for the defendants to prove results, and to show, from experience in other places, that lots similarly located with those of the plaintiff with reference to a railroad, had not been injured by it, and that persons, from choice, had bought and erected buildings upon lots situate nearer to the track of the road than many of the plaintiff's lots, that are claimed to be injured, are situated.

The matters offered to be established were facts pertinent to the issue, upon which the jury could profitably have applied their own common sense and discernment.

Upon the whole view of the case, I am persuaded that the rule to show cause ought to be made absolute.

Justice CARPENTER concurred in discharging the rule, on the ground that the judge before whom the trial was had was satisfied that justice had been done by the verdict.

WEART v. HOAGLAND'S ADMINISTRATOR.

1. Under the common counts, if services rendered and goods furnished have been proved sufficient to raise an implied assumpsit, a special agreement may be given in evidence to fix the price stipulated; but such price must be in money, and such evidence cannot be admitted under the common counts where the contract was for payment in any thing else, as by a bond or note of a third party.

2. A special contract to give a certain sum or a specific article for uncertain services, which may greatly exceed or fall short of the value of the consideration, cannot be given in evidence under a *quantum meruit* count, which claims to recover according to the value.

3. Where a contract has been declared void by a decree in chancery, between the same parties, it cannot be given in evidence in a suit at law.

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This matter came up on a rule to show cause why the verdict rendered for the plaintiff should not be set aside, and a new trial granted.

Argued by *Hamilton* and *Vroom*, for the rule, and by *Field* against it, before the CHIEF JUSTICE and Justices NEVIUS and OGDEN.

NEVIUS, J. This is an action on the case, brought by the plaintiff to recover from the defendants, administrators of Betsey Hoagland, for board, nursing, attendance, and necessaries found and provided by her for the deceased, during the latter part of her life. The declaration contains only the common counts. The verdict was for $1250, which the defendants insist is exorbitant and excessive, and was produced by the admission of illegal evidence at the trial and the misdirection of the judge in his charge to the jury. The case furnished us shows that the deceased was an aged and infirm widow, and came to reside with the plaintiff on the 27th of October, 1842, and continued to live with her until the 22d of July, 1844, when she died. During that period, she was provided with all necessary board, nursing, and attendance by the plaintiff, which, according to the highest estimate of any of the witnesses, did not exceed in value $500. At the trial, the plaintiff offered to prove, and was permitted to prove, notwithstanding objection made, "that at the time the deceased came to reside with her, she (deceased) had a claim against her step-son, on account of her dower right, amounting to $1700, which had been secured by a promissory note, which had been lost or stolen, and about the payment of which some difficulty had arisen; that shortly after this, the deceased proposed to the plaintiff to give her that claim in full compensation for her maintenance and support, and nursing and attendance, as long as she lived; that subsequently this claim was adjusted by a bond, given by one Isaac Rowe to the deceased, for $1500, and that the deceased then offered to the plaintiff to give her this bond in consideration of such maintenance and attendance during her life, and that the plaintiff had agreed to accept, and did accept, such offer.

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The plaintiff further offered to prove, and by permission of the court did prove, that the said bond of Rowe came to the hands of the plaintiff after the decease of the testatrix; but, on a bill of interpleader, filed by the obligor of said bond, she was decreed to deliver up the same to the defendants, as administrators, to be by them disposed of in due course of administration.

The reasons urged in support of a new trial are—that, under the pleadings in the cause, the foregoing evidence ought not to have been admitted, and that the court erred in charging the jury, "that they might take it into consideration with the other evidence, to enable them to say how much the plaintiff merited for her services."

I think the court erred in admitting the evidence of the special contract under the general *indebitatus assumpsit* counts, and also in its instructions to the jury, as to the effect of the evidence. I admit the general principle, that where the terms of a special contract have been fully performed by one of the parties, a duty is raised, for which *indebitatus assumpsit* will lie, (4 *Cow.* 566) and that the plaintiff may avail himself of an agreement not under seal to ascertain the measure of damages he is entitled to recover, (7 *Wend.* 109) and that, in certain cases, it is not necessary to declare on the special contract, but the stipulated price under such contract may be recovered under a *quantum meruit* count. 7 *Cranch.* 303; 1 *Wil.* 117; 4 *Bos. & Pul.* 351. But in all these cases the price stipulated to be paid by the contract must be in money, and not in any other thing. If it be in any thing else, as a chattel or chose in action, the remedy is upon the special contract, for the damages in such case would be the value of the consideration withheld, and that value would be the material issue raised, and tried without being fairly presented by the pleadings. The case before us is not, therefore, within these acknowledged and well settled rules. The first special contract proved was, that the plaintiff should have for her services, board, and attendance, furnished to the deceased, the debt or claim which the latter held against her son-in-law, the principal evidence of which, *to wit*, the note, was lost. This claim,

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therefore, and for many other reasons, may have been of very uncertain value; it may have been worthless, or it may have been worth the nominal amount. This claim being afterwards secured by the bond of Rowe, the contract seems to have been changed, and this bond became the consideration of the services to be rendered. This did not change the character or the legal aspect of the first special contract, for the bond of Rowe might have been of as uncertain and doubtful value as the original claim against the son-in-law. The special contract offered in evidence, if valid in its inception, remained in force when the suit was brought; it had never been rescinded by the testatrix in her lifetime, by a refusal on her part to perform it, for, by its very terms, it was to be executed after her death by her representatives, and on the full performance by the plaintiff of her part. It is not such a contract as could legally be given in evidence in support of an *indebitatus assumpsit*, either for the purpose of ascertaining the quantum of damages or for any other purpose, and if the plaintiff intended to avail herself of the benefit of it, she should have declared upon it as a subsisting contract. Again, if this contract was lawful evidence, it was conclusive as to the amount of damages to be awarded, and all other evidence, as to the value of the services rendered, was unnecessary and improper. 7 *Wend.* 109. Another and fatal objection to the admission of the evidence is, that it is not adapted to the *quantum meruit* count, which claims a return according to the true worth of the services rendered. This contract was speculative: the testatrix might have died the day after it was made, and in that case, if the bond was worth its face, it would have greatly exceeded the value of the services, and the plaintiff's right to recover would rest wholly on the contract; or she might have lived twenty years, and in that case the defendants might have set up the contract as a defence in an action on a *quantum meruit*. I deem it unnecessary to advert to the decree in chancery, further than to remark, that if by that decree this special contract was declared void, then it was clearly improperly received in evidence. If such was not the object of the decree, then the evidence was unlawfully received, according

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to the premises above stated. I think the verdict ought to be set aside, and a new trial granted; but am willing that the plaintiff should have liberty to amend her declaration, by adding a count on the special contract, on paying the cost of such amendment.

The CHIEF JUSTICE and Justice OGDEN concurred in setting aside the verdict.

Rule absolute.

MOREHOUSE v. COTHEAL.

1. When a sheriff's deed is offered by a party to sustain his own title, it must be supported by proof of the judgment and execution under which it was given; but this is not requisite when it is offered to show under what title the adverse party claims the property: he cannot deny the authority of the sheriff to give the deed under which he claims.

2. What will constitute waste, will, in some measure, depend upon the situation and custom of the country and the course of husbandry. But the mere destruction or sale of timber not for the immediate purpose of reparation is always waste, and repairs done at another time cannot be recouped against it or justify it.

3. In an action of waste, a verdict of guilty, as to one part, is substantially a verdict of not guilty as to the residue. And the court will so record or amend the *postea* as to legalize and give effect to the verdict.

4. It is not necessary in a verdict of guilty in waste to describe the place wasted by metes and bounds, a general designation of it is sufficient.

This was an action of waste, tried at the last Middlesex Circuit, upon the general issue *nul waste*. The verdict, as returned on the *postea*, was, "that the said defendant, D. C., did make waste, sale, and destruction in woods and lands, that is to say, in taking twenty cords of wood from spring hollow, and five cords of wood from sugarloaf hill, and oaks, chesnuts, pines, and other trees from the premises adjoining spring hollow, and dispersely standing around the clay pit upon the said premises, in quantity equal to fourteen and a half cords of wood, in manner and form as the said plaintiffs have by their declaration supposed, and they, together, assess the damages of the said plaintiffs, by reason thereof, at the sum of

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$89: and as to the other waste charged in the said declaration, the jurors aforesaid, upon their oath say, the said defendant, D. C., made no waste, sale, and destruction, as the said plaintiffs in their said pleading have alleged."

At the coming in of the *postea*, Mr. *Leupp*, for the defendant, asked for a rule to show cause why the verdict should not be set aside. He urged that the verdict did not sufficiently specify the locality upon which the waste was committed, so as to authorize a judgment of forfeiture. That the verdict, as actually delivered by the jury, (though otherwise returned upon the *postea*) made no mention of the residue of the waste charged in the declaration, the defendant being found guilty only in part. He urged that the verdict was, therefore, insufficient. Another point taken was, that a sheriff's deed was read by the plaintiffs, in order to show the defendant's title, without first offering in evidence the decree upon which it was founded. Also, that the defendant, on the trial, was not permitted to prove that improvements, greater in value than the waste charged, had been placed by the tenants upon the premises.

He cited *Green* v. *Cole*, 2 *Saund.* 228; *Ib.* 238, *note* 5; *Ib.* 250, *note* 6; 5 *Pick.* 191; 5 *Mason* 13; *Bac. Abr. Waste* (*M.* 7).

Blydenburgh, (of N. Y.) contra.

Carpenter, J. Undoubtedly, in order to deduce title under a sheriff's deed, the judgment and execution must also be produced, so as to show the authority of the officer to sell. But in this case the plaintiffs did not offer the deed in order to establish their own title. It was offered to show how the defendant held, for which purpose it was competent. The defendant has entered under the deed of the sheriff, and it does not lie in his mouth to deny his authority to sell.

It was urged that the verdict ought not to stand, because the acts of the defendant did not amount to waste. But I do not see how, upon this point, any question can be raised as to the propriety of the verdict. It is quite true that the law of waste is not held in this country precisely in the same manner

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as in England, but, to some extent, is accommodated to our peculiar circumstances and condition. Thus regard has been had to the condition of the land and to the object of felling trees, and whether good husbandry and the situation of the property required that the land should be cleared and reduced to tillage. So as to other circumstances which conform to the situation and known practice of the country. What is conformable to such usage, and not prejudicial to the inheritance, has been held not to be waste. *Pynchon* v. *Stearns*, 11 *Metc.* 305.

But the cutting, in the present instance, does not come within any of the special circumstances to which I have alluded. The defendant did not attempt to show that the timber had been cut for any justifiable purpose connected with the use of the property, as for the reparation of the premises. Nor did he show that it had been cut and sold for the benefit of the property, as for the purpose of raising money in order to repair, and that the proceeds had been so applied. *Loomis* v. *Wilbur*, 5 *Mason* 13, a case cited, goes to this extent; but, without expressing any opinion as to the correctness of the doctrine, the defendant does not bring himself within it. This case is one of mere destruction and sale of timber, and nothing is shown by which it could be excused or justified. The offer of evidence, as to improvements made by the tenants, had no connection with the cutting of the timber, and was properly rejected. The defendant had no right to *recoupe* for improvements which he might at some time have made.

It was said that the verdict, as rendered by the jury, found the defendant guilty only as to part of the waste charged in the declaration, and did not acquit him as to the residue. 2 *Saund.* 250, *note.* Supposing the formal acquittal, as to the residue, to be essential, yet the verdict, as returned on the *postea*, is entirely regular, in this respect, and in accordance with the precedents. If the jury, in delivering their verdict, found the defendant guilty in part only, specifying the particular waste so found, it was equivalent to an acquittal as to the residue. The intention of the jury was plain, the verdict was sufficient in substance, and the judge did entirely right in

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permitting the verdict to be entered upon the *postea* in the proper form. Verdicts are to be favorably construed, and the court will set them right as to mere form, when the intention of the jury is manifest. *Hawks* v. *Crofton*, 2 *Burr.* 698; *Thompson* v. *Button*, 14 *John.* 86; *Foster* v. *Jackson*, *Hob.* 54.

This is a clear case, and had not the entry been already made in due form, the court, if necessary, would even now permit an amendment. The cases cited, when the verdict did not comprehend the whole issue or issues, have no application.

It seems the verdict must expressly find the place wasted, or no judgment can be entered. *Redfern* v. *Smith*, 2 *Bing.* 292.

The exception here taken is, that the verdict does not sufficiently specify the place wasted, and that, therefore, there can be no judgment, but that the case should again go down for trial. In the nature of the case, however, I do not see how the designation, by the jurors, of the place wasted can be much more specific. Unless the waste be *sparsim*, dispersed over the whole tract, only those portions of the tract actually wasted are forfeited. In such case the extent of the portions wasted cannot be ascertained by mere designation by name, since the whole tract to which the name will apply is not wasted; nor the boundaries and measurement, for the place wasted is to be found by the view of the jury. Any great exactness as to the place wasted cannot, therefore, ordinarily be attained by the jury, in rendering their verdict. I suppose a designation, as in the present instance, of each place wasted must be sufficient, and that the plaintiffs, in executing their writ of seisin, as in the case of the writ of *hab. fac. poss.* in ejectment, will execute it at their peril.

The rule is refused.

Justice Nevius concurred.

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FIELD AND FIELD v. RUNK.

1. G. and R., each owning a crop of corn in severalty, commenced negotiating with a miller for the sale of their crops jointly. At a subsequent time G., alone, completed the bargain for the sale of both crops, which R., by subsequent admissions to third persons recognised; this is a joint bargain, and this proof will sustain a count on a joint bargain.

2. If corn be sold at a mill to the miller, to be delivered at a certain time, and is in part delivered at the mill, this is sufficient to authorize the jury to infer that the delivery was to be at the buyer's mill, although there be no express proof of any place of delivery being mentioned.

3. When a joint contract is proved by two parties, to sell and deliver corn owned by them in severalty, and one of them delivers part of his parcel, this is a sufficient part delivery to comply with the statute of frauds.

On writ of error to Somerset Circuit Court.

This case was argued, by *Ransom* and *G. H. Brown*, for plaintiffs in error, and *Vroom*, for defendant in error, before the CHIEF JUSTICE and Justices NEVIUS and OGDEN.

The facts of the case distinctly appear in the opinion of the court, delivered by Justice NEVIUS, in which the CHIEF JUSTICE and Justice OGDEN concurred.

NEVIUS, J. The defendant in error brought this action in the court below against the plaintiffs in error, for a breach of contract, in not delivering a quantity of corn sold by them. The declaration contains two counts. The first charges that the defendants, on or about the 20th January, 1847, sold to the plaintiff 800 bushels of white corn, at 62½ cents per bushel, and 120 bushels of yellow corn, at 60 cents per bushel, to be delivered at the plaintiff's mills in the month of March following, to be paid for on delivery; and which the plaintiff agreed to accept and receive, and pay for, when delivered, at the prices aforesaid. That the defendants neglected and refused to deliver, &c., although he, the plaintiff, was ready and willing to receive and pay for, &c.

The second count charges the like contract, but for 800 bushels of white corn only, and damages are claimed for the breach of these contracts.

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The first error assigned for the reversal of the judgment, which was for the plaintiff below, is that the contract proved did not correspond with that laid in the declaration, and the variance is said to consist in this, that the proof on the trial did not show either the time or place when and where the corn was to be delivered, nor did it establish a joint contract by the defendants, as set forth in the declaration. It was upon this ground that a motion was made, on the trial, to nonsuit the plaintiff, which was overruled, and a bill of exceptions prayed and sealed. To determine whether this error is sustained by the facts, it becomes necessary to examine the evidence given on the part of the plaintiff with some particularity. And the first and most important question is, did the plaintiff prove a joint contract by the defendants? George Runk, the first witness, testified that the plaintiff was a miller, engaged in the business of buying grain, and manufacturing it into flour, at his mills at Branchburg, in Somerset county. That, on the 15th of January, 1847, the defendants came together to the plaintiff's mills, and said they wanted to engage to him their corn, *to wit*, 800 bushels of white, and 120 bushels of yellow corn, for 62½ cents for the former, and 60 cents for the latter, per bushel. The plaintiff offered them their price, if they would keep it till March, and deliver it then. This they declined doing, and the parties then separated without making any contract. He further testifies, that, on the 21st of January, Richard Field again came to the plaintiff's mills, and the plaintiff asked him if he had heard what he, the plaintiff, and Gabriel, the other defendent, had done the day before. He answered he had. The plaintiff thereupon produced his mill book, and read to him the following entry or memorandum: "January 20, 1847, bought of Gabriel Field and Richard Field his father 800 bushels white flour corn, at 62½ cents per bushel, to be delivered in the month of March next." Richard then said that Gabriel had told him he had also engaged 120 bushels of yellow corn, at 60 cents a bushel. The plaintiff replied that he did, but he had forgotten to enter it. He then added to the foregoing memorandum the words "and 120 bushels of yellow corn, at 60 cents per bushel," and read again the whole

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entry as amended, and Richard said that was right, he had ordered Gabriel to do so, and to engage his corn with his own. The plaintiff then, at the instance of the defendant, Richard, agreed to permit *them* to bring in the yellow corn when it suited them, and accordingly 98 bushels were delivered, on the last of January or first of February, at the plaintiff's mills, for which the money was paid on delivery.

Another witness testified that, on the 4th of March, 1847, the defendant, Gabriel, told him he had engaged his corn to the plaintiff, but was not going to take it; that he had also engaged his father's, or that his father had engaged his own; both were engaged. He said he would not take the price for it at which it had been engaged; that it was a verbal bargain, and would not stand law; that he had signed no writing, but believed the plaintiff *had booked it*. Other witnesses, as appears by the bill of exceptions, testified to a recognition of a contract, by both the defendants, with the plaintiff for the sale and delivery of corn; but I deem it unimportant to recite their testimony, as it is merely corroborative of that already referred to.

Upon this evidence two questions are very distinctly presented:

1st. Does it prove any contract at all, for the sale and delivery of corn between the plaintiff and either or both of the defendants? And

2d. If there was a contract, was it a joint or several contract by the defendants?

To the first of these questions, it seems to me, but one answer can be given, and that is in the affirmative. We have, in the testimony above recited, a clear acknowledgment, by each of the defendants, that there was a sale to the plaintiff of 920 bushels of corn, to be delivered in March, at a stipulated price. The defendant, Gabriel, said he had engaged his corn to the plaintiff, and also his father's, but would not take the price at which it was engaged, that the bargain was verbal, and not binding. Richard said he had told G. to engage it. Both defendants recognised a verbal contract. Was it a joint contract by them? or was the evidence sufficient to warrant the jury

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in finding it a joint contract? I think these questions must also be answered in the affirmative. The plaintiff made an entry in his mill book, kept for that purpose, on the 20th of January, which, although not signed by the parties, and therefore not of itself binding upon the defendants, yet it contains all other requisites to constitute a valid contract and a joint contract. "Bought of G. F. and R. F. 800 bushels of corn, to be delivered, &c., at 62½ cents, and 120 bushels at 60 cents." Here is a memorandum of a contract of purchase of corn, from both defendants, at a stipulated price, to be delivered at a stated time. The parties, the subject matter, and the terms and conditions, are there expressed. Was there, in truth, such a contract made? Richard Field, the day after, and when the entry was completed by adding the 120 bushels of yellow corn, said it was right; that he had ordered Gabriel to do so, and that Gabriel had informed him that he had made such contract. Gabriel told another witness that he had engaged his corn, and also his father's, but did not mean to take it at the price at which it was engaged; that although the contract had been entered in the plaintiff's books, it was not signed, and therefore not binding. Here we have, then, both defendants acknowledging the contract, as expressed in the memorandum contained in the mill book. Upon this evidence, I think the jury warranted in finding a contract, and a joint contract, by the defendants. Although it appeared in evidence that part of the corn was the property of one, and the other part the property of the other, yet the contract was entire and for the entire quantity, and not for part from one and part from the other. The language of the defendants to the plaintiff, on the 15th of January, was, "We have 920 bushels; we want to engage it; we want such a price; we have more, but will not engage more at present." The defendants were then acting together, negotiating as partners and joint owners, and attempting to sell the whole together. This explained their acts and declarations subsequently made, and when the contract was finally closed. The fact, that they owned the corn in separate quantities, does not vary the case; they had a perfect right to make a joint contract with a third party for the whole, and I think

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the plaintiff proved that they did make such contract. If there was no joint contract, there was none at all, and this can hardly be pretended.

The next ground of variance, it is said, is in the time of delivery. It is insisted that the time proved is not the time laid in the declaration. According to the memorandum in the book, the delivery was to be in March, and so the declaration alleges. Although the time for the delivery of the yellow corn is not fixed by direct and express words, yet, by fair construction, it was to be at the same time that the white corn was to be delivered: "800 bushels of white corn to be delivered in March, also 120 of yellow corn." When to be delivered? Surely at the same time. But it is said that the latter was actually delivered in February. Be it so, the parties had a right, by mutual agreement, to change the time of delivery, and if they did so, either as to the whole or part, it would not avoid the contract. If the contract was joint, as has, I think, been shown, the agreement of one of the defendants to deliver a part, and actually delivering a part before March, was binding on both, as it may be esteemed the act of both. And as the suit was brought not for that which had been delivered, but for what had not been delivered, I think the time properly stated in the declaration, and proved as laid.

Again, it is alleged that there was no proof that the delivery was to be made at the plaintiff's mills, as stated in the declaration. There is, indeed, no direct proof that the corn was to be delivered there; but the facts proved abundantly show that such must have been, and in truth was, the understanding of the parties. The plaintiff was a miller; his business was to buy grain, and manufacture it at his mills; the bargain was made there; it was there that grain bought by the plaintiff was usually delivered, and weighed or measured; a part of the grain bargained for was actually delivered there by one of the defendants; and the other defendant, when he had resolved to violate the contract, declared he would not *take* it. Take it where? Why, by fair inference, where he had already taken the 98 bushels—to the plaintiff's mills. There can be no reasonable doubt as to the place of delivery contemplated by the

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parties to this contract, and, therefore, no demand was necessary, after the expiration of the time fixed for the delivery and before suit brought. If, then, the jury were warranted in finding that the contract was joint, as I think they were, it remains to inquire whether it is a valid and legal contract, and can be enforced in a court of law. The defendants contend that it is void by the statute of frauds, because there was no memorandum of it signed by the parties, nor any part of the goods accepted and received by the buyer, nor any thing given in earnest to bind the bargain, or in part payment.

The fifteenth section of the statute provides "that no contract for the sale of goods for the price of $30 and upwards shall be allowed good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the bargain be made, and signed by the parties to be charged, &c."

In this case there was no note or memorandum in writing signed by the parties; there was nothing given in earnest to bind the bargain, or in part payment. We are, therefore, to inquire whether any part of the property sold was actually accepted and received by the plaintiff, who was the buyer, so as to take the case out of the operation of the statute.

The case shows that, shortly after the contract was entered into, a part of the corn sold, *to wit*, 98 bushels, was delivered by the defendants below, and actually accepted and received by the plaintiff, and a part of the whole purchase money or price paid by him upon such delivery. But it is objected that this was not done at the time the contract was made; and, as it was void in its inception, such delivery afterwards did not render it valid for the whole quantity of 920 bushels. The answer to this objection is, that the quantity delivered was in pursuance of, and in direct reference to the contract, and was in itself a reaffirmance of the contract by the defendants. It can make no difference whether the delivery, acceptance, and receipt were a few hours or a few days after the bargain and sale, if made in pursuance of such sale. A parol sale of goods exceeding $30 in value is good, though no part was accepted

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and actually received by the vendee until a few hours after the sale. *Davis* v. *Moore*, 1 *Shepley* 424; *Peck* v. *Hall*, 2 *Pick.* 206.

I think the contract a legal and valid one, and that the judgment below ought to be affirmed.

Judgment affirmed.

VAN WAGENEN ET AL. v. COE.

1. The officer who makes the order to hold a debtor to bail on the ground of fraud, is the exclusive judge of the weight of the evidence, and this court will not review or set aside his order upon the weight of evidence; but when there was no evidence before him of any legal fraud they will review it.

2. Fraudulent conduct in a debtor, in inducing his creditors to accept a worthless security from him for a former debt, is such fraud in contracting this last debt as will authorize an order that he be held to bail.

W. Pennington, for the defendant, moved to quash the *capias ad respondendum* issued in this case, or to discharge the defendant on common bail, on the ground that the affidavits upon which the order for bail had been granted were insufficient. Cited *Rev. Stat.* 321; *Spenc.* 364, 476, 648, 656.

A. B. Woodruff, contra.

Carpenter, J. The defendant was held to bail upon an order made under the act respecting imprisonment for debt in cases of fraud. The order, to which no exception has been made, seems to be regular, and the motion to set it aside and to quash the writ, is founded on the alleged insufficiency of the affidavits. Now, as to the proof of fraud necessary to support this order, we can review only its legality and applicability: its weight and credibility rested entirely with the officer by whom it was made. It is not now a question whether the proof was satisfactory, but whether there was any evidence from which fraud could be inferred. If there was any such evidence the order must stand.

No pretence of fraud in the creation of the debt appears

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upon the face of the affidavits. If there was any fraud, it must be found in the subsequent conduct of the debtor.

The affidavits, in substance, disclose that the defendant, being indebted to the plaintiff, on the 23d April, 1846, in the sum of $822.87 procured time, by inducing the plaintiffs to take a bond conditioned for the payment of that sum at a future period, to be secured by a mortgage on a farm of the defendant; that the plaintiffs were induced to accept this security upon the representations of the defendant, made at the time; that there was no prior lien, except a mortgage called the Terhune mortgage, and the defendant engaging punctually to make certain specified payments towards the discharge of the debt.

That the bond not being paid, the plaintiffs proceeded to foreclose their mortgage; and that one Mary Hopper, the mother-in-law of the defendant, then set up a prior mortgage, though unregistered, by which the plaintiffs' security was defeated, or rather to which it was postponed (as the affidavits allege), upon the false testimony of the defendant, that he had given the plaintiffs, or one of them, at the time of taking their mortgage, notice of the said prior lien, a notice fully denied in these affidavits; that, in consequence of the delay, the defendant has for a long time enjoyed the use and profits of the farm, and that the plaintiffs' mortgage has been thus rendered unavailing; that subsequently the defendant promised to pay the debt to the plaintiffs, if they would relinquish the costs; that the plaintiffs assented to this proposition, and offered to receive their debt without the costs, and discharge the defendant, yet that the defendant has neglected and refused to fulfil the offer so made by him; that the defendant has since then made sale of his personal property, with the declared intention of removing to California; that he has refused, after request, and without reason given for his refusal, to apply any part of the proceeds to the satisfaction of the debt of the plaintiffs, and the plaintiffs, as well as their attorney and solicitor, swear that they verily believe he intends to remove his property from this state, with the intention to defraud his creditors.

It will be perceived from this summary of the contents of

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the affidavits, which upon this motion must be taken as true, that the case goes much farther than mere proof of a public sale of property, with the avowed purpose of removing with the proceeds from the state. Bad faith in procuring time for payment of the debt, by inducing the plaintiffs to accept a worthless mortgage, is sworn to. All the circumstances together, we think, form such a case as might well leave room for the inference of fraud, and make it improper for us to interfere with the legal discretion of the judge who signed the order. There was some evidence from which fraud might be inferred: as evidence having been satisfactory to him, we will not undertake to review its weight or credibility.

NEVIUS, J., concurred.

Motion refused.

HUNT v. ALLEN.

1. In debt on bail bond it is not necessary that the declaration should aver that the writ on which the defendant was arrested was issued on an affidavit of debt, and endorsed with the sum sworn to.

2. The affidavit is part of the process to bring the defendant into court, any irregularity in regard to which must be taken advantage of in the first instance: it is, therefore, not a good plea in an action on the bail bond, that no affidavit of the cause of action had been made and filed before issuing the *capias* in the original suit.

3. The assignee of the sheriff may bring suit on the bail bond in his own name: it is not necessary that he should be styled assignee in the writ.

4. Judgment in this action must be entered for the penalty of the bond, but the court gave time to permit such clerical error, in making up the record, to be amended.

Error to Salem Circuit Court.

Allen, the plaintiff below, brought an action of debt upon a bail bond against Hiles and others, Hunt, one of the defendants, being one of the sureties upon said bond. The defendants pleaded, that no affidavit of the cause of action had been made and filed before the issuing of the *capias* in the original suit against the defendants in that suit, &c.

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The plaintiff below demurred to this plea: the demurrer was sustained, and judgment below entered for the plaintiff. Hunt, one of the bail, having obtained a rule for that purpose, brought a writ of error.

Argued before Justices NEVIUS, CARPENTER, and RANDOLPH. *Eakin*, for plaintiff in error, *Allen*, pro se, contra.

CARPENTER, J., delivered the opinion of the court.

In *Whiskard* v. *Wilder*, 1 *Burr.* 330, it was held, on demurrer, that it was not necessary in the declaration to aver that an affidavit had been made of the sum due, nor that the sum sworn to was endorsed on the writ. It was further held, in the same case, that the bond was not void for want of such affidavit, whatever might be the consequence of such omission to the sheriff or plaintiff. Lord Mansfield said, that, on reading the act, (12 *Geo.* 1*) it did not appear to be an essential requisite to the validity of the bail bond, nor in the nature of a condition precedent to it; but, on the contrary, the statute appeared to be only directory to the sheriff, so that though the sheriff himself might be answerable for such omission, yet the bond was not void. The other justices concurred in these remarks, Mr. Justice Foster saying, that if in fact there was no affidavit, the defendant might have been relieved in a much easier method by applying to be discharged upon common bail. Of course the application referred to must have been made in the original action. This decision is directly in point, as to an objection raised to the form of the declaration, and has been repeatedly recognised. See *Sharp* v. *Abbey*, 5 *Bing.* 193; 1 *Har. Dig.* 598 (*Phil.* 1846) and cases cited.

The rule established in *Whiskard* v. *Wilder* seems to be the obvious result of this principle, that the affidavit to hold to bail is a part of the process to bring the defendant into court, any irregularity in regard to which must be taken advantage of in the first instance, and is waived by subsequent proceedings. In *D'Argent* v. *Vivant*, 1 *East.* 330, the court said, that the affidavit to hold to bail was only process to bring the party in, and if he choose to waive any objection to that,

* *V. N. J. Rev. Stat.* 950.

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he might do it; and that in that case he had done it, by omitting to raise a valid objection in due season.

It has been supposed that a doubt was thrown over the case cited from *Burrows*, by a remark of Sir James Mansfield, in *Hill* v. *Heale*, 5 *B. & P.* 202. He said he had difficulty as to the statute being merely directory, and thought that the sheriff could not justify, unless his writ was duly endorsed for bail with the sum sworn to. In most cases process regular on its face will be a sufficient protection to the officer, and defensively he may justify under such process, issued by a court of competent jurisdiction, without being obliged to show the foundation of the writ or the regularity of the previous proceedings. But, for the protection of the officer, it must be fair on its face. The remark of Sir J. Mansfield is, therefore, not inconsistent with the decision in *Whiskard* v. *Wilder;* and it may be admitted that the writ must be duly endorsed, in order to enable the sheriff to justify, without disturbing any thing in the case cited from *Burrows.*

In *Mills* v. *Bond*, 1 *Str.* 399, the original process was void, (not voidable merely) and the court, therefore, held that no action could be maintained on a bail bond taken under such process. But, as it seems clear, both upon principle and authority, that the want of an affidavit does not avoid process, and is simply an irregularity, it follows that the irregularity must be taken advantage of in the original action, and is waived by subsequent proceedings being taken without objection; of consequence the plea is not good in any form in this action.

It is true the plea is found among the precedents in *Chitty*, and perhaps in other collections, but its validity has been much questioned. In *Hume* v. *Liversedge*, 1 *Crompt. & Mees.* 332, 3 *Tyrwh.* 257, it was held that a plea, that no *proper* affidavit, &c., was bad on special demurrer. In *Knowles* v. *Stevens*, 1 *C. M. & R.* 26, 4 *Tyrwh.* 1016, the same court (exchequer) went a step farther, and held that the plea, that no affidavit of debt had been *filed*, was insufficient. The court said, intimating that the validity of the plea was an open question, that if the question debated, as to the fact of there being no affidavit

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filed, was intended to be fairly raised, it should have been by pleading that no affidavit was made, as the omission, by inadvertence, to file the affidavit would certainly not vitiate the arrest. The plea is bad upon the authority of that case, as held in the court below; but the statute requires the affidavit to be made *and* filed, and the case cited, as it seems to us, is only to be supported by the broader position already presented. We think the want of an affidavit cannot be raised as a defence to this action in any shape.

Again, looking to the previous pleading, it is objected that the declaration does not show the suit to be by the plaintiff below, *as assignee* of the sheriff; that the delegated power to sue, conferred by the statute, should appear by these words. But it does so appear on the face of the declaration. The objection, however, really is, that the plaintiff is not styled assignee in the writ, and the writ so recited in the declaration: so understood, there is nothing in it. The statute expressly authorizes the plaintiff, on taking an assignment of a bail bond, to bring suit in his own name. *Rev. Stat.* 838, § 16.

The other alleged errors are merely formal. They go to the form of record merely. The first is, that the judgment is irregularly entered, and that it is not entered for the penalty of the bond according to the statute, no sum being mentioned. The entry is certainly equivocal, no sum being mentioned, it being merely that the plaintiff recover "his said debt, and also *(blank)* for his damages, as well on occasion," &c. But, admitting the entry to be erroneous, the court is reluctant to reverse for such clerical mistake. Upon a similar objection, C. J. Kirkpatrick, for the court, said the judgment was erroneous, it should have been entered for the penalty; but he said, were it the only objection, they would be disposed to suspend judgment until an amendment could be made by the court to which the writ of error was directed. *Webb* v. *Fish*, 1 *South.* 374. The court will suspend judgment in this case until an amendment can be made by the court below.*

The omission to enter any judgment for costs below is no

* See *De Tastet* v. *Rucker*, 3 *B. & B.* 65, where the Court of Errors gave the defendant leave to amend the transcript.

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cause for reversal. The cases on appeal from justices' courts, of which so many have been cited by the counsel of the plaintiff in error, have no application. The result is simply, that the plaintiff, not having entered judgment for costs, cannot recover costs below.

It is proper to add, that the record is exceedingly awkward and ill drawn, encumbered by useless verbiage, and defective in that important part, the *consideratum est* or judgment of the court. It was certainly unnecessary to record the remark of the judge, "that a writ of error cannot be allowed until final judgment;" or the agreement of counsel, that the plea of *non est factum* should be stricken out, and final judgment signed upon the demurrer. The record sent up seems to be a mere copy, by the clerk, of the pleadings filed below and of the entries in the minutes of the court, and greatly lacks the precision and neatness of a common law judgment.

When the record shall have been amended in the matter indicated, let the judgment be affirmed.

Justices NEVIUS and RANDOLPH concurred.

THE STATE v. THE MORRIS CANAL AND BANKING COMPANY.

1. It is not a defect in an indictment, that it purports to be made upon the "oaths," instead of the "oath" of the grand inquest.

2. When, by statute, the duty of building and keeping in repair a public bridge is imposed upon any person or corporation, such person or corporation is liable to indictment at the common law for neglecting such duty, and the allegation *contra formam statuti* will be applied to the statute, as creating the duty, and not as imposing the penalty.

3. Whether a provision in a charter enacting, "that when a canal *shall* cross any public road, it shall be the duty of the company to make and keep in repair good and sufficient bridges across the said canal," obliges the company to erect bridges across the canal, where crossed by public roads, laid out since its construction? *Quere.*

This was a motion to quash an indictment, found in the Passaic Oyer and Terminer, against the defendants, for not

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keeping in repair a bridge over their canal, where crossed by a public highway, in the township of Wayne, in the county of Passaic.

The indictment was removed into this court by *certiorari*, and the motion to quash was argued before Justices RANDOLPH and OGDEN.

OGDEN, J., delivered the opinion of the court.

Two principal objections were urged against the indictment:

1st. That it purports to have been made upon the oaths and affirmation of the inquest, not oath. This objection is without force.

Either expression is sufficient. 2 *Hawk.* 298.

2d. That the indictment does not show upon its face that a misdemeanor has been committed, for which the defendants are amenable.

It is stated in the indictment, that on the 1st of May, 1848, and thence to the taking of the inquisition, there was a public road in the township of Wayne, in the county of Passaic, used, &c.; that on the 1st of May aforesaid, there was, and from thence hath been, and still is, an incorporated company, by the name of "the Morris Canal and Banking Company," setting forth the date of the charter and title, and the organization under it; that under the charter, they, prior to the said 1st of May, made and constructed, and since that date have used and maintained a canal, a portion of which is in the township of Wayne; that, by the twelfth section of the charter, it was enacted, "that where the said canal shall cross any public road, it shall be the *duty* of the company, at their proper expense, to make good and sufficient bridges across the said canal, and keep the same in repair, so as to prevent any inconvenience in the use of the said road, by reason of the said canal crossing the same."

It is then stated that the canal crosses the said public road at Mead's basin, in said township; that the company there erected a bridge across the said canal, and that the said bridge, on the 1st of May aforesaid, and continually thereafter to the time of taking, &c., was, has been, and is a bad and insufficient

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bridge across the said canal, and insufficient to prevent inconvenience in the use of the said road, by reason of the said canal crossing the same, and is broken, decayed, unsafe, &c., so that the public could not pass upon the said public road as they were wont to do, to the damage and common nuisance of all persons passing and repassing upon the said public road, contrary to the form of the statute aforesaid, against the peace of the state, the government and dignity of the same.

It thus appears upon the face of the indictment, that the public road and the canal existed on the 1st day of May, 1848, in Wayne township, in the county of Passaic, and continued to exist at the finding of the grand jury; that the canal crosses the said road; that the company had heretofore erected a bridge there over the canal, and that on the day named, and from thence to the time of finding the indictment, the said bridge was bad and insufficient to prevent inconvenience in the use of the said road, &c., negativing a performance of the duty in the terms used in the section.

We are of opinion that the facts stated, together with the duty imposed upon the company by the twelfth section of the charter, exhibit an offence against the public, for which they are indictable.

It is not necessary that the charters of turnpike, canal, and railroad companies should, in terms, subject them to indictment for neglect of a positive duty enjoined upon them towards the public at large, in order to bring them within the reach of criminal proceedings. The neglect of an ascertained duty towards the public may create a nuisance, for which they may be indicted at common law.

This proceeding is of that character, and although the indictment charges, that permitting the bridge to remain in a decayed and inconvenient state, was contrary to the form of the statute aforesaid (meaning the section imposing the duty), it does not follow that the offence charged became such by virtue of the statute. It is an offence at common law, flowing from a non-observance of the obligation imposed by the statute.

There is nothing upon the face of this indictment which calls upon the court now to settle whether the duty created by the

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twelfth section of the charter extends to roads constructed *after* the erection of the canal. If the legislature intended that the burthen of constructing and maintaining bridges over the canal, upon all roads which might be laid out and across the canal after its excavation, should devolve upon the counties traversed by it, and that such erection should be adapted by them to the convenient navigation of the canal, it will be time enough to decide that important question, when a case fairly presenting itself shall arise. The practical workings of such a construction of the section might create serious embarrassment in the enjoyment and protection of the canal by the company.

We adjudge the indictment to be good, and refuse the motion to quash.

OGDEN AND McCOMB v. HARRIS.

On an application for leave to issue execution against a certificated bankrupt, on a judgment obtained before his discharge, on allegation of fraudulent preference of creditors, the court can and will, in a proper case, order an issue to try the facts.

A judgment was obtained in 1831, in this court, by the plaintiffs against the defendant. A *fi. fa.* was then issued thereupon, and returned *nulla bona.* Subsequently Harris was discharged under the United States' bankrupt act. After his discharge an execution was issued, without any order of the court, which was set aside on a rule to show cause, the plaintiffs alleging fraud in obtaining his discharge, but failing in their proof on the argument, on account of some informality in their affidavits.

A rule was after this granted, on application of the plaintiffs, that the defendant show cause why an execution should not be ordered to issue on an allegation of fraud in obtaining the bankrupt's discharge, with leave to take affidavits. These not being satisfactory, an application was made for an issue to try the fact of fraudulent preference.

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Argued before Justice RANDOLPH; *A. Gifford*, for plaintiffs, *A. C. M. Pennington*, for defendant.

RANDOLPH, J. The case and evidence impeach the discharge—1st, for being in contemplation of bankruptcy, and 2d, for fraudulent preference; either of which grounds, if sufficiently proved, would render the discharge null.

We see no difficulty in trying this matter by an issue, as is the practice of some of the states.

Let a rule be entered for an issue, &c.

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CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT APRIL TERM, 1849.

THOMPSON v. BOYD.

1. A widow is dowable of an equity of redemption, the mortgagor being considered as the legal owner, except as against the mortgagee, and those claiming under him, and the *mere assignee* of the husband is concluded from denying his seisin.

2. But she cannot claim dower at law against the mortgagee or his assigns, where the mortgage was before coverture, and the equity of redemption has been united by release or conveyance to the legal title of the mortgagee. *Semble*, the only remedy of the widow in such case is in equity on bill to redeem *pro tanto*.

3. The assignee of the mortgagee purchased the equity of redemption of the executors of the husband, who sold the land under the authority of a private act, which directed the proceeds of the sale to be first applied to the discharge of the mortgage. The conditions of sale were, that the executors would give a title to the land free of encumbrance, but the holder of the mortgage, who purchased at the auction sale, paid only the balance over the amount due on the mortgage, from which he released the executors, and insisted on retaining the mortgage as a muniment of his title. *Held*, that the mortgage was not satisfied or extinguished; that he held by virtue of the mortgage, and that the widow was not entitled to dower.

Error to Warren Circuit Court.

This was an action of dower, brought in the court below by Nancy Thompson, widow of Robert Thompson, deceased, against James Boyd. The demandant claimed dower in a farm

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of 225 acres, in said county, in the possession of the defendant. The tenant pleaded that the husband was never seized of the premises during coverture. The cause was tried in the Circuit Court, August, 1844, before Mr. Justice Nevius, when a verdict for the demandant was taken by consent, subject to the opinion of the court (after advisement with the Supreme Court), whether, upon a case stated, she was entitled to recover. If the court should be of opinion, upon the acts as stated, that she was entitled to recover, then judgment accordingly; if otherwise, then the verdict to be set aside, and judgment entered for the defendant: either party, if dissatisfied with the judgment of the court, to have liberty to turn the case into a special verdict, and to bring a writ of error.

The Circuit Court, after advisement with the Supreme Court, set aside the verdict, and gave judgment for the defendant. See 1 *Zabriskie* 58, where will be found the reasons assigned for the judgment below.

The material facts are as follows: James Thompson, the father of the demandant's husband, was owner of the premises out of which dower is claimed, and on February 17, 1817, mortgaged them to one Thomas Shields, to secure the payment of $3217. James Thompson died in 1825, leaving this mortgage unsatisfied. By his will, dated in 1823, he devised all his real estate to his two sons, Robert, the husband of the demandant, and William. A copy of the will has not been furnished with the state of the case, and its phraseology cannot be given, and it does not seem material, upon the grounds on which the case was decided. But it was said, that the premises in question were devised to them in such proportion as they should pay off the mortgage; and it was urged on one side, that, by the terms of the devise, the payment of the mortgage was a condition precedent to the vesting of the estate.

William first occupied the premises after his father's death, but paid no part of the mortgage, and on the 9th of November, 1826, released all his right therein to his brother Robert, the husband of the demandant, who then entered into possession, and subsequently made considerable payments, by way of interest, on the mortgage. Robert died January 4, 1831,

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leaving the mortgage still outstanding and unpaid. By his will, dated December 26, 1830, he directed and empowered his executors to sell certain other parts of his real estate; but this provision of the will was supposed not to include the lands in question.

The executors, entertaining doubts as to their power to sell this farm, either under the authority of the will or under an order of the Orphans' Court, applied to the legislature for the necessary power. An act was procured to be passed, which, after reciting the supposed situation of the property, enacted, in substance, as follows: That the said executors of Robert Thompson, deceased, should be authorized to sell and convey, by deed in fee simple, the lands, &c., so devised by the said James Thompson to the said Robert and William, and that their deed should vest in the purchaser as good and perfect an estate in fee simple as the said Robert was seized or possessed of at his death. The act further directed, that the executors should appropriate and apply so much of the proceeds of the sale as should be necessary for the purpose, to the extinguishment of the said mortgage, and the residue should be assets in their hands, and applied to the payment of the debts of the said Robert Thompson, deceased, as other personal assets, and should be accounted for in the same manner. *Act March* 13, 1832, *Pamph. Laws* 153.

The executors proceeded to sell under the authority of this act. The conditions of the sale, as previously announced, were, that the property should be sold clear of encumbrance, and the mortgage extinguished by the executors. The property was struck off to the defendant for $3274, the amount then due on the Shields mortgage being about $3150.

Previous to this sale, Boyd, the purchaser, had become the owner of the Shields mortgage, and of the debt which it was intended to secure, the bond and mortgage having been regularly assigned to him by Shields and the prior holders. Boyd also held, at and prior to the time of the purchase, a second mortgage, which had been given by James Thompson to Shields, upon another farm, as additional and collateral security. Upon consummating the sale by a conveyance, Boyd

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declined to deliver up and cancel his first mortgage, but declared his intention to hold it as a muniment of title. He offered to deliver up and cancel the second mortgage, and release to the executors all claim and demand upon the estate, which was accordingly done. In the release he acknowledged that he had received the sum of $3150.09, the amount due on the mortgage, and paid to them $120.16, the balance of the purchase money in cash, declaring, in the same instrument, that, with the assent of the executors, he held the said mortgage as a muniment of his title to the lands so purchased. The executors, when they settled their account with the surrogate, charged themselves with the full amount of sale, and craved and obtained an allowance for the amount due on the Shields mortgage, from which the estate had been relieved, in the mode just stated.

On the trial, the tenant relied on his title under the Shields mortgage, as a defence against the claim of the demandant.

B. Williamson and *Dayton*, for the demandant.

The will of James Thompson, after a disposition of some other property in favor of his daughter, recites the bond and mortgage, and then devises the premises in which dower is claimed to the two sons, upon a request and condition that they would discharge the mortgage. They took the property in fee simple, subject to the mortgage: the whole subsequently became vested in Robert. It is a mistake, in the preamble of the private act, that the payment was a condition precedent to the vesting of the estate; the devise was in fee, charged with the payment of the mortgage debt.

But the sale was made to convey the title of Robert Thompson, by virtue of the act, and for the express purpose of extinguishing this mortgage. The purchaser only took what the executors were authorized to sell, the right of Thompson subject to the mortgage, which, when extinguished, left the right of dower unaffected. The executors were not authorized to sell the right of dower, and they were bound to satisfy the mortgage from the proceeds. If the sale had been to another person, there could have been no question made. When the

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mortgagee is in under the mortgage, and then the equity of redemption is conveyed to him, he really holds by his mortgage. But even then it depends upon the circumstances. Here Boyd was not in possession. He got possession under the husband, and cannot, therefore, set up his mortgage. See the cases cited by Justice Randolph, 1 *Zabr.* 64. The conditions of the sale were, that the property was sold clear of the mortgage, and it brought a full price clear of the mortgage.

But this defence cannot be set up under the general plea of *ne unques seisie.* A mortgage can only be set up by special plea, as in the case of outstanding leases or encumbrances. 8 *Petersd. Abr.* 486; 2 *Saund.* 44; 3 *Powell on Mort.* 1089. The legal seisin is in the mortgagor; and when it was so settled by *Montgomery* v. *Bruere* then it became necessary to set up a mortgage by special plea. In *Ashton* v. *Florence,* an attorney of great experience, on these considerations, thought it necessary to resort to a special plea, and which will be found on the files of the Supreme Court.

[It was suggested by a member of the court, that the question, if any thing in it, was hardly open in this case; that the demandant's right to recover by the consent at the trial, was placed upon the facts stated, and not on the form of the plea.]

The counsel of the demandant examined, and questioned the case of *Woodhull* v. *Reid,* 1 *Har.* 128.

Wurts and *Vroom,* for the tenant.

The attempt is to set aside the well settled doctrine of this state, as to dower in mortgaged premises. The mortgagor is seized as against every one but the mortgagee; as against him, or any one holding under him, he is not seized, and the general plea is therefore sufficient for one standing in the position of the tenant in this action.

But Robert was never seized of any legal estate in the premises, not having performed the precedent condition of paying off the mortgage, a condition imposed for the benefit of the rest of the estate, upon which it was also an encumbrance.

The mortgagee took the land for the debt, and held it by his

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mortgage deed, the equity of redemption simply having been conveyed to him by the executors.

There is nothing in the act to prevent such an arrangement, otherwise undoubtedly in conformity with the rights of the purchaser. The only object of the direction, as to the proceeds, was to relieve the rest of the estate. But in point of fact the executors could only sell the equity of redemption. Had any other person purchased, he must have used diligence to get clear of the mortgage, and procure the performance by the executors of their collateral agreement to discharge the encumbrance. They cited *Woodhull* v. *Reid*, 1 *Har.* 128; *Hartshorne* v. *Hartshorne*, 1 *Gr. Ch. R.* 349; *Hinchman* v. *Adm'rs of Emans*, *Saxton* 100; 4 *Kent* 44, 45; *Van Dyne* v. *Thayre*, 19 *Wend.* 168; *Dexter* v. *Harris*, 2 *Mason* 529.

Carpenter, J., delivered the opinion of the court.

We have not been furnished with a copy of the will of James Thompson, but, if I rightly comprehended the statements of counsel in regard to the devise to his two sons, I suppose they took a fee simple in the premises subject to the Shields mortgage, and charged with its payment. The doubts suggested in the preamble of the act empowering the executors to sell, were but the suggestions of those who procured that act, and are not entitled to any special consideration. The conveyance or release by William to Robert vested in the latter the whole estate subject to the encumbrance. It will be assumed that Robert was seized, during coverture, of an estate in fee simple subject to the mortgage, and that the wife was dowable in the premises, unless barred by the special matter set up by the tenant.

Since the case of *Montgomery* v. *Bruere*, it has been considered as settled law in this state, that a widow is dowable of an equity of redemption, the mortgagor being considered as the legal owner, except as against the mortgagee, and those claiming under him, and the *mere assignee* of the husband by conveyance after marriage is concluded from denying this seisin. But it is otherwise in regard to the mortgagee. As against him, or those claiming under him, the law is equally

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well settled that the mortgagor is not so seized as that the widow, where the mortgage was before coverture, can claim dower. The wife's dower must yield to the superior title of the mortgagee, for (says Chancellor Kent), as against the title under the mortgage, the widow has no right of dower, and the equity of redemption is entirely subordinate to that title. 4 *Kent* 45 (*5th ed.*) As against the mortgagee there is no seisin, which seems an answer to the technical objection to the form of the plea, though that objection, in this case, is excluded by the terms of the consent upon which the verdict was taken below.

The mortgagee holding, as against the mortgagor, the legal title, subject only to the condition or equity of redemption, may unite that equitable interest to his legal title, either by foreclosure or by the voluntary release or conveyance of the mortgagor. Such union of the legal and equitable estate extinguishes, or, as the phrase is, merges the equitable in the legal estate, and the latter becomes absolute. The estate which was before a fee simple, is still the same, but it is relieved of the condition or equity with which it had been previously encumbered. If by foreclosure, the condition is gone for all purposes, and the estate is absolute in the mortgagee. If by conveyance, it is so at law, and if the widow has any right, it is only in equity to redeem *pro tanto*. In such case the mortgagee does not hold under the subsequent conveyance, but under the mortgage, and, the equity of redemption being extinguished, his title is paramount to the dower title of the wife. It is an entirely different case where, the mortgage having been discharged, the tenant can rely only on the title derived from the husband. He who claims under the husband by conveyance during coverture will hold subject to the wife's dower.

But, if such be the law, still it is urged that this case stands on special grounds, which distinguish it from the general rule. It is said that the sale by the executors was under the authority of a statute, which specially directed the proceeds of the sale to be applied to the discharge of the mortgage, and that the conditions of the sale actually were, that the conveyance should be clear of encumbrance. But we do not conceive that

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the authority so to dispose of the proceeds can affect the title of the mortgagee. The mortgage was an encumbrance upon another part of the estate, which it was desirable to relieve by this sale. The authority so to dispose of the proceeds was necessary to effectuate the object. That the property, therefore, should be sold clear of encumbrance, was properly made a condition, and which would have been important, had the sale been made to any third person. The executors could not affect, by their sale under the authority of the statute, the title of the mortgagee, and it would have been important for such third person, had he purchased, to see to it, that the collateral agreement was duly performed and the mortgage extinguished by payment. But it may have been, and probably was impossible to make a satisfactory sale to a third person, with the additional difficulty as to the widow's dower, which would intervene upon the discharge of the mortgage. In either case, whether the sale should be to the mortgagee or to a third person, the title to be conveyed by the executors was but the interest which had been held by Robert Thompson previous to his decease, and which was merely an equity of redemption. When that interest was purchased by the holder of the mortgage, the collateral agreement to discharge the mortgage became not merely immaterial and unnecessary, but inconsistent with his rights. He insisted, as he lawfully might, that he would not relinquish the estate which he already had, but that he would hold his mortgage as a muniment of title of land taken, not in payment, but in substitution for his debt. He received a conveyance of the equity of redemption, but he chose to hold his prior paramount title; and the executors assented, receiving from him a release of the bond and mortgage, in which he declared, that he so held the mortgage, and his purpose not to relinquish it. However the executors may have chosen to state their accounts, in fact he paid but $120.16 for the release of the equity (all that the executors could convey), which equity he thus extinguished by merger in his legal title.

It is difficult to see how the prior or subsequent acquisition of the legal title under the mortgage can affect the doctrine of merger, which is said to be inflexible at law. Merger is said,

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by Mr. Preston, to be the conclusion of law upon the union of two estates: merger, or in other words extinguishment, is the effect, while union is the cause. It takes place when a greater and a less estate coincide and meet in one and the same person, and an instance given is, when tenant for years obtains the fee; so when legal and equitable estates unite, the equitable must merge in the legal. But it is the union of the two estates which is described as causing this result, and which seems to owe nothing to the mere order of acquisition of those estates. There is, however, nothing in the case itself which makes it necessary to decide whether one who holds the equity of redemption by conveyance, mediate or immediate from the husband, can protect himself from dower by the *subsequent* purchase of a prior mortgage. *(a)* This question, though discussed as part of the general doctrine, is not raised by the case. The present seems to be the plain case of the equity of redemption united by purchase to the prior legal title of the mortgagee, and thus extinguished at law.

The judgment must be affirmed.

Judgment affirmed—*Ayes*, CARPENTER and OGDEN, Justices, and WALL, PORTER, SPEER, SINNICKSON, SCHENCK, and MCCARTER, Judges—8.

Nays—None.

The CHIEF JUSTICE and Justices NEVIUS and RANDOLPH did not hear the argument, and therefore expressed no opinion. The chancellor did not vote.

(a) The rule treated of in the judgment of the court is the technical application at law of the common law doctrine of merger or extinguishment, which takes place on the union of two incompatible estates in the same person. To the cases cited may be added, *Den* v. *Van Ness*, 5 *Halst.* 106; *Cooper* v. *Whitney*, 3 *Hill* 95. But the view taken by the court upon the point here mooted seems to derive some support from the rule held in courts of equity. Payment of the mortgage debt by the mortgagor must extinguish the lien, but such is not necessarily the result of payment by a purchaser of the equity of redemption. If the latter, in such case, take an assignment of bond and mortgage given before marriage, it has been held that the widow will be entitled to dower in the equity of redemption only, subject to the mortgage. *Hartshorne* v. *Hartshorne*, 1 *Gr. Ch. Rep.* 356; *Russell* v. *Austin*, 1 *Paige* 193.

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CHAMBERS v. HUNT.

1. In replevin, when defendant pleads property in himself, and traverses the allegation of property in the plaintiff, and plaintiff replies by denying property in defendant, and reaffirming it in himself, the burthen of proof lies on the plaintiff, who must show property in himself; and if plaintiff and defendant appear to be joint owners, the defendant is entitled to a verdict.

2. In such case the only issue is property in plaintiff, or not; the allegation of property in defendant is only inducement, and not traversable, but *it would seem* that, to entitle defendant to a judgment of return, the allegation of property in himself must be found for him.

3. The permission of leading questions to a witness in direct examination, is in the discretion of the court, and no ground for reversal; if improperly permitted, the remedy is a new trial. When a witness is examined by commission, the proper time to object to a question, as too leading, is on the settlement of the interrogatories, and not at the trial.

4. It is error to prove what a deceased witness testified to upon a former trial between the same parties, without proving the fact of such trial by the record; but the error is cured if such record proof be produced before the close of the evidence.

5. The fact of payment may be proved by parol, although there is written evidence, as a receipt, by which it might be proved. But when the fact of payment is attempted to be proved by the giving of a bill or order, the contents of such bill or order, or of the receipt of the party receiving the same, cannot be given in evidence without first satisfactorily accounting for the absence of the paper itself.

This cause came up from the Supreme Court by writ of error. The plaintiff had brought an action of replevin in the Supreme Court to recover a sloop, with her apparel. To a declaration in the usual form, defendant pleaded, that the sloop was the property of the defendant, and not the property of the plaintiff. Replication, that the sloop was not the property of the defendant, but of the plaintiff, and issue thereon to the country.

On the trial at the circuit, the plaintiff proved a conveyance of the sloop to him alone, by documentary title; the defendant, on his part, offered proof that plaintiff had sold one moiety of the sloop to him by parol. To this evidence the plaintiff objected, on the ground that the sale of a vessel must be in writing, and to the decision of the court, admitting the evidence, took a bill of exceptions.

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The plaintiff, on the trial, objected to the admission of the depositions of an absent witness for the defendant, taken on commission, on the ground that the interrogatories were too leading. The court admitted the evidence, to which decision plaintiff excepted.

The defendant offered evidence of what a witness, now deceased, had sworn to on a former trial between the same parties, no record of such trial being first produced. The plaintiff objected to this evidence, and excepted to the opinion of the court admitting it.

The defendant offered, as part of the proof of his parol purchase of one half of the sloop, to show payment by a bill, or order, given by him to the plaintiff, on one Mills, for $800 or $1000; and proved the contents of the order, and of the receipt of the plaintiff thereon to Mills for the amount, without accounting in any way for the absence or loss of the order and receipt. To this evidence the plaintiff objected. It was admitted by the court, and to this admission the plaintiff excepted.

The jury rendered a verdict negativing the property in the plaintiff and for damages, without finding whether the property was in the defendant or not, it at the same time appearing from the evidence, as stated in the bill of exceptions, that the sloop and her apparel were owned by the defendant and plaintiff jointly.

Upon this verdict judgment was rendered in the Supreme Court, as well for a return as for damages and costs.

S. G. Potts and *W. Halsted*, for plaintiff in error.

1. The verdict is ambiguous, and is no response to the issue; it should have met both branches of the issue.

The evidence only shows title in Hunt to one half of the vessel, and that title but a contingent interest. When the property is partly in the plaintiff the plea should be in abatement, and not in bar.

The judgment is not supported by the verdict. *Pierce* v. *Vandyke*, 6 *Hill* 613; *Rogers* v. *Arnold*, 12 *Wend.* 30; *Bemus* v. *Beekman*, 3 *Ib.* 667; *Cro. Jac.* 519; *Ib.* 611; 2 *Lev.*

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92; 6 *Mod.* 103; *Moore* v. *Shenk*, 3 *Barr.* 20; *Gilb. Repl.* 175; 4 *Taunt.* 320; 2 *Lil. Entr.* 358, 512; 1 *Saund.* 346; 1 *Str.* 507; 3 *Har.* 347, 359, &c.; 4 *Mason* 515, 538.

2. The ownership of the vessel was only proved by parol. The defendant could not so support his claim of title to the vessel, or part of it, for the title could only pass by written instrument. 3 *Kent* 130, *(5th ed.)*; 2 *B. & Cresw.* 627; 1 *Stark. R.* 175; 5 *T. R.* 709; 2 *Ib.* 462; 1 *Mason* 317; 4 *Ib.* 390, 394; *Story on Sales* 251.

3. The interrogatories were too leading, and the exceptions to them should have been sustained. 1 *Greenl. Ev.* § 434; 4 *Wend.* 247; 2 *Ib.* 71.

4. Proof of contents of written paper should not have been admitted until the loss of the paper had been proved, or notice to produce it, if in the possession of the opposite party. 1 *Greenl. Ev.* § 88; 1 *South.* 93; 2 *Cow. Phil. Ev.* 547, *note.*

5. Evidence, as to what a witness swore on a former trial, was admitted, without first producing the record of such trial.

S. R. Hamilton and *Vroom*, who argued the case for the defendant, cited *Co. Lit.* 145, *b.*; 1 *Har. & Gill* 308, 322; 1 *Salk.* 290; *Cowp.* 450; 9 *Wend.* 338; 9 *Cow.* 330; 3 *John.* 175; 12 *Wend.* 30; 21 *Ib.* 205; *Hunt* v. *Chambers*, 6 *Penn. Law Journal* 82; 3 *Wash. C. C. R.* 209; 1 *Greenl. Ev.* § 89; *Ib.* 261; 15 *John.* 298; 14 *Ib.* 201; 7 *Cow.* 334; 2 *Cow. Phil. Ev.* 547, *notes.*

Carpenter, J., delivered the opinion of the court.

This cause has heretofore been before this court, and certainly so much of the argument of the counsel of the plaintiff in error, as relates to the character of the plea of property, and to the evidence admissible under that plea, was then fully considered, and, I think, clearly settled, after a thorough examination, both by the counsel and the court. As I understand it, we then held, as clear law, that one of two joint owners, or tenants in common of personal property could not maintain replevin against the other: and further, that in such action, property being pleaded by the defendant, the affirmative of the issue joined on such plea was on the plaintiff. The affirm-

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ative being on the plaintiff, upon the principle already referred to, it followed that he must prove property in himself, absolute or qualified, to the entire chattels, or what, in reference to this plea, amounts to the same thing, a right of exclusive possession at the time of bringing the action. Whatever the plaintiff must prove in order to maintain his action, the defendant may disprove; and evidence that the defendant owned half the vessel, offered by him to rebut the plaintiff's proof having been overruled, the court for that error reversed the judgment. *Hunt* v. *Chambers*, 1 *Zab.* 620. The principles above stated, it seems to me, were clearly involved in the decision then made. I do not perceive how the testimony offered could have been held admissible on any other grounds.

The case on the former writ of error came up in this wise. On the trial below, the plaintiff had shown *prima facie* proof of ownership. He had shown that the vessel in controversy had been purchased in his name, and that a bill of sale had been executed to him by the vendor. The defendant then offered to prove that, in point of fact, the vessel had been purchased jointly by himself and the plaintiff; that he owned one half of her, and that he, the defendant, had been, from the time of the purchase until the commencement of the action, in the actual possession, with the plaintiff's assent, in the double capacity of master and joint owner. This evidence (except so much as went to show that Hunt was in possession with the plaintiff's assent, as master,) was overruled as incompetent. Upon the review, this court held this evidence to be competent under the plea to rebut the title of the plaintiff, and, it having been rejected, reversed the judgment below. The plaintiff under the issue held the affirmative, and was bound to prove his ownership of the entire chattel, or, in other words, his right of exclusive possession at the time of the commencement of the action. This proof being necessary, on his part, to maintain the action, the defendant was entitled to rebut it. Although in his plea, by way of inducement to the traverse of the plaintiff's title, he had alleged the entire property in himself, yet it was held that he might, under that plea, show that he and the plaintiff were joint owners, and thus rebut the

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right of exclusive possession set up by the plaintiff. This much, as to the character and effect of the plea, and as to the evidence admissible under it, was then clearly decided by this court. I expressed at length, on that occasion, my reasons for concurring with the court in the decision then made, and I have heard nothing which leads me to suppose we were mistaken.

Certainly there can be no doubt as to the principle, that one of two joint owners or tenants in common of personal property cannot maintain replevin against the other. The one has no more right to the exclusive use or possession of a chattel so held than the other. It is too obvious for argument, and the authorities are as clear as the reason is unquestionable.* A few cases were cited on a previous occasion, and need not be repeated.

Nor can there be any more doubt as to the second position, that upon the plea of property, the traverse of the plaintiff's title, the reaffirmance of his title by the plaintiff, and the issue there taken, the affirmative is with the plaintiff, and the burthen of proof lies on him. The whole difficulty, the mystification of a matter in itself so simple, lies in misapprehension of the nature of the plea, in supposing it to be an affirmative plea, instead of what it really is, a mere traverse or denial of a material allegation in the plaintiff's declaration. In regard to this point, there is no peculiarity in the plea, nor is the effect here given to the special traverse of the plaintiff's title any exception to the general rules of pleading. However peculiar the action of replevin may be, in some of its features, this plea, in this respect, falls within, and is to be tested by the ordinary rules applicable to all pleading. Whether any, and if any, what effect is to be given to the introductory matter of the plea, beyond that of mere inducement to the special tra-

* "If two be possessed of chattels personal in common by divers titles, &c., if the one take the whole to himself out of the possession of the other, the other hath no remedy but to take this from him who hath done to him the wrong to occupy in common, &c., when he can see his time," &c. *Litt.* § 323. So Lord Coke, in his comment on this passage: "If one tenant in common take all the chattels personal, the other hath no remedy *by action*, but he may take them again." *Co. Litt.* 200 *a*. See *Cowp.* 450; 1 *Salk.* 290.

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verse, is not now the subject of remark, but will be alluded to more particularly hereafter. By a traverse a matter is denied by one party, which has been alleged by the other, and of which he is thus put to the proof, and bound to maintain. A special traverse is when some one material allegation in the prior pleading is selected, and made the subject of distinct denial. The allegation, thus denied, becomes the matter material in the issue, and not the inducement by which, according to legal formalities, the travérse is prefaced.

The plea is not an affirmative plea, or a plea by way of confession and avoidance. It is true it puts the plaintiff to no proof in order to maintain his action, but of the very allegation selected for denial; still it does not confess any thing, and then avoid its effect by the introduction of new matter. It does not confess the allegation of property in the plaintiff, and then avoid its effect by new affirmative matter. It simply denies; and the inducement, in relation to the point which I am now considering, is merely an indirect denial, introductory to, and the foundation of the direct denial which immediately succeeds. The allegation, that the property belongs to the defendant, is mere inducement to the traverse, and issue cannot be taken on that allegation. *Brown* v. *Bissett*, 1 *Zab.* 267. The erroneous conclusions of Justice Ford, as I suppose them to be, in an opinion much relied on by the counsel of the plaintiff in error, are the consequence of the misapprehension of the learned judge on this point. (See 3 *Har.* 348.) He treats the plea, throughout the opinion referred to, as a plea of justification, confessing and avoiding the case made by the plaintiff, when, according to my judgment, it has not one characteristic of such plea: it is simply a negative, and not an affirmative plea.

The effect of a special traverse is strikingly exemplified in a case cited on a former occasion. The declaration was in case, for carelessly impinging with a ship against the plaintiff's bridge, and thereby doing damage. Plea, that the plaintiff improperly narrowed the channel by an obstruction; *without this*, that the damage was occasioned by the carelessness of the defendants. It was held that, under this plea, the defend-

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ants were entitled to give evidence in disproof of carelessness, after they had failed to establish the obstruction imputed to the plaintiff. *Cross Keys Company* v. *Rawlings*, 3 *Bing. N. Cas.* 71.

The character of the plea will be obvious, not only from the nature and effect of a special traverse, which appear from the reasons given, but from the form of the entries. The plaintiff alleges property in himself. The defendant, after a formal inducement, traverses and denies that allegation, which traverse, being material, must be met. The plaintiff is bound to accept the traverse so tendered. He must reaffirm his own title, and is then bound to maintain it by proof. But it is only necessary for him to *reaffirm his own title*, and no notice need be taken in the replication of the matter stated in the introductory part of the plea, and many precedents are so drawn. 2 *Lil. Entr.* 357, 358; *Ib.* 512; 2 *Rich. K. B.* 456; *Rastall's Entr.* 577; *Clift's Entr.* 654, &c.

Undoubtedly the response of the verdict, in the affirmative or negative of the issue so formed, will be a good answer. If for the plantiff, it will be in the affirmative, that the property was in the plaintiff. 2 *Lil. Entr.* 512. If for the defendant, it will be sufficient to enable him to go without day and in bar of damages, if it simply negative the allegation of the plaintiff. What may be necessary to enable the defendant to have a return, is another inquiry.

Much remark has been made on the point, that property in the defendant and the plaintiff must be pleaded in abatement, but it is a point that does not come in question. It seems clear that property in the defendant may be pleaded either in abatement or in bar, and the evidence applicable to such issue has been settled by the former decision.

But there is a point now presented which it was not necessary to consider on the former review, a point in some measure obscured by the labor spent by counsel on what was previously clearly settled. Exclusive property in the plaintiff, as already shown, is necessary for the maintenance of this action. If the title set up in the declaration be denied, he is put to the proof of such ownership, and, unless it be made out, he must

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fail in the action, and a verdict will go for the defendant. So far is very clear, but the point is, what must be shown by the defendant, and what must be found by the verdict to entitle the defendant to a return?

In this action, that the defendant may be in *statu quo*, he must not only show some ground upon which the writ may be quashed or the action defeated, but, also, that he ought to have a return; and for this reason it is often said, that both parties are actors in replevin. In many cases the defendant must set out his title in a formal avowry, and prove that title in order to have a return. The plea denying the caption, or confessing and avoiding it, may be *quoad* the damages only, the avowry is *pro retorno habendo.* A plea of property in the defendant, or in a stranger, disaffirms the title of the plaintiff, and, it is said, gives a return without a conusance *pro retorno habendo.* The allegation in the inducement of property in the defendant, or in a third person, seems to stand in the place of an avowry, and to serve as an avowry. Whether founded on accurate reasoning or otherwise, it is clearly established for law, that the defendant shall have a return, because, as is the reason given, he had the possession, which was illegally taken from him by the replevin, *when the plaintiff had no right.* Such plea is said to disaffirm the title of the plaintiff. *Butcher* v. *Porter*, 1 *Salk.* 94, *note; Pusgrave* v. *Saunders*, 1 *Salk.* 5; *S. C.* 6 *Mod.* 81; *Wilkinson* 48, 91; *Gilb.* 212, 213, &c.

But is such the rule when the plaintiff and defendant have equal rights, and are equally entitled to the possession of the chattel? The evidence in this action, assuming it to have been satisfactorily proved, was not that the property was in the defendant or in a stranger, but in the plaintiff and defendant; that is to say, that the plaintiff and defendant were joint owners of the chattel in controversy, and that each had an equal right to the possession. It defeats the action, for it shows that the plaintiff was not sole owner, and had not the right of exclusive possession. But will it entitle the defendant to a return, when it shows that the plaintiff has an equal right with himself to the possession? Supposing the plea to have alleged such ownership, if properly pleaded, (whether in

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abatement or in bar, it is not now necessary to inquire,) it would have defeated the action: but would it have sustained a judgment of return, when it showed on its face that each party had equal rights, and that the one had no more right to the exclusive possession than the other? It is said, in a treatise on the subject of replevin, in regard to a return without cognizance or avowry, "In order to settle this, it will be necessary to take a distinction between pleas that *disaffirm* property in the plaintiff, and pleas that admit the property in the plaintiff. As if the defendant in replevin pleads property in the beasts in himself, or in a stranger, (whether it be pleaded in abatement, or pleaded in bar of the action or by justification,) if the defendant prevails in it, he shall have return without any avowry, because if these pleas be true, they destroy all right of complaint in the plaintiff for the caption and detention; and if the plaintiff hath no right to the replevin under the present form, nor under any other, he ought to have no benefit from his unjust complaint; and therefore the court must award restitution of the beasts to the defendant, out of whose possession they were taken by the replevin. If the defendant pleads property in the plaintiff and J. S., though this plea may abate the replevin under the present form, yet by *admitting the property in the plaintiff*, it shows that the plaintiff and J. S. have a right to a replevin, though under *another form*, and consequently the defendant shall not have a return of the plaintiff's beasts, unless he shows good cause for such return, and avoids the injustice of the first caption complained of by the plaintiff." *Wilkinson* 91, 92, cites *Gilbert* 212, 213, &c., 127, (*ed.* 1792). Again, "If defendant in replevin claims property in himself, he shall have a return without a conusance, *because his plea destroys the plaintiff's title.* So if he says property in a stranger, and makes no conusance, if that matter be admitted by the plaintiff; for in that case, by the admittance, the plaintiff's property is destroyed. But in all pleas that do not show *the property out of the plaintiff* there must be a conusance made, and the plea is what only is answerable, and not the conusance, for to traverse that would be a discontinuance." *Crosse* v. *Bilson*, 6 *Mod.* 103; 19 *Vin.* 25 *n. tit.*

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"*Replevin*" (*C. a.*) The conusance which goes for the return is not traversable, "but the plaintiff must maintain the form of his own count without falling on the title of the defendant." *Gilbert* 128, (*ed.* 1792).

If the inducement to the plea serves as an avowry, it would seem to follow, that though not traversable, still that its truth must be proved in evidence and found by the verdict, not in order to defeat the action, and *quoad* the damages, but in order for a return. The point is somewhat obscure, and requires a much greater examination of the ancient entries and authorities than I have been able to make. The cause, in the view I take of another part of the case, may be settled without the decision of this question, and, though not without a strong impression on the subject, yet I pass it without any attempt to settle it on the present occasion.

It is urged, as ground of error, that the defendant below ought not to have been permitted to prove ownership of the vessel by parol merely, the plaintiff having first shown title in himself, or at least made *prima facie* proof of title by the usual documentary evidence, a bill of sale and the enrolment, on the oath of the plaintiff that he was the sole owner. Undoubtedly the proof to overcome such evidence ought to be satisfactory, and a jury might well listen with hesitation and distrust to loose declarations as to title in opposition to documentary proof. But I am not prepared to say that such testimony is inadmissible, or that title to a vessel may not be shown, as between vendor and vendee, without a formal bill of sale. The doctrine in England, as held in the cases referred to, seems to rest very much upon the strong language of the registry laws of that country, and may not be generally applicable here, in cases where the national character of the vessel is not in controversy. It is not, however, necessary to express any opinion upon this point, or as to whether, in this case, the defendant had not concluded himself at law from denying the legal title of the plaintiff by his own action in regard to the documentary evidence of title: it does not appear, by the bills of exception, that either point was raised below, and therefore it is not open here.

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Again, it is objected that leading questions were addressed to a witness, whose evidence was brought before the court by depositions taken upon a commission. But it is an objection which in such case cannot be first raised at the trial. Before the interrogatories can be addressed to the witness, whose testimony is to be taken by commission, they must be approved by the court or a judge, an opportunity being first given to the opposite party for objection, if he thinks proper. *Rev. Stat.* 960. If there is any objection to any one or more of the interrogatories in point of form, it ought then to be made. It is unreasonable that such objection should be first raised at the trial, to the surprise and injury of the party, after the expense of executing the commission, and in regard to a matter which might have been rectified, had the objection been made at the time of settling the interrogatories. Taking this view, it is not necessary to examine the character of the interrogatory. But it may be proper to remark, that it is often necessary to direct the attention, and it may be especially necessary when the questions are addressed to an absent witness by means of a commission. How far this shall be done, is a matter that must lie in the discretion of the court or judge, and therefore does not seem in any case to be the ground of an assignment of error. If the discretion be improperly exercised, the proper redress is by application for a new trial.

Another matter urged as error was, that the judge admitted proof of what a deceased witness had testified on a former trial between the same parties, without first proving the fact of such trial by the record. The error was subsequently cured by the production of the record, as appears by the bill of exception, and the court will therefore not reverse for this cause.

But there is one matter which has been urged, and to which no satisfactory answer has been made by the counsel of the defendant in error. It became material and important on the trial, on the part of the defendant, in order to prove property in himself to one moiety of the vessel, to prove payment by him to the plaintiff for that half. One witness (Isaac Asay), produced by the defendant, testified that, being present at a conversation between Hunt and Chambers, Hunt told Cham-

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bers that he had given him a big bill on Mills, or Miles, and that if he would give it back to him, he might take the sloop. The witness thought it was something like $800 or $1000. To show the character and amount of the order referred to, and that it operated as payment of such sum from Hunt to Chambers, parol proof of its contents was given, the order not being produced or any ground laid for secondary proof. Without any proof of its loss, or any notice given to the opposite party to produce it, another witness was then asked if he had not seen an order of Hunt on Mills, in whose favor, and for what sum, &c. The witness was thereupon permitted to testify as to the contents of this order, how receipted, &c. Now this we take to have been an error.

It is clearly competent to prove payment by parol, or rather by verbal testimony, even though there may be written evidence, as a receipt or order. Here, if the object had been simply to prove payment by direct proof, verbal evidence would have been sufficient, but the object of the evidence was not to prove payment in such mode. It was to prove payment by the contents of the written order, and in such case a receipt or order, or other document, showing payment, is clearly within the general rule, that the best evidence which the nature of the case admits of must be given. The instrument must be accounted for, or other ground laid, before secondary evidence of its contents can be admitted. See 2 *Cow. Phil. Ev.* 547, where the cases are collected in the notes of the American editors. On this ground, we are of opinion that the judgment of the Supreme Court must be reversed.

Reversed.

For reversal—The CHANCELLOR and Justices CARPENTER and OGDEN, and Judges SPEER, PORTER, SCHENCK, MCCARTER, and SINNICKSON—8.

For affirmance—None.

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THE STATE v. LEWIS.

1. Although the words of the road act direct surveyors to be appointed by the Common Pleas, on "due proof being made that the advertisements have been set up according to law," an order which, reciting that "the court, being satisfied that due and legal notice of this application has been given," appoints surveyors, sufficiently shows that proof has been given. It will be intended that the court was not satisfied without legal proof.

2. When general powers over a whole subject matter are conferred by statute on courts of general jurisdiction, although their jurisdiction over the subject matter must appear on the face of their proceedings, every intendment will be made in favor of the correctness of their proceedings.

This was on writ of error to the Supreme Court, removing an order affirming the appointment of surveyors of the highways by the Court of Common Pleas of Monmouth county, for the purpose of laying out a public highway.

By the papers, it appeared that a proper and regular affidavit of putting up notices of the application, as required by the statute, had been made and exhibited to the Court of Common Pleas at the time of their appointment. But in the order of the Common Pleas appointing the surveyors, the recital was, "the court being satisfied that due and legal notice of this application has been given," without reciting, in the words of the statute, "on due proof being made that the advertisements had been put up according to law."

Vredenburgh, for plaintiff in error, contended that the Court of Common Pleas, in road proceedings, was a special and limited jurisdiction; their powers were conferred by statute, and were distinct from, and independent of their common law jurisdiction; that, like all special jurisdictions, their proceedings, in each case, must show *on their face* that the requisites to give them jurisdiction of the case have been complied with: the notices are clearly such prerequisite, and the Court of Common Pleas *being satisfied* that they were put up, is essentially different from *due proof* being made. *Griff. Tr.* 329, 369, 477; 3 *Green* 58, *State* v. *Shreve; Spencer* 478; *Rev. Stat.* 646, 605, and 106, § 15; *Pat. Laws* 387; *Bloomfield's Laws* 239.

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Vroom, contra, cited 4 *Halst.* 17, *State* v. *Scott;* 5 *Cranch* 180, *Kemp's lessee* v. *Kennedy.*

RANDOLPH, J. The only ground relied on for the reversal of the order is, that "it does not appear upon the face of the order of the Court of Common Pleas, appointing the surveyors, that due proof was made before them that legal notice of the application for the appointment of surveyors was given by the applicants:" the order states that the "court, being satisfied that due and legal notice of this application has been given," do nominate and appoint, &c.; and the second section of the road act, *Rev. Stat.* 515, requires the court to appoint six surveyors, when applied to, "on due proof being made that the advertisements have been set up according to law," on which the judgment of the court is conclusive. By the affidavit accompanying the papers, which was that made before the Common Pleas to obtain the order, it appears that due proof was made before the order was obtained, so that if we reverse, it must be not for error in fact, but in the form of the order; and the ground taken is, that this is the exercise of a special power under the statute; and the ground or fact upon which its legal exercise depends must appear upon the face of the proceedings themselves, as in the proceedings of the surveyors under this same act, in whose return it must appear that proof of publication had been made of their meeting. *State* v. *Scott*, 4 *Halst.* 17. And so in the allowing an order for bail under the statute, the officer must have legal and requisite proof before him, (*Hill* v. *Hunt*, *Spencer* 476); though if it should appear in the other part of the proceedings, but not in the return or order itself, that the legal and requisite proof was given at the time, I am not aware of any case which sets aside the proceedings for that cause. In the *State* v. *Shreve*, 3 *Green* 57, the court set aside the order of the Common Pleas, because, as the opinion states, it "was made without any proof." It is true the learned judge, in giving his opinion, intimates that there could be no presumption in favor of the order; that due proof had been received by the court below upon the principle of the case referred to in 2 *Salk.* 522; that "if a *particular*

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jurisdiction does not *show* the matter to be within its authority, it must be taken to be without it, thereby taking for granted that the Court of Common Pleas was a court of particular jurisdiction; whereas the same learned judge, in a case which arose some time afterwards (*Den* v. *Hammel*, 3 *Harr.* 78, 81,) insists, with much force, that the Orphans' Court is not a court of special, but of general jurisdiction, though limited in extent. The distinction is between the exercise of a special authority, delegated by statute to particular persons or special and limited tribunals, or where a general statute authorizes or directs the courts of general jurisdiction to grant orders or to proceed in the premises. In the former, the preliminaries which give them power to act must appear on the face of the proceedings themselves, while in the latter, courts will presume that such preliminary proceedings were had, till the contrary appears. In *Rex* v. *Croke*, *Cowp.* 29, Lord Mansfield states the rule thus: "This is a special authority, delegated by act of parliament to *particular persons*, therefore it must be strictly presumed, and must appear to be so, upon the *face* of the order." 7 *Com. Dig. Poiar D. a.* And in *Kemp's lessee* v. *Kennedy et al.*, 5 *Cranch* 173, Marshall, C. J., takes the same distinction, and decides that the Court of Common Pleas of Hunterdon county, in this state, was a court of general jurisdiction, and their proceedings in a matter of forfeiture for treason, though erroneous, were not void. The form of the order in this case seems to be in accordance with the practice of the Supreme Court, and although there is a slight difference in the phraseology of the second section, applying to the Courts of Common Pleas, and the third section, which applies only to the Supreme Court, yet in the fourth section, which relates only to private roads, and applies to both courts, the language of the third section is adopted, leaving out *upon due proof* of notice, &c. This merely goes to show that the variance is not to be considered material, and that when the court below sets forth, in their order, that it was granted, upon being satisfied that due and legal notice had been given, we are to presume, alike in both cases, that such satisfaction arose from due proof before them. Affirm the judgment.

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For affirmance—Justice RANDOLPH, Judges PORTER, SPENCER, SCHENCK, and MCCARTER—5.

For reversal—None.

The CHANCELLOR, doubting, expressed no opinion.

BROWNING v. FLANAGIN.

The issuing and return of writs, as part of the proceedings of the court, are properly entered in the book of minutes of the court. *Held*, in an action of escape against a sheriff, that the *ca. sa.*, having been lost, an abstract (being a copy of the endorsement on the writ), with a copy of the return, recorded in a supplemental book of minutes, called a "sealing docket," was sufficient secondary evidence of the writ.

Such book is an official register, which, its authenticity and character being first shown, may be read in evidence without the oath of the officer by whom the entries were made.

Semble, that other entries, not entitled to the character of an official register, can only be read in evidence when aided by collateral proof. If alive and not insane, the person by whom made must be produced to sustain them by his oath.

The writ of *ca sa.*, when proved, was accompanied by a return of *non est inventus* by the sheriff against whom the action was brought. *Held*, that such return did not conclude the plaintiff, who might still, on proof of the arrest and escape, recover in this form of action, notwithstanding the return.

How far a sheriff's return is conclusive considered:

The defendant, in order to show that the judgment had been satisfied prior to the issuing of the *ca sa.*, produced a *fi. fa.*, issued on the same judgment, with a return endorsed by a former sheriff, to whom such *fi. fa.* had been directed and delivered, that "By virtue of the within writ, &c., I have levied and sold of the personal property of the defendant to the amount of $1400.60:" and also, that he had levied on certain specified land of the defendant, &c., "subject to prior encumbrances, value which remains, &c." *Held*, that the said former sheriff might be called to testify that money in his hands, as well as the real estate mentioned in the return, was subject to prior encumbrances and absorbed by prior executions, and that no money was in fact made upon, and applicable to the said *fi. fa.*, no record proof being made of such prior liens, by which it was said the said money was absorbed. (CARPENTER, OGDEN, and PORTER dissented on this point.)

Error to the Supreme Court.

This was an action of debt for an escape, brought by Flanagin against Browning, to recover the debt, interest, and costs endorsed upon a *capias ad satisfaciendum*, alleged to have

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been issued and delivered to the defendant below for execution, while sheriff of the county of Gloucester.

The declaration set out a judgment in debt, recovered in 1834, by Flanagin against one Federal Champion, in Gloucester Pleas, the issuing thereon of several successive writs of *ca. sa.*, which were severally returned "not found," and the issuing of a writ called a second *pluries capias ad satisfaciendum*, directed and delivered to the defendant below, then sheriff of the said county, duly endorsed for $398.28 of debt, besides costs, &c.; an arrest of Champion by the defendant, and the escape.

The defendant pleaded *nil debet*, and the issue came on to be tried before Mr. Justice Nevius, in the county of Gloucester, at the May circuit, 1846, when a verdict was rendered for the plaintiff below, against the defendant, for $399.24, upon which final judgment was rendered in the Supreme Court. At the trial, exceptions were taken to the ruling of the judge, allowed and sealed.

It was proved on the trial, by the former clerk of the county, that there is now, and has been for more than one hundred years past, kept in the office of the clerk of Gloucester, a book of records, called the *sealing docket*, in which all writs returned by the sheriff were entered, together with the return of the sheriff. It was proved, by the attorney of the plaintiff below, that he issued a *pluries ca. sa.* in the suit of *Flanagin* v. *Champion*, and placed it in the hands of Browning, the defendant below, who was then sheriff of Gloucester. This writ was shown to be lost from the files of the court. And an entry in the sealing docket of the writ and return was offered in evidence by the plaintiff below, and admitted by the court, to the admission whereof the defendant below excepted. The entry was as follows: "*John Flanagin* v. *Federal Champion, second pluries ca. sa.*, in debt, Jeffries att'y—"Not found." J. P. Browning, sheriff." The plaintiff proved, by parol admissions of the defendant, that he had arrested the defendant in that execution, by virtue thereof, and by mistake had let him go, on receiving a common bail bond. The defendant proved, by the return of a previous sheriff to a previous execution against

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lands and goods, on the same judgment, that personal property of the defendant had been levied upon and sold, to an amount much larger than sufficient to satisfy the judgment. The sheriff's return was as follows: "By virtue of the within writ, to me directed, I have levied and sold of the personal property of the defendant to the amount of $1400.60. Also have levied upon a tract of land in the township of Hamilton and Egg Harbor, adjoining lands of Wm. Treen, Daniel Baker and others, containing 512 acres more or less. Also a tract of land in Weymouth township, adjoining lands of E. Taylor and others, containing 50 acres more or less, subject to prior incumbrances, value one dollar, which remain, &c., with all other of his real and personal property in Gloucester county.

J. W. CALDWELL, *Sheriff*."

The plaintiff below offered sheriff Caldwell to prove, by parol only, that there were prior encumbrances on the property levied upon and sold to an amount greater than the whole proceeds of sale, and that no part of the proceeds was paid to Flanagin; and that he intended the phrase "subject to prior incumbrances," to apply to the personal, as well as to the real estate. To the decision of the court, admitting this evidence, the defendant below excepted.

On these exceptions errors were assigned.

A. Browning (Att. Gen.), for plaintiff in error.

1. This is a penal action, and to be construed strictly. The whole sum due on the execution is recoverable, being in the nature of a penalty. Under the plea of *nil debet*, the plaintiff must show an existing judgment debt, the issuing of the writ, its delivery to the sheriff, &c. *Brown* v. *Genung*, 1 *Wend.* 115; *Brown* v. *Littlefield*, 7 *Wend.* 454; *Watson's Sheriff* 147, 149.

The plaintiff below produced the judgment, but failed to produce the writ; and one exception arises from the mode by which it was attempted to meet the difficulty. The entry in the "sealing docket" was not of itself, or by the mere proof of the handwriting of the officer, sufficient to prove the contents of the writ, supposing ground to have been laid for secondary

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evidence. The entry is no record, in the proper acceptation of the term, but a mere memorandum in a book, not required by law or necessary from the nature of the office. It is a book kept only for the convenience of the officer, and is not an official register in the nature of a record. Besides, the entry is irregular, and not made in accordance to the practice of the office. The clerk who made the entry was not called, and it was therefore admissible as a memorandum to refresh the memory. 1 *Greenl. Ev.* § 483, 496; 2 *Har.* 60; 7 *Halst.* 42; 8 *B. & C.* 813; 18 *Ves.* 443.

2. The plea put in issue the existence of the debt at the commencement of the action, and consequently any thing could be given in evidence under the plea which would show that the debt was then satisfied. The defendant below, to show that the judgment had been satisfied before the issuing of the *ca. sa.*, produced a *fi. fa.*, with a return endorsed thereon, showing that the sheriff had levied and sold property of the defendant to an amount beyond that of the judgment. Not only a sale, but even a levy, to an amount sufficient to satisfy the execution, will extinguish the judgment. 4 *Cow.* 65; 4 *Ib.* 417; 7 *Ib.* 21.

Exceptions arise from the attempt to avoid this levy and return. The former sheriff was not competent to deny or to explain his return. The construction was for the court. The return was conclusive, and if any error, application should have been made, in proper time, to the court to amend the return. The amount of the execution was made by the sheriff, and it was entirely immaterial whether paid over by him to the plaintiff in execution or not. *Coxe* 168; 17 *Mass.* 601; 10 *Ib.* 313; 9 *Mass.* 99; 4 *Ib.* 479.

3. But when a sheriff has returned a *ca. sa.* "not found," the return is conclusive, and debt for an escape will not lie. If the return is not true the remedy is an action for a false return. I have found but one case to the contrary (9 *Serg. & R.* 390), but this against settled principle. *Anon. Lofft.* 371; 3 *Har. Dig.* 6100 (*Phil.* 1846); 4 *Mass.* 479.

If the writ was duly proved, still it was accompanied by

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proof of the return. The entry cannot be read for one purpose, and part of the same entry repudiated in order to serve another.

W. N. Jeffers, contra.

Carpenter, J. At the trial the judgment was proved, the issuing of the writ by the attorney, &c. The writ, after search, not being found on the files, and sufficient ground, as supposed, having been shown to let in secondary evidence, the plaintiff below offered to prove its contents by an entry in a book, called "a sealing docket," kept in the clerk's office of the county of Gloucester. He proved that a book of this character had been kept in that office from before the revolution, one hundred years or more. That a memorandum of all writs issued and returned were entered by the clerk in this book. If issued by the clerk, the note, being a copy of the endorsement, with the number of the writ and the date when issued, was made before delivery to the sheriff; and his return, when made, was also copied into the book. Writs not issued by the clerk, and not in his hands till returned, were entered at the end of the other writs in the proper term, but without date. The entry in question was in the handwriting of the clerk, without date, and it was alleged, by the counsel of the defendant below, out of the usual order of making such entries. The then clerk, by whom the entry was made, was not produced to prove that it had been made by him in the regular course of duty in his office, or to prove any other circumstance in connection with it. He had, long previous to the trial, left the state, and was not within reach of the process of the court. The first exception arises from an objection, on the part of the defendant below, to the reading of this entry, as any proof of the contents of the writ or for any other purpose.

If a record, or other document in the nature of a record, is lost, after a proper foundation is laid, its contents may be proved, like any other document, by proper secondary evidence. No objection seems to arise from the fact, that a mere abstract of the writ, being a copy of the endorsement, was offered as evidence of the contents of the writ, though undoubtedly a complete copy would have been more satisfactory. In

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a case where an assignment of tolls had been executed, by way of mortgage, by a turnpike company, in an action by the personal representative of the mortgagee, after his death, it was held that after sufficient proof of the loss of the mortgage, entries in a book of the company, endorsed "Mortgage book," containing an abstract of the names of the creditors, the amounts of their securities, and the interest due upon them, was good secondary evidence of such security. *Pardoe* v. *Price*, 13 *M. & W.* 267.

My first impressions as to this book, were to regard it, not in the light of an official register required by law, but as a mere memorandum of the writs issued from, and returned into the office. If kept by the clerk merely for his own convenience and security, and not because required by statute, or necessary, in any strict sense, from the nature of the office, it might, under some circumstances, be used in evidence, but upon a different principle than as offered in the present instance. It would have been admissible only as an entry, made at the time, according to the established practice of the office, by one having competent knowledge of, and no interest to misstate the matter recorded. Such entries have been frequently held admissible, when made at the time of the transaction by any one in the usual and regular course of professional or other duty, but only when aided by collateral proof. If the person by whom made be alive, even if beyond the jurisdiction of the court, he must be found, and his testimony produced, either personally or by deposition. It is only in case of his death that such entry can be read on proof of the handwriting. 1 *Greenl. Ev.* § 115; 1 *Stark. Ev.* 394, 396, &c.; *Poole* v. *Dicas*, 1 *Bing. N. C.* 649; *Welch* v. *Barrett*, 15 *Mass.* 380; *Nichols* v. *Webb*, 8 *Wheat.* 326; *Wilbur* v. *Selden*, 6 *Cow.* 162; *Cooper* v. *Marsden*, 1 *Esp.* 1.

In Massachusetts, insanity has been held equivalent to death. *Union Bank* v. *Knapp*, 3 *Pick.* 96, 106. Looking at the book in this light, I felt very unwilling to relax the rule, which is settled upon sound and safe principles.

But subsequent examination has placed the book in a very different light. An entry of every action commenced in court,

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and of the issuing of every writ, is supposed to be made; and so of the return by ministerial officers, of duty performed under each writ. Our own statutes give the clerk fees for making these entries, and I suppose they are in fact made in every county of the state with more or less accuracy, according to the intelligence and diligence of the officer. The original practice, still followed in some counties, was to make such entries in the minutes of the court, as part of its proceedings, and ordinarily at the close of each term to which the writs were respectively returned. In other counties, as a matter of convenience, the entries, in regard to the issuing and return of writs, have been transferred to a separate book, styled, as in the present instance, a "sealing docket," which thus became a supplemental book of minutes, in which so much of the proceedings of the court was recorded. In this light, it is rightly to be considered as a book of minutes, in which a portion of the proceedings of the court is recorded; and, so far as regards such entries, strictly an *official* register. As such, the book from which the entry in question was offered on the trial, was properly admitted as evidence of itself, without the necessity of producing the officer who made the entries, or sustaining its authenticity by his oath. 1 *Greenl. Ev.* § 483, 484; 1 *Stark. Ev.* 228, 243, &c., (*Phil. ed.* 1842.) The alleged irregularity in regard to the entry, was a matter for the jury below, and the objection, if entitled to any weight, was one addressed to the credit, and not to the competency of the book.

To proceed to the subsequent exceptions. The entry, when given in evidence, showed a writ of *ca. sa.*, as set forth in the declaration, but it also showed a return by the sheriff, that the defendant was "not found." The defendant then insisted that this return was, in this action, conclusive upon the plaintiff; that his remedy should have been by an action for a false return; and the plaintiff having rested, the counsel of the defendant moved for a nonsuit. The court overruled the objection, and the defendant again excepted.

It is true that such credence is given to a sheriff's return that in many cases no averment can be made to the contrary thereof, but such is far from being a general, much less an

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universal rule. The return of a sheriff is nothing more or less than his answer under oath respecting the duty enjoined upon him by the writ, in order that the court may be informed of what was done in the premises. It is always, at least, *prima facie* evidence of the facts set forth in regard to that duty, when those facts come incidentally in question, even against third persons. 1 *Phil. Ev.* 391 *(Cow. ed.)*; *Gifford* v. *Woodgate*, 11 *East* 297; *Browning* v. *Hanford*, 7 *Hill* 120.

It is said that generally there can be no averment in the same action against the sheriff's return; and it seems to be conclusive in all questions that can arise between debtor and creditor, and any person claiming under either of them. Thus, in case of title set up under judgment and execution, the sheriff's return is doubtless conclusive as to the effect of the execution in favor of a purchaser. So a defendant returned "summoned," or the like, cannot aver to the contrary in the same action, though in an action against the sheriff he may show the return to be false. So the same effect is given to the return against those who stand in the place of the defendant, as in the case of bail or other sureties, though it is said that, in some cases, a defendant may have an averment which stands with a return, but avoids its effect. See *Watson's Sheriff* 73; *Vin. Abr. tit.* "*Return*" *(O)*; *Slayton* v. *Inhabitants of Chester*, 4 *Mass.* 478; *Whitaker* v. *Sumner*, 7 *Pick.* 555; *Bates* v. *Willard*, 10 *Metc.* 80; *Botts* v. *Burnell*, 9 *Mass.* 98; *S. C.* 11 *Ib.* 165; *Bean* v. *Parke*, 17 *Mass.* 591; *Chapman* v. *Cumming*, 2 *Har.* 11.

The sheriff himself is generally concluded by his own return, when set up by a party that may claim any thing under it, so that he cannot contradict it by parol evidence. If not according to the facts of the case, he must take care, for his own protection, to apply in due time to amend. *Paxston* v. *Stackel*, 2 *Barr.* 93; *Baker* v. *McDuffie*, 23 *Wend.* 289; *Gardner* v. *Hosmer*, 6 *Mass.* 325; *Boynton* v. *Willard*, 10 *Pick.* 169.

But upon what principle can the sheriff's return be held conclusive in the present action? No ground of policy, no legal principle, seems to call for the application of the rule in the present instance. The sheriff's return is not any part of the case upon

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which the action is founded, and the arrest is not necessarily proved thereby. Indeed policy strongly demands that the sheriff should not be permitted to set up his own return as conclusive evidence in his own favor. A right of action accrued to the plaintiff below upon the escape or discharge of the defendant in execution, and suit might in such case be brought immediately. It would be far from expedient to permit the sheriff to destroy the right to recover in an action so brought, and defeat the plaintiff by making a subsequent false return upon his writ. There are at least two cases in which a recovery was had against the sheriff in the present form of action after a return by him of *non est inventus*, and in neither was this point mooted by the counsel or adverted to by the court. *Wheeler* v. *Hambright*, 9 *Serg. & Rawle* 390; *Blatch* v. *Archer*, *Cowp.* 63. In the latter case, the return *non est*, in the handwriting of the sheriff, was relied upon by counsel as proof of the delivery of the writ, and held sufficient for that purpose by the court. There was certainly no error in the ruling of the court upon this exception.

The defendant then opened his defence, and read in evidence a *fi. fa. de bonis et terris*, issued upon the said judgment of Flanagin against Champion, and also the return of J. W. C., esq., then sheriff. The said writ was endorsed for $392.32, besides costs, interest, &c., and was returnable to the term of October, 1834, prior to the issuing of the *ca. sa.* The writ and return were offered to show that the judgment had been extinguished by levy and sale of the property of the defendant in execution. If the judgment had been thus satisfied, it is very clear that no action could be maintained against a succeeding sheriff on a *ca. sa.* subsequently issued on the same judgment. If the sum due on the *fi. fa.* had been levied and made by the sheriff, or otherwise received by him, the judgment was satisfied, although never paid over by the officer to the plaintiff in execution.

The return of the sheriff to the *fi. fa.*, endorsed on the writ, and signed, was, that "By virtue of the within writ, &c., I have levied and sold of the pereonal property of the defendant to the amount of $1400.60;" and also, that he had levied on

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certain specified land of the defendant, &c., "subject to prior encumbrances, value one dollar, which remain," &c. The plaintiff then called the said former sheriff, J. W. C., to explain the return upon the *fi. fa.*, and to prove that the money in his hands, as well as the real estate mentioned in the said return, was subject to prior encumbrances and absorbed by prior executions, and that no money, in fact, was made upon, and applicable to the execution of Flanagin against Champion. This evidence was objected to, but admitted. The former sheriff testified that the words in the return, "subject to prior encumbrances, value one dollar," applied as well to the sum mentioned ($1400.60) as to the real estate therein mentioned, and that he paid no part of the money raised on the *fi. fa.* to Flanagin, or to his order. The admission of this testimony forms the ground of the further bills of exception taken on the part of the defendant below.

The sheriff is liable, in an action of debt, for an escape upon final process for the whole sum due by the defendant in execution, debt, interest, and costs; in other words, he stands in the place of the original debtor. But he is liable no further. If the original judgment is satisfied, the sheriff cannot also be held liable in this action. An unsatisfied judgment is necessary to maintain the action. If a levy before sale be but a satisfaction *sub modo*, yet a levy and sale, to the amount of the judgment and execution, undoubtedly extinguishes the judgment, even although the proceeds never reach the hands of the plaintiff. *Clerk* v. *Withers*, 1 *Salk.* 322; *S. C.* 2 *Ld. Raym.* 1072; *Wood* v. *Torrey*, 6 *Wend.* 562; *Greene* v. *Burke*, 23 *Wend.* 490, 496; *People* v. *Hopson*, 1 *Denio* 578.

The return was at least *prima facie* evidence that the money had been raised on the *fi. fa.*, and the judgment thereby satisfied. So in express words, as it seems to me, is the return made by the sheriff, to which, until contradicted by some competent evidence, credence will be given, as the official act of a public officer.

It is nothing to the contrary that the sum raised by the sheriff, as appears by the return, was much greater than the amount endorsed on the execution. It will certainly appear to

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any one as very probable, independently of the testimony in the case, that the sheriff had other executions in his hands at the same time, to which this money, or some of it, was applicable, and that he did not, without other protection, expose himself to the consequences of a levy and sale to an amount so far beyond the authority contained in this writ; still, if I apprehend rightly the effect of this return, a satisfaction is not the less shown, unless that effect is avoided by some competent evidence to the contrary.

The evidence offered to contradict this return, or rather to avoid its effect by showing a collateral fact, to wit, the existence of a prior judgment and execution, to which the money raised by the levy and sale was applicable, and by which it was absorbed, was parol only. No offer was made to prove the existence of such prior lien by the production of the record, the attempt was to prove it by the testimony of the officer only. The mere fact, that the money raised by the sale had not been paid over to the plaintiff in execution, was immaterial. It could only become material when connected with proof of the existence of a prior lien to which the sheriff was authorized to appropriate the money, and which justified him in withholding it from the plaintiff. The existence of such prior lien was a matter of record, and could only be proved by the record. Its production was in the highest degree important. When produced, possibly it might be found irregular and void, and those to be affected by it ought not to be concluded by the opinion (perhaps the mistaken opinion) of the sheriff. 1 *Greenl. Ev.* § 86; *Scott* v. *Clare*, 3 *Campb.* 236.

The evidence of the sheriff was certainly incompetent, so far as it was offered to explain the meaning of his language used in the return. The construction of written instruments is for the court. But taking the suggestion, that the words in the return, "which remain, &c., subject to prior encumbrances, value one dollar," to relate as well to the money raised, $1400.60, as to the real estate simply levied on, and which then still remained unsold, the same difficulty occurs. The return contains a distinct statement by the officer, that he had received more than sufficient to discharge this execution, subject to any

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proper claim by virtue of a prior lien. There is no certificate by him that such prior lien or encumbrance did in fact exist, much less that he had appropriated this money to its discharge. The return then shows, *prima facie*, that this execution and the judgment were satisfied by levy and sale, and the money must be taken to be in the hands of the sheriff for that purpose until the alleged prior liens are shown by competent proof, which, it seems to me, must be by the record. Even if the return had certified the existence of such prior liens, it may be very doubtful if it would have been sufficient evidence for the present purpose. The return of the sheriff is undoubtedly *prima facie* evidence of his own official acts under and by virtue of the writ; but I am unable to understand how it can be evidence of a collateral fact, such as the existence of a prior judgment and execution.

Upon the last point, I am of the opinion that the judgment ought to be reversed.

Justice OGDEN and Judge PORTER concurred in the opinion delivered by CARPENTER, J.

For affirmance—The CHANCELLOR, the CHIEF JUSTICE, Justice RANDOLPH, and Judges SPEER, SCHENCK, and MCCARTER.

Judgment affirmed.

BELL, ADMINISTRATOR OF STOLL, v. PRICE.

1. A paper containing a summary of the accounts between the parties, delivered by the arbitrator with the award, on a motion to set aside the award, considered as part of the award.

2. On motion to set aside an award, the submission having been made a rule of court for that purpose, it is not competent to read an *ex parte* statement of the oral evidence before the arbitrators, proved by the oath of counsel to contain the substance of the testimony there delivered.

3. When there has been no corruption or partiality in the arbitrators or fraud practised by the party, the award is conclusive, and the court will not, on such motion, inquire whether the arbitrators have judged right or wrong on the facts.

4. Courts will not interfere with an award for mistake in law, unless it appears,

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on the face of the award or by the statement of the arbitrator, that he had meant to decide according to the legal rule, and had mistaken it.

5. Mistakes of fact, which can be taken advantage of on such motion, must be mere mistakes, as miscalculation of an account, or the like, and not an erroneous conclusion of the judgment on the part of the arbitrator. They must appear on the face of the award or the accompanying papers, or be established by the oath of the arbitrator.

6. On an arbitration between a surviving partner and the administrator of a deceased partner, an award that the former should pay off and discharge a bond given during the lifetime of the latter by both partners, and therefrom save harmless and indemnify the representatives of the deceased partner, is sufficiently certain.

The parties in this cause had submitted the matters in difference between them to the determination of three arbitrators, Robert Hamilton, Joseph Linn, and John D. Everett. After hearing the parties and their evidence, two of the arbitrators made the following award:

"Award between John Bell, administrator of the estate of Joseph Stoll, deceased, and Samuel Price, made the twenty-second day of January, eighteen hundred and forty-four; the said parties having by their agreement, made on the sixteenth day of May last past, mutually agreed to submit all matters in difference between the said Samuel Price, and the said John Bell, as administrator of the estate of Joseph Stoll, deceased, in which were to be included the accounts and dealings between the said Samuel Price and the said Joseph Stoll, in his lifetime, as partners in trade, and all other accounts and dealings between the said Samuel Price and the said Joseph Stoll, in his lifetime, to the award and final determination of Robert Hamilton, Joseph Linn, and John D. Everett, or any two of them, arbitrators, by them chosen; and the said arbitrators, having been first duly sworn faithfully and fairly to hear and examine the matter in difference between the said parties, and make a just and true award, according to the best of their skill and understanding; and having heard the proofs and allegations of the said parties, and considered the same, we the subscribers, two of the said arbitrators, do hereby make and publish our award of and concerning the matters to the said arbitrators submitted as aforesaid, as follows:

Firstly. We do award, that the said Samuel Price do pay to

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the said John Bell, administrator as aforesaid, the sum of three hundred and forty-one dollars and ninety-three cents, on or before the first day of April next, with interest thereon from this date.

Secondly. We do award, that the said sum is in full satisfaction and discharge of all demands and controversies by and between the said Samuel Price and the said John Bell, as administrator as aforesaid, and of all demands between the said Samuel Price and Joseph Stoll, in his lifetime; and we do award, that all actions, suits, controversies, quarrels, and demands whatsoever, between the said Samuel Price and John Bell, as such administrator as aforesaid, existing at the date of the said submission to the said arbitrators as aforesaid, cease and be no further prosecuted.

Thirdly. We do award, that upon the payment of the said sum of money aforesaid to the said John Bell, administrator as aforesaid, that he deliver up to the said Samuel Price, his executors or administrators, to be cancelled, a certain bond and mortgage, bearing date on the first day of April, eighteen hundred and twenty-six, given and executed by the said Samuel Price to the said Joseph Stoll, to secure the payment of the sum of six thousand seven hundred and fifty dollars.

Fourthly. We do award, that the balance remaining due and unpaid upon a certain bond and mortgage, given and executed by the said Samuel Price and Joseph Stoll to Usal C. Hagerty, bearing date the twenty-fourth day of June, eighteen hundred and twenty-four, to secure the payment of twenty-five hundred dollars, is now the proper and respective debt of him, the said Samuel Price, and that he shall pay off and discharge the same, when demanded by the holder, so as that he save harmless and indemnify the representatives and estate of the said Joseph Stoll therefrom.

Fifthly. We do award, that the services and expenses of the said arbitrators, amounting to the sum of one hundred and fifty-six dollars, be paid by the said parties equally, and that, if the same be paid wholly by one of the said parties to the said arbitrators, that then the other party do pay to the party who shall pay the said arbitrators the one-half thereof, on demand, and that all other costs and charges of either party, be borne and paid by the party incurring the same.

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In witness whereof, we have hereunto set our hands and seals, this twenty-second day of January, eighteen hundred and forty-four, above written.

ROBERT HAMILTON, [L. S.]
JOSEPH LINN, [L. S.]"

The submission, pursuant to its terms, was, under the statute, made a rule of court in the Sussex circuit. A rule to show cause why it should not be set aside was taken, with leave to take affidavits. The reasons filed for setting aside the award were in substance as follows:

1. Because the award is not in pursuance of the submission.
2. Is not mutual.
3. Is not certain.
4. Is not final.
5. Because the said arbitrators who signed said award determined upon the matters in difference in the absence of J. D. E., one of the arbitrators, without notice to him of the time and place of said determination.
6. Because the arbitrators were not sworn.
7. Because the arbitrators, on the hearing, rejected legal, and received illegal evidence.
8. Because the arbitrators made a plain mistake in allowing a credit to the said Samuel Price of $701.
9. Because the arbitrators committed a plain error in allowing to the said Samuel Price the sum of $1000, as a credit.
10. Because the arbitrators committed a plain error in the computation of interest.
11. Because the arbitrators did not impartially hear and determine said matter in difference.
12. Because the arbitrators committed plain and palpable errors, both in law and fact.

In the depositions taken, it was shown that H. D., a justice of the peace, was present to swear the arbitrators, but not being able to repeat the oath, one of the arbitrators, with the consent of the justice, repeated it, all three having their hands upon, and kissing the book. The justice did not hold the book, repeat the oath, or certify it; that he offered to certify it, but was told that it was unnecessary.

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The depositions further tended to show that there was a mistake in one or two of the credits allowed to Price, and that, on the whole facts of the case, they ought not to have been allowed. One of the counsel before the arbitrators was sworn, and testified that a state of the case, drawn by him, and made an exhibit, contained the whole of the testimony taken before the arbitrators. The arbitrators, at the making of the award, had drawn and signed a statement in figures, entitled "general result," exhibiting the manner in which they had arrived at their determination, which statement was delivered with the award.

The Circuit Court, having referred the case to the Supreme Court for their advisory opinion, *(a)* in accordance with that opinion, refused to set aside the award, holding that the state of the case, purporting to contain the oral testimony, could not be read on the argument of the rule, and discharged the rule.

From this decision of the Circuit Court a writ of error was brought, removing the proceedings into this court. No objection being made to the legality of the writ of error in this cause, the argument came on upon the reasons assigned for error, which were in substance the same as the reasons filed in the circuit, adding thereto, as an additional reason, the rejection of the state of the case by the Circuit Court on the argument of the rule.

Potts and *W. Pennington*, for plaintiff in error.

The court below erred in overruling the "state of the case" containing the substance of the oral testimony given before the arbitrators.

But it erred in not setting aside the award, because—

1. The arbitrators were not sworn.
2. The award was not final.
3. The arbitrators did not act fairly and impartially.
4. The arbitrators made gross mistakes, by which the estate of Stoll was greatly injured. The items in which the mistakes were made appear on the accompanying calculation, and that paper must be considered as part of the award. *Watson on Arb.* 281 (*Law. Lib.* 1848); 3 *East* 18.

(a) See case reported 1 *Zabr.* 32.

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One year's interest seems to have been omitted in the calculation of the sum due on the bond of Price to Stoll.

The credit of $350, paid by House on the Coursen note, should not have been allowed.

There was nothing to warrant the credit to Price of $1000 for his note payable in Sussex Bank.

The counsel cited *Bac. Abr. tit. "Arbitrament" (K); Hall* v. *Hinds*, 2 *Man. & Gr.* 847; *Ward* v. *Dean*, 3 *B. & Ad.* 234; *Ames* v. *Milward*, 8 *Taunt.* 637; *Coxe* 105; *Ib.* 385; *Pen.* 932; 2 *South.* 777; 5 *Halst.* 7, 12, 17; 1 *Gr. Ch. Rep.* 301; 3 *Atkins* 644; 2 *Green* 337; *Kyd* 349; *Billings on Arb.* 227; 3 *Burr.* 1257; *Davis* v. *Getty*, 1 *Sim. & Stuart* 411; *Dawson* v. *Sadler*, 1 *Ib.* 537; *Nichols* v. *Chalie*, 14 *Ves.* 265; *Gwinnett* v. *Bannister*, *Ib.* 530; 2 *Story's Eq. J.* § 1450, 1453, &c.

Vroom and *Dayton*, contra.

This is the first attempt ever made to review, in this mode, the merits of an award. The Circuit Court of Sussex having refused to set aside an award, the matter is somehow here by writ of error. The proceeding is very anomalous, but, waiving the question as to the propriety of the writ, there is nothing in the reasons assigned for error.

The statement of the oral testimony given before the arbitrators was *ex parte*, not authorized by the rules of the court, and not offered for any competent purpose; it was therefore properly rejected.

In point of fact it does appear that the arbitrators were sworn, and there is nothing in the affidavits to show that they misbehaved or acted unfairly.

The award was final. In the point complained of, it was that Price should pay off and discharge a bond given by Stoll and Price, and indemnify and save harmless the representatives of Stoll. *Billings on Arb.* 135, *et seq.*; *Byers* v. *Van Deusen*, 5 *Wend.* 268; *Wohlenberg* v. *Lageman*, 6 *Taunt.* 251.

The alleged mistakes bring up the question as to the powers and practice of the courts in setting aside awards under the statute. Our act (*Rev. Stat.* 113) is closely copied from 9 and

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10 *W.* 3, *c.* 15, previous to which courts of common law had no jurisdiction over awards, unless in cases of references at *nisi prius.* This statute put submissions to arbitration in cases where there was no cause depending upon the same foot as those where there was a cause depending. 2 *Burr.* 701.

Courts of common law have not the same power under the statute as courts of equity at common law, or rather by virtue of their general jurisdiction, though the powers of each court under the statute are the same. Courts of equity, upon bill filed, can correct an award; not so courts of common law. The doctrine of Lord Brougham, in *Nichols* v. *Roe,* 3 *M. & K.* 431, is contrary to the rule, as previously understood in England, and has not heretofore been recognised in this state. Upon the statute courts will not enter at all into the merits of the matter referred to arbitration, nor look at the unreasonableness of an award. *Notes to Veale* v. *Warner,* 1 *Saund.* 327; 2 *Burr.* 701; 2 *Bos. & Pul.* 375; 2 *Ves. Jun.* 15.

A mistake in law, in order to impeach an award, must be apparent on its face, and courts will not take notice of matters coming up only by affidavit. But there can be no such thing as an inquiry as to matter of fact. The cases are confined to an apparent mistake in law. 1 *Taunt.* 47; 6 *Ib.* 254; 13 *East* 357; 1 *Chitt. R.* 674; 3 *Com. Bench.* 705; 9 *J. B. Moore* 666; 5 *Man. & Ry.* 3.

The case of *Hall* v. *Hinds* is somewhat peculiar, and seems to trench upon settled principle, but it was a case of gross mistake in calculation, shown by the affidavits of the abitrators themselves. The farthest the courts have gone, has been in case of such mistake not only admitted but made to appear by the oath of the arbitrators. Where the arbitrator admitted an error, but was not sworn, the court refused to set aside the award. *Phillips* v. *Evan,* cited in *Billings on Awards* 60, *note.*

The American cases are not consistent, but in many instances they rest upon peculiar local authority and usage, as in Pennsylvania, where the courts seem to deal with awards as with verdicts. In *McKinney* v. *Newcomb,* 5 *Cow.* 425; *Bar-*

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low v. *Todd*, 3 *John.* 369; *Kleine* v. *Catara*, 2 *Gallison* 61, the common law doctrine was recognised.

But the distinction must be adverted to, as to the powers of a court of equity under the statute, and its original powers under a bill filed to set aside or reform an award. In the latter case, it seems a mistake in fact may be corrected, but it must be apparent on the face of the award, or established to the satisfaction of the arbitrators, whose affidavit must be procured. *Knox* v. *Symonds*, 1 *Ves. Jun.* 369; *Anderson* v. *Darcy*, 18 *Ves.* 447; 2 *John. Ch. R.* 361; 1 *Gr. Ch. R.* 301; 8 *East* 54; 1 *Vern.* 157.

Lord Hardwicke was the first equity judge who laid down the principle, that a mistake in fact could be corrected; but he was disposed to interfere only in cases of palpable mistake, as in the instance of miscalculation of an account, &c. But it was not attempted to apply correction to errors of judgment. If parties agree to refer matters to judges of their own selection, in the absence of fraud or corruption their judgment is conclusive.

But, even under the rule recognised in equity, there was no ground to set aside this award. The alleged mistakes are not apparent on the face of the award or of the accompanying paper; but so far as there is any thing to sustain the allegation, they are altogether mere matter of evidence. But even the depositions do not show that any error was committed. The arbitrators were examined, but were not questioned as to the supposed mistakes. Had they been examined, it may be presumed they would have acknowledged the error or made such explanations as would have removed all difficulty.

Carpenter, J. This is a writ of error, directed to the Circuit Court of the county of Sussex. The object of the writ is to review the decision of the judge of that court, in refusing to set aside an award of arbitrators, the submission having been made a rule of court under the statute. The affidavits taken in the court below, under the rule for the purpose of setting aside the award, have been brought up by *certiorari* on allegation of diminution, and used on the present argument as ground to sustain the assignment of errors. Such application

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of the writ of error seems to be a singular departure from the rules of the common law, and will give rise to no little embarrassment in practice. But the question as to its propriety has not been raised, and will not therefore be discussed.

The award was signed by two arbitrators, the third dissenting, and was accompanied by a paper entitled, "General result," which contained a sort of summary of the calculations by which the arbitrators ascertained the amount of indebtedness of Price to the estate of Stoll, the deceased partner. There were evidently other accounts and calculations, the results of which seem to have been drawn into this statement. This paper may be considered, for the purposes of the present inquiry, as part of the award.* Various grounds of error have been assigned, all except the first corresponding with the reasons filed below for setting aside the award.

The first error assigned was, that the Circuit Court, on the hearing of the rule, refused to receive and consider a paper, offered by the plaintiff in error, alleged by him to contain a statement of all the oral testimony given or offered to the arbitrators. The court was clearly right in the rejection of that paper. It was a mere *ex parte* document, purporting to contain the *substance* of the oral testimony before the arbitrators, compiled from the notes and memory of the plaintiff's counsel, but under no authority derived from the rules and practice of the court or the consent of the opposite party. Such statement could not be made evidence because it was sworn to contain the substance of the oral testimony. Rules to take affidavits to be used on motion to set aside an award must be to substantiate some particular exception, not to bring up the whole case, in order to show that the award was against the weight of evidence. It was therefore further not offered for any competent purpose. It was no part of the duty of the court to review the merits of the award by an examination of the evidence before the arbitrators. Under the rules of the common

* See *Kent* v. *Elstob*, 3 *East* 18 *acc.* Still the rule does not appear to be very clearly settled as to how far extrinsic statements by arbitrators shall be received to impeach their award. See *Russell on Arb.* 301 (*Law Lib.* 1849); *Ward* v. *American Bank*, 7 *Metc.* 490; *Jones* v. *Boston Mill Co.*, 6 *Pick.* 154.

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law, as here understood, the decision of the arbitrators upon the evidence is final, and not subject to be reviewed by the courts by an examination of that evidence. That they have arrived at an unreasonable judgment, is no ground to impugn their decision, unless, indeed, the error be such as to show corruption and misconduct.

The allegation, that the arbitrators were not sworn, also assigned for error, may be passed with slight remark, as we think the fact that they were duly sworn sufficiently appears by the affidavits read on the hearing of the rule in the Circuit Court. The ground chiefly relied on to impeach the award was, that the arbitrators, as alleged, made a plain and palpable mistake in allowing to Price certain specified items of credit, which items appear on the face of the statement accompanying the award.

Indeed the controversy, in regard to this point, may be narrowed down to the alleged mistake in the credit of $350.50 allowed to Price. The objection here taken, that one year's interest on the bond was not allowed to the estate of Stoll, was not raised in the Circuit Court, and certainly is not sufficiently sustained by any thing which appears on the face of the award, or the accompanying calculation, nor even by any thing to be found in the depositions. It is a matter of the merest conjecture.

The credit allowed to Price for a note of $1000, payable at the Sussex Bank, may or may not have been properly allowed. There seems to be nothing to show that it was improperly allowed, either on the face of the documents just referred to or in the affidavits, supposing that we can look into those affidavits for such purpose.

To return to the alleged mistake, chiefly pressed on the argument. On the statement styled "General result," Price was credited by the following item: "Then paid by House for Price to A. Coursen half $701—$350.50." A note of Price and Stoll to Coursen was produced, and made an exhibit in the Circuit Court, which after some prior payments, perhaps out of the partnership funds, appeared, by the affidavit of one House, to have been discharged by the payment of this $701 in behalf of Price. Then the question seems to be, although

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not so presented, whether the estate of Stoll ought not to have been credited by $400, paid by Stoll to Price, as appears by the receipt of Price, endorsed on the same Coursen note. But it is very evident that if any error has been committed in regard to this note, and the allowance of the credit in question, the error does not appear on the face of the award or the accompanying paper, but is shown by affidavits, and is a matter of extrinsic evidence. The item certainly appears on the face of the calculation, but that it was improperly allowed to Price, if shown at all, is only made out by the affidavits taken and read on the hearing.

Mr. Justice Whitehead, in the advisory opinion delivered by him in the Supreme Court, seems to assume it as very probable that an error was committed by the arbitrators in relation to this credit. We are far from being clear that the case, as presented to us, will warrant such supposition. We do not know what was before the arbitrators. The inspection of books, the admissions of parties, inferences from facts of which we have no knowledge, or other sources of information hidden from us, may have furnished sufficient ground for their action, even supposing that this sum of $400 was not in fact carried to the credit of the estate. But it may have been allowed in some suitable mode. The statement referred to, as accompanying the award, was a calculation of the amount due from Price to the estate of Stoll, upon the bond and mortgage given by the former. The calculation states the indebtedness of Price on the bond down to the period of Stoll's death, when a rest is made. Then occur items of credit, of which this is one: "Then paid by balance of individual account $141.89." This item of credit shows that other matters of account between Price and the estate of Stoll had been adjusted to this period, and the balance due him had been carried to his credit on the bond. The calculations which produced this credit are not before us; but if the estate of Stoll was entitled to the credit of $400, it is quite possible, indeed quite probable, that it was there given. The whole argument, as to the alleged error or mistake, seems to rest upon the assumption that the credit should have been given in a particular mode or in a particular

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connection. But, if due to the estate of Stoll, it might naturally and properly have been allowed in the mode suggested, and we are unwilling to assume that there is even a *prima facie* case shown by the affidavits, the arbitrators themselves not having been examined as to this point.

But the remarks just made upon the merits of the award are rather in answer to the arguments of the plaintiff's counsel than in connection with the true grounds upon which awards can be set aside, when made a rule of court under the statute. The allegation of error rested for its support upon extrinsic evidence, and the alleged error did not appear either on the face of the award or the accompanying paper, or by the admissions of the arbitrators. To enter upon such a case into the merits of the award, would be to turn the proceeding under the statute into an appeal from the judgment of the arbitrators. Courts have not been entirely consistent as to the grounds upon which they will set aside awards good upon their face, but we are not aware that any court has gone to this length. Where there has been no corruption or partiality in the arbitrators, or fraud practised by the party, the award is conclusive, and the court will not take upon itself to inquire whether the arbitrators have judged right or wrong upon the facts; the court will not attempt to correct their judgment upon the facts. *Underhill* v. *Van Cortland*, 2 *John. Ch. R.* 361; *Morgan* v. *Mather*, 2 *Ves. Jun.* 15.

The view taken by the judge who delivered the opinion of the Supreme Court, as to the grounds of setting aside an award, seems to be substantially correct, confining his observations to the case before the court and to the proceedings under the statute. We are not called upon to make any inquiry as to the power of courts of equity, upon bill filed, to set aside an award. The inquiry here relates to the power of the court under and by virtue of the statute, the submission having been made a rule of court; and in such case it may be taken for granted that there is no difference whether it be made a rule of a court of law or a court of equity. The only authority in either case, where proceeding by rule, is under the statute, and the only mode of relief is by setting aside the award.

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In regard to mistakes in law courts will not interfere, unless it appears that the arbitrators meant to decide according to the legal rule, and had mistaken it; and it must so appear on the face of the award or by the statement of the arbitrators. If arbitrators mean to decide according to law, but mistake the rule in some palpable and material point, in such case the award will be set aside, as not conformable to their real judgment and intention. But, unless they intend to be bound by the legal rule, courts will not withdraw the matter from the tribunal which the parties themselves have selected. The courts will not undertake to inquire whether the conclusion was right or not, unless they can see that, professing to decide according to law, the arbitrators had decided contrary to law. In a late case, in which an objection, not apparent on the face of the award, was attempted to be shown by affidavits, other than of the arbitrator himself, the court refused to interfere with his decision. *Fuller* v. *Fenwick*, 3 *C. B.* 705.

So as to mistakes in fact, those which can be taken advantage of in this mode are comprised within very narrow limits, and must appear on the face of the award itself or in some authentic shape. They must be such as the arbitrators would admit, as miscalculation in an account, or the like, and certainly unless they appear on the face of the award, or the accompanying paper, must be made out to their satisfaction. In such case, also, the award is not what the arbitrator intended it to be, *viz:* the result of his judgment. The safe rule seems to be that acted upon by Lord Thurlow, who always required the oath of the arbitrator himself to establish or admit the alleged mistake.

In a loose sense, the arbitrators may be said to have fallen into an error or mistake when they have judged wrong upon the evidence before them. But this is not the kind of error or mistake intended, because so far as they have exercised their judgment it is conclusive, though to other minds the result might seem palpably erroneous. The mistake must be of a different character, something which has deceived or misled them, and not a mere mistake in drawing conclusions of fact from observation or evidence. *Hall* v. *Hinds* (2 *M. & G.*

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847) was a case of miscalculation made to appear to the satisfaction of the arbitrators, and established by their affidavits, the mistake, though gross, not being apparent on the face of the award. It was considered as a case of mere clerical mistake, by which the arbitrators expressed on the award not the intention of their own minds, but one widely different. But the carelessness was so gross, and the mistake so great, as, according to the opinion of the court, to merit the epithet of misconduct on the part of the arbitrators. The award was set aside. But the courts in England have expressed their disposition to go no farther. In *Phillips* v. *Evans* (3 *M. & W.* 309), the arbitrator made a mistake in not allowing a proper credit, which he admitted to the party on the error being pointed out to him, and wished the matter referred back to him that he might correct it, though to this the opposite party objected. The court refused to set aside the award, as the error did not appear on the face of the award, and the arbitrator had not made any affidavit himself admitting the mistake. The court refused to interfere without the oath of the arbitrator. See *Russell on Arb.* 295, *et seq.* (*Law Lib.* 1849); *Watson* 281 (*Law Lib.* 1848); *Ward* v. *American Bank*, 7 *Metc.* 489; *Boston Water Power Co.* v. *Gray*, 6 *Ib.* 131, 181; *Kleine* v. *Catara*, 2 *Gallison* 61, 69.

In this case the arbitrators were examined and their depositions taken by the plaintiff in error, but no question was put to them as to the alleged mistake. Under the sound and safe principles to which I have referred, we think, without their admission of the error, the court was right in refusing to set aside the award. The whole case is obviously an attempt to review, in this mode, the decision of the arbitrators, and to correct an alleged error in their judgment, without calling upon them to admit or explain the alleged error. To admit such proceeding would be to rehear the merits of the award, and, as before said, it would be in effect an appeal from the judgment of the arbitrators. This the settled decisions of the courts, founded in policy and justice, will never permit.

One word only remains to be said upon the single remaining point. We see no difficulty as to the final character of the

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award. The arbitrator, among other things, awarded that Price should pay off and discharge the balance due on a certain bond given by Stoll & Price, and save harmless and indemnify the representatives of Stoll from the same. The award is direct and explicit as to the duty, and the remedy clear in in case it was not performed.

Judgment affirmed.

For affirmance—CARPENTER and OGDEN, Justices, SPEER, PORTER, SINNICKSON, and WALL, Judges—6.

For reversal—The CHANCELLOR, NEVIUS, Justice, and SCHENCK, Judge—3.

The CHIEF JUSTICE, RANDOLPH, J., and Judge McCARTER did not sit on the argument of the cause.

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CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT OCTOBER TERM, 1849.

THE PROPRIETORS OF THE BRIDGES OVER THE PASSAIC AND HACKENSACK v. THE STATE.

1. The contract made by the commissioners by virtue of the provisions of "An act for building bridges over the Passaic and Hackensack," passed November 24, 1790, is not a lease, although the operative words are words proper to create a term.

2. A *grant* of a franchise by the state for a term of years is not a lease.

3. The toll bridges over the Passaic and Hackensack, erected under the act of 1790, are liable to be taxed as other toll bridges are.

This was a writ of error, brought to remove the judgment of the Supreme Court affirming an assessment of taxes made by the assessor of the township of Harrison, in the county of Hudson, on the bridges of the plaintiffs over the Passaic and Hackensack. The assessment had been removed into the Supreme Court by *certiorari*, and was sustained by the decision of the Supreme Court. 1 *Zabr.* 384.

The state of the case will be found in the report of that decision *ubi sup.*

The case was argued before the CHANCELLOR, Justices RANDOLPH and OGDEN, and Judges PORTER, SCHENCK, WALL, and SINNICKSON.

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Gifford and *Bradley*, for plaintiffs in error; *W. Pennington*, and *F. T. Frelinghuysen*, for defendants.

The whole court, except the CHANCELLOR, concurred in affirming the judgment, upon the grounds contained in the opinion of the court below.

The CHANCELLOR. By the 11th section of the act of November 24, 1790, the commissioners were authorized and empowered, at their discretion, to contract and agree, with any person or persons who would undertake the same, for the erection of the bridges, for such toll, for so many years, and upon such conditions, as, in the discretion of the commissioners, should appear expedient. The last proviso of the 22d section of this act provides, "that the bridges to be built by virtue of this act shall continue the property of the persons therein named, (that is, the commissioners,) their executors, administrators, or assigns, for the term of ninety-nine years from the passing of this act, and no longer." By an indenture, made the 19th February, 1793, between the commissioners, of the one part, and Samuel Ogden and others, of the other part, reciting the said 11th section of the act of November 24, 1790, and that the party thereto of the second part had agreed with the said commissioners to erect, build, and maintain the said bridges for the term and on the conditions therein after mentioned. The commissioners, in consideration of the covenants in the said indenture after reserved and contained on the part of the said party of the second part, demised, granted, and to farm let, unto the said party of the second part, the said bridges, to be erected, as therein afterwards is declared, together with the tolls appertaining thereto, not to exceed certain rates specified in the said indenture: to have and to hold the said bridges, with the said specified tolls, unto the said party of the second part, their executors, administrators, or assigns, from the 24th of November, 1792, for, during, and until the full end and term of ninety-nine years. And the said party of the second part, for themselves, their heirs, executors, and administrators, did, by the said indenture, covenant, grant, and agree, to and with the said party of the first part, and the survivors and survivor

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of them, and the executors, administrators, and assigns of such survivor, to erect the said bridges, and to construct the same in a certain manner, specified in the said indenture, and to construct a draw in each bridge, in such part thereof as should be determined by the said commissioners, and to build the bridges of such material, and of sufficient strength to be safe, &c., all of which shall be determined by the said commissioners; and to keep the said bridges, and the causeways leading thereunto, from the bridge on the east side of the Passaic river to the bridge over the Hackensack river, in good and sufficient repair for and during the term aforesaid; and at the expiration of said term well and truly to deliver up the said bridges and causeways, in good and sufficient repair, unto such person or persons as may be by law authorized to receive the same; the bridges to be completed on or before the 24th November, 1794. And the said commissioners covenanted with the said party of the second part to cause good and sufficient causeways to be made from the east side of the bridge over the Passaic river to the upland on Bergen, on the east side of the bridge over the Hackensack river, on or before the 1st December, 1795. And it was further covenanted and agreed between the said parties, that if, at any time after the said bridges and causeways should be completed, any part of the agreements and covenants in the said indenture contained, on the part and behalf of the party thereto of the second part, should be broken, the trustees of the road and ferries from Newark to the road leading from Bergen Point to Paulus Hook, established by law, "in whose custody this agreement is to be lodged by law," shall and may cause a prosecution to be commenced and carried on for such breach in the name or names of the said commissioners, or the survivors or survivor of them, and in the name or names of the executor or executors, administrator or administrators, of such survivor.

This instrument is neither more nor less than the contract or agreement which the commissioners, by the 11th section of the act of November 24, 1790, were empowered to make with any person or persons who would undertake to build the bridges for said tolls for so many years, and on such conditions as to the

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commissioners should appear expedient, and can have no more or other effect than if the party of the second part had contracted to build the bridges for the tolls to be derived from them for a smaller number of years. It is no more an assignment of the property in the bridges, than an agreement that the builders should have the tolls for fifty years for building the bridges would have been an assignment of the property in the bridges. It is simply a contract on the part of the commissioners, acting as trustees for the state, that the party thereto of the second part, as a consideration for building the bridges, shall have the tolls for a certain number of years.

It is a misconception, I apprehend, to suppose that the word *assigns*, in the last proviso to the 22d section of the act of November 24, 1790, means the persons who shall contract to build the bridges. It was uncertain, at the passage of this act, how many years' toll would be agreed upon as sufficient to compensate for the building of the bridges. Hence it is clear that the word *assigns*, in this proviso, does not mean the persons who should contract to build the bridges, for the persons intended by this proviso are to hold the property in the bridges for the whole term of ninety-nine years, under all circumstances, and without regard to the question how many years' toll might be agreed upon as sufficient to compensate for the building of the bridges.

The nature of the contract or agreement contemplated in the 11th section required that the property in the bridges should be put, by the act, in persons other than the parties who should contract to build the bridges, for the tolls thereof, for a time to be agreed upon between them and the commissioners. Accordingly this proviso puts the property in the bridges in the commissioners, their executors, administrators, and assigns (legal assigns), trustees for the state, for the whole term of ninety-nine years. Where would the property in the bridges have been if the party of the second part in this contract had undertaken to build the bridges for the tolls for fifty years?

By the contract itself the party of the second part covenant with the commissioners, and the survivors and survivor of them, and the executors, administrators, and *assigns* of such

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survivor to erect, &c. What meaning can be given to the word *assigns* here, if by this very contract the party undertaking to build the bridges became the assigns of the property in the bridges?

The act to prolong the time granted for erecting the bridges, passed November 5, 1794, after the said contract or agreement was made, gives the understanding of the legislature as to the nature of that contract. It calls the party of the second part to that contract "stockholders contracted with by Doctor Samuel Tuthill and others, commissioners authorized to contract for building bridges," &c., not assigns of the property in the bridges, but simply, according to the fact, contractors for building the bridges.

It seems clear to me that the property in the bridges is not in the defendants below, but that they have only a right to receive the tolls of the bridges for the number of years specified in the said contract, as a compensation for building the bridges.

We have an act providing that tenants shall pay the tax, and be allowed to deduct it from the rent. This is not a case within that act; no rent is payable here, and if the builders of the bridges are compelled to pay tax they have no remedy.

It is said the act of 1846 taxes toll bridges. There are toll bridges which are private property, and therefore subject to taxation. It does not follow that toll bridges which are the property of the state, or of commissioners who are trustees for the state, are subject to taxation, nor that persons who have, by contract with the state, through its commissioners, a right to the tolls of bridges for a certain number of years, as a compensation for building the bridges, are to pay tax on the bridges.

The state, by its commissioners, contracted with the defendants below to permit them to receive the tolls for the number of years specified in the contract, as the price or consideration for the building of the bridges. This is all the right or interest given by the contract to the defendants below. The effect of the contract is the same as if the defendants below had contracted to build the bridges for the privilege of receiving the

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tolls for ten years. The property in the bridges is not in them, but in the commissioners, as trustees for the state, and in the state. The law of 1846, taxing toll bridges, does not apply to this case, and if it could, the defendants below are not the persons liable to pay the tax on these bridges.

In this view of the case, I am constrained to say that I think the judgment of the Supreme Court should be reversed.

Judgment affirmed.

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CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT JANUARY TERM, 1850.

DEMAREST ET AL. v. DEN EX DEM. HOPPER ET AL.

When lands are devised to any person for life, and at his death to go to his heirs, the children of the tenant for life take immediately a *vested* remainder in fee, by virtue of the first section of the act further regulating the descent of real estates. *Rev. Laws* 774 *(a)*.

This was an action of ejectment brought in the Supreme Court by John Den, on the demise of Maria Louisa Hopper, Eliza Ann Hopper, Charity Euphemia Hopper, Henry Lewis Hopper, Catharine Jane Hopper, Emily Hopper, Lewis Hopper, John Bush, and Peter P. Wortendike and Rachael his wife, against Garret J. Demarest, Daniel D. Blauvelt, James Holdrum, and Henry A. Terhune, in trespass and ejectment for lands in Bergen county.

It was tried before the Chief Justice at the Bergen Circuit, in February, 1847, when a special verdict was found under the direction of the court.

John Bush and Rachael the wife of Peter P. Wortendike, two of the lessors of the plaintiff, were found to be lawful heirs of

(a) Re-enacted, *Rev. Stat.* 340, § 10.

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Catharine Salyer, now deceased, the daughter of Johannes Perry. A general verdict was found that the defendants were guilty of the trespass and ejectment complained of, and the damages of the plaintiffs were assessed at six cents, subject to the opinion of the court upon the following case, and the facts so specially found by the said verdict:

Johannes Perry, of Orangetown, Rockland county, New York, by his last will, dated May 29, A. D. 1823, and duly signed and attested to pass real estate in New Jersey, devised, among other things, as follows: "I give unto my daughter Catharine, for and during her life, the remainder of my real estate; after her death, I will and require the same shall be equally divided among her heirs, and be unto them, their heirs and assigns for ever."

That the said Johannes Perry died in about the year 1832, and was, at the time of his death and at the date of said will, seized in fee of the premises in question, which, with a lot of wood land, containing about 18½ acres, adjoining the said premises, and some lands in Rockland county, constitute the remainder of his real estate, and were not included in any specific devise in his will.

That said testator, at the date of said will, had three children, Margaret, Mary, and Catharine; that Catharine was, before the date of said will, lawfully married to Michael Salyer, who is still living, and from whom she never was divorced; that after said marriage, and during the cohabitation of said Michael Salyer and Catharine his wife, she had one child, Maria, afterwards the wife of Lewis Hopper; that, after the birth of said Maria, Michael Salyer and his wife Catharine separated and lived apart, under written articles of separation; that during said separation the said Catharine was formally married to Peter Bush, by the Reverend Stephen Goetchius, a settled and ordained minister of the gospel, settled at the Reformed Dutch Church at Pascack, in the county of Bergen; and that after said ceremony of marriage they cohabited as man and wife, and that during said cohabitation John P. Bush and Rachael Wortendike, two of the lessors of the plaintiff, were born of said Catharine. John was born about two years after said

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marriage by S. Goetchius, and before the date of the will; Rachael was born a few years after John, and after the date of said will, but in the lifetime of Johannes Perry.

That Maria, the daughter of Catharine Salyer, was married to Lewis Hopper in 1824, and died May 22, 1846, leaving six children, born during said marriage, to wit: Maria Louisa, aged 18 years; Eliza Ann, aged 16; Charity Euphemia, aged 14; Henry Lewis, aged 11; Catharine Jane, aged 8; and Emily, aged 4 years, and leaving no other descendants.

That Catharine, the daughter of Johannes Perry, died in September, A. D. 1845, before her daughter Maria, and leaving no other descendants than said Maria, John, and Rachael; that said Catharine and Peter Bush, after said marriage ceremony before S. Goetchius, cohabited as man and wife until her death, and that her children, John and Rachael, were always called by the name of Bush.

That Lewis Hopper and Maria his wife, by deed, duly acknowledged, dated April 13, 1832, recorded May 28, 1832, reciting a consideration of $500, witnessed that they had granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, unto Peter Bush and his heirs and assigns, all the right, title, and interest which they then had, or thereafter might have by virtue of the will of Johannes Perry, in the premises in question, and on seventeen acres in Rockland county, without any covenants.

That Peter Bush and Catharine, called his wife, by deed, duly acknowledged, dated April 13, 1832, recorded October 23, 1833, reciting a consideration of $300, witnessed that they had granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, unto Lewis Hopper and Maria his wife, the wood lot of 18½ acres adjoining the premises in question, and part of the lands devised by Johannes Perry to his daughter Catharine, for her life, without any covenants.

That Peter Bush, by bond, dated April 13, 1832, became bound to Lewis Hopper in the sum of $1000, with a condittion reciting, that whereas John Bush and Rachael Bush, heirs of Catharine aforesaid, were minors, and incapable to transfer real estate, that if said John Bush and Rachael Bush, when of age,

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should convey their interest in said 18½ acre wood lot, or if said Peter Bush should pay said Lewis, his heirs or assigns, all costs or damages which he may sustain by reason of their not so doing, that bond to be void.

That said bond and said last mentioned deed were the true and only consideration of the release executed by Lewis Hopper and wife to Peter Bush; that Peter Bush and the said Catharine, before that, and at the opening and reading of the will of Johannes Perry, had expressed themselves much dissatisfied with the limitations on Catharine's share, and he threatened that if some arrangement was not made he would sweep all the wood off the same; that, after this, negotiations began, which ended in the above conveyances.

That Peter Bush, at and before the date of the release to him, was in possession of the premises, and that Lewis Hopper entered upon the 18½ acre lot, and has sold the same to divers persons, by deeds with full covenants of warranty and seizin, for the sum of $850, in all.

That Peter Bush and Catharine, called his wife, by deed, duly acknowledged, dated October 23, 1833, and never recorded, reciting a consideration of $1982, witnessed that they bargained, sold, and conveyed to the defendants, Daniel D. Blauvelt and Garret J. Demarest, 30.72 acres, part of the premises in question, in fee simple, with full covenants of title.

That Peter Bush, at the date of said last mentioned deed, executed to said Garret J. Demarest and David D. Blauvelt his bond, with a condition reciting that said John Bush and Rachael Bush, as heirs of Catharine, were interested in the said 38.72 acres by virtue of said will, and that said bond should be void on their releasing to said Garret and Daniel, when they came of full age.

That Peter Bush and Catharine, called his wife, by deed, dated October 23, 1833, duly acknowledged, but never recorded, conveyed, by bargain and sale, with full covenants, 13.76 acres, the residue of the premises in question, to James Holdrum, for the consideration of $602.27.

That Peter Bush, at the date of the said deed, gave to James Holdrum his penal bond, with like recital and condition as is

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contained in the bond above stated, to Garret J. Demarest and Daniel D. Blauvelt.

That John P. Bush, when of age, executed a deed to Garret J. Demarest and Daniel D. Blauvelt, dated December 31, 1842, duly acknowledged, but never recorded, reciting a consideration of one dollar, whereby he witnessed that he had granted, bargained, sold, remised, released, and for ever quitclaimed to said Garret and Daniel, in fee, the lands so conveyed to them by Peter Bush, without any covenant of any kind, and executed a like release for like consideration, with like words of conveyance, of said date, and also without any covenant of any kind, to James Holdrum, for the lands so conveyed him by Peter Bush.

The question for the opinion of the court is, whether, on the facts above stated and the facts specially found by the jury, as above stated, the lessors of the plaintiff, or any of them, have any title to the premises in question, or any part thereof; and if the court shall be of opinion that the lessors of the plaintiff, or any of them, have title to said premises, or any part thereof, then the verdict is to be entered for the plaintiff as aforesaid, or for such part of the premises as the lessors of the plaintiff, or any of them, have title to; but if the court should be of opinion that the lessors of the plaintiff, or any of them, have not title to the premises in question, or any part thereof, then a verdict to be entered for the defendants.

And either party is to be at liberty, within ninety days after the judgment of the Supreme Court shall be rendered on this case stated, to turn this special case into a special verdict, and to enter the same on the record, by giving notice of such election within said ninety days to the opposite party, or his attorney, in order that a writ of error may be brought thereon.

The Supreme Court upon this case decided that the lessors of the plaintiff were entitled to recover two undivided third parts of the premises in question, and judgment was so ordered accordingly.

After judgment was thus rendered, the defendants below brought their writ of error to reverse the said judgment, and

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within the time specified turned the special case into a special verdict.

The plaintiffs in error assigned the following causes in error:

First. Because the Supreme Court decided that the devise in the will of Johannes Perry to his daughter Catharine during her life, of the remainder of his real estate, and after her death to her heirs, and to be unto them, their heirs and assigns for ever, gave to the children of the devisee for life only a contingent interest in the estate devised, and that such children on the testator's death took a contingent, and not a vested interest in the remainder.

Second. Because the said court decided that the deed from Lewis Hopper and Maria his wife to Peter Bush and his heirs, mentioned in the state of the case, passed no title whatever in the said lands.

Third. Because the said court decided, that Lewis Hopper was not tenant by the curtesy of his wife Maria of the premises in question.

Fourth. Because the said court decided, that the lessors of the plaintiff, being the husband and children of Maria Hopper, were not estopped, either technically so or in any way barred in law, from setting up a title adverse to the deed of the said Lewis Hopper and the said Maria his wife, herein before mentioned, or from averring that no title passed by that grant.

Fifth. Because the said court decided, that Maria Hopper was never in either the actual or constructive possession of the premises in question, and had only a bare right to possess them.

Sixth. Because the said court ordered judgment for two undivided third parts of the premises in favor of the plaintiff, when judgment should have been ordered for the defendants.

W. Pennington, for plaintiffs in error.

The title of the defendants, as well as of the lessors of the plaintiff, is deduced from the will of Johannes Perry, who died in 1832, having devised the residue of his estate, which comprised the premises in question, to his daughter Catharine for life, and after her death to heirs, &c. Catharine had three

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children, Maria, undoubtedly a lawful child, and John and Rachael, the two last born after a second marriage, entered into according to the peculiar notions of Dominie Goetchius. But the jury have found that they are the lawful heirs of Catharine Salyer, and they are to be considered such in this discussion. The defendants claim title to two-thirds of the premises in question. They do not claim title from Rachael, who has not released since she came of age. We suppose that here the sole controversy will be in regard to the share of Maria Hopper, conveyed by her and her husband before the death of her mother, Catharine. [The counsel of the defendants here stated that they should also claim the share of John P. Bush and judgment for the entire premises.]

1. What is the effect of the devise to Catharine? At common law, under the rule in *Shelley's case*, the devise would be in fee. The statute of 1820 (*Rev. Stat.* 340, § 10) comes in, and its operation is to turn it into a devise to Catharine for life, with remainder to her children in fee. We contend that remainder is a *vested interest*, a vested remainder in the three children, as tenants in common. When Hopper and wife and John P. Bush made their several conveyances, they had a vested interest, which they could convey, and not a mere contingent interest, which could not be conveyed, and could have no operation except by estoppel.

The courts incline to consider remainders as vested, rather than contingent; and the court below had no difficulty on the first clause of the statute, that on the death of tenant for life the estate should go to, and vest in the children of such devisee. The difficulty was upon the second clause, but which must yield to the policy of the law and obvious intent of the statute. The court will labor to vest it, if possible.

Maria did not die before her mother, and the case provided for in the subsequent clause never occurred; her children claim not by force of the statute, but as heirs. They claim not under the will, but under the mother, and she, with her husband, has conveyed the premises in fee. She took a vested remainder in fee, which would open in favor of afterborn children. She was entitled to convey, and the purchaser took

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a fee subject to be divested, had she died before the death of the mother. *Den* v. *Allaire, Spenc.* 6. See also 4 *John.* 61; 2 *B. C.* 169; 5 *Mass.* 535; 1 *Serg. & R.* 378; *Ives* v. *Legge,* 1 *Fearne C. T.* 319, *note;* 2 *Har.* 281; 4 *Kent* 201. If vested remainder, there is an end of the cause.

2. But suppose the remainder to be contingent, and no title passed by the deed of Maria Hopper and her husband or of John P. Bush, yet the estate vested on the death of the mother, and enures by estoppel to the benefit of the purchaser. It may be said that there is no recital or covenant of title, and therefore no technical estoppel. I admit it, but it stands on the broader ground, that courts will not permit persons to claim in opposition to their own deed. The deed of a married woman, executed according to the form prescribed by the statute, is effectual to pass her title, and the principle will equally apply to her. 1 *John. Cas.* 81; 12 *John.* 201; 13 *Ib.* 316; 14 *Ib.* 193; 3 *Ib.* 331; 5 *Halst.* 102; 2 *Gr.* 1; *Cowp.* 600; 3 *Wash. C. C. R.* 549.

3. One count is on the demise of Lewis Hopper, as tenant by the curtesy. If his wife was ever so seized as to entitle him to a life estate, we have his deed.

Zabriskie and *A. S. Pennington,* for defendants in error.

The court below were mistaken in regard to the deed of John P. Bush. His release was before, and not, as supposed by the court, after the death of his mother, Catharine Salyer. We shall therefore insist, that if the remainder over is held contingent, that we are entitled to judgment for the entire premises. The record was one brought into this court by the writ of error, and such judgment may here be given as the court below should have given.

1. Maria Hopper and John P. Bush, at the time of executing the conveyances by them, had not such estate as they could convey by release or bargain and sale. No estate vested in them during the life of their mother. There was not even a contingent remainder, but merely a possibility or expectancy, such as a child may have during the lifetime of a parent.

The word "heirs," in the will, is a word of limitation, and

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not of purchase or designation, unless made so by the plain language of the will. 4 *Kent.* 537, *note;* 2 *Jac. & Walk.* 65, 189; 1 *Pow. Dev.* 301, 304, 311. At common law, then, there is no dispute but that, under the rule in *Shelley's case,* Catharine would have taken a fee.

But the words come within our statute, (*Rev. L.* 774, § 1; *Rev. Stat.* 340, § 10,) and the construction of that statute must govern this devise. The statute does not provide for the case where no descendants. Its object is not to abolish the rule in *Shelley's case,* but, when there are descendants, to carry out the will of the testator, despite the rule. The rule seems not to be abolished, but is averted when there is issue. If neither child nor grandchild the rule operates, and the estate descends to the heirs of the first taker. The vesting of the freehold was not the mischief, it was the contravention of the will of the donor by the first taker. The statute is one to regulate descents, not to construe wills, and should be construed as near the common law as will attain the object of the statute.

No *estate,* upon this construction, vests during the life of the ancestor, but there is only a possibility or expectancy as heir.

But, if this construction cannot be adopted, still the remainder to the children is contingent, not vested. It is contingent to vest in case the child survive the parent, if not, then go to the grandchild, who is to take not by descent from the parent, but by purchase, according to the disposition in the will. The person to take is uncertain, which is the characteristic of one class of contingent remainders. This construction is conformable to the view taken in *Den* v. *Provost* (4 *John.* 65), where, under such provision, it was admitted that the remainder would be contingent, *viz.* that the estate should go to children living at the time of the death of the mother, and if any deceased, then to the issue of such deceased child. So in *Pelletreau* v. *Jackson,* 11 *Wend.* 121-2.

In New York there is a statute very similar to ours, in which, however, it is declared in express terms, that the "heirs," on the termination of the life estate, shall take as purchasers; and this is said by Kent to be a contingent remainder. See 4 *Kent* 511, *note* (*5th edition*).

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2. If contingent, then no title passed by the conveyance, and none can be set up, unless by way of estoppel, of which principle no question can be made.

No estate passes by deed of release, bargain and sale, or other deed taking effect under the statute of uses, except what was vested in the grantor at the time of the conveyance. Nor will the grantor be estopped from setting up any after acquired estate, unless such deed contains an express recital of title or covenants of warranty. The cases can have proceeded only on the ground that there was no estoppel, either technical or equitable. *Litt.* § 446; *Co. Lit.* 265 *a & b; Wyvil's case, Hob.* 45; *Whitfield* v. *Fausset*, 1 *Ves. Sen.* 387; *Seymor's case*, 10 *Co.* 95; *Adm. arg. in Doe* v. *Whitehead*, 2 *Burr.* 704; *Doe & Lumley* v. *Scarborough*, 3 *Ad. & Ell.* 2; *Right* v. *Bucknell*, 2 *B. & Adol.* 278; *Bensley* v. *Burdon*, 2 *Sim. & Stuart* 519; *McCracken* v. *Wright*, 14 *John.* 193; *Jackson* v. *Vanderheyden*, 17 *Ib.* 167; *Jackson* v. *Hubble*, 1 *Cow.* 613; *Jackson* v. *Winslow*, 9 *Ib.* 13; *Jackson* v. *Bradford*, 4 *Wend.* 622; *Pelletreau* v. *Jackson*, 11 *Ib.* 110; *Jackson* v. *Waldron*, 13 *Ib.* 178; *Blanchard* v. *Brooks*, 12 *Pick.* 47; *Kinsman* v. *Loomis*, 11 *Ohio* 475; *Allen* v. *Sayward*, 5 *Greenl.* 227; 2 *Smith's L. Cas.* by *Hare & Wallace*, 454, *et seq.* (*Law Lib. ed.* 1844).

The words "grant, demise, and release," in a conveyance in fee, do not imply a warranty, whatever might be the case in a lease for years. *Frost* v. *Raymond*, 2 *Caines* 188; *Grannis* v. *Clark*, 8 *Cow.* 36; *Co. Lit.* 384, *a, and note.*

The case of mortgage stands on special grounds. *Den* v. *Gardner*, *Spenc.* 556, 560, and authorities there cited.

The doctrine is well settled, and most of the cases that seem to conflict are consistent, so far as the decision goes, though they contain *dicta* too broadly expressed. *Jackson* v. *Murray* (12 *John.* 202), the only case in which the point seems decided in New York, and the *dicta* of Kent, J., in *Jackson* v. *Bull* (1 *John. Cas.* 81), have been overruled by the subsequent cases in the same state, already cited. See also the *dictum*, as stated in 4 *Kent* 260 *and note* (*5th edition*).

Den v. *Vanness*, 5 *Halst.* 102, was a mortgage case, and

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the *dicta* to be found there were unnecessary to the decision. The case of *Lessee of Cooper* v. *Galbraith* (3 *Wash.* 546), was that of ejectment by purchaser at sheriff's sale against the defendant in execution, who must surrender the possession; this point is also decided in *Den* v. *Winans*, 2 *Gr.* 1. There are *dicta*, however, in these three cases which it is submitted are not law.

In *Den* v. *Allaire*, the party who conveyed had a plain vested estate in fee simple by executory devise, subject only to be defeated by subsequent contingency. Had the court held the party in remainder could have conveyed before the contingency happened on which the subsequent estate was to vest, that case might then have had some application to this argument..

3. But clearly a married woman is not bound by warranty or estopped by her deed of bargain and sale; and this applies to conveyance by Maria Hopper. 17 *John.* 167; 6 *Wend.* 1; 2 *Kent* 168.

Again, the heirs of Maria Hopper do not claim by descent from her, but *per formam doni.* She was never actually seized, and therefore her husband never became tenant by curtesy.

Vroom, in reply.

Under this will and the act of 1820 (*Rev. L.* 774), which is supposed to abolish the rule in *Shelley's case*, Catharine took simply an estate for life, and was deprived of the power to alienate from her children. She left three children, and the residue of the estate was in them. The construction cannot be adopted, which would leave part of the estate undisposed of.

If this construction prevails, the same must also apply to all devises, which, but for the act, would have been estates tail. The same construction must apply to the second, as to the first section of the act.

The children of Catharine take as purchasers under the act; that cannot be disputed, and we insist they take an estate in fee, subject to the contingency on which it is to go down; something like a condition subsequent, of living until the death of the mother.

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Cited and commented on *Den* v. *Allaire, Spenc.* 6, and *Dingley* v. *Dingley*, 5 *Mass.* 537.

2. Suppose we are wrong, and the children have merely a contingent interest; a contingent remainder is an estate known in the law, an interest which one hath in lands, &c. Estates are divided into estates in possession, reversion, and *remainder.* Maria, as well as her brother, had an estate in lands, and she made a conveyance of an estate which she then held, not of an after acquired estate. She did not attempt to convey a mere possibility or expectancy, as in case of a son during the lifetime of the father, in which case nobody ever dreamed the son would be estopped. I do not argue for such a case. Maria conveyed her interest or estate; she survived her mother; her interest then became absolute, and enured to us, and vested for our benefit. I take it, an estoppel depends upon whether any estate existed in the grantor; which is not the case where the interest is merely speculative, as in the case of a son during the life of his father.

The counsel cited, and commented on the cases already referred to.

The conveyances profess to carry all the title which the grantors then had or which they might have, and this is tantamount to an assertion of title. It would sanction a fraud to permit them now to deny that they had title.

But it is said that Mrs. Hopper was a married woman, and cannot be estopped. This is putting the doctrine of estoppel on the technical ground of warranty. It is true a married woman cannot bind herself by covenants of warranty, but estoppel rests on broader grounds. Under our statute, a wife can convey as firmly as her husband; but title passes, and she shall not deny that she had title.

The Chancellor. Johannes Perry died in 1832, leaving a will, by which, after other devises, he devised as follows: "I give unto my daughter Catharine, for and during her life, the remainder of my real estate; after her death, I will and require the same shall be equally divided among her heirs, and be unto them, their heirs and assigns, for ever."

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At the death of the testator, Catharine had a daughter, Maria, her only child by her husband, Michael Salyer, the said Maria being then married to Lewis Hopper.

After the death of the testator, and in the lifetime of Catharine, Lewis Hopper and the said Maria his wife, by deed, duly acknowledged, conveyed to Peter Bush, his heirs and assigns, all the right, title, and interest which they then had, or thereafter might have, by virtue of the said will, in the premises in question.

Maria survived Catharine, and afterwards died, leaving six children. The question is, whether these children can recover the property from the said grantee of Maria and her husband.

The foregoing statement is sufficient to raise all the questions involved in the case.

I am of opinion that the estate which Maria had before Catharine's death was an alienable estate. By the provisions of our statute, excluding the last clause, "and if any child be dead, the part which would have come to him or her shall go to his or her issue in like manner," Maria had, while Catharine lived, a vested remainder. And if this last clause can be considered as doing any thing more than declaring what would be the result in case the person in whom the remainder was vested had not conveyed it, and had died leaving children; if it can be considered as legislating an additional limitation to the estate; my opinion is, that it is a limitation by way of executory devise. If it is an executory devise, then the person to whom Maria, in Catharine's lifetime, conveyed took subject to be defeated of her estate by the happening of the contingency on which the executory devise was to take effect. But this event did not happen, Maria survived Catharine. On the death of Catharine, the remainder was executed in possession. If Maria had not conveyed, it would have been executed in possession in her. She having conveyed, it was executed in the person who represented her, that is, her grantee.

There can be no doubt that, by the word "heirs," first used in this will, the testator meant *children*. Substituting the word *children*, this will give a life estate to Catharine, with a vested remainder in fee to her children or child.

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The artificial construction adopted by the English judges in the *Shelley case*, was a clear violation of the intention of the testator. Our legislature have repudiated that construction by the statute; and the results of such a will, as declared by the statute, are just the results which the substitution of the word *children*, instead of the word *heirs*, produces, that is to say, a life estate with a vested remainder over in fee to the children. Of course, if one of the children die leaving issue, and without having aliened, his interest will go to his issue. And this, I apprehend, is all the statute means. It is certainly all the testator meant; and we should hardly suppose that the legislature, in a statute made for the purpose of carrying out the intention of the testator, would make a different will, by adding a limitation which would defeat the intention.

The courts in England, to avoid a contingent remainder and its consequences, felt bound to say, against the clear intention of such a will, that it gave a fee to the person therein named as devisee for life. If prohibited from such construction, they would certainly, to avoid the same consequences and to carry out the clear intention, have construed the word *heirs* to mean *children*, and have said that such a will gives an estate for life with a vested remainder in fee. And it cannot be doubted that courts under our institutions would have done the same, if our legislature had simply declared that such a will should not give a fee to the person therein named as devisee for life.

Now the object of our statute was to restore to such a will the construction demanded by the intention. And it is admitted by the Supreme Court that, without the last clause in the statute, the estate of the children or child is a vested remainder. A vested remainder is descendible. Has the statute, by simply declaring a result of this principle, as applied to the case, undone its intended work, and converted the estate, after all, into a contingent remainder, and defeated at once the intention of the testator and its own purpose? I think not. But, as before observed, if we are liberty to consider this last clause as an additional limitation, it appears to me it should be held to be a limitation in the nature of an executory devise.

The case presents another question: Maria survived the

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devisee for life: the remainder became thereby executed in possession; could she, against her said deed, maintain ejectment for the lands? In the view I have taken of the case, it is not necessary for me to go into an examination of this question, or to express a decided opinion upon it; but I am strongly inclined to think she could not. I concur in the reversal of the judgment.

Judges WALL, SINNICKSON, and MCCARTER concurred with the Chancellor.

CARPENTER, J., (dissenting). Johannes Perry, who died in the year 1832, by his last will devised as follows: "I give unto my daughter Catharine, for and during her life, the remainder of my estate; after her death, I will and require the same shall be equally divided among her heirs, and be unto them, their heirs and assigns, for ever." Catharine Salyer, the daughter, at the time of her decease, in 1845, left three children, found by the special verdict to be her lawful heirs. The lessors of the plaintiff, the children and grandchildren of Catharine, claim under this devise. The defendants claim two shares, out of three, in the premises in question, under deeds of bargain and sale and release without covenants of warranty, given by two of the children of Catharine during the lifetime of their mother; one of those children being a married woman, and having executed the conveyance in connection with her husband, according to the form prescribed by the statute. The first question is, what interest did the children of Catharine take under the will of their grandfather during the lifetime of their mother. If they took a vested remainder in fee, which they could alien or otherwise dispose of during her life, then there is an end of the case, and the lessors of the plaintiff cannot recover. If otherwise, and during her life, their interest was merely contingent; then another question will be presented.

It is too obvious to need additional remark, that at common law, under the rule in *Shelley's case*, Catharine Salyer would take by this devise a fee simple in the premises. But the devise is controlled by the first section of the act of 1820 (*Rev. L.* 774), which enacts, "That in case any lands, &c., shall be

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devised to any person for life, and, at the death of the person to whom the same shall be so devised for life, to go to his or her heirs, &c., then and in such case, after the death of such devisee for life, the said lands, &c., shall go to, and be vested in the children of such devisee, equally to be divided between them as tenants in common in fee, but if there be only one child, then to that one in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue, in like manner."

The devise is to be construed by the aid of the statute. The statute directs to whom the estate shall go, in cases within its terms, when the tenant for life shall die leaving issue. It is not now necessary to consider what will be the result in cases when the tenant for life shall die without issue. The suggestion may be offered, that possibly in such case, the statute not applying, the rule in *Shelley's case* may operate, and the estate descend to the heirs-at-law of the first taker. This view, it seems to me, must be adopted, or a reversion must remain in the heirs-at-law of the testator. Even under the construction adopted by the majority of the court, the remainder must be contingent until the tenant for life shall have a child in whom that remainder may vest. However this may be, the tenant for life left issue, and, in my judgment, the effect of the statute is to make those words in the will, which at common law are words of limitation, words of purchase. The statute gives to the word *heirs* the effect of the word *children*. Did the case then rest upon the first clause of the statute, as applied to the words of the will, the children of Catharine living at the time of the death of the testator would take a vested remainder, subject to open for the benefit of afterborn children.

Undoubtedly courts incline to construe remainders vested, rather than contingent, and it is not the uncertainty of ever taking effect in possession that makes a remainder contingent. To that every remainder for life and in tail must be liable, as the remainder man may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vested, that an estate is always ready, from its commencement to its

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end, to come into possession the moment the prior estate happens to determine, characterizes a vested remainder. 4 *Kent* 202; *Fearne* 216; *Williams on Real Property* 191 (*Lond.* 1845). This devise, then, were it controlled only by the first clause of this statute, would have been a vested remainder; though had there been no children at the time of the testator the remainder would have been contingent until the birth of the first child, when it would have vested, subject to open and let in those who might be born afterward. *Right* v. *Creber*, 5 *B. & C.* 866; *Doe* v. *Perryn*, 3 *T. R.* 484.

The succeeding clause of the statute, however, enacts, "that if any child be dead, the part which would have come to him or her shall go to his or her issue in like manner." As stated in the opinion delivered below, the whole provision of the section, taken together, is this: after the death of the devisee for life the lands shall go to, and be vested in his children; and if any child die in the lifetime of the tenant for life, the share of such child shall go to his children. The devise in the will of Johannes Perry, construed by the statute, is tantamount to a devise to Catharine for life, and on her death to her children, in case they survive her; and if any child shall die in the lifetime of the tenant for life, the share of such child shall go to his or her children. Under such a devise, the remainder to the children is clearly contingent upon their surviving the tenant for life, and cannot vest until her death.

It was suggested, by the counsel of the defendants, that the children of Catharine Salyer, at the death of the testator, took a vested interest by way of executory limitation, defeasible in case of their dying before her. I suppose such idea of an executory devise to be entirely without precedent or authority; it is certainly unsupported by any case cited before the court. The cases cited are of executory devises of a fee limited on a fee, and the like, to take effect upon a definite failure of issue in the first taker. The first taker in such case has a defeasible fee. But there is no such case here. Besides, it is a rule that no limitation will be allowed to operate by way of executory devise which consistently with the language used and with the intention can operate as a remainder. Hence the observation

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of Mr. Fearne: whenever a future interest is so limited by devise as to fall within the rules laid down for the limitation of contingent remainders, such interest is not an executory devise, but a contingent remainder. *Fearne* 299. Lord Kenyon said, in *Doe* v. *Morgan* (1 *T. R.* 755), that if there ever existed a rule respecting executory devises, which has uniformly prevailed without any exception to the contrary, it is that which was laid down by Lord Holt, in *Purefroy* v. *Rogers*, that "where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise." The same rule was stated by Bailey, J., in *Doe* v. *Selby*, 2 *B. & C.* 926. See, also, 2 *Prest. Abst.* 117, 153.

I think it to be clear that in this disposition to Catharine for life, and on her death to her children, and if any child die in the lifetime of Catharine leaving issue, then over to such issue, the limitations over may take effect by way of contingent remainder. There is a particular estate of freehold, the estate for life to Catharine, to precede and support the contingent remainders. The contingency upon which the estate over is to vest must happen immediately upon the termination of the estate for life. It is so limited as to await the actual termination of the particular estate, and not to take effect upon any event which might prematurely determine it. These are the rules which control and sustain contingent remainders, and this case is within those rules. 2 *Prest. Abst.* 113; 4 *Kent* 248.

The remainder has a double aspect. It is first to such child of Catharine as shall survive her, which was held by Chief Justice Hornblower, in *Den* v. *English*, to be a contingent remainder; and if any die before that period leaving issue, then over to such issue. In *Doe* v. *Hopkinson*, 5 *Q. B.* 230, one moiety was given to T., during his natural life, and after his decease to such child or children *as he should happen to leave:* it was said by Lord Denman, who delivered the judgment of the court, that if the will had stopped with the devise above stated, it would have been impossible to resist the clear effect of the words. Nothing then could have vested till, at least, the

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decease of T. But in that case, looking to the whole will, there were other words which showed the intention of the testator that the remainder should vest, upon which the court placed its judgment. So in *Festing* v. *Allen*, 12 *M. & W.* 279, 298, where the words were to A. for life, and on her death to such child of A. as should attain the age of twenty-one, and for want of such over, the devise was held a contingent remainder in children of A. So *Goodright* v. *Dunham*, *Doug.* 251.

Numerous cases might be cited to the same effect; but it is certainly unnecessary to multiply such citations, as, upon the view I take of the operation of the statute, I think it clear that the children of Catharine, on the death of the testator, took a contingent interest only in the premises devised, which did not vest until the death of their mother. It seems to me such result cannot be avoided without overturning, or rather disregarding, well settled rules of law, unless some other view is taken of the meaning or operation of the statute. Perhaps I do not properly apprehend the view of that portion of the court who hold that the children of Catharine take, under the devise in question as controlled by the statute, a vested remainder in fee. I understand, however, the view to be, that the first clause in the statute gives a vested interest, and that the subsequent clause is merely directory to regulate the descent in case any child should die in the lifetime of the tenant for life. This, I think, is to nullify that clause of the statute, to render it entirely nugatory. If the clause were stricken from the statute, the descent in the case supposed would not be otherwise. On the other hand, if the estate in remainder be vested, it may not only be aliened, and taken in execution during the lifetime of the tenant for life, but it may be devised, and the remainder over to the issue thus defeated, in direct contravention of the statute. Such construction seems to me to be in direct opposition to a clear and positive provision in the statute susceptible of a consistent exposition, and it is one in which I cannot concur. It is utterly to disregard that clause of the statute which provides, that upon the death of any child, leaving issue, his share shall go to his issue.

Under the view I take of the devise, as controlled by the

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statute, it becomes necessary to inquire as to effect of the conveyances during the lifetime of the mother, before the contingency upon which the estate was to vest had happened. The court below was mistaken as to the time of the conveyance by John Bush, which was in fact made by him after he came of age, but prior to the death of his mother. It becomes, then, necessary to inquire, whether a deed of bargain and sale without warranty or recital of title will estop the grantor or bar him, and those claiming under him, from setting up a title adverse to his own grant.

I suppose it to be clear, upon the authorities cited by the counsel of the plaintiff, that, at common law, there can be no estoppel upon a conveyance by grant, unless there are covenants of warranty or an express recital of title. A deed of release, bargain and sale, or other deed taking effect under the statute of uses, passes no estate, except what is vested in the grantor at the time of the conveyance. Thus *Littleton* (§ 446) says: "Also these words, which are constantly put in such releases, *sc. quæ quovismodo in futurum habere potero*, are void in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made." Lord Coke, in his comment on this section, says, that if there be a warranty annexed to the release, it will rebut and bar a future right. *Co. Lit.* 265 *a.* So stands the doctrine to this day. A mere release of a possibility or contingent interest to a party not privy in estate will certainly pass no legal interest. What is here said of a release will apply to a deed of bargain and sale, or other conveyance, taking effect under the statute of uses. These conveyances cannot pass an estate, either when the grantor has nothing at the time of the sale, or an interest merely contingent. There is in such case no seizin to give effect to the statute, so that the deed operates only as a common law grant, which can never pass an estate unless it be vested in interest. 2 *Smith's L. Cas.* 455, *note by Mr. Hare* (*Phil. ed.* 1844).

There is nothing in the distinction, attempted to be raised in the application of the doctrine, between contingent interests and mere expectancies. Indeed, a contingent interest is not,

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strictly speaking, to be called an estate; it is merely the chance of having one. There may be a contingent interest, says Mr. Preston, but no interest, except such as is vested, can be accurately termed an estate. 2 *Prest. Abst.* 92. It might have been extinguished by feoffment, fine, or common recovery, but it cannot be conveyed at law by conveyance to take effect under the rules of the common law. The effect of a conveyance under the statute of uses upon such interest, if any, must be to bind the grantor, or those claiming under him, by way of estoppel.

An estoppel is said, by Lord Coke, to be when a man is concluded by his own act or acceptance to say the truth, a definition rather startling; as if truth was the enemy which the law of estoppel was invented to exclude, while its real object is to repress fraud and to render men truthful in their dealings with each other. Rightly understood and properly applied it is a valuable auxiliary in the hands of justice for the best purposes. A better definition has been given by some old authorities: "An estoppel is where a man is concluded and forbidden by law to speak against his own act ordered; yea, even though it is to say the truth." *Termes de la Ley, tit. Estoppel;* 1 *Lit. Pr. Reg.* cited in *Best on Evidence,* § 362, *p.* 403. It is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature; so high and conclusive that the party whom it affects is not permitted to aver against it, or to offer evidence against it, or to offer evidence to controvert it. The principle, as applied to duty, is, that where a man has entered into a solemn engagement under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted. 2 *Smith's L. Cas.* *437, *456 (430, 450, *Phil. edition*). In *Goodtitle* v. *Bailey, Cowp.* 600, Lord Mansfield said: "If a man has made a solemn deed *covenanting* that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken, no more than it shall be permitted to a mortgagor to dispute the title of his mortgagee. No man shall be allowed to dispute his own solemn deed." The *dictum*, as

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applied to the case then before the court, is unquestionably sound; though separated from the context, it has been used as a text to introduce or support an untenable doctrine. The doctrine of estoppel was properly applied to the case then under consideration. But, as conveyances which take effect under the statute of uses only pass such interest as the grantor has at the time, it can only apply when by covenants or recital of title the grantor can be concluded by his solemn admission of title. Thus, in *Bensley* v. *Burdon*, 2 *Sim. & Stuart* 519, cited on the argument, after a recital of title, the grantor conveyed by deeds of lease and release, and it was held that, having afterwards acquired an interest in the estate, he was estopped, in respect of the solemnity of the instrument, as against the other party to the indenture, to aver or insist that he had not such interest at the time of its execution.

But it is unnecessary to recur to all the cases cited. I take it that there can be no question as to the general doctrine, that, by our present modes of conveyance, estoppels can only arise by recital or covenant of title. The only doubt can be whether the rule has been shaken in this state by previous adjudication, so as to conclude us on this inquiry. I am of the opinion that there have been no decisions which should restrain us from setting the doctrine on its true foundations.

There are two cases only in this state, and in neither was the point necessary for the decision of the cause. *Den* v. *Winans*, 1 *Green* 1, was the case of ejectment by a purchaser at sheriff's sale against a defendant in execution; and it was properly held that he could not set up an outstanding title in a third person to defeat the plaintiff, such third person not having appeared and made himself a defendant, or in any way asserted his rights. It was very unnecessarily said in this case, that no man can recover in ejectment or defend himself against his own deed. The true principle seems to be this, that a purchaser of land at sheriff's sale takes the title and privileges of the execution debtor, and such debtor shall not be permitted to defeat the purchaser's recovery of his possession by setting up a title in some third person, or alleging that he had no title at the time of the sale. This rule is said to be

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founded (not on the doctrine of technical estoppel), but in justice and sound policy. The rule was carried farther in a case somewhat similar. The defendant being in possession when lands were levied on and sold, it was said that the plaintiff was entitled to possession under his deed, and the defendant ought to be put to a new action for the trial of his title. *Lessee of Culbertson* v. *Martin*, 2 *Yeates* 443. The case of the *Lessee of Cooper* v. *Galbraith*, 3 *Wash.* 546, which was cited, was in Pennsylvania; but the point of that case goes no farther than that of *Den* v. *Winans*, and the same remarks apply. Some of the *dicta*, it is true, seem very broad, but, when the language of Justice Washington is critically examined, I think there is much to induce us to suppose that he intended to apply it only to the case then before the court. In an action by the purchaser at sheriff's sale to recover the possession of land against the execution debtor, he would not permit such debtor to set up a defect in his own title at the time of the sale. If the case went farther I should be very unwilling to follow it. I should regard a rule, that a defendant, whose title conveyed by the sheriff may be merely possessory, must not only surrender the possession, but be estopped from setting up any after acquired and better title, as exceedingly unjust and of the most dangerous tendency.

The only other case in this state is that of *Den* v. *Van Ness*, 5 *Halst.* 102. This was the case of a mortgage, and the decision was unquestionably right, but there were some unnecessary *dicta* as to the effect of a mere grant. It is well established that a mortgagor cannot dispute the title and invalidate the security pledged for the payment of the mortgage debt; but such is the rule without reference to the doctrine of technical estoppel. By what may properly be called an equitable estoppel, based upon the legal fraud which would otherwise be permitted, one who mortgages land as his own, upon suit brought against him, shall not be permitted to derogate from his own mortgage by denying the title or by setting up a title in any third person. See *Den* v. *Gardner*, *Spencer* 556, and cases cited. It was unnecessary, then, in that case to go farther, and what was said as to the effect of a mere grant is not entitled to the

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weight of an adjudged principle. What was so said is not supported by the authorities cited, unless perhaps the two cases cited from New York, since, however, overruled or disregarded in that state. The authorities cited from Coke's Reports, Plowden, and Coke Littleton were upon leases, and do not apply. In leases for years the law will imply a covenant upon the word "demise" and other words of grant, but it is otherwise in conveyances in fee. *Cooper* v. *Galbraith*, 3 *Wash.* 546, there cited, has already been referred to. *Den* v. *Brewer*, *Coxe* 172, was the case of a mortgage, and it was held that the defendant, who was the mortgagor, was bound by the *recital* in his own mortgage deed. The principle, even there, seems to have been misapplied, for it does not appear that the lessor of the plaintiff claimed under that deed. The case was a mere *nisi prius* decision, and, like many others collected in that volume, entitled to very little weight.

I hold, then, that in this case there was no estoppel; that neither John Bush nor the heirs of Maria Hopper are estopped from setting up the interest which vested subsequently to the respective conveyances, there being no recital of title or covenant of warranty. In regard to the deed of Maria Hopper, I fully adopt the further conclusion of the court below: a married woman, whose conveyance derives its effect entirely from the statute, would not be bound even by express covenants or recital of title. I can add nothing to the clear exposition of the law on this point, there given.

There was no actual seizin by Maria Hopper, and, as the law has always been held in this state, her husband never became entitled to curtesy. She never had either actual or constructive possession of the premises. The defendants, therefore, have acquired no rights under his deed.

The result, under the view taken by me, would be, that the plaintiff below should have judgment for the entire premises, while he obtained judgment but for two-thirds. Were this the opinion of the court, there would be no difficulty in rectifying such error, although the writ was brought by the defendants below. The record is now in this court, and we can here give such judgment as the court below should have given. It was so

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held in *Garr* v. *Stokes*, 1 *Har.* 404, where, upon error by the defendant below, the judgment was reversed, and a new judgment given against the plaintiff in error, without costs in error.

Judges PORTER and SCHENCK concurred in the opinion delivered by CARPENTER, J.

The CHANCELLOR and Judges WALL, SINNICKSON, and MCCARTER voted to reverse the judgment below. *(a)*.

The judgment below was reversed, and judgment was ordered for the plaintiff below for an undivided third of the premises, being the third devised by Rachael Wortendike.

THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY v. BRIGGS.

1. Penal statutes are to be construed strictly, remedial statutes more liberally.

2. Grants and charters to corporations are to be construed favorably to the rights of the public, and most strongly against those claiming under them.

3. Railroad, canal, bridge, turnpike, and ferry companies have no power to take toll by implication, but only by express grant in their charters, and the right granted will not be extended by implication; and on questions of tolls, freight, and fares, courts uniformly construe such charters most in favor of the public and against the company.

4. The restriction or rates in the sixteenth section of the charter of the Camden and Amboy Railroad and Transportation Company extends to the whole route from Philadelphia to New York, as well upon the water as the railroad.

5. If certain rates of toll and fare be fixed by the charter of a company, a subsequent act, inflicting severe penalties on the company for exceeding the charter rates, is no violation of the contract of the charter, and is not unconstitutional.

Peter Briggs commenced an action before Eli Morris, one of the justices of the peace in and for the county of Mercer, against the Camden and Amboy Railroad and Transportation

(a) This is one of those cases in which, by the peculiar constitution of the Court of Errors, four judges being the majority of a bare quorum, may reverse a decision against the opinions of six other judges of the same court when three of the latter are constitutionally incapable of voting in the Court of Errors, from the fact of having given their opinion in the court below; from which it may occur, as in this case, that an actual minority, happening to be a constitutional majority, may decide a bare *legal* question contrary to the opinions of all the law judges hearing the cause.

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Company for a penalty, and recovered a judgment for the amount of penalty and costs. The defendants brought the case up, by *certiorari*, to the Supreme Court, where the cause was argued, and the judgment below affirmed upon the following state of the case, agreed upon by the parties:

"This was an action of debt, brought by Peter Briggs, the plaintiff below, against the Camden and Amboy Railroad and Transportation Company, for the recovery of a penalty of one hundred dollars, under the act to prevent the taking of unlawful toll or fare on canals and railroads (*Rev. Stat.* 601), for an alleged violation of law in charging more than they were authorized to charge for the transportation of certain merchandise from the city of New York to the city of Trenton, by the way of South Amboy and Bordentown.

The plaintiff below proved that the defendants, on the twenty-ninth of January, eighteen hundred and forty-six, charged Briggs & Bacon, partners, trading, &c., the sum of ninety-six cents for one box, of the weight of two hundred and forty pounds, for the transportation of the same from the city of New York, by the way of the Camden and Amboy railroad, to Trenton. That the same was transported by the steamboat of the company from New York to South Amboy, a distance of 30 miles; thence in the cars of the company, over the company's railroad, to Bordentown, a distance of 35 miles; and thence, over the company's railroad, to Trenton, a distance of 6 miles, the whole distance being 71 miles; and that said transportation was done by, and for the benefit of the said company, the defendants below. The bill was paid, by the plaintiff below, to the agent of the company. The justice gave judgment thereupon for the plaintiff, for the penalty of one hundred dollars and costs. And it is agreed by and between the parties, by their respective attorneys, that if upon the above state of facts the plaintiff below was entitled to recover, that then the judgment be affirmed, otherwise that it be reversed."

All the acts relative to the Camden and Amboy Railroad and Transportation Company were in evidence before the justice.

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S. G. Potts, for plaintiffs in error.

This is an action brought by Briggs, for a *penalty* for a forfeiture under the act (*Rev. Stat.* 601), incurred by taking more than legal toll. By this case, it appears that more than eight cents per ton per mile was taken between New York and Trenton; but it does not appear how much of it was taken for the road, and how much for transportation on the water, to which the restriction does not apply, or say that the excess was on the water; and in a penal action the violation of law must clearly appear.

1. The penal statute only applies to tolls on canals and railroads; the preamble and remedy show this. The words *any incorporated companies* are restrained by other parts of the act; it does not apply to bridge or steamboat companies. 2 *Green* 21, *Allaire* v. *Howell Works;* 2 *Gallison* 492, *U. S.* v. *Haywood;* 2 *Cranch* 358, *U. S.* v. *Bright et al.* It is clear that the penalties of the act are only intended for overcharges on canals and railroads, not steamboats.

2. In the charter there are no words restricting the amount of tolls or fare from Amboy to New York. The word "thereon," in the sixth section of the charter, both by grammatical and legal construction, can only be held to apply to the railroad.

The word "thereon," in the sixteenth section, must be held to refer to "railroad," in the fifteenth section, and not to "communication," in the second section.

The charge does not refer to the waters from Amboy to New York, because they are out of the jurisdiction of the state, and the state had no power to authorize a toll on waters out of the state, or to restrict it. *Federalist, Nos.* 22 and 42; 9 *Wheat.* 1, *Gibbons* v. *Ogden.*

New Jersey has always opposed such claim by the state of New York. *Rev. Stat.* 547, 564.

The object of the charter was only to impose a restriction on the new route created by it.

If there is any doubt, the rule that penal statutes are to be construed strictly, will in this action decide that doubt in favor

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of the company. 1 *Blac. Com.* 88; *Esp. on Stat.* 54; 2 *Black. R.* 1226; 4 *T. R.* 490; 4 *U. S. C. R.* 593; *Paine's C. C. R.* 32.

Again, the act imposing the penalty was passed subsequent to the charter. The legislature had no right to pass any act which would impair or alter the terms of the charter; it was a contract, and beyond their control.

The following cases were also referred to: *Baldwin* 205, *Bonaparte* v. *Canal Co.;* 5 *Ad. & Ell.* 747, *Canfield* v. *Louden and Bergh;* 2 *Railway Cases* 629; 1 *Ib.* 193, 563.

W. Halsted, for defendants in error.

1. The construction of the Supreme Court, applying the limitation or charge to the whole route, is the true judicial construction, based on the intention, to be gathered from the whole act. Its object was to provide communication and transportation from New York to Philadelphia; and a restriction or rate of charge that did not protect the whole route would be utterly useless.

The antecedent of "thereon," in section sixteen, are not the words pointed out by mere proximity, but by the object and intention of the act and of that provision.

The company cannot charge toll or for transportation, unless the right is expressly granted. 4 *N. Hamp. R., Olcott* v. *Bancroft;* 6 *B. & C.* 703; 10 *East* 334; 2 *Strange* 1161; 7 *Com. Dig., Tolls E.* 479; 11 *East* 674; *Gildart* v. *Gladstone,* 2 *B. & Ald.* 66; *Hustler* v. *Leeds and Liverpool Canal,* 1 *B. & C.* 424; 2 *B. & Ad.* 792; 2 *Man. & Gr.* 134; 164–5; 3 *Ib.* 496; 7 *Ib.* 870; 11 *Pet.* 544, *Charles R. Bridge* v. *Warren Bridge;* 6 *Conn.* 240, *Catlin* v. *Eagle Bank; Angell and Ames on Corp.* 59, 60; *Saxton* 591; 1 *Hal. Ch.* 169; *Van Wyck* v. *Som. Man. Co.;* 6 *Bac. Ab. tit. Stat. I.* 7, 8; 17 *Ver. R.* 479.

Penal statutes are not restrained by construction within their plain intent, nor by preamble. 10 *Mod.* 282; 1 *Str.* 253; 6 *Bac. Stat. I.* 2; 2 *Cranch* 400; 3 *Atk.* 205.

Vroom, for defendants in error.

The question is, whether, in the sixteenth section, limiting the charge, the *road* or *route* is meant by the word thereon.

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The object of the act was to secure and keep open a communication from city to city. They are to provide steam vessels at each end of the road to carry passengers.

In the supplements of February 13, 1841, and March 2, 1832, the limitation of toll expressly is from city to city; this shows the understanding of the company and the legislature. 3 *Railway Cases* 589, *Parker* v. *Great Western Railroad.*

The legislature have power to enable the company to take fare on the whole route; the restriction to these rates is based on this power, and this restriction on water is necessary, as there can, in practice, be no competition with the boats of the company.

Charters are to be construed strictly as to companies, and liberally as to the public. 1 *Railway Cases* 659.

The company are in reality a transportation company, not a mere road company. The seventh section provides for their having steamboats to transport, &c. And though the road is declared a *public highway*, it is not so in the ordinary sense of the term.

It belongs to a private corporation; the public cannot get on or off at pleasure, and the tolls for using it, being made equal to the charges for transportation, effectually exclude the public from using it as a highway.

The company must go back to their charter for power to carry passengers or freight, either upon or off the water; a creature of their charter, all their powers are derived from and limited by it. *Angell & Ames on Corp.* 232, 233, and 84.

In the construction of statutes where the intention is expressed, that intention is to be followed, even when contrary to the words of a particular section. 2 *Cowen* 89, *Jackson* v. *Collins*; 2 *Cranch* 33 and 386; *Bac. Abr. Stat. I.* § 10, and *I.* § 6; 3 *Rep.* 27, *Butler* v. *Baker.*

The statute inflicting the penalty applies to this case, (*R. S.* 601). The title speaks of toll or fare, the preamble of toll or passage money, and the act of charge, toll, rates, or fare.

If in this case there is an overcharge on the whole route, there is on each part of it, and the penal statute of overcharging on canals and railroads applies.

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The general doctrine is, that a penal statute is to be construed strictly, but even in them the intention of the law is to be followed. *Bac. Abr. tit. Stat. I.* 390 and 391; *Bald.* 78, *U. S.* v. *Porter and Wilson;* 13 *John.* 497; 3 *Rep.* 7; *Ib.* 73; *Paine* 32.

The act inflicting penalties does not violate their charter, it only compels them to observe it by additional penalties.

Field, for plaintiffs in error.

The great question in this cause is, whether the restriction contained in the sixteenth section of the act incorporating the Camden and Amboy Railroad and Transportation Company is confined to the *railroad*, or whether it extends to the *water carriage* between Amboy and New York.

In the first place, let us look at the *words* of the act: "That the said company are hereby authorized to demand and receive such sum or sums of money for tolls, and the transportation of persons and every species of property whatsoever *thereon*, as they shall from time to time think reasonable and proper; *provided*, that they shall not charge more than at the rate of *eight* cents per ton per mile," &c.

The restrictions upon the power to charge tolls, cannot, of course, be more extensive than the power itself. On what, then, are the company empowered to charge for tolls and transportation? The answer to this question depends upon the meaning of the word "*thereon.*" It is a word of reference, and points to an antecedent; and, by the plainest rules of construction, that antecedent is to be sought for in the sections immediately preceding the one under examination. To search for it in some *distant* and *remote* section, would be to violate the principles of English grammar as well as of common sense.

Now there are five sections immediately preceding the one in question, in each of which we find the antecedent to which the word *thereon* manifestly refers. By the eleventh section, the company are empowered to construct a *railroad* from the Delaware river, near Camden, to a suitable point on the Raritan bay. The twelfth section authorizes them to construct a *lateral railroad* to Bordentown. The thirteenth and fourteenth

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sections provide compensation for the use of the land to be taken for their *road*, and point out the mode of ascertaining its value. The fifteenth section makes it the duty of the company to construct bridges or passages over their *railroad*, where it intersects other roads. And then we come to the sixteenth section, which authorizes the company to charge for tolls and transportation "*thereon*." Is it not perfectly clear, therefore, that the word "*thereon*" refers to *railroad*, and can refer to nothing else? Such is, undoubtedly, the *literal* construction of the clause under consideration. There is not the slightest ambiguity in the language; he who runs may read it. Now it must be a very strong case, indeed, that will induce a court, in the construction of a statute, to depart from the plain meaning of the words which are employed; to decide that the legislature, while they have *said* one thing, really *meant* another.

But, not to adhere too closely to the words of the clause in question, let us look at the *context*. In a subsequent part of the section we find this expression, "the said railroad." And yet the term "railroad" does not occur before in the section, unless *thereon* means *railroad*.

But this is not the only section in which the word *thereon* is made use of. It is found in several other sections of the act, in the seventh, the eleventh, the twenty-third; and wherever it is found it means railroad, and nothing else. Why, then, should it not be understood to mean the same thing in the sixteenth section. It also occurs twice in the twenty-third section of the charter of the Delaware and Raritan Canal Company, where it refers to *canal*.

The context, then, sustains the literal interpretation of the section.

But let us see what are the *effects* and *consequences* that flow from the construction contended for on the other side. The word "*thereon*," we are told, is not confined to the *railroad*, but extends to the whole line of communication between New York and Philadelphia.

Now what are the company authorized to charge "thereon?" *Tolls* and *transportation*. It is of the utmost importance, in

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this connection, to understand clearly the meaning of these terms, more especially as Judge Nevius, in pronouncing the opinion of the court below, seems entirely to have lost sight of the distinction between them.

Fortunately there are no two words the meaning of which is better settled, either in popular or legal language. Webster defines *tolls* to be "a tax paid for some liberty or privilege, particularly the privilege of passing over a bridge, or on a highway, or for that of vending goods in a fair or market." Transportation, on the other hand, is defined to be, as indeed its derivation clearly implies, "the act of carrying or conveying from one place to another." Such, too, is their legal sense.

By "*tolls*," then, in the charter of the company, is meant a compensation for the use of their railroad; for the privilege of passing over it; just as a turnpike company is allowed to charge *tolls* for the use of their turnpike road. By "*transportation*" is meant an entirely different thing, a compensation for the conveyance of goods or passengers over the railroad; just as stage proprietors receive compensation for carrying over a turnpike road.

This distinction between *tolls* and *transportation* is never lost sight of by the legislature. It is distinctly recognised in the very act upon which this prosecution is founded. *Rev. Stat.* 601.

It is also recognised in the charter of the New Jersey Railroad Company. *Harr. Com.* 381, § 8, 383, § 13.

The same distinction is kept in view in acts of incorporation passed by other states. See *Charter of Philadelphia and Trenton Railroad Company*, § 13 and 14.

The plaintiffs in error are not only a *railroad*, but a *transportation company*. They act in a twofold capacity, as *proprietors of* the road and *common carriers on* the road. It is usual for railroad companies to combine these two functions, but not necessary. One set of men might own the road, and another do the transportation. That is the case with turnpike companies. It is also the case with many of the railroads in Pennsylvania.

But this company was designed to act in a double capacity.

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It may charge *tolls* for the use of the road, and *transportation* for carrying goods and passengers. Other persons may also carry over the road. Then the company can only charge for *tolls;* but if they carry themselves, for tolls and transportation. This is also the case with most of the English railways. See *Queen* v. *The London and Southwestern Railway Co.*, 2 *Railway Cases* 648.

Such is the meaning of the terms *tolls* and *transportation*, as used in the sixteenth section. Now, on what may the company charge them? The answer to this will settle the meaning of the word *thereon.*

Did the legislature mean to authorize the company to charge *tolls* on the waters between Amboy and New York? That they had no right to do so, it is, of course, unnecessary to argue. Is it to be presumed, then, that they meant to clothe this company with a power which *they* had no right to confer, and which the company could not exercise? And is this presumption to be made in the very face of the language they have employed?

It is, I think, the very last power which a New Jersey legislature would undertake to exercise, remembering, as they must, the controversy which once shook our judicial and legislative halls, in reference to an exclusive right set up by New York to the use of these waters.

On the *railroad*, it was right that the company should be authorized to charge *tolls*, for it was constructed at their expense. But what have they done to improve the navigation of the waters between Amboy and New York? They are in the same condition now as when first discovered by Hudson.

If, then, the right to charge *tolls* and *transportation* is confined to the railroad, and cannot, by possibility, extend to the waters between Amboy and New York, must not the *limitation* also be confined to the railroad?

If the legislature meant to extend the restriction to the whole line of communication from city to city, why did they not say so?

We shall see that when such was their intention, they had no difficulty in expressing it in clear and unambiguous terms.

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By the act of February 15, 1831, relative to the Delaware and Raritan Canal and the Camden and Amboy Railroad Companies, it is provided, "That it shall not be lawful for the said companies to charge more than three dollars for the transportation of passengers *from and to the cities of New York and Philadelphia.*"

But now, because the legislature meant to extend the restriction to the whole line, when they *said so*, the counsel on the other side argue, that they must have meant it when they *did not say so.*

There was some reason, however, for extending the restriction to the whole line of communication in the supplement to their act of incorporation, whereas, in the original charter, there was no reason at all for it.

By the original charter, the only protection given to the company was confined to the *road itself.* No other railroad was to "commence and terminate within three miles of the commencement and termination of the Camden and Amboy Railroad. See *24th section of charter.*

It was proper, then, that the *restriction* should be confined to the road.

But, by the supplements, protection is extended to the whole line of communication from city to city, the legislature expressly stipulating not to authorize the construction of any other railroad "*which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia.*" *Act March* 2, 1832, *section* 2.

Now there was some propriety in restricting the company as to what they should charge on the whole line of communication. But this restriction the legislature thought proper to confine to *passengers* alone, and did not extend it to the transportation of *property.* They might have done so undoubtedly, and the company would have been bound by it, inasmuch as they accepted these supplements to their charter. But, having neglected to do so, an effort is now made to supply the omission, by putting upon the original charter a construction which it never could have been intended to bear, and which is as re-

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pugnant to its spirit as it is to its letter. This would be carrying judicial legislation to an extent quite beyond any thing that has ever been witnessed, at least in New Jersey.

The restriction, too, contained in the supplements prior to 1837, was not only confined to passengers, but to *through* passengers, as they are called, passengers from city to city. It did not include *way* passengers; they were left subject to the provisions of the sixteenth section of the charter, where the only limitation was ten cents a mile.

Now if we could find in any of the supplements a reduction of this charge for way passengers, we might discover how far the legislature supposed the limitations contained in this sixteenth section extended, whether to the whole line of communication or to the railroad alone. Well, look at the act of March 15, 1837, by the third section of which the limitation upon way passengers is reduced to five cents per mile. What is its language? "That it shall not be lawful to charge more than five cents per mile for the transportation of each and every way passenger." Where? on the whole line from city to city? No, but "*on the road of the Camden and Amboy Railroad and Transportation Company.*" It is very clear, therefore, that this reduction of the way fare is confined to the road alone, and does not extend from Amboy to New York. But is it conceivable, that if the legislature had supposed that the limitation of ten cents per mile in the original charter was applicable to passengers from Amboy to New York, that they would not have made the reduction to five cents applicable to the same passengers? Can any motive be assigned for reducing the way fare upon the road, and not from Amboy to New York, except a conviction that the limitations contained in the original charter had nothing to do with the water carriage?

Here, then, we have a very clear legislative construction of the meaning of the sixteenth section.

A great deal has been said about the *exclusive privileges* of this company, and that all the public would be entirely at their mercy, if the construction which they contend for is sustained. But let it be remembered that none of these *exclusive privi-*

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leges were conferred by the original charter. They were all given by the supplements. When the company was incorporated, railroads were an untried experiment. The project was considered by many, perhaps by most, as a visionary one. Hence the most *liberal* charter was readily granted, in order to encourage the enterprise. The idea of protecting the public against the company never entered into the mind of any one. The limitation of *ten cents per mile* for passengers, was really no limitation at all. It was more than had ever been charged by stages and steamboats. It was not until exclusive privileges were given, that it became necessary to protect the public.

There is another reason why this limitation could not have been intended to apply to the water carriage between Amboy and New York. So much a *ton* is an unheard of mode of charging for *carriage by water*, if by a ton be meant twenty hundred weight. On a railroad, it is a usual and a proper mode, for the wear and tear is the same whether the articles be gravel or gold. But on the water, the chief elements which enter into the cost of transportation are *bulk* and *value*. Hence *ton*, in a commercial sense, means forty-two cubic feet. The company, too, are insurers, and the risks which they incur are chiefly on the water. With what propriety, then, could the same limitation, as to charge, be applied to a ton of rags, worth twenty dollars, perhaps, and a ton of silks, worth twenty thousand.

But it is said, by the second section of their charter, the company are to "perfect an expeditious and complete line of communication from Philadelphia to New York; and, therefore, the restriction contained in the sixteenth section must be intended to apply to the whole line. But the very same provision is contained in the second section of the charter of the Delaware and Raritan Canal Company; and did any one ever suppose that, therefore, the restriction upon the rates of toll, contained in the seventeenth section of their charter, was meant to extend beyond the *canal*, and to embrace the carriage from New Brunswick to New York?

Besides, the company were not to *make* a line of communi-

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cation from New York to Philadelphia, but to *perfect* it. From New York to Amboy it was already made. It needed no improvement. It was a great natural highway, free and open to all. It was to be *perfected*, that is completed, by a railroad from Amboy to Camden. This was what the company were alone authorized to make, and to this were the provisions of the charter confined.

But the construction contended for on the other side, is said to be necessary for the protection of the *just rights* of the company. If the limitation, they say, contained in the sixteenth section, is confined to the road, the right to charge must also be confined to it; and then it will follow that the company have no right to charge at all from Amboy to New York. Such, too, is the reasoning of Judge Nevius, in pronouncing the opinion of the court below.

Is there the slightest foundation for such an idea? That the company are authorized to transport passengers and property from Amboy to New York, is not denied. Nay, by the seventh section of their charter, it is made their *duty* "to provide suitable steam or other vessels" for the very purpose. How, then, can any one doubt as to their right to *charge* a reasonable compensation for such transportation? They are not only authorized, but obliged to be *common carriers* from Amboy to New York. *Freight*, then, is chargeable of common right. They certainly need no express power to charge it. Can they be subject to the *liabilities* of common carriers, without being entitled to their privileges? It might as well be contended that a company incorporated for the purpose of manufacturing goods, have no right to *sell* them without an express power to that effect. Suppose a company were incorporated to run a line of stages from Trenton to New Brunswick, would they have no right to charge for the transportation of passengers, unless expressly authorized to do so?

But it is insisted that the company, having the entire monopoly of the carrying trade between Philadelphia and New York, it would defeat the very object of the limitation, if it were not extended to the whole line of communication. But how did the company acquire this monopoly? Certainly not

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by their *original charter;* and it is with this, alone, that we now have to do. The question is, how this original charter is to be construed, and that was the intention of the legislature when they granted it. Now nothing is more certain than this, that the legislature originally had no idea of conferring upon this company any exclusive privileges whatever. On the contrary, on the very day when they incorporated the Camden and Amboy Railroad Company, they also incorporated the Delaware and Raritan Canal Company for the very same purpose, of transporting passengers and property between New York and Philadelphia. True, these companies have since become consolidated; but nothing was farther from the intention of the legislature at the time when they were created. They were designed to be *rival* companies; and while it was believed that the railroad might successfully compete with the canal in the carrying of *passengers,* yet in the transportation of *property* it was generally supposed that the canal would have greatly the advantage. And hence, while the railroad company were permitted to charge as high as *eight* cents a ton per mile, the canal company were limited to *four* cents a ton; so little idea had any one at that time that a monopoly of the carrying trade was to be enjoyed by the railroad company.

What, then, becomes of the argument founded upon the *exclusive privileges* of the company? And yet this is the argument upon which the Supreme Court appears mainly to have relied. When it was proposed to confer these exclusive privileges, there might have been some reason for extending the limitation over the whole line of communication; but the legislature did not think proper to do so. And can this court now say that they meant to do so, when there was no reason at all for it, and when their language expressly negatives any such idea?

Nor has the omission to extend the limitation over the whole line worked any injury to the public. For seventeen years the company have acted under the full persuasion that they were not limited in their right to charge between Amboy and New York. And what has been the consequence? does any one complain that their charges are *unreasonable?* This

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is not the complaint. The truth is, they have always encountered, in the *coasting trade* between the two cities, a keen competition, under the influence of which they have been obliged to reduce their charges, from time to time, until they are now so low as to be, I believe, entirely satisfactory; for while, upon small packages and for light goods, their charges between Amboy and New York may rise above the limitation of eight cents a ton, upon other articles they fall considerably below it.

So that, to whatever test we subject this sixteenth section of the company's charter, whether we look at the words, or at the context, or at the whole scope and spirit of the act, the conclusion is irresistible, that the *limitation* is confined to the road, and does not extend to the water carriage between Amboy and New York.

But suppose we are wrong in our construction of the charter, are we within the provisions of the act of 1839, upon which this prosecution is founded? *Rev. Stat.* 601.

The complaint is, that we have charged more than we had a right to charge *between Amboy and New York.* We have attempted to show that we did not. But suppose we did, was this *the taking of unlawful toll or fare on a canal or railroad?* For it was to prevent *this* that the act of 1839 was passed. It is entitled, "An act to prevent the taking of unlawful toll or fare on canals and railroads." And the language of the act shows most clearly that this was the only object which the legislature had in view, for it provides that suits for the recovery of the penalty shall be prosecuted "before any justice of the peace in any county of this state, through which the *said road or canal may pass.*" Suppose these goods had been carried *from New York to Amboy* alone, could it be pretended that we would be within the provisions of the act? In what county could the suit be prosecuted? It is submitted that the case is not altered by the fact, that the goods, after being taken to Amboy, were carried on the railroad to Trenton. For it is for the excessive charge alleged to have been made between Amboy and New York, that the suit is really brought. Upon the most *liberal* principles of construction,

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then, we cannot be brought within the provisions of this act of 1839.

But how is this act to be construed? It is an act highly and exclusively *penal.* Its harshness and severity are unrelieved by one single remedial feature. The penalty is not given to the *party grieved.* He may not have complained; he may have consented to the charge. It is given to the *common informer;* and, to stimulate his cupidity to the utmost possible extent, the *whole* of it is given to him: no part of it to the state. A more vindictive statute could not well be imagined.

Now, penal statutes are to be *strictly* construed. This has become an axiom in the law.

"The rule," says Chief Justice Marshall, in *U. S.* v. *Wiltberger,* 5 *Wheat.* 95, "that penal laws are to be construed strictly, is perhaps not much less old than construction itself." It was insisted, in that case, that the *intention* of the law maker must govern in the construction of penal, as well as other statutes. This, said the Chief Justice, was true; but he added, "the intention of the legislature is to be collected from the *words* they employ. To determine that a case is within the intention of a statute, its language must authorize us to say so." See, also, what he says on page 105.

"Every body knows," says Chief Justice Holt, in *the Queen* v. *Whistler,* 7 *Mod. Rep.* 134, "a penal law ought, by equity and reason, to be construed according to the *letter* of it, and no further, although the fact that you would bring under it be within the reason, and as heinous or more than that which is expressed in it."

This being a penal action too, if a reasonable *doubt* exists as to the true construction of our charter, we are entitled to the benefit of it. If the action were merely to recover back the overcharge, the rule would be different. There the presumption would be against, rather than in favor of the company.

A penal action is in the nature of a *criminal prosecution.* The company cannot be guilty, without an *intention* upon their part to violate their charter. If they were *honestly* mistaken with regard to its true construction, they ought not to be convicted. Who will say that the meaning of the sixteenth

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section is not one about which, at the very least, there might be an honest difference. The mere fact, that this company have, under the advice of counsel, during the whole period of their charter, put upon it the construction now contended for, and that it has never before been questioned, notwithstanding the sleepless vigilance with which all their acts have been scrutinized, ought, if there were nothing else in the case, to be a complete protection to them in this action. Where has this construction slept so long that it should now for the first time rise up for their destruction?

The CHANCELLOR. The second section of the act of incorporation declares the general object of the act to be, to perfect an expeditious and complete line of communication between the cities of New York and Philadelphia.

The eleventh section enacts that, to facilitate the objects of the act, the president and directors of the company are authorized to survey, lay out, and construct a railroad from the Delaware river to a suitable point on the Raritan bay.

The sixteenth section authorizes the company to demand and receive such sum or sums of money, for tolls and the transportation of persons and property thereon, as they shall from time to time think reasonable and proper; *provided*, that they shall not charge more than at the rate of eight cents per ton per mile for the transportation of property, nor more than ten cents per mile for the carriage of each passenger.

The seventh section enacts that it shall be the duty of the company to provide suitable steam or other vessels, at either extremity of the road, for the transportation of passengers and produce from city to city, so that no delay shall occur for want thereof.

We thus have an act of the legislature of New Jersey incorporating a company, and authorizing the corporation to construct a railroad in New Jersey, for the purpose of perfecting an expeditious and complete line of communication between the cities of New York and Philadelphia; the other parts of the contemplated line of communication between the said cities being on and over waters common to all the citizens of

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the United States for the purpose of navigation, and lying partly in Pennsylvania, partly in New York, and partly, only, in New Jersey; and authorizing the corporation to charge eight cents per ton per mile for the transportation of property, and ten cents per mile for the carriage of a passenger on the said road; and requiring the corporation to provide suitable steam or other vessels, at either extremity of the road, for the transportation of passengers and produce from city to city.

The railroad is sixty miles long: so that the act, by the tolls it gives on the road, allows the corporation $6 for every passenger, and $4.80 for every ton of goods transported from city to city.

Whether the legislature were liberal, or otherwise, in requiring that for these sums, allowed by way of tolls on the road, the corporation should provide vessels at the extremities of the road, to take passengers and goods over the intervening waters to the cities, respectively, is not a question for the consideration of the courts. But it may not be amiss to say that the company are now transporting passengers from city to city for half the sum thus allowed by the act; and I presume that this is true, also, in respect to the transportation of goods by the ton; and, for aught we know, the company may, even at the prices now charged by them, be reaping most liberal returns for their expenditures under the act.

Is there any difficulty in believing, or any reason why we should seek, by construction, to avoid the conclusion that the legislature intended that, for the rates of toll per mile on the railroad, the company should provide a vessel to take passengers and goods across the Delaware from and to the western *terminus* of their road? And if the act requires this, it requires the company to provide a vessel to take passengers and goods over the waters lying between the eastern *terminus* of the railroad and the city of New York; the duty of providing vessels at each extremity of the road being imposed by one and the same clause in the act.

The company claim that, inasmuch as the act only restricts them to a rate of toll on the railroad, they are at liberty to charge without restriction or limit for transportation on and

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over the said waters; and they have charged accordingly. It is plain that if the company are right in this claim, they are at liberty to charge at their own pleasure for transportation between the cities; for if they can charge without limit on a single mile of the line of communication between the cities, they can make the charge from city to city what they please, notwithstanding the restriction to certain rates on the railroad. The Supreme Court had and could have no difficulty in denying this claim of the company.

But the Supreme Court have held that the word *thereon*, in the section fixing the rates of toll, does not mean the railroad, but means the whole line of communication between the cities; and that the company are entitled to charge on this whole line the rates of toll per mile fixed by the act. In this view I cannot concur. The distance between the cities is ninety miles. I see no reason for believing that the legislature intended to allow $9 for transporting a passenger, and $7.20 for transporting a ton of goods from city to city. The plain words of the act, as well as its provisions and general scope, are, it seems to me, opposed to this position of the Supreme Court. And the opinions already given by the other members of this court in this case enable me to say, that the majority of this court are unwilling to affirm its correctness.

The act gives no authority to the corporation to charge for transportation on and over the waters forming a part of the line of communication between the cities. No such charge, therefore, can be made, it being a familiar principle, that a corporation, a creature of law, has just such rights and powers as the law creating it gives it, and no other.

And the idea, contended for in argument, that the corporation, as the owner of the boats which the act requires it to provide, may charge as a common carrier, is manifestly excluded by the same principle.

It was said, in argument, that if the corporation be not allowed to charge as a common carrier on the said waters, it might not receive adequate compensation for transportation from the cities, respectively, to a point between the *termini* of its railroad. This only raises a question as to the adequacy of

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the compensation fixed by the act. It would seem that the company entertain the idea that if, in reference to any particular commodity transported, or to any partial travel on their road, the act has not given them a sufficient compensation, they are at liberty to charge what they please for it, however great may be the profits which the act, as a whole, gives them.

It will hardly be contended that the transportation of goods or passengers across the Delaware, between Philadelphia and Camden, as *termini*, was an object of the act of incorporation. But if they can charge for the distance across the Delaware when they take a packet or passenger a mile on their road, why are they not entitled to make such charge if they only land the packet or passenger on the Jersey shore opposite Philadelphia? And so of the rate between the other extremity of the road and the city of New York.

The object of the act was an expeditious and complete line of communication between the cities of New York and Philadelphia; and the duty is imposed on the company to provide suitable vessels, at either extremity of the road, for the transportation of passengers and goods from city to city. The company are not bound to transport goods or passengers between Philadelphia and Camden, as *termini*, nor between New York and South Amboy, as *termini;* nor have they any authority to do so. And if they be bound to transport goods and passengers from the cities, respectively, to any point or station on their road, they must do it for the compensation which the rate of toll per mile on their road to that point or station, fixed by the act, will give them.

The views of the company and those of the Supreme Court differ in two respects.

1st. The company say that the act gives them no right to charge for transportation on and over the said waters; that the word *thereon*, in the section authorizing them to receive tolls, means the railroad, and nothing else. The Supreme Court have said, that the said word *thereon* means the whole line of communication between the cities, and that, therefore, the act gives the company the right to charge for the whole distance between the cities, according to the rates per mile fixed

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by the act. On this part of the case, I concur in the views of the company.

2d. The company contend, that if the act gives them no right to charge for transportation on the said waters, they may charge for it as common carriers, and, of course, charge what they please. The Supreme Court say that if the act does not give the company this right they can make no such charge. In this respect I concur with the Supreme Court.

In the view I have taken of the case, the judgment must be affirmed.

RANDOLPH, J. In the discussion of this cause, two questions are raised for our consideration:

1st. Does the act of March 12, 1839, *Rev. Stat.* 601, to prevent the taking of unlawful tolls or fare on canals and railroads, apply to the case.

2d. Have the plaintiffs in error rendered themselves amenable to its provisions and penalty.

As the determination of the last inquiry, in some measure involves an answer to the other, I will first consider that question.

1st. The facts of the case are admitted. A bale of merchandise, containing two hundred and forty pounds, was transported by the plaintiffs for Bacon & Briggs, from New York, by steamboat, to South Amboy, a distance of thirty miles, and from thence to Trenton, by railroad, forty-one miles, making in all seventy-one miles, for which a compensation of ninety-six cents was demanded by the company, and paid by Bacon & Briggs. And it is also admitted that if the restriction, in the sixteenth section of their charter, of eight cents per ton per mile extends to the whole distance by water, as well as by land, from New York to Trenton, then there is an overcharge of some sixty-one cents, and the company have rendered themselves amenable to the penalty of one hundred dollars, sued for by Briggs as a common informer, provided the penal statute is applicable to the case. But if the restriction in the sixteenth section of the charter extends only to the railroad proper, leaving the company to charge, at their discretion, such sum for

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the transportation by steamboats from New York to Amboy as they may think reasonable and just, and that the sixty-one cents was charged by them for that portion of the freight, then the company are in no wise liable to the penalty. I say charged, because that seemed to be the view of counsel on the one side, that, as the bill was made out generally from New York to Trenton, the rate per mile should be considered the same throughout, and therefore an overcharge; while, on the other side, it appeared to be thought that the company could at pleasure place thirty-five cents to the railroad, and sixty-one cents to the water carriage.

I presume that, if the facts set up constitute a bar to the action, the court would not deprive the party of the benefit of it on account of the formality or the informality of the bill or the mode of stating the account.

Whether the restriction of eight cents per ton per mile extends to the carriage by water, or is to be confined to the railroad alone, depends on the construction to be placed on the charter; and that depends on the intention of the legislature, if that can be arrived at satisfactorily.

It is well settled that penal statutes are to be construed strictly, and those of a remedial character more liberally, (1 *Bl. Com.* 88; *Paine C. R.* 32), while such as are intended for the public benefit are to be taken most strongly against the persons or corporations claiming rights or power under them, and most favorably for the public. 11 *East* 674; 3 *Man. & Gran.* 496; 7 *Ib.* 870; 1 *Railway Cases* 659; *Bac. Abr. title Statute I*, § 10.

But these rules are not to be resorted to, unless the intention cannot be clearly derived from the clause or section affecting the subject matter, or the whole charter itself. Let us inquire, then, what was the general intent of the legislature, to be collected from the whole charter; what the particular intent to be found in the sixteenth section. The *title*, which though it may not enlarge or restrict the act itself, may afford a means of explaining its doubtful passages, is, "An act to incorporate the Camden and Amboy Railroad and Transportation Company."

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The first clause merely embraces the railroad company, like a turnpike company, limited by its *termini* from Camden to Amboy, on which tolls may be taken for the passage of cars, or the contents thereof. But it is the latter clause which makes the company common carriers, a transportation company along or over the road, but not restricted to its *termini*. The act itself contains some twenty-eight sections, most of which are used to designate the mode and means of organizing the company, and constructing the road, and the necessary appendages thereto, for a railroad or transportation company; while but few of the sections are inserted to define the powers, rights, duties, and restrictions of the company. Keeping this distinction in view, let us examine some of the sections as they occur.

The first section applies only to the opening of the books and the preliminaries to form a company. The second constitutes a company, by the name of "the Camden and Amboy Railroad and Transportation Company," with a capital of a million of dollars, powers to hold real and personal estate, of perpetual succession, to have and use a common seal, and to enjoy and exercise all the *rights, powers, and privileges pertaining* to corporate bodies, and necessary to *perfect an expeditious and complete line of communication from Philadelphia to New York, and to carry the objects of this act into effect.*" The next thirteen sections relate not to the general powers, rights, and restrictions of the company, but to its organization and the construction of the work; the subscriptions, how paid for, how forfeited, and when void; the meetings of the stockholders, election of directors and president; the compensation, duties, and meetings; the taking, appraising, and paying for land, materials, and damages; the construction of the railroad bridges, and passages over the same. The next section is the sixteenth, which relates to the general powers, rights, and restrictions of the company; but, between this and the second section, no general or corporate powers or rights are granted. The seventh section, though much relied on in the argument, grants no power to the company; it designates the duties of the board of directors, *viz.* to supply vacancies in the board; to appoint a treasurer and other officers and agents

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required; to fix their compensation and the amount of their security; to decide upon the kind of carriage to be used upon the road, the weight to be carried, time of starting, rate of travelling; to provide suitable steam or other vessels, at either extremity of the road, for the transportation of passengers and produce; to regulate the tolls, superintend the receipts and disbursements, and all other affairs of the company, and make and enforce *by-laws*. Here is a mere specification of duties to be performed by the board of directors, all the power for doing or authorizing of which, by the company, is to be found in the second section, and not in the seventh itself, *viz.* in the general clause, granting all power to perfect a complete line of communication and to carry the objects of the act into effect. With regard to steam vessels, it states explicitly that it "shall be their duty to provide;" but unquestionably they had the right to do so by the second section, for such was necessary to perfect that complete line of communication by railroad and transportation from city to city, which was the object of the act to be carried into effect; and the insertion of this as a duty, in the seventh section, seems to have been, for abundance of caution, thrust into the section between the duties relating to carriages, and the regulation of tolls therefor, as will be apparent on examining the seventh, being the corresponding section in the canal charter, passed on the same day. There no such duty relating to steam vessels is inserted, the company relying only on the same general power as that contained in the second section. Besides, if this clause relating to steam vessels were to be considered a distinct power, it would not aid us in determining the difficulty in this cause, for, if considered a power which would draw after it the right of taking tolls, freight, or fare for transportation from New York to South Amboy, then in like manner the power to construct a railroad from Camden to Amboy would draw after it the right to take tolls or fare for transportation between those two points; and so the sixteenth section would be unnecessary and nugatory, and the company have a perfect right, a common law right, as it has been termed, to take tolls and freight *ad libitum* from city to city without restriction. But there is

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no such common law right: the law of a corporation must be found in its charter; whatever power is there expressed or necessarily implied, in order to carry into effect those powers that are expressed within the general intent of the charter, constitute the only powers granted. The taking of tolls or freight is a distinct independent power, and cannot be implied from other powers granted. This has been repeatedly adjudged in the cases of turnpikes, ferries, and other granted franchises. *Olcott* v. *Banfill et al.*, 4 *N. Hamp. R.* 545; 2 *Mass.* 102; 1 *Pick.* 122; 7 *John. R.* 179; 18 *Ib.* 397; 1 *Pick.* 30; *Charles River Bridge* v. *Warren Bridge*; 1 *Pet. R.* 545; 6 *Conn. R.* 240; *Stourbridge Canal Co.* v. *Wheeler*, 2 *B. & Adol.* 793; 2 *Harr. Dig.* 2925, *tit. Navigation.* In this last case power was given to charge certain rates for every ton of iron and other goods navigated on any part of the canal, which should pass through one or more of the locks, and it was held that they had no common law or other power to charge the rates when the boats navigated the upper canal, where there were no locks. See *Angell and Ames on Corporations*, 3*d ed. c.* 3, 81, *et seq.* and cases referred to; 6 *Pick.* 23, 32; 18 *Ib.* 501; 2 *John. R.* 109; 15 *Ib.* 358.

In questions arising on canal and railroad charters, as to the right to take freight or toll, or the quantity thereof, courts have uniformily construed the charter most in favor of the public and most against the company. *Barret* v. *Darlington and Stockton Railway Company;* 2 *Man. & Gran.* 134; same case in the House of Lords; 7 *Man. & Gran.* 870; *Gildart* v. *Gladstone*, 11 *East* 675; *Proprietors of the Leeds and Liverpool Canal* v. *Hustler*, 1 *Barn. and Cress.* 424.

In the first fifteen sections of the charter there is to be found the incorporation of the railroad and transportation company, for the purpose of creating a complete line of communication between New York and Philadelphia, with full powers for that purpose; the provisions for organizing the company, appointing its officers, constructing the road, and placing carriages thereon, and steam vessels at either termination to complete the route. All is prepared for a successful experiment of the great enterprise. But one power of an important charac-

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ter, the right of the company to compensate themselves by taking tolls or freight, has not yet been granted. That is to be found in the sixteenth section, the particular object of which is to provide for this deficiency. By this section the company are "authorized to demand and receive such sum or sums of money for tolls, and the transportation of persons and every species of property whatsoever *thereon*, as they shall from time think reasonable and proper; *provided*, that they shall not charge more than at the rate of eight cents per ton per mile for the transportation of every species of property, nor more than ten cents per mile for carrying passengers." This embraces a grant of power to charge for tolls and transportation, and a restriction upon that grant, the latter not limited by phrase or word to any part of the route in particular, but doubtless intended to be coextensive (and no more) with the former; so that if the word "thereon," in the first branch, restrains the charge for tolls and transportation to the railroad only, between the terminations of Camden and Amboy, the restriction, as to the amount of such charge, is also restrained within the same limits, for it would be absurd to place a restriction on a portion of the route over which no power was granted: it would be a restraint upon a power which had no existence.

Is, then, this power or restriction limited to the road proper, or does it extend to the route? It is insisted that the word "thereon" limits it to the road only, because the first term, which is applicable for its antecedents, is the word "railroad," in the fifteenth section. Doubtless, in several sections, the word railroad is the appropriate, as well as the grammatical antecedent to the word *thereon*. Thus, in the seventh, "travelling thereon" refers to the word railroad, a few lines preceding. And so in the twenty-third section, respecting transit duty. And so, also, in the twentieth and twenty-sixth sections of the canal charter, where the same word occurs several times, it refers to the terms canal and feeder, either before or after, in the same sections. But there is no necessary connection between the words "thereon" and "railroad," for in the eleventh section it refers to the antecedent words, "embankments and

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bridges," and in the act of February 4, 1831, relating to the railroad and transportation company, the word refers to the thousand shares of the capital stock to be transferred to the state. Nor does it follow that, in search for the antecedent of the word "thereon," you must necessarily seize the first word that may answer the reference, for that word may occur in a section which has nothing to do with the subject matter, and be used or placed in that position accidentally; thus the word railroad is used in the fifteenth section, and it is taken as the necessary antecedent to the word thereon, in the sixteenth, though the latter section relates to the general powers of the company, while the former only to the bridges and passages over or across the railroad, and is placed in the position it occupies accidentally, without any necessary connection with the succeeding or preceding sections, and might have been placed in any other part of the charter. Any other section might have occupied the position of the fifteenth with equal propriety. Had it been the twelfth, then the antecedent would have been the lateral road from Bordentown; and thus the power and restriction, as to tolls and freight, would have been confined to that road only. These considerations go to show that, although the word "railroad," in the fifteenth section, may be the antecedent of the word "thereon," in the sixteenth, it does not follow that it must be such, or that it was the intention of the legislature so to restrict it. To ascertain that we must look beyond the fifteenth section into the charter itself. Had the sixteenth section immediately followed the second, little doubt could be entertained that the power and restriction, as to tolls and freight in the former section, would refer to and be governed by the description of the line of communication from city to city, as described in the latter. So far as relates to the general powers of the company, the sections do follow each other; all between relate to other matters, and may be considered as in a parenthesis, or in some other position in the statute: thus placing them would remove any ambiguity arising from the word "thereon." But was not the word "thereon" placed in the sixteenth section in order to show the sense of the legislature, that the tolls and freight were to extend to the

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route, and not to be confined to the road only? Without it the sense would have been complete, yet it would have left the distance on which to calculate mileage obscure, therefore some word would have been sought to define it. In the corresponding section of the canal charter, which is generally in the same words as this, instead of the word "thereon," is inserted the term "canal and feeder," which express all that was required in that charter, because that was a mere canal, and not also a transportation company, extending from river to river, without injunction to place steam vessels at either extremity, and was created for the mere purpose of opening a water communication between New York and Philadelphia; and when the canal was constructed, and opened from river to river, the "complete line of communication," mentioned in its second section, was accomplished, and boats and merchandise could pass through the whole line on the same element, and no tolls or freight could with propriety be required, except on the canal and feeder.

With this charter, then, in the hands of the legislature, either just passed or passing, their attention would naturally be called to the different powers of the companies, and the respective positions which they occupied in regard to tolls and freight. If, then, it had been their intention that these should be limited to the road istelf, would they not have inserted the word *railroad* instead of the word "thereon," as they had just inserted "canal and feeder" in the other charter? This would have been easy and natural; but if intending the section to extend to the whole line, it would have been exceedingly awkward to have placed in it the whole description, as set forth in the second section; and so, for the want of a better word, instead of such description, and as if in reference to it, they inserted the word "thereon." This construction will appear the more reasonable when we look at the intention of the restriction as to toll and freight. The road was made from the then inconsiderable town of Camden to the much less considerable place of South Amboy; the transportation of property or passengers merely between these two points was of very little importance, and indeed could not have been intended by

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the legislature or the company; whereas the carrying of passengers, produce, or merchandise from New York to Philadelphia, or from some point in the state to either of those cities, constituted the grand object of the company, as expressed in various sections, and was of vast importance. Can it, then, for a moment be supposed that the legislature would have been so careful to restrict the transportation to eight and ten cents per mile between Camden and Amboy, and leave the company to charge what they pleased between city and city, or between any point in the state and either city, while they granted them an entire monopoly of the business? Would they have placed any restriction at all, if they had not done it, or thought they had done it, on the whole route? Would they intentionally leave open a link in the chain of communication which destroyed all they did? Beyond all question the legislature could have had no such intention; and as the language which they used may extend to the whole route quite as appropriately as to the road only, we are bound to give it that construction; the power to charge and the restriction are coextensive, and both extend to the whole route. But it is objected that the granting this power, and the restriction thereon to operate upon the water as well as upon the land, is an interference with the constitution, as expounded by the Supreme Court in *Gibbons* v. *Ogden*, 9 *Wheat.* 1. That was a case where one party held an exclusive right to navigate by steam the waters lying in the state of New York, under an act of that state, granting to Fulton and Livingston an exclusive right; and the court decided that such grant was in violation of the constitution and laws of Congress: that the bays and navigable waters were free alike to all the states and citizens, to navigate by steam or otherwise. But it was never pretended in that case that a state legislature could not charter a company to navigate the waters in any state, or even the ocean itself. If the company seek the protection and security of a state charter, they are bound, as a company, by the restrictions and penalties of that charter, and of the legislature that grant it, though any individual member of the company may exercise the right of a citizen, and do the same thing on his own re-

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sponsibility without restriction: and this in no way interferes with the constitution or the exclusive powers of congress; it is no restriction of commerce or of the rights of individuals; no exclusive grant or prohibitory use of the waters within or without the state; no imposition of taxes, duties, imposts, or excises on vessels, or the cargoes thereof, but simply a power granted to a corporation, and a restriction thereon by the granting power; not intended to operate on the persons of individuals, or their vessels or property, but simply on the corporation itself, on whom is conferred the right, imposed the duty, and is added the restriction. An individual, it has been urged, may do the same things unrestricted, for the waters are free. True, but when a company of individuals ask of a state a portion of its sovereign power to enable them, by land and water, to complete a line of communication between New York and Philadelphia, and to do this not under their individual names and responsibilities, but like a sovereign, with its capacity to act under its own seal in its corporate name, they cannot complain if the state that grants them this shall add all proper restrictions. It is no more than is constantly done to the various pilot companies, steam navigation companies, whaling companies, and others, chartered by state legislatures.

In disposing of one question, we have virtually settled the other; for if the sixteenth section of the charter extends to the whole line of communication, then the overcharge for transportation from New York to Trenton is an overcharge upon every mile of the railroad travelled, and of course brings the company within the penalty of the statute, unless the fact of the penal act being passed some ten years after the charter, is a violation of the contract. But as its object is only to compel the company to fulfil their part of the contract, and inflicts a penalty only in case of its violation by them, of course it cannot come within this objection, for it neither violates or suffers the violation of the contract. The statute imposes a penalty of one hundred dollars upon any incorporated company in this state, authorized by law "to charge for transportation," which shall directly or indirectly, "under any pretence," take more than the rates of fare allowed by law, to be sued for before

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any justice of the peace of any county through which the railroad or canal passes. It is of no consequence where the offence was committed, whether on land or water, in the state or out of it, if it was by an incorporated company in this state authorized to take tolls, and was contrary to law. The phrase, to be sued for before any justice of the peace in any county in this state, through which the railroad or canal passes, does not limit or restrict the offence to any particular county, for the description of that is completed by the former part of the act; the restriction is merely as to the remedy or action, and would seem to imply that by "incorporated companies," in the preamble and previous part of the act, the legislature only intended railroad and canal companies, and not ferry or other incorporated companies, authorized to take fares or tolls. It has been urged before the court with much force, that the duty imposed on the company to carry small packages of valuable merchandise for this restricted compensation, being a small fraction of one cent per pound, from New York to Trenton, would be exceedingly onerous and unreasonable, and that it ought not to be required. There would certainly be weight in the suggestion, had the court the power to adjust the burthen or relieve from the difficulty; and on the first examination of the charter, it did occur that possibly the restrictions of "eight cents per ton per mile" might be limited to the ton or larger transportations; but the legislature have superadded "*at the rate of eight cents, &c.,*" showing that the company were to carry small as well as large parcels at the same price, no such graduating phrase being added in the succeeding line in relation to the transportation of passengers: and the same distinction is made in the canal charter; but no such distinction occurs in either charter in regard to the transit duty, there it is simply so much per ton.

The construction of the charter contended for by the company, is said to have been honestly given, and acted on for many years, without supposition that it was in violation of their right and duty, and that the decision of the Supreme Court has already brought hundreds of penal suits and actions for the overplus charged, and that its confirmation by this

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court would be exceedingly injurious, if not ruinous to the corporation. If the question before us admitted of serious doubt in the minds of the court, this argument certainly would be entitled to grave consideration; but placing it, as we must, beyond all doubt, in our judgments, this court cannot look at consequences, but must administer the law as they find it.

To-day, it is true, we are called upon to protect the individual rights of the citizen against the alleged aggression of the company; to-morrow we may be asked to protect the chartered rights of the company against the aggression of the citizen; but in the performance of our duty, we can give no higher assurance of the security of the one, than by our judgment for the protection of the other. The judgment below must be affirmed with costs.

Judge Speer. In the argument of this cause, several questions were presented, not necessary to be decided by the court at this time. The defence set up in behalf of the plaintiffs in error rests upon the question, "whether this company have a right to charge as common carriers for services rendered in discharge of duties, imposed by their charter upon them as a transportation company?"

In my opinion, they have not. The company is the creature of legislation, clothed with such powers and rights, only, as are derived from the legislature by specific grant and necessary implication. A right to charge for transportation is expressly granted in the charter, and is there accompanied by a limitation coextensive with the right itself.

Applying this view of the rights and powers of the company to the facts of the case before the court brings the act of the company complained of in this case within the language of the penal statute under which this suit is prosecuted. By the provisions of that act, any incorporated company in this state, authorized by law to take toll or charge for transportation of passengers, goods, &c., which shall take or demand more than the charge, toll, &c., allowed by law, shall forfeit and pay the sum of one hundred dollars, to be sued for, &c. I can find nothing in the reasons urged before the court, by the counsel

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of the company, which satisfies my mind that this company are not amenable to the provisions of that statute.

I am, therefore, of opinion that the judgment of the Supreme Court be affirmed.

Judge SCHENCK. This was an action of debt, brought by Peter Briggs, the plaintiff below, against the Camden and Amboy Railroad and Transportation Company, for the recovery of a penalty of one hundred dollars, under the act to prevent the taking of unlawful toll or fare on canals and railroads, for an alleged violation of law in charging more than they were authorized to charge for the transportation of certain merchandise from the city of New York to the city of Trenton, by the way of South Amboy and Bordentown.

The plaintiff below proved that the defendants, on the twenty-ninth day of January, eighteen hundred and forty-six, charged Briggs & Bacon, partners, trading, &c., the sum of ninety-six cents for one box, of the weight of two hundred and forty pounds, for the transportation of the same from the city of New York, by the way of the Camden and Amboy railroad, to Trenton; that the same was transported, by the steamboat of the company, from New York to South Amboy, a distance of thirty miles; thence, in the cars of the company, over the company's railroad, to Bordentown, a distance of thirty-five miles; and thence, over the company's railroad, to Trenton, a distance of six miles, the whole distance being seventy-one miles; and that the said transportation was done by and for the benefit of the said company, the defendants below. The bill was paid by the plaintiff below to the agent of the company. The justice gave judgment thereupon for the plaintiff for the penalty of one hundred dollars and costs. And it is agreed by and between the parties, by their respective attorneys, that if, upon the above state of facts, the plaintiff below was entitled to recover, then the judgment be affirmed, otherwise that it be reversed.

The Court of Errors and Appeals, on the above state of the case, are asked to reverse the judgment of the Supreme Court, on two grounds, *viz:*

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First. Because the penal act, passed March 12, 1839, to prevent the taking of unlawful toll or fare on canals and railroads (and under and by virtue of which act the above suit was brought, and judgment obtained,) was enacted subsequently to the act incorporating the Camden and Amboy Railroad and Transportation Company, and therefore inoperative, void, and of no force or effect against the company.

Second. Because there was no evidence that the company had taken or charged unlawful fare or toll on the said railroad or roads.

Before entering upon the consideration of the reasons assigned for reversal of the judgment of the Supreme Court, it may be proper to remark, that the company make no allegation that the charge was made, and received by them or their agents, by mistake or inadvertence, but claim the legal right of making the charge by virtue of their corporate powers.

This being the position assumed by the company, our inquiry will be directed to the first reason assigned for reversal, *viz.* "that the penal act, passed March 12, 1839, was enacted subsequently to the act incorporating the Camden and Amboy Railroad and Transportation Company, and therefore inoperative, void, and of no force or effect against the said company." The reason here given for reversal can only have validity, either because the penal statute of March 12, 1839, was an *ex post facto* law, or because its provisions were of a character to impair the contract between the Camden and Amboy Railroad and Transportation Company and the state of New Jersey, entered into by virtue of the act incorporating said company, passed February 4, 1830. If either of these positions can be sustained, then the penal act under which this suit was brought comes in conflict with that provision of the constitution which declares that the legislature "shall not pass any bill of attainder or *ex post facto* law, or law impairing the obligation of contracts." Is the penal statute above referred to inoperative, void, and of no force or effect in the case now under consideration, in consequence of its being violative of the constitution of this state or of the United States, as an *ex post facto* law? or do its provisions impair the conditions of the contract made

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with the Camden and Amboy Railroad and Transportation Company by the act of incorporation already referred to?

With regard to the first branch of the prohibition relative to an *ex post facto* law, it certainly has no application to this case. The act imposing a penalty of one hundred dollars for taking unlawful fare or toll, became a law of the state March 12, 1839. The charge of demanding and receiving unlawful fare, on which this suit is founded, was made January 29, 1846. It is therefore manifest that, at the time the taking of unlawful fare is complained of, the law fixing the penalty had been in existence several years.

In the next place the inquiry presents itself, whether there be any substantial reason for the proposition in this case, that the penal statute of March 12, 1839, impairs the contract made between the legislature of New Jersey and the Camden and Amboy Railroad and Transportation Company by the act of February 4, 1830, and therefore inoperative and void against the said company. The act of incorporation recognises the liability of the company to the provisions of the act entitled, "An act to prevent frauds by incorporated companies," section 26th of the act. And as there is no provision, expressed or implied, in the act of incorporation exempting the company from the operation of any penal statute which may be subsequently passed "to prevent the taking of unlawful fare or toll on canals and railroads," this reason has no validity, and needs no further comment. The first reason, therefore, assigned for error, and on which reversal is asked, is not substantial, and cannot be sustained.

With regard to the second reason assigned, *viz.* that there was no evidence before the court to prove that the Camden and Amboy Railroad and Transportation Company had charged unlawful fare or toll on their said railroad or roads, it can only be determined by reference to the provisions of the act itself. In the case before us, it is admitted that the said company did transport 240 pounds of merchandise from New York to Trenton, for Briggs & Co., a distance of seventy-one miles, part of the distance, *viz.* thirty miles, by steamboat, and the residue of the distance, forty-one miles, on the company's

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railroad, and in their cars, for which transportation they charged and received from the said Briggs & Co. ninety-six cents, which is more than at the rate of eight cents per ton per mile for the transportation of the said merchandise. But it is alleged by the company, that the charge of ninety-six cents was for the whole distance; and that on part of the distance the transportation was made by steamboat on the navigable waters between Amboy and New York; and that the rate of fare or toll prescribed in sixteenth section of the act applies only to transportation of goods and merchandise on the said railroad, and not in steamboats on the water. Such is the construction which the company allege they have given to to the act, and which they contend before this court is the true and legitimate construction. If this be so, then there is no evidence that the company have charged more than at the rate of eight cents per ton per mile on the railroad; for if the rate of charging, as prescribed in the sixteenth section of the act, is limited to the railroad, then the company may charge any amount of fare by steamboat, or other vessel, which in their discretion they may think reasonable and proper, on either extremity of the "line of communication from Philadelphia to New York." The question, therefore, to be determined by the court is, whether the construction contended for by the company is in accordance with the provisions of the act of incorporation. To arrive at a correct conclusion on the subject in controversy, our attention must be directed to the act itself, the whole act, the object to be accomplished, the powers conferred upon the incorporators, and the restrictions imposed. The act of incorporation, which gave existence to "the Camden and Amboy Railroad and Transportation Company," was passed February 4, 1830. It resulted from an application of several individuals, who were willing to embark in the enterprise of establishing "a line of communication from Philadelphia to New York," which line of communication should consist in part of railroad, and in part over navigable waters, the transportation to be made, at either extremity of the railroad, with steamboat or other vessel. In accordance with the wishes of the applicants, the legislature, as heretofore stated,

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passed an act clothing with corporate powers such individuals as might associate in the enterprise, specifying in the said act, section second, that the corporation thereby created should "have, enjoy, and exercise all the rights, powers, and privileges pertaining to corporate bodies, and necessary to perfect an expeditious and complete line of communication from Philadelphia to New York, and to carry the objects of this act into effect."

The object, therefore, contemplated by the legislature, and provided for by the act, is clearly defined to be the establishment of an expeditious, continuous, and complete line of communication between the two great commercial cities already mentioned; and, to secure the accomplishment of this object, it is provided, by the seventh section of the act, that "it shall be the duty of the company to provide suitable steamboats or other vessels, at either extremity, for the transportation of passengers and produce from *city to city*, so that no delay shall occur for want thereof, and that no impediment shall be offered to persons or property travelling on the railroad."

The object for which this company was incorporated being distinctly defined, and the powers granted and the privileges conferred being also definitely specified in the act of incorporation, we are next brought to inquire, by what authority and by what rule of charging for the transportation of persons and property on the said line of communication from "*city to city*" the company are to be remunerated for their investment in the enterprise.

The sixteenth section of the act of incorporation provides, that the said company are hereby authorized to demand and receive such sum or sums of money, for tolls and the transportation of persons and every species of property whatsoever thereon, as they shall from time to time think reasonable and proper; *provided*, that they shall not charge more than at the rate of eight cents per ton per mile for the transportation of every species of property, nor more than ten cents per mile for the carrying of each passenger." The correct and appropriate construction to be given to the word "thereon," in the fourth line of this section, has been elaborately discussed by the coun-

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sel for plaintiffs in error. It has been maintained with much earnestness, that the word "thereon" applies exclusively to the transportation of merchandise and every species of property on the railroad of the company, and not on the free navigable waters between South Amboy and New York, on which the merchandise and other property is carried in steamboats or other vessels. That this is the true intent and meaning of the act, is inferred by plaintiff's counsel.

First. From correct grammatical construction of the act, counsel insist that the word "thereon" must relate to some substantive which has gone before. That, in the application of this grammatical rule to the phraseology of the section under consideration, the conclusion is inevitable, that the word "thereon" must relate to the railroad, as there is no other antecedent to which it can consistently refer, either by proximity or affinity.

In this effort of counsel to supersede the fair and legitimate construction of the act (as clearly indicated to be the intention of the legislature by the whole tenor of the act), they have not, in my opinion, taken a tenable position. The word "railroad," in the fifteenth section, immediately preceding, is not so used or applied as to indicate any distinct object or design for which a railroad was authorized by the legislature. It relates in no way to transportation or a highway, and, consequently, if used in no other section, could not, by implication or otherwise, have relation to tolls, fare, or merchandise, or charges for passengers. In every instance in which it is used in this section, it is preceded by the word "said;" the "said road" is repeated several times, and in such connection as to make it clearly understood that its signification had been previously defined in the act of incorporation. We are to look, therefore, to some other part of the act to determine its appropriate meaning, and whether, by sound grammatical construction, it should be subjoined to the word "thereon," in the sixteenth section. In the eleventh section of the act, by which the corporate powers of the company are enlarged and specified, it is also provided that the company shall have power "to do all other things which shall be suitable and necessary for the

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effectual completion of "said road or roads, *and to carry into full effect the objects of this incorporation.*"

What, then, is the object of this incorporation? Can any one hesitate to believe that the intention of the legislature was to establish a line of communication from "city to city," expeditious, unbroken, and complete; which line, when completed, to be used for the transportation of persons and every species of property whatsoever without impediment or delay? And, having provided for the establishment of a complete line of communication from "city to city," the act proceeds to prescribe the mode of remuneration by which the company may demand and receive toll and fare for persons or property carried on said line.

The word "thereon" must apply to the whole line, and not to any particular part; as no discrimination is made in the act designating the particular part on which fare may be demanded, none can be presumed by implication. The purpose of the legislature is kept prominently in view throughout the whole act, that the railroad was designed to be a part of the whole line from "city to city," and not regarded as a separate and detached portion, liable to restrictions or favored by peculiar privileges not applicable to the whole line.

Secondly. In support of this construction, it is further contended that the legislature never could have intended to extend the rate of fare at eight cents per ton per mile, on either extremity of the line, beyond the *terminus* of the railroad, because the navigable waters are free to all, and the legislature have no jurisdiction over those waters. If this be so, if the legislature have no power to prescribe the rate of fare on that part of the line which lies across the navigable waters between Amboy and New York, then the company can demand no fare whatever for merchandise transported on their steamboats or other vessels by virtue of their corporate powers.

But it is maintained that the company may charge and demand fare on their steamboats and other vessels as common carriers, and as common carriers they are not limited by the rate of fare prescribed by their charter; but to claim authority to demand a higher rate of fare for transportation by their

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steamboats than the maximum prescribed by the legislature, is an assumption of power not conferred or conceded by the act of incorporation. No right whatever is granted to the company to transform themselves at pleasure from being carriers under the charter to become carriers at common law. Suppose any individual should deliver a quantity of merchandise to one of the agents of the company's line at South Amboy, to be carried in the line to New York, and, on delivery of the said merchandise in New York, the agent should demand, by the company's orders, at the rate of fifteen cents per ton per mile for transporting the same, and payment refused on the ground of the charge being unlawful, could the company sustain an action by virtue of their corporate powers, at that rate of charging, for transportation from South Amboy to New York? or could they sustain an action as common carriers for merchandise carried on their line as a privileged company? But, to make a case more directly in point, suppose, in the suit now before the court, the defendants in error had refused to pay the charge of 96 cents for the transportation of 240 pounds of merchandise from New York to Trenton, because unlawful, could the company have sustained an action in a twofold capacity of common carriers for thirty miles of the distance, and privileged carriers for the remaining forty-one miles?

The act of incorporation makes it the imperative duty of the company to keep steamboats or other vessels at both extremities of the railroad, so that no delay shall be caused to the transportation of persons or property on the line of communication established by the charter. Now if the legislature were authorized to impose this duty on the company, and if they did possess the power to command the observance of it, by what mode of reasoning or by what form of argument can it be maintained that the legislature did not intend, and have not prescribed the rate of fare to be charged on either extremity of the line extending from "city to city?"

Again, it has been contended, and insisted by the counsel for the company, that the "line of communication authorized and fixed by the act of incorporation is declared to be a public

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highway," and, as such, is open to competition, and may be used by others as carriers of persons, merchandise, and other property, and that the community have abundant guaranty for moderate charges by the ordinary operation of competition; that the rates of fare must necessarily be reduced to the lowest point by opposing competitors for the business of transportation on this public highway. Any legislative prescription therefore, fixing the maximum rate of charging on the whole line, would be superfluous, and result in no benefit to travellers or persons transporting merchandise thereon.

It may be sufficient to remark, in answer to this argument, that no competition has ever been attempted, either by individual or associated enterprise, and that any protection, therefore, which might be secured to the public by rival carriers, has never been experienced. But let us examine this proposition, and ascertain, by reference to the charter, whether it be true, in point of fact, that this line of communication is a public highway for any purposes of competition. Is it accessible to any, as a medium of transportation, except to the company? Can any individual or individuals become carriers on this line by the payment of tolls, without the consent and approbation of the corporators?

The road, with all its appendages, is declared to be the personal property of the company, the whole line of communication from "city to city" is controlled by the direction of the company, for their exclusive benefit, and the powers they exercise and the profits and advantages they enjoy is by virtue of the act of incorporation. By the seventh section, it is provided that the directors, or a majority of them, "shall decide upon the description of carriages to be used on said road, the weight to be carried in a carriage, the times of starting, and rates of travelling." The power hereby granted, if there were no other, is abundantly comprehensive and efficient to enable the company to exclude all competition. The proposition, then, that this road is a public highway, cannot be sustained by reference to the act itself, and is contradicted by the fact, that no competition has ever been attempted.

But, admitting that there is ground for diversity of opinion,

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as to the intention of the legislature in some of the provisions of this law, owing either to the novelty of the subject or the vagueness of the language employed in specifying the details of the act, are we left to grope our way in the dark, directed only by the dim light of conjecture, guided in our judgments by what we may individually regard as expedient or inexpedient? For myself I feel no such embarrassment. If I do not greatly err, there lies at the bottom of this inquiry a fundamental principle, on which we may safely establish an opinion, legitimate, sound, and substantial.

The principle is this, that all legislation must be construed relative to the fundamental elements of the government under and by authority of which laws are enacted. The spirit of our free institutions not only justifies, but imperiously requires, that where doubts arise in the construction of legislative acts, whereby exclusive privileges are vested in a few, the construction should be favorable to the rights and interests of citizens at large, and adverse to the few who claim to exercise doubtful powers.

Judge Sinnickson. I am of the opinion that the word "thereon," in the sixteenth section of the charter of the company, means the railroad; and that the company have no right to charge beyond the extremities of their road, either under the charter or on any other ground.

Ogden J. The argument was heard in this cause upon the facts set forth in a state of the case, agreed upon by the attorneys of the parties.

It is an action of debt, brought by Peter Briggs against the company, to recover a penalty of $100, under "An act to prevent the taking of unlawful toll or fare on canals and railroads," passed in March, 1839. (*Rev. Stat.* 601.)

On the 26th of January, 1846, the company charged Briggs & Bacon, partners in business, residing in Trenton, ninety-six cents for the transportation of a box, weighing 240 pounds, from the city of New York, by a steamboat of the company, to South Amboy, a distance of thirty miles, thence, in the cars of the company, over their railroad, to Bordentown, thirty-five

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miles, and thence in their cars, over their railroad to Trenton, six miles, the entire distance being seventy-one miles.

The bill was paid by Mr. Briggs (the plaintiff below) to an agent of the company.

2. The plaintiff insisted, before the courts below, and again in this court, that the charge made by the company for transporting said box was more than their charter allowed, and that, under the general act of the legislature, before referred to, they had forfeited a penalty of $100, which he, as a common informer, was entitled to recover, with costs.

The overcharge is claimed to flow from a violation of the sixteenth section of the act incorporating that company; and, in the language of the senior counsel for the prosecutor, the question must be resolved by the settlement of two propositions.

1st. Does the limitation, not to charge more than at the rate of eight cents per ton per mile for transportation, extend from New York to Philadelphia? and if so,—2d. Are the company liable to the penalty of the statute of March, 1839, which, by the judgment of the justice and of the Supreme Court, has been applied to them?

The first depends upon a proper construction of a charter, in the nature of a contract, between the legislature and the company, granted to promote and accomplish a great internal improvement. The second rests upon the legal construction and application of a highly penal statute, enuring *exclusively* to the use of the informer, irrespective alike of the party overcharged, as also of a charitable or remunerative appropriation of any portion of its penalties.

The nature of the first inquiry has led to an elaborate and ingenious discussion of the charter incorporating "the Camden and Amboy Railroad and Transportation Company," and more particularly of the provisions of that portion of the sixteenth section thereof, which bears upon the compensation to be charged by them.

Most of the preceding sections contain enactments touching the organization of the company, the procurement of lands, and the laying out and constructing of a railroad or roads,

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with all necessary appendages, from the Delaware river, in the then county of Gloucester, to a point or points upon the Raritan bay.

The fifteenth section imposes a duty upon the company of constructing and keeping in repair bridges or passages over the *said railroad or roads*, where any other roads shall cross the same. By the sixteenth section, it is thus enacted: "That the said company are hereby authorized to demand and receive such sum or sums of money, for tolls and the transportation of persons, and every species of property whatever thereon, as they shall from time to time think reasonable and proper; *provided*, that they shall not charge more than at the rate of eight cents per ton per mile for the transportation of every species of property, nor more than ten cents per mile for the carriage of each passenger, and that the *railroad or roads* and their appendages, and all other property belonging to the company, are hereby vested in the said company during the continuance of this charter."

The legislative meaning and application of the word *thereon*, in this connection, has created whatever doubt is urged as embarrassing this branch of the case.

It may be contended, in support of the judgment below, that the design of the legislature in granting the charter was to have *perfected "an expeditious and complete line of communication between Philadelphia and New York;"* that a duty is therein imposed upon the corporators to provide suitable steam or other vessels, at either extremity of the railroad, for the transportation of passengers and *produce* from city to city, so that no delay should occur for want thereof; and that the whole scope of the charter looked to the accomplishment and use of the entire route. From those premises the argument was drawn, that, in conferring powers to demand and receive compensation, the legislature contemplated that such power should be exercised upon the whole extent of the desired line of communication; and that they also imposed their restriction upon the whole line.

Both parties concede that the grant of a power to charge,

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and the restriction thereof, are *coextensive;* so that the determination of the former will necessarily settle the latter.

It was answered, in behalf of the company, that the words of the sixteenth section are not ambiguous, but are susceptible of a plain construction, without resorting for aid to the whole scope of the act; but if not so, then that the legislature did not mean in the sixteenth section to extend the *power* and apply the *limit* beyond the railroad proper.

In support of this aspect of the case, it was urged that the relative word "*thereon*" is the controlling one in that paragraph; that its antecedent is to be sought in the context, *as the sections are placed in the charter;* that the *railroad or roads proper,* having been the subject of the next five preceding sections, they should be taken as the antecedent; and that overlooking them, and passing back to the second section, and thence taking "*the entire line of communication between the cities*" for a proper antecedent to "*thereon,*" would violate every principle of grammatical and established rules of construction.

The first section provides for opening books for subscription; the second fixes the capital stock, gives the corporate name, and confers the general powers pertaining to corporate bodies, and necessary to perfect an expeditious and complete line of communication from Philadelphia to New York and to carry the objects of the act into effect.

Let us examine the several provisions. The third section regards the subscriptions for the stock; the fourth, the effect of insufficient subscriptions; the fifth and sixth, the mode of electing directors and their president; the seventh confers powers on the directors for supplying vacancies, appointing other officers, deciding upon the description of carriages to be used on the *road* when completed, the weight of loads, times of starting and rates of travelling, regulating of tolls, and making by-laws for the general government of the company and its officers, and, for the prevention of delay, requires the provision of suitable boats at either extremity.

The eighth, ninth, and tenth sections regard annual exhibits, special meetings of stockholders, and elections in certain cases.

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The eleventh section, prefacing it to be "for *facilitating the objects of the act*," confers the powers necessary to survey, lay out, and construct a *railroad* or roads, with all necessary appendages, from the Delaware river to the Raritan bay. The twelfth provides for a lateral *railroad* to Bordentown; the thirteenth authorizes the taking of required lands and materials for the railroads upon making compensation, as therein is directed; the fourteenth gives an appeal from the tribunal for compensation established in the thirteenth section; the fifteenth imposes upon the company the duty of constructing suitable bridges and ways where any road shall cross the said *railroad* or *roads*, and where the said *railroad* shall intersect a farm: then follows the sixteenth section, which enacts, that the company are thereby authorized to demand and receive such sum or sums of money, for tolls and the transportation of persons and every species of property whatsoever *thereon*, as they shall from time to time think reasonable and proper, limited by the restriction already recited. As the sections are placed in the act, the construction of the limitation contended for by the plaintiffs in error is consistent with the language employed and the rules of grammatical construction; and should, in my judgment, prevail, unless its consequences would conflict with other plain provisions of the charter, or defeat the obvious intention of the legislature, as developed by the whole act.

It was not alleged, in argument, that there was any other enactment upon the matter of compensation which should influence the construction of the sixteenth section; but this branch of the case was put by the prosecutor, upon the ground, that confining the restriction to the *road* would defeat the intention of the legislature to guard the public against excessive charges, by providing a limitation coextensive with the route upon which, as transporters, the company were authorized by the act to operate.

The great design of the legislature was to confer those powers and privileges upon a company that were necessary to perfect a line of communication from the one city to the other, for the more expeditious and desirable transit of pas-

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sengers and property between those points, and likewise to and from intermediate points upon the line. The eleventh section authorizes the location and construction of a railroad from the Delaware river to the Raritan bay, to facilitate the *objects* of the act; and it is fair to assume that the representatives of the people of the state, in parting with a portion of her sovereignty to individuals, circumscribe its exercise within *such* bounds as a due regard for the interests of the public would dictate.

In behalf of the company it was said, that such protection was extended by applying the restriction exclusively to the roads, inasmuch as the waters were free, and the portions of the route from the respective *termini* of the railroad would be open to competition, which would regulate the charges thereon.

In seeking for the intent of a legislative body, it is proper to consider the state of things existing at the time of the passage of the act under examination. This company was incorporated when railroads were in their infancy in this country. The line of communication from Philadelphia to New York was then maintained by stages and transportation wagons between the Delaware and Raritan rivers, and by steamboats from the *termini* of the land routes and from the cities.

These boats were then maintained by others than the applicants on this road in successful and competing operation, at charges much less upon passengers and tonnage than would result from the maximum rates allowed to the company in the sixteenth section. A distinct and antagonistic application was also at the same time before the legislature, desiring a charter for the construction of a canal from the Delaware to the Raritan; and so jealous was each company of the rival adventurers, lest the other should obtain more favorable terms from the legislature, that the two charters were framed in identical language, as far as the nature of the respective improvements would allow, the second section of each contemplating, in words, the perfecting of "an expeditious and complete line of communication from Philadelphia to New York. The two applications were kept, by their respective advocates, in like state of advancement before the legislature, and both charters

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were eventually passed on the same day. So far as we can now enter into the views then entertained of the expected operations of these institutions, it is reasonable to suppose that a brisk and healthful competition was fully anticipated.

The companies continued under advancing management for one year, and on the 15th of July, 1831, when the canal company was seeking powers to construct a railroad, the act was passed authorizing a consolidation of the two stocks.

I have made this historical digression for the purpose of showing that the intention of the legislature regarding the operation of the sixteenth section, when sought in the language adopted, and the object they had in view, and the whole scope of the charter, is not so manifest as not to have afforded ground for honest differences of opinion upon the construction of the limitation.

Locomotive engines were not at that time in successful operation here, and the prevailing idea undoubtedly was, that the railroad would be used by individuals as a public highway, under the twenty-eighth section of the charter, subject to such regulations as the company might ordain under the powers granted to them in the seventh section of the same.

Such, however, has not been the result. The main carrying business upon railroads, in this country and in England, has fallen into the hands of the companies themselves.

In the present case, the company have stocked the railroads with carriages and motive power; have provided, as a part of their corporate property, steam vessels at each *terminus* of the road; and have established, and do conduct such lines of transportation, both for passengers and property, as effectually to preclude all competition in the use of their railroad, or of the rivers in *connection with* their roads.

Such appropriation of the benefits of the road has centered in the company the entire carrying business upon that line between the two cities, and it has become a matter of grave importance to the public how far they can be restrained, under their charter, in their charges for transportation. If the construction, advisedly adopted and openly and professedly acted upon by them up to the time of the commencement of this

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suit, be the only one of which the phraseology of the act is susceptible, then their power to charge upon the water must be declared by this court to be *discretionary*, and the limitation imposed upon the railroad must practically become a nullity.

Experience and authority teach that, when called upon to construe grants of powers to companies of this nature, if the language is ambiguous, courts should establish that construction which will be most favorable to, and protective of the interests of the public, and comport with the ascertained intention of the legislature.

Such charters are universally granted upon the application of individuals. The language used should be considered as their language; and if it is open to a fair doubt, and great inconvenience would result from a particular construction, that construction should be avoided, unless the meaning of the legislature be plain; and the act should be construed *strictly* against the corporators.

Influenced by a policy which contemplates, in grants of such powers, a suitable protection against unlimited charges, I am of opinion that the language of the sixteenth section is not so plain as clearly to indicate a legislative intent of confining the power to charge within the *termini* of the railroads; and hence, that the restriction in the section should be taken as extending over the whole line of communication from New York to Philadelphia completed by the corporators under the powers of their charter, and used by them in the exercise of their privileges as a "transportation company."

This result brings me to the consideration of the second proposition, which I shall endeavor to dispose of with more brevity.

I think the justice who delivered the opinion of the Supreme Court erred in premising that "the only question for the consideration and decision of the court was, whether the charge made by the company is greater than the law authorizes them to make," as neither the state of the case nor the facts shown confine us to that one point.

It does not, then, in my judgment follow that, in giving the

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foregoing construction to the charter, we must *necessarily* decide that "the plaintiff below was entitled to recover." He came before a judicial tribunal of the state as an informer, demanding a judgment for $100 costs against the company for a forfeiture, charged by him to have been incurred in virtue of a penal statute.

His attitude entitled him to no liberality from the court, nor should any intendment be made in his favor. If he, as a member of the firm of Bacon & Briggs, had been overcharged, their redress was open in an action for the money overpaid; which remedy still will exist unaffected by the determination of this branch of the case.

If the act of the 12th of March, 1839, construed and executed upon those conservative rules applicable to penal statutes "which the wisdom of ages has sustained," and, in the language of Chief Justice Marshall, "are founded on the tenderness of the law for the rights of individuals, and on the plain principle, that the legislature, and not a court, is to define a crime and ordain its punishment;" if, I say, thus construed, it embraces this case, the judgment below should be affirmed; but if it does not, the judgment, in my opinion, should be reversed.

The statute under which the suit was instituted is *entitled*, "An act to prevent the taking of unlawful tolls or fare on canals and railroads."

The preamble is in the following language: "Whereas complaints have arisen that some of the incorporated companies of this state have taken a greater amount of *fare* or *toll* than is allowed by law, and also of the unequal, fluctuating, and unlawful rates of *toll* or *passage money* upon the several canals or railroads of this state, therefore"—

Then follows the enacting clause.

"That any incorporated company or companies in this state, which is, are, or shall be authorized by law to take toll, or to charge for the transportation of passengers, goods, wares, or merchandise, which shall, directly or indirectly, through or by any agent, director, or other officer whatever, take or demand of any passenger or person, under any pretence whatever,

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more than the charge, toll, rates, or fare allowed by law, shall forfeit and pay the sum of $100 for each and every such offence, to be prosecuted for and recovered, with costs, before any justice of the peace in any county of this state through which the said railroad or canal may pass, in the name and for the use of the person or persons prosecuting for the same."

The counsel for the company have insisted that the plaintiff was not entitled to recover, because the statute does not apply to the evidence in this case. They urged that, if the company have made the overcharge complained of, it having been done upon the water portion of the whole route, their error does not fall within the provisions of this act.

Although their bill was rendered for the charge in gross, yet if the amount was made up by a computation at eight cents upon the railroad and the excess upon the steamboat, as they allege, the mode of announcing the charge in gross, no items having been required of them, cannot change their liability under the penal act.

For the purpose of reaching a satisfactory conclusion, it is proper to examine the act, and, if practicable, to test the intention of its framers, as maintained on either side by the language adopted.

It would be unsafe to assume that, in penal prosecutions, a case is within the reason or mischief of the statute, and hence within its provisions, unless the plain meaning of the words used warrants such conclusion.

Does the description, "*any incorporated company in this state*," necessarily embrace the plaintiffs in error? If so, the same description will include the various incorporated *steamboat* and turnpike companies in the state, who may charge or take unlawful fare, rates, or toll, without any jurisdiction being established for entertaining the prosecutions.

Failing then, from the general descriptive words of the enacting clause, to divine the intention of the legislature, it is next proper to examine other portions of it, in quest of that guide for a construction.

The latter clause thereof provides that the action shall be brought before a justice in *some county* of this state through

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which the *said* railroad or canal may pass. Is it not indicated, by this expression, that the mischief, which the legislature intended to remedy, was being committed upon some *railroad* or canal within the state?

Suppose that the box of merchandise had been delivered at the office of the company in New York, to be transported to Perth or to South Amboy, and they had charged and been paid for that service upon their boat the sum of fifty-five cents, instead of thirty cents, which latter would be the charge for it, if computed upon the restriction in the sixteenth section, would the penalty of this act have attached? If so, where and before whom should the action be brought? The box would not in that case, as yet, have touched any railroad carriage or canal boat.

This insistment, that transportation upon *canals* and railroads was alone in the contemplation of the legislature, is likewise supported by the *title* and the *preamble*, although when, by the enacting clause, the intent is so plain that nothing is left for construction, *it* should control; yet in cases of dubiety the *title* may be invoked to assist in removing the ambiguity, and the preamble may be used as a key to open the intent of the law makers.

This is entitled, "An act to prevent the taking of unlawful tolls or fare *on* canals and railroads."

The preamble sets out "that complaints have arisen that some of the incorporated companies of this state have taken a greater amount of *fare* or *toll* than is allowed by law; and also of the unequal, fluctuating, and unlawful rates of *toll* or *passage money upon* the several *canals* or *railroads* of this state.

It, in terms, locates the mischiefs complained of *upon* the canals and railroads, thus disclosing the inducement for the act; while the title, in language, professes to prevent *such illegalities "on canals and railroads.*

If these portions of the enactment throw any light to guide in the construction of the act, do they not direct us to that conclusion which will confine its penalty to cases occurring *exclusively* upon canals and railroads?

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This is the highest grade of penal statutes affecting property. Unlike the "act to prevent the unlawful waste and destruction of timber in this state," which appropriates one half of the penalty to the owner of the land, or the act against usury, which gives one half for the use of the state, this presents the strongest inducements for speculative prosecutions against companies, irrespective of the extent of the overcharge and of all circumstances of justification.

It makes no allowance for mistakes, misunderstandings, or honest differences of opinion as to legal rights, but fastens its punishment upon the subjects of its penalties, if, "*under any pretence whatever*," they happen to make a charge in good faith which may thereafter for the first time be adjudicated to be illegal.

Penal statutes are to be construed strictly against the prosecutor, and in cases of ambiguity the court is bound to decide in favor of the accused. Livingston, J., *Paine's N. York Cir. Ct. R.* 32.

He continues, "They ought not, by what may be considered their spirit or equity, to be extended to offences which are not *specially* and *clearly* described and provided for in terms which leave *no* reasonable doubt of their meaning."

If it be the duty of a jury to acquit where such doubts exist concerning *facts*, it is equally incumbent upon a judge not to apply *the law to secure*, where he labors under the *same* uncertainty as to the meaning of the legislature. Nor is a court bound to conclude that a legislature *have* done what they intended, unless *fit* words be used for the purpose.

"The *language* employed must authorize the determination of a case to be *within* a penal statute. *Probability* of legislative *intent* is not a guide which can safely be taken in construing a penal statute."

It would be dangerous, indeed, to carry out the principle, "that a case which is within the reason or mischief of a statute *is* within its provisions, because it is of kindred character with those enumerated in it." Chief Justice Marshall, 5 *Wheat.* 76, &c.

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Upon these principles and by these rules penal statutes should be construed. No intendment is to be made in favor of the informer. If the present act does not reach as far as ascertained evils require that it should reach, it is far safer to leave the matter to the wisdom and sound discretion of the legislature than to seek a cure by judicial legislation.

It is proper, from suggestions made upon the argument, that we should ascertain whether the act of 1839 partakes of the qualities of a remedial statute. It is true that a penal statute may be a remedial law; and, also, that a penal statute may be penal in one part, and remedial in another; in which latter case, however, each clause should be construed by the peculiar rules applicable to its distinctive character.

This act has but one aspect, the imposition of a penalty. In providing for that, it recognises and constructively affirms the legality of tolls and rates allowed in existing charters; but "an affirmance of an anterior law cannot properly be styled remedial." *Devarris on Statutes*, 637.

Remedial acts have been divided into *enabling* and *restraining* statutes. *Ib.*

They are made to supply the defects discovered in the common law, from whatever cause such defects arise; by *enlarging* it where found *too* narrow, or *restraining* it where too luxuriant. *Ib.* 641–2.

If, by analogy to the common law rule, we are permitted to test the character of a statute by its effect upon another statute, we cannot escape the conclusion, that the act under examination neither enlarges nor restrains the provisions of the charter of this, or of any similar company. It suggests no defects; it provides no remedy which did not before exist; it merely adds to the common law remedy, which every injured party had for redress against an illegal charge for toll or fare, an independent forfeiture of a penalty to any person who may sue for the same.

Although the defendants below are a corporate company, yet their vitality and ability to act and to carry out the objects of their charter spring from the enterprise and the capital of

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individuals, thus involving rights which are entitled to the common protection and law of the land.

Being clear in my conviction, that the act of 1839 is not in any portion thereof remedial, but that it is a purely penal statute of the most punitive class, which if legally construed cannot be applied to the facts of the present case, I am of opinion that upon this ground the judgment should be reversed.

Judge PORTER. The first section of the act incorporating the railroad company provides for opening the books for subscription to the stock, &c., the second section divides the capital stock into shares, &c., and gives them power to make and use a common seal, and to exercise all powers pertaining to corporate bodies, and necessary to perfect an expeditious and complete line of communication from Philadelphia to New York.

There being a line of steamboats then running from Amboy, on the Raritan bay, to New York, the railroad from Camden to Amboy was necessary to perfect an expeditious and complete line of communication; therefore clearly inferring that it was not to make, but to perfect, with what already existed, an expeditious line of communication.

The seventh section provides that the officers of the company shall decide upon the description of carriages to be used on said road, when completed, the weight to be carried in a carriage, the times of starting and rate of travelling, so that no injury may be done to said road, or impediments offered to persons or property travelling *thereon;* and it shall be their duty to provide steam or other vessels, at either extremity, for the transportation of passengers and produce, so that no delay shall occur for want thereof, shall regulate tolls, &c.

The fifteenth section makes it the duty of the company to construct and keep in repair good and sufficient bridges or passages over the said railroad or roads, where any public or other road shall cross the same; and when the said railroad shall intersect the farm or lands of any individual, to provide and keep in repair suitable wagon ways, &c.

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The sixteenth section authorizes the company to demand and receive such sum or sums of money, for tolls and the transportation of persons and every species of property whatsoever *thereon*, as they shall from time to time think reasonable and proper; *provided*, that they shall not charge more than at the rate of eight cents per ton per mile for the transportation of every species of property.

This, in my opinion, gives the company the right to charge such reasonable sum for toll and transportation of property as they may think proper only on the road or roads incorporated by this act, and extends the restriction of eight cents per ton per mile to the same. That the word *thereon*, in the sixteenth section, refers to some antecedent, and, by the fair reading of the act, it refers to the word railroad or roads, in the section immediately preceding, and should be so read as though the word railroad had been written in its place.

From South Amboy, on the Raritan bay, to the city of New York, a distance of about thirty miles entirely over the water, which is an arm of the sea and beyond the geographical limits of the state, the legislature have, by this charter, granted no privileges and imposed no restriction, leaving the compensation for transportation on this part of the line from city to city to be charged by the company, as common carriers over navigable waters.

It is admitted that the package, for which an overcharge of freight was alleged to have been made, was carried over the water from New York to Amboy, and on which, in my opinion, the penal statute does not apply.

The judgment of the court below is therefore erroneous, and should be reversed.

Judge McCarter concurred in the opinion expressed by Judge Porter.

For affirmance—The Chancellor, Justice Randolph, and Judges Sinnickson, Schenck, and Speer.

For reversal—Justice Ogden and Judges McCarter and Porter.

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The CHIEF JUSTICE and Justices NEVIUS and CARPENTER had given opinions in the court below, and Judge WALL was a director of the company.

Judgment affirmed. *(a)*

THE STATE v. BERRIAN.

This was a writ of error, brought by the state to remove the judgment of the Supreme Court reversing the judgment of the Middlesex Oyer and Terminer. The case is stated in full, and the arguments of counsel given in the report of the cause in the Supreme Court. *Ante.*

No written opinions were delivered in the Court of Errors, by whom the judgment of the Supreme Court was affirmed, and the judgment of the Oyer and Terminer was reversed; nor does the vote by which it was reversed appear by the minutes of the court.

The president of the court (Chancellor Halsted) has furnished the reporter with the following *memoranda* from an endorsement on his notes.

The court resolved unanimously that, as a general rule, the use of figures in an indictment was illegal.

The court resolved, Judges WALL and SPEER dissenting, that the indictment was not defective for the use of figures, as therein used.

But the court resolved, Justice RANDOLPH dissenting, that the indictment in this case was otherwise defective, and therefore affirmed the judgment of the Supreme Court.

(a) The Supreme Court of the United States, in the case of *John A. Perrine* v. *The Chesapeake and Delaware Canal Co.*, 9 *Howard* 172, decided at January term, 1850, (contemporaneously with the Briggs case) maintain the doctrine held in this case by the Court of Errors, that a corporation cannot *take toll* or exercise any other corporate power when not clearly granted by their charter. In that case, the charter having *omitted* to authorize the demand of toll for passengers, it was held that passengers are entitled to pass on the canal toll free. See, in opinion of Taney, C. J., 184 and 192.

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CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT APRIL TERM, 1850.

BOLLES v. BEACH.

1. On error, the court will not inquire as to the weight of the evidence.

2. A sheriff's deed is admissible in evidence without proof of the sheriff's authority to make the deed when the object is merely to show some collateral fact.

3. The grantor of a deed, in an action for the purchase money, is not estopped by the usual acknowledgment in the deed, that the money has been paid. Where the intention in regard to the estate is not disputed, nor the operation of the conveyance, as such, sought to be changed, this clause is regarded as formal merely, and open for explanation by parol.

4. Upon a sale of land by deed, which acknowledged the receipt of the purchase money, and which also contained full covenants of title and against encumbrances, the deed was given upon an agreement by the grantee that he would discharge a mortgage of $1000 upon the premises, and indemnify the grantor therefrom, the grantee retaining so much of the consideration money for that purpose. The grantor, having been compelled to pay the debt, *held* that, in an action against the grantee upon his undertaking, the plaintiff was not estopped by his deed from proving the encumbrance and the agreement to discharge it. The agreement was considered to be collateral to the deed.

5. The damnification of the plaintiff under such an agreement, when the payment by him was the giving a new security, is to the whole extent of the failure by the defendant to appropriate to the discharge of the mortgage the consideration money left in his hands for that purpose.

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Ephraim Beach brought an action of assumpsit in the Circuit Court of the county of Essex, to recover of Nathan Bolles an indemnity for the payment or discharge of a certain bond and mortgage, given by Beach, and which he alleged Bolles assumed to pay.

The plaintiff below declared as follows:

1. Whereas the plaintiff heretofore, to wit, on the 20th day of January, 1835, at, &c., made, executed, and delivered, under his hand and seal, to S. Condit, S. Hayes, and J. Taylor, executors, &c., of John Douglass, deceased, a certain bond, in the penal sum of $2000, bearing date on the day and year aforesaid, conditioned, that if the plaintiff, his heirs, executors, and administrators, or any of them, should and did well and truly pay, or cause to be paid, unto the said S. C., S. H., and J. T., executors as aforesaid, or to their certain attorney, executors, administrators, or assigns, the just and full sum of $1000 in one year from the date thereof, with lawful interest for the same, &c.; and did then and there, together with Eliza his wife, make, execute, and deliver, under their hands and seals, respectively, to the said S. C., S. H., and J. T., executors as aforesaid, a certain indenture of mortgage, bearing date the day and year aforesaid; and did thereby then and there, for and in consideration of the said sum of $1000, grant, bargain, and sell to the said S. C., S. H., and J. T., executors as aforesaid, and to their heirs and assigns for ever, certain lots or parcels of lands and premises, situate, lying, and being in the city of Newark, in the said indenture of mortgage more particularly mentioned and described, subject to a proviso or condition therein contained, that if the plaintiff, his heirs, executors, or administrators, did and should well and truly pay, or cause to be paid, to the said S. C., S. H., and J. T., executors as aforesaid, or to their certain attorney or attorneys, heirs, executors, administrators, or assigns, the said sum of $1000, &c., according to the condition of the said bond, without any deduction for taxes, assessments, &c., then and from thenceforth the said indenture of mortgage and bond, and every thing therein contained, should cease and be void, &c. And whereas afterwards, and before the payment of the said bond and inden-

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ture of mortgage, to wit, on the 14th day of November, 1835, at, &c., there being then and there due upon the said bond and indenture of mortgage the said sum of $1000, in the conditions thereof respectively mentioned, with the interest thereon from the date thereof, respectively, the defendant, in consideration that the plaintiff, at the special instance and request of the defendant, would, together with his said wife, make, execute, and deliver to the defendant, under their hands and seals, respectively, a deed of conveyance for divers lots or parcels of land and premises, situate, lying, and being in the said city of Newark, and more particularly mentioned and described in the deed of conveyance herein after mentioned, embracing the said lots or parcels of land and premises herein before first mentioned, and so mortgaged as aforesaid, and subject to the lien of the said indenture of mortgage as aforesaid, undertook, and then and there faithfully promised the plaintiff, in part payment of the consideration money of the said deed of conveyance, to provide money to pay the principal money of the said bond and indenture of mortgage, with all interest that should accrue thereon from the first day of April, then next ensuing, till the same should be paid, and to pay the said principal, and such interest money as aforesaid, to indemnify and save harmless the plaintiff from and against the payment of the same, to wit, at Newark aforesaid. And the plaintiff avers, that he, confiding in the said promise and undertaking of the defendant, afterwards, to wit, on the said 14th day of November, 1835, at Newark aforesaid, together with his said wife, accordingly made, executed, and delivered to the defendant a deed of conveyance, under their hands and seals, respectively, bearing date the day and year last aforesaid, for the said divers lots, tracts, or parcels of land and premises, embracing the said lots, tracts, or parcels of land and premises herein before first mentioned and so mortgaged as aforesaid, and subject to the lien of the said indenture of mortgage; yet the defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff in this behalf, did not nor would provide money for the payment of the said

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principal money, and the interest thereon from the said first day of April, 1836, and did not nor would pay the same, and did not nor would indemnify and save harmless the plaintiff from and against the payment of the same, by means and in consequence whereof the plaintiff, as the obligor in the said bond, afterwards, to wit, on the 24th day of June, 1843, at Newark aforesaid, was called upon and required to pay, and did then and there pay, to one Catharine E. Douglass, then the owner and holder of the said bond and indenture of mortgage, to whom the same had been theretofore duly assigned upon and for and on account of the principal money of the said bond and indenture of mortgage, and the interest which had accrued thereon subsequently to the said first day of April, 1836, and then due and in arrear and unpaid, and payable thereon, as and for the balance remaining unpaid thereon, a large sum of money, to wit, the sum of $818.78; and by means, &c.

The second count states that Ephraim Beach settled the balance due on the bond and mortgage given to the executors of John Douglass, by giving a new bond, secured by a mortgage on other property.

3. The common counts.

Plea, general issue.

The cause was tried at the February term, 1848, of the Essex circuit, and a verdict rendered for the plaintiff below for $1051.12.

Several bills of exceptions, which follow, were taken at the trial.

First. The plaintiff's counsel called J. B. Burnet, former sheriff of the county of Essex, to prove that he, as such sheriff, sold the mortgaged premises mentioned in the said declaration by virtue of an execution issuing out of the Court of Chancery, and offered to give in evidence for the same purpose the record of the sheriff's deed of the sale and conveyance thereof to the purchaser at such sale; to which evidence, the defendant, by his counsel, objected, on the ground that the decree of the Court of Chancery, or some proceeding thereof authorizing such sale, should also be produced. The court declaring the

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testimony offered competent, the defendant prayed a bill of exceptions.

And the plaintiff, having given in evidence the deed of conveyance from Beach and wife to the defendant, bearing date the 14th November, 1835, for the lots of land therein named, and also specified in his bill of particulars, the consideration money whereof, amounting to $14,274, was thereby acknowledged to be received, and is acknowledged on the 17th December, 1835, and recorded on the 13th April, 1836, and which said deed contains covenants by the said Beach with the defendant, that the said Beach was the lawful owner thereof at the time of such conveyance, and that the land and premises thereby conveyed, or any part thereof, were not then encumbered by any mortgage, or any encumbrance whatsoever, whereby the title of the said Bolles could be affected in any way whatsoever, and that the said Beach would warrant the said land and premises against the lawful claims and demands of every person free of all encumbrance. And the plaintiff, having called F. H. Smith as a witness, to prove, by parol, that the defendant assumed to pay off a mortgage subsisting on a part of the said premises at and before the said conveyance of $1000, and mentioned in said declaration as a part of the said consideration money so expressed to have been received; to which evidence the defendant objected, on the ground that the same was inconsistent with, and in contradiction of the said deed and the written contract between the parties, and that the plaintiff was estopped by his said deed, and covenants therein contained, from proving such matters, and also because the said mortgage had been shown to cover other property than that conveyed to the defendant, and that such agreement, to be without the statute of frauds, must be in writing; and the court having given an opinion declaring the evidence offered to be competent to prove the said several matters, the defendant, by his counsel, prayed a second bill of exceptions.

And the plaintiff, having proved that the mortgaged premises mentioned in the plaintiff's declaration, and specified in his bill of particulars, sold at the said sheriff's sale for the sum

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of $450; and that after crediting that amount on sum due for principal and interest on said mortgage, the said Beach was called upon to pay the balance of his said mortgage, and did settle for the same, by giving to C. E. Douglass, the holder of said mortgage, a new bond for said balance, secured by a mortgage upon other property, but failed to prove the payment of any money or other consideration on that account by the said Beach.

And the plaintiff, having given in evidence a certain agreement in writing, bearing date —— 1835, executed by and between Charles O. Bolles and Abel Thomson, of the first, and certain persons, whose names were thereunto subscribed, including the said E. Beach, of the second part, by which it appeared, after reciting that the said Beach had agreed to sell to the said C. O. Bolles and A. Thomson, by a certain agreement in writing, bearing date the 31st of October, 1835, a large tract of land lying in the city of Newark for the sum of $75,000, and which includes the premises conveyed to the defendant by the said Beach, by the deed mentioned in his declaration, that the said persons should constitute a company and should divide the said property into seventy-five shares, of $1000 each, and should be interested therein to the amount of the several shares subscribed by them, and that a public sale should be made of the lots of which the said tract consisted, and a committee appointed to superintend said sale, and in case the said premises sold for less than $75,000, the deficiency was to be made up by the said company, in proportion to the shares subscribed by them; if more than that sum was realized, the profits were to be divided, and that the said shareholders were not to be answerable one for the other, and that the conditions of payment by the purchasers were to be one-third of the purchase money in approved endorsed notes, and the balance secured by mortgage, payable in one and two years' instalments; and the plaintiff relying upon the evidence of F. H. Smith to prove the assumption of the said mortgage of of $1000 by the defendant, who testified that the Douglass mortgage was not paid off by the shareholders, whoever purchased that property, the mortgage was considered a part of the pur-

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chase money; that the person who purchased the lot fronting the road was to pay the mortgage, had an impression that Bolles was the person who assumed the mortgage, but was not clear, said, from the papers, that the mortgage was allowed on the settlement with Captain Beach; he delivered the deed, and that the purchase money passed through his hand. He settled with Beach; that the said lots were sold at public auction, and that there were written conditions of sale, one of which was, that warranty deeds were to be given to the purchasers, and produced a receipt, signed by the said E. Beach, for a sum in full of the first instalment of $25,000 due to him on the sale of his property to C. O. Bolles and A. Thomson, in which he allowed for the Douglass and Carman mortgages, which the company were to pay, and which receipt was given to said F. H. Smith and two others, a committee appointed by said company, and bears date April 1, 1836, but, from another memorandum, appearing to be given on the 9th of April aforesaid; and that said committee had afterwards a final settlement with the said E. Beach, on account of the sale of his property to C. O. Bolles and A. Thomson.

And the plaintiff, having proved by S. Condit that he was one of the persons to whom, as executor of John Douglass, deceased, E. Beach gave the mortgage of $1000, and that after said auction sale Mr. Beach paid the interest thereon to the 1st of April ensuing, and that the defendant paid the interest thereon for several years thereafter, and then refused to pay any more, and who also testified that he supposed that the mortgaged premises, at the time of the sale at auction by the said company, included a dwelling house, but which was afterwards found to be upon other property.

The plaintiff having rested, the defendant, by his counsel, moved for a nonsuit, on the following grounds:

1st. That there was no contract of sale between the plaintiff and defendant for the lots conveyed in said deed, the plaintiff having agreed to sell the whole tract previously to Bolles and Thomson; that the company afterwards sold at auction, and that the consideration was payable to them; that there was no consideration for any promise to assume Beach's

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mortgage, he being a trustee for title only, nor any special promise to plaintiff proved.

2d. That the plaintiff had not shown himself damnified, having paid no money in settling his mortgage, but only gave a new bond and mortgage.

3d. That the sale being an auction sale, with written conditions of warranty, parol proof was inadmissible to show an existing mortgage.

4th. Variance of proof from the declaration.

The court refused to nonsuit, and the defendant again excepted.

The defendant, by his counsel, having stated his several matters of defence to the jury, and having given in evidence the original agreement between Beach and Bolles and Thomson, before mentioned, by which the plaintiff agreed to sell to them the tract of land known as the Beach property for the sum of $75,000, in three payments of $25,000 each, and bound himself to give deeds for building lots into which the said property was to be laid out, on a sale thereof, when required by the said C. O. Bolles and A. Thomson, or their assigns, on their complying with the aforesaid terms.

And the said defendant, in proof of the payment of the whole consideration money mentioned in his deed, gave in evidence a receipt by John Rutherfurd, jun., one of the committee appointed by the company, for sundry promissory notes, amounting to $5229, on account of the deed for the lots so conveyed by the plaintiff to the defendant, and mentioned in his declaration, and which receipt is dated the 19th March, 1836, and also gave in evidence a cancelled bond and mortgage from defendant to the plaintiff for the sum of $9000, payable one half on the 1st April, 1837, and the residue on 1st April, 1838, and which mortgage was acknowledged and recorded on the said 19th March, and came to the hands of the said committee.

And D. A. Hayes, a witness on the part of the defendant, testified that there were two committees appointed by the company, the first a committee to sell, of whom John Rutherfurd, jun., was one, and after the sale another committee of

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finance, consisting of F. H. Smith, J. C. Hornblower, and J. Rutherfurd, jun.

F. H. Smith, being called on the part of the defendant, testified that no deed was delivered until settled for.

C. O. Bolles, being called on the part of the defendant, testified that Mr. Rutherfurd was the principal manager of the business: he drew the deeds, and witness accompanied him, on the seventeenth December, 1835, to the house of Mr. Beach to get some deeds acknowledged, and is of opinion that Mr. Smith had nothing to do with the deeds, unless it may have been some deeds that were not taken, some having refused to receive their deeds, several encumbrances having been discovered on the premises after the auction sale.

The defendant's testimony being closed, the plaintiff gave in evidence several other deeds from the plaintiff to the defendant for purchases at said sale, the consideration money whereof being added to that of the deed mentioned in his declaration, amounts to $——.

The evidence on both sides being closed, the court charged the jury among other matters, after stating that the receipt offered in evidence by the defendant of $5229 on account of his said deed for the lots in question, and the delivery of the bond and mortgage of $9000 on the same day payable as aforesaid, would be conclusive evidence in favor of the defendant, if no other transaction had taken place between the parties, and the jury would judge whether it was not paid on account of deeds previously delivered, as the receipt of Mr. Beach, of the 1st April, 1836, stated that he then looked to the company for payment of the Douglass mortgage of $1000. The court charged the jury, that although the said mortgage of $9000 might have been given on account of said deed, and for delivery thereof, and was recorded as aforesaid, yet it may not have come to the plaintiff's hands until after the first of April, and subsequent assumption of the Douglass mortgage by the defendant.

And the said court further charged, that the said plaintiff has paid the balance of the Douglass mortgage; and in case their verdict should be for the plaintiff, to bring in a verdict for said balance, with interest from the date of the new bond

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and mortgage given in settlement thereof, to which several charges the defendant, by his counsel, again excepted.

The errors assigned sufficiently appear in the bills of exception and in the points taken by the counsel of the plaintiff in error.

R. Van Arsdale and *A. Whitehead*, for plaintiff in error.

1. The sheriff's deed was admitted in evidence without first proving any authority in the sheriff to make such deed. The authority of such deed rests only on the judgment and execution, which were not shown. *Peters' C. C. R.* 66.

2. The deed from Beach to Bolles contains full covenants of title, and that the premises were unencumbered, and yet evidence was admitted to the contrary, in contradiction to the deed and the written contract between the parties. The plaintiff was estopped by his deed. 2 *Crabb on Real Prop.* 1047, § 2433; 2 *Taunt.* 141; 3 *Mason* 347, 358; 4 *Hill* 646; 6 *Halst.* 174; 12 *Ad. & Ell.* 442; 2 *Ad. & Ell.* 278; 4 *Peters* 83; 1 *Grnl. Ev.* § 275; 11 *Mass.* 30; 8 *Ib.* 146; 10 *Ib.* 244; *Chetwood* v. *Brittain*, 1 *Halst. Ch. R.* 628.

Neither could such evidence be received to contradict the written conditions of sale. *Babington on Auctions* 17 (*Law Lib.*); 1 *H. Bl.* 289.

3. The court ought to have nonsuited. The contract was not with the plaintiff, who was a mere trustee for title, and had no beneficial interest remaining in him. *Lewin on Trusts* 486 (*Law Lib.*)

4. Beach was not legally damnified. Security was no payment. 8 *John.* 202; 1 *Hill* 516; 5 *Ib.* 448; 1 *Wend.* 424; 3 *East* 169; 4 *Wend.* 306.

5. Again, there was a variance between the declaration and the proof, as to the description of the mortgage. 1 *Archb. N. P.* (*Law. Lib.* 1845).

6. Lastly. The Chief Justice improperly left it to the jury to infer that the mortgage of $9000 did not come to the plaintiff's hands till after the assumption of the Douglass mortgage by the defendant below.

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A. C. M. Pennington, for defendant in error.

The facts found by the jury are to be taken as true. Beach parted with his property for a consideration, $1000 of which, it is manifest, he has not received, and which ought to be paid. The only inquiry is, whether the evidence received was competent.

1. The sheriff's deed was not offered in order to show title, and the rule does not apply. It was only offered to show that we had received $818.78 by the sale, evidence which we might have left to the other side. The evidence produced no injury to the defendant, and even if erroneous would be no ground of reversal. 2 *Halst.* 361; 1 *Zab.* 5.

2. The evidence did not go to alter the deed or to affect its operation, but simply to show how far the consideration was paid under a collateral, distinct, subsequent management between the parties. 3 *Cow. Phil. Ev.* 1441 *and cases;* 6 *Grenl. R.* 364; 4 *John.* 23.

3. How does it appear that there was not evidence to go to the jury? The consideration, notwithstanding the bargain between the speculators and Beach, was to be paid to the latter. The contract was between the defendant below and Beach.

4. The question is not here whether the extinguishment of the prior liability by the giving of a new bond by Beach would be a technical payment under a money count. A legal damnification does appear under the special agreement set out in the declaration and found by the jury. 10 *B. & C.* 329; 7 *Cow.* 662; 2 *Wend.* 481; 11 *Mass.* 498; 4 *Pick.* 444; 1 *Har.* 139; *Ib.* 14; 4 *Cow. Phil. Ev. note* 348 *(p.* 221 *of notes).*

5. The alleged variance is founded on a misapprehension. The allegation is not descriptive of the mortgage. It is immaterial, and ought to be stricken out.

6. The charge of the judge was correct as to the effect of the receipt; and here this court will not examine as to the weight of the evidence.

Carpenter, J., delivered the opinion of the court.

Beach brought suit against Bolles for the recovery of damages consequent upon the breach of a special agreement. The

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case set up by the plaintiff below is shortly this: In 1835, Beach conveyed to Bolles certain lots of land, in the city of Newark, for the consideration of $14,274. The deed acknowledged the receipt of the purchase money, and contained the usual form of acquittance; it also contained full covenants of title and against encumbrances. At the time, however, of the execution and delivery of this deed, a part of the premises conveyed was subject to a mortgage of $1000, given by Beach and wife to the executors of one John Douglass, deceased. It is alleged that the deed was given by Beach, and accepted by Bolles, subject to the lien and encumbrance of the mortgage, and upon an express verbal stipulation between the parties that Bolles, the defendant, in consideration of the delivery of that deed, would assume the payment of the Douglass bond and mortgage, and would indemnify the plaintiff against them. Bolles did not discharge the bond and mortgage, and Beach, having been compelled to pay $818.78 of the sum so alleged to have been assumed by the defendant, sued for that amount and the interest.

Much has been said as to the sufficiency of the evidence offered by the plaintiff to sustain his case upon this point. It is sufficient to say, that if the verdict was not supported by the evidence, the remedy was in another mode. We are upon a writ of error, and our duty is simply to review the ruling of the judge, as subjected to our revision by the bills of exception taken in the progress of the trial. It will be assumed that the facts stated are true, and no inquiry will be attempted as to the weight of the evidence or as to the propriety of the verdict. Indeed, how can we judge as to the weight of the evidence, when we do not know that all the evidence before the jury has been embodied in the bills of exception?

The first error assigned is the admission of the deed of sheriff Burnet, without the judgment or decree and execution upon which that deed was founded, so as to show the authority of the sheriff to make the deed. But the deed was not offered to prove title or to show any fact which was dependent on the authority of the sheriff for its effect or validity. It was simply offered to show the amount of money raised by the

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sheriff, a mere collateral fact, for which purpose the deed was sufficient.

The next question is one of more difficulty. It is insisted, on the part of the defendant below, that the plaintiff was estopped by his deed, and the covenants which it contains, from proving that a part of the premises charged was encumbered by mortgage, or that the defendant undertook and promised to pay off and discharge that mortgage, as part of the consideration expressed in the deed.

In England the doctrine of estoppel, that a man shall not be permitted to deny facts which he has admitted by the solemnity of a deed, has been applied to the consideration clause in a deed of conveyance when the question of payment has arisen between the parties to the conveyance. When that clause contained an acknowledgment in the usual formal terms, the grantor has been held to be estopped from showing that no money in fact passed. *Rowntree* v. *Jacob*, 2 *Taunt.* 141; *Baker* v. *Dewey*, 1 *B. & C.* 704. It does not appear that it was there ever held otherwise. *Rex* v. *Scammonden*, 3 *T. R.* 474, a case so often cited in support of a contrary course of decision elsewhere, did not involve the doctrine of estoppel, not being between parties or privies to the deed. It was a mere settlement case, in which the question depended upon the fact of the purchase of any estate in the parish, and the payment of £30 therefor; and parol evidence was offered, not to contradict the deed but to ascertain this independent collateral fact. But a different rule has been generally adopted in this country, and the course of decision, for the most part, has been in favor of free inquiry in regard to the fact of payment in actions for purchase money, &c. Many of the cases on the subject are collected in *Cowen's Notes to Phillips' Ev.* 217, 218, 1441, &c., (*ed.* 1843). It is there said, that when the intention in regard to the estate is not disputed, nor the operation of the conveyance, as such, sought to be changed, this clause is regarded as formal merely, like the date, and open for explanation by parol. Thus, when the deed acknowledges the payment of the consideration, it cannot be denied by the grantor for the purpose of destroying the effect and operation of the deed, though

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it may be denied for the purpose of recovering the consideration money. *Grant* v. *Townsend*, 2 *Hill* 557. This doctrine is now in this country supported by such a weight of authority as not readily to be disturbed.

But this case goes somewhat farther, and has its peculiar difficulties. The counsel of the defendant below have not contested the doctrine, that the payment of the purchase money is open to inquiry, notwithstanding the consideration clause; but they deny that the plaintiff can prove the existence of an encumbrance on the premises, as part of his case, when he expressly covenants by his deed that the premises were free of encumbrances.

In England the injustice which sometimes results from the strict doctrine of estoppel, applied to a clause merely formal, has been so strongly felt, that courts have obviously been ready to use any distinction or ambiguity to escape it, and reach the justice of the case. *Lampon* v. *Corke*, 5 *B. & Ald.* 606, is an instance. In *Baker* v. *Dewey*, already cited, the court held that the grantor was estopped from denying that the purchase money had been paid, but intimated that a part, which had been retained by the grantee to be worked out in his business as a plumber and glazier, might have been recovered in another mode. *Baker* conveyed land to *Dewey* in consideration of a given price, but it was stipulated that the latter should retain £60 out of the purchase money, to be paid in work. While it was held that *Baker* was precluded from saying that any part of the money remained due as purchase money, yet it was said that the consideration might have been paid, and a part returned, on condition that the grantee would do certain work for the grantor. The court placed the transaction upon the ground of an independent or *quasi* subsequent agreement. The plaintiff failed because there was no count in the declaration to meet such a case. In *Schillenger* v. *McCan*, 6 *Greenl. Rep.* 364, the Supreme Court of Maine adopted the same view, and applied it to another state of facts. S. owned two lots in the same town, one being lot No. 60, otherwise known as the *Hall* farm, and lot No. 66. Being indebted to W., he mortgaged to him lot No. 66, without any other description, sup-

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posing it to be the *Hall* farm. Afterwards S. sold the *Hall* farm to M., taking, as part of the consideration, his obligation "to cancel the mortgage, given by S. to W., of the *Hall* farm," which obligation he assigned to W., the mortgagee. In a suit brought on this undertaking by W., in the name of S., he declared, first for money had and received; and in two other counts on the promise to cancel a mortgage, first as on the *Hall* farm, called by mistake lot No. 66; and secondly, as on lot No. 66, called by mistake the *Hall* farm. The plaintiff proved that about $400, being part of the consideration for the conveyance, was left in the hands of the defendant to pay the mortgage on the *Hall* farm, who signed an agreement to that effect. Thus the whole transaction in relation to the conveyance of the title, and the payment of part, and the security of the residue of the consideration, was closed at the same time. The construction given to the transaction was, that the agreement to cancel or pay off the mortgage was received as part payment of the consideration, so much being left in the hands of the grantee for that purpose. That as the grantee might have proved in his defence, that the agreement had been so received, had he been sued for the unpaid part of the consideration, so on the other hand the grantor might prove, as he did, the foregoing facts, for the purpose of showing his claim to the $400, as a sum left in the defendant's hands for a purpose which had failed. This sum was left to pay off a mortgage which did not in fact exist, and, the purpose having failed, was so much in the hands of the grantee, who was the defendant, and recoverable under the count for money had and received to the use of the plaintiff.

These cases have been referred to for the principle, by which, in order to reach the justice of the case, the effect of the consideration clause, as held in those courts, was avoided. The collateral and independent character attributed to the agreement, by which a part of the consideration was left in the hands of the grantee to be specially applied, may be here similarly adopted, in order to escape the supposed effect of the covenant against encumbrances. In the time of Lord Mansfield it was ruled, that if a man covenant under seal that an-

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other shall enjoy certain premises, he shall not maintain ejectment against that person during the term specified in his covenant, the covenant by estoppel operating as a lease. *Right* v. *Proctor*, 4 *Bur.* 2208. It would probably be so held at the present day. However, therefore, the covenant in the present case might estop the grantor in an action between the parties to the deed, brought on the deed or defended by title or justification under the deed, yet can it have that effect in an action not founded on the deed, but upon an agreement merely collateral? In *Carpenter* v. *Butler*, 8 *M. & W.* 209, it was held that though as between the parties to an instrument under seal, in an action upon it, it is not competent for the party bound to deny a matter of recital; yet it was held that such party is not estopped in an action by the other party not founded on the deed, but wholly collateral to it. Among the cases referred to, to exemplify the doctrine of estoppel, was that of *Lainson* v. *Tremere*, 1 *Ad. & Ell.* 792. In that case the action was upon a bond to secure the payment of rent under a lease, in which it was recited, that the lease was at a rent of £170; and the defendant was estopped from pleading that it was £140 only, and that such amount had been paid. The court said, in citing the case, that if in *another* suit, though between the same parties, the question should arise collaterally as to the amount of the rent, it could not be held that the recital in the bond was conclusive evidence as to the fact. We incline to think, therefore, that in this action the plaintiff is not estopped by his covenants against encumbrances, the question presented being collateral to the deed merely.

But, independent of this technical answer to the objection, if the consideration clause, under the course of adjudication in this country, is made an exception to the general doctrine of estoppel, why should not the exception be extended to the question of payment in this instance, coming, as it does, within the same reason? The evidence, as to the agreement to pay off the mortgage, did not go to affect the operation of the deed, but simply to show the character and extent of the payment of the consideration; and the same reasons which persuade to the free admission of extrinsic inquiry in the one case, equally

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apply to the other. We are not willing to reverse on account of the admission of the evidence in this instance.

Another ground of error, predicated upon the exceptions taken at the trial, is, that Beach was not legally damnified, not having discharged the original liability by a payment in money, but merely by giving a new security. It is said that the giving the new security to the holder of the Douglass mortgage did not support the allegation of payment.

Assuming, in this form, that the contract charged was proved, the defendant was obviously damnified to the whole extent of the failure by the defendant to appropriate to the discharge of the Douglass mortgage, the consideration money left in his hands for that purpose. As the giving the new security, received as payment, extinguished the Douglass bond and mortgage, perhaps it is not clear that this case comes within the range of cases cited, or that the plaintiff might not recover under the first count. But, however this may be, we do not perceive any difficulty. The second count expressly sets out the giving the new security, as the damnification consequent upon the default of the defendant, and the evidence certainly supported that count.

The only other error assigned, necessary to be noticed, is the alleged variance, as to the mortgage, between the declaration and the evidence. We do not, however, understand the language of the declaration to be as supposed by the counsel of the defendant below. It is not an exception for which we should be inclined to reverse, unless the error were very apparent.

It has been before said that we do not feel called upon to examine those objections which are based upon the supposed defect of evidence. It may be proper to say that, notwithstanding the intervention of a committee of speculators between Bolles and Beach, yet that the purchase money was to be paid to the latter for his own benefit; he was therefore the party in interest, and entitled to sue, though it is true, when paid, it became also so much paid on account of that committee.

We think (though I hesitated on one or two points) that the judgment ought to be affirmed.

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The CHANCELLOR. The mortgage was on the whole tract. There can be no implied promise that N. Bolles, the purchaser of a part only of the mortgaged premises, should pay the whole mortgage.

There was no contract or agreement between N. Bolles and Beach. To show this, it is only necessary to read the declaration, and ask the question, what did N. Bolles agree to pay Beach for the lots which he, N. Bolles, bought at the vendue made by the company? Was there any contract between N. Bolles and Beach, as to the price of those lots? None. That contract was between N. Bolles and the company.

Now a condition of the sale of lots by the company was, that the lots should be free from encumbrance. A person to whom a lot was struck off at that sale, on finding that there was a mortgage on the property, was at liberty to refuse to comply with his bid. N. Bolles, therefore, was in condition to make his own arrangement with the company. He might refuse to assume a personal liability for the amount of the bond secured by the mortgage. And would the company, having, by what means does not appear, obtained from him bids amounting to upwards of $14,000 for the lots struck off to him, have ventured to express to him an unwillingness to consider the said lots sufficient security for $1000, and to say to him that he must assume a personal liability for the $1000? It is sufficient to say that he was at liberty to refuse to take the lots on such terms. And the reason why he might be unwilling to do so appears in the case. The lots he bought were afterwards actually sold on the mortgage, and did not bring enough to pay it; and the question involved in this suit is, whether he is personally liable to Beach for the balance, or whether Beach's only remedy is not against the persons with whom he contracted. Why should the dealing between N. Bolles and the company be entirely overlooked, and an action be sustained by Beach against N. Bolles, between whom not a word ever passed in relation to the purchase of lots by Bolles?

If any body ever undertook with Beach to pay the mortgage, it was the company, not N. Bolles. It seems to me that Beach

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should be left to go against the company, on their express agreement; and if the company have a case against N. Bolles, let them show it in proof in an action against him. They should not be permitted to act through Beach, and to come in themselves as witnesses.

There is a fatal variance between the proofs and the declaration. The declaration is, that Beach gave a mortgage on certain lots described in the mortgage; and that afterwards N. Bolles, in consideration that Beach would execute to him a deed for certain lots described in the deed, embracing the lots so mortgaged as aforesaid, subject to the lien of the mortgage, N. Bolles undertook to pay the mortgage. The proof is, that only a part of the land mortgaged was conveyed to Bolles. The declaration is, that in consideration of the conveyance of all the mortgaged land, Bolles agreed to pay the mortgage. The proof is, that but part of the mortgaged land was conveyed to him. Why, under this declaration, should he pay the whole mortgage, when but part of the mortgaged land was conveyed to him?

But the proofs suggest this further question. Why should Beach, whose only contract was with the company, and which contract was, that the company, in consideration of his conveying to them the whole property mortgaged, should pay the mortgage, be permitted to go against N. Bolles for the payment of the whole mortgage, because he bought a part of the mortgaged premises from the company?

There are other difficulties in the way of an action by Beach against Bolles. Beach, in the deed from him to Bolles for the lots bought by Bolles of the company, covenanted that the lots were free from encumbrances. I am not clear that he can be permitted to avoid this covenant by parol proof that Bolles agreed to pay an encumbrance.

Again, Beach has not paid the money due on the mortgage. He has only given another bond and mortgage for it; and there is no proof that the first mortgage is cancelled. I think it at least very doubtful whether assumpsit for money paid can be maintained.

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I think the judgment is erroneous, and that it should be reversed.

For affirmance—Justices CARPENTER, RANDOLPH, and OGDEN, and Judges PORTER, SCHENCK, and McCARTER—6.

For reversal—The CHANCELLOR, Justice NEVIUS, and Judges SPEER and WALL—4.

Judgment affirmed.

WARD v. WARD.

1. Error cannot be assigned on the admission of evidence to which the plaintiff in error objected, wishing the court to note the objection, if no bill of exception is sealed.

2. It is not proper to except to the charge of the court to the jury generally, without specifying the points excepted to; and the court below can refuse to allow such general exception. But if the court below allow and seal such general exception, error may be assigned on any part of the charge.

3. After the case is read and the argument commenced, it is too late for the defendant in error to call for the bill of exceptions. And the court will hear and determine reasons of reversal assigned upon the printed bill of exceptions, although there should in fact be no bill of exceptions.

4. A former verdict, with judgment thereon between the same parties upon a point in issue in the former suit, will conclude and estop in a suit between the same parties, although not pleaded in the latter suit, if the party offering it as an estoppel has had no opportunity to plead it.

5. Where, in one suit, there are several distinct causes of action, it is proper to direct the jury to find the issues separately and to assess the damages for each matter separately.

This was an action on the case, brought by William Ward, the defendant in error, against John Ward, the plaintiff in error, in the Bergen county Circuit Court, and removed from thence to this court by writ of error.

The declaration below contained three counts. The first count sets forth that the plaintiff was seized of a certain close and meadow, situate at, &c., through, along, and over which a certain brook and stream of water had always been accustomed to flow, and still of right to flow out of the same, in and upon

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a certain close of the defendant, contiguous and adjoining to said close of the plaintiff, in its natural channel, freely and unobstructed, except as the said brook and stream was hindered and obstructed by an ancient milldam on the said close of the defendant, when said dam was held and maintained at the same height at which it was held and maintained on the third day of May, 1830. Yet the defendant did wrongfully rebuild and raise the said ancient dam higher than the same was kept on the third day of May, 1830, and did erect and build another dam higher than said ancient dam was kept on the third day of May, 1830, upon the said close of him the defendant, in and across said brook and stream, and kept said ancient dam, so rebuilt and raised higher, by means whereof the waters of said stream were prevented from flowing from and out of the close of the plaintiff, as they had before been accustomed to flow, and still of right ought to flow, and were pent up and thrown back, and made to overflow and drown the plaintiff's meadow land aforesaid.

The second count was the ordinary count, for nuisance in obstructing the free flow of water across the plaintiff's lands.

The third count was as follows: "And for that whereas, also, the plaintiff heretofore, to wit, on the first day of May, in the year 1838, and from thence hitherto, at the township of Franklin, in the county of Bergen, was seized in fee simple and possessed of a certain lot of land there situate, known as the distillery lot of the plaintiff, and of the distillery thereon being, and of a certain other lot known as the cider-house lot of the plaintiff, in said township, near to said distillery lot, and of the cider-house thereon; and by reason thereof, the said plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a free passage over certain lands of the defendant, then and there situate between said distillery and cider-house, for the purpose of leading the cider from the said cider-house to said distillery, and the right to place, keep, and maintain leaders, troughs, and gutters over said lands of the defendant, from said cider-house to said distillery, to pass and convey the cider from said cider-house to said distillery, free and unobstructed as to the said distillery lot and cider-house of

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the plaintiff, with the appurtenances belonging and appertaining. Yet the said defendant, well knowing the premises, but contriving to injure the plaintiff, while he, the plaintiff, was so seized and possessed of said distillery and cider-house and said lots of land, with the appurtenances as aforesaid, to wit, on the first day of May, in the year eighteen hundred and thirty-eight, and on divers other days and times between that day and the commencement of this suit, to wit, at Franklin aforesaid, wrongfully and injuriously removed the leaders, troughs, and gutters of the plaintiff, placed upon the said land of the defendant between said distillery and cider-house for the purposes aforesaid, and placed and piled up large quantities of bark, stone, boards, and timber, and built a wall and vault, and divers other obstructions on and upon said lands of him, the defendant, lying between said cider-house and distillery, and over which the said plaintiff was then and there entitled to said right of free passage to convey his cider as aforesaid, and kept and continued the said bark, boards, timber, stones, wall, vault, and other obstructions across the said lot, on which the plaintiff was entitled to free passage for his cider aforesaid for a long space of time, to wit, from thence hitherto, and thereby, during all the time aforesaid, the said right of passage of the plaintiff for conveying his cider across said lot of the defendant was and still is obstructed and stopped up, by means whereof the plaintiff could not, during the time aforesaid, or any part thereof, nor can he now have, enjoy, and use his said right of passage for his cider, nor his said distillery and cider-house, as he otherwise would have done, and of right ought to have done, and hath been and is deprived of the benefit of the same, and of great profits and gains which he might else have made therefrom, to wit, at Franklin aforesaid. By means of which several premises, the plaintiff hath sustained damage to the amount of seven hundred dollars; wherefore he brings suit."

To this declaration the defendant pleaded the general issue.

On the trial, the plaintiff below proved that he and the defendant were seized, as tenants in common, of a four acre lot, containing the mill lot and distillery in the declaration men-

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tioned. He gave in evidence a deed from himself to the defendant, dated May 3, 1830, by which he conveyed all his interest in the four acre mill lot to the defendant, "together with the privilege of holding the milldam the same height as it now is," and with a reservation in these words: "except thereout the distillery and every thing thereunto belonging, with the same privilege as it has heretofore been used for distilling, unto the said party of the first part and to his heirs and assigns."

The plaintiff below gave parol evidence to show that the dam on the defendant's lot had been raised by him since the third day of May, 1830, and the plaintiff's meadow thereby overflowed and damaged; to rebut which the defendant gave parol evidence to show that it was not raised in fact. The plaintiff also gave in evidence the record of the pleading and judgment in a former suit, brought by John Ward against William Ward, in Bergen Circuit Court, in trespass, for two causes of action, one for entering this very mill close and taking down part of this very dam, the other for assault and battery. To these charges William Ward pleaded, besides the general issue, first, as to taking down part of the dam, that he was seized of a lot of meadow adjoining the plaintiff's close, and was entitled to have a stream that flowed over it flow off over the plaintiff's close unobstructed, except so far as the same was obstructed by an ancient milldam on the plaintiff's (John's) close, while maintained at the same height as it was on the third of May, 1830; that the plaintiff (John) had raised that dam higher than it was on May 3, 1830, and than he had a right to do, by reason whereof the waters of said brook were flowed back upon his meadow injuriously, and that he therefore entered the plaintiff's close, as he had right to do, and took down the part of the dam which was so raised. As to the assault and battery, he pleaded *non assault demesne.* To these pleas the plaintiff replied—1st, that he did not raise the dam as alleged; 2d, as to *non assault demesnes, De injuria,* &c., concluding to the country. The jury found specially that John Ward had raised said dam, as alleged in the defendant's plea; that the defendant was guilty of the assault

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and battery, assessing the plaintiff's damage at six cents; and that the defendant was not guilty of the residue of the trespasses in the declaration mentioned. To the admission of this record the defendant objected, and, upon the same being admitted by the court, asked the court to note the objection, but prayed no bill of exceptions.

The plaintiff gave evidence, under the same count, to show that before May 3, 1830, there were troughs and leaders running from the cider house to the distillery, used in carrying on the distillery, which had run across part of the four acre lot conveyed to the defendant; that the defendant had taken down these leaders, had obstructed their use, and prevented the defendant from putting them up, and that without these troughs the distillery was valueless, or nearly so; and that the plaintiff had, by reason thereof, been deprived of the use of the distillery for several years. It was shown, on the part of the defendant, that the cider-house had been burned down since the deed of May 3, 1830; and that, after rebuilding the same, the plaintiff placed more of his cisterns in the cider-house than before, and that the troughs and leaders were placed in a position somewhat different from what they were before, some witnesses testifying that they were inconvenient to the defendant, and others that they were not. It was proved, by witnesses on both sides, that the defendant had forbidden the plaintiff to put up any leaders, and had piled bark and logs in the place where they used to pass, so that they could not be put up.

When the cause rested, the Chief Justice (who held the Bergen county Circuit Court) charged the jury as follows:

The plaintiff complains that, on the 1st of June, 1832, he was, and ever since has been seized and possessed of a parcel of meadow land, in the township of Franklin, through which flowed a stream of water; and that the defendant, on the 1st of June, 1832, raised a dam higher than it was on the 3d May, 1830, and higher than it ought to have been, and has since kept it higher than it ought to have been, by means of which the water was thrown back on the plaintiff's meadow, his grass there growing injured and destroyed, and the land rendered spongy, rotten, and impassable.

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The plaintiff further complains that, on the 1st of May, 1838, he was seized and possessed of a lot and distillery, and also of another lot upon which was a cider-house, and that he ever since ought, and still of right ought to have a free passage across land of the defendant, between the distillery and cider-house, for the purpose of leading the cider to the distillery, and of placing leaders and troughs across the defendant's lot for that purpose; that the defendant has wrongfully removed the leaders and troughs, and has placed piles of bark and logs and a vault and other obstructions on his lot, so that the passage of the cider was obstructed and stopped, so that the plaintiff was interrupted in the enjoyment of the distillery, and deprived of the profits which he might else have made.

To each of these charges the defendant has pleaded not guilty.

To sustain his first ground of action, backing water on his land, the plaintiff must show his title to the meadow lot, and the fact that the defendant has thrown the water back upon it by raising the dam higher than by law he was entitled to do. How high was he entitled to hold the dam?

It seems that the four acre mill lot was devised by Col. Peter Ward (the father of these parties) to his two sons, Peter, and John Ward, the defendant. Peter's share was afterwards conveyed by his assignees, and came to William. William and John Ward (the parties to this suit) became joint owners of the mill lot on the 1st May, 1830. On the 3d May, 1830, William, the plaintiff, conveyed his share to his brother John, the defendant. The deed contained this clause, after conveying the land, "together with the privilege of holding the milldam the same height as it now is."

This deed, then, by the act of these parties themselves, fixes the true height of the dam to be the same height as it was on the 3d May, 1830, the date of the deed. The inquiry is, how high was the dam on the 3d May, 1830? Has it since been higher than it then was? If yea, how long and what damage?

Upon this part of the case the plaintiff has offered in evidence before you the record of a former suit between these same parties. And it becomes a material question how far

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the record in that case is binding upon you and upon the parties in this cause, and what the effect of that verdict must be upon this cause.

It appears that in May, 1846, John Ward, the defendant, sued William (the plaintiff) for an assault and battery, and for injuring and breaking his milldam. He complains that, on the *first of March*, 1845, the defendant, William, broke and destroyed a part of his dam, and split and broke the planks on the top of the milldam, and at the same time with his fists beat the plaintiff, and threw him into the water.

To these charges the defendant pleaded—

1st. That John, the plaintiff in that suit, had raised his dam higher than he ought to have done, and higher than it was on the 3d May, 1830, and thereby overflowed William's land, and injured his grass, and that the defendant, William, because the water was so injuriously thrown back on his land on the 1st March, 1845, by means of a plank and timber put on the top of the dam, entered on the plaintiff's land (John's) and removed and broke the plank board and timber placed on the dam, as he had a right to do; and as to beating John, he pleads that John attempted to beat him, and that in self-defence he committed the assault and battery on John; and lastly, he pleads that he was not guilty of the trespasses.

Now here were three material issues submitted to the jury.

1. Whether John had, 1st March, 1845, raised his dam higher than he had a right to do.

2. Whether William, in beating his brother, acted in self-defence.

3. Whether William was guilty of the trespasses charged.

Now the jury found—

1. That John had raised his dam.

2. That William was guilty of the assault and battery.

3. That he was not guilty of injuring the said plaintiff's rights in breaking the dam.

How is this finding to operate upon you? I take the well settled rule of law to be this, that when a material traversable fact directly in issue between two parties has been ascertained by the finding of a jury, and judgment final has been rendered

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upon that verdict, and remains unreversed, that finding is conclusive between those parties, and it does not lie in the mouth of either afterwards to gainsay it. It rests upon the principle that there should be an end of litigation. Justice requires that every cause should be once fairly tried, and when a fact has once been fairly and legally settled, it should not be again disturbed, but that that controversy should be closed for ever.

Now, in regard to the record offered, John Ward can never again sue William for the assault and battery complained of in the former suit. Nor can William ever hereafter deny the assault. Why? He has been pronounced guilty once by a jury. John can never again sue his brother for cutting down his dam. Why? The jury pronounced him not guilty, and that verdict is conclusive; and, upon the same principle, John cannot deny that, on the 1st March, 1845, his dam was too high. Why? Because the jury in the former suit found that very fact, and judgment has been pronounced upon it, and the parties' mouths are stopped from further controverting it.

It is said, however, by the defendant's counsel, that in order to make that verdict conclusive, and to estop the defendant from denying its truth, the plaintiff should have pleaded the estoppel. But how could he have pleaded the estoppel? The defendant pleaded not guilty. If William Ward had sued in this action merely for raising his dam too high on the 1st March, 1845, and overflowing his land on that day, the plaintiff might have set up the verdict of the former jury as an estoppel; he might have replied that the former jury had settled that fact. But the plaintiff in this suit has sued not only for the dam being too high on the 1st March, 1845, but he alleges that the dam was raised too high on the 1st June, 1832, and was continued too high until the commencement of the suit in May, 1847, for a period of fifteen years. He asks damages for that period. Now the plaintiff may recover for the whole or for any part of that period. The former verdict establishes the fact, that on one day (1st March, 1845,) that dam was too high, and for that day the plaintiff is entitled to your verdict; but for all the rest of the period the question remains open, and you are, by your verdict, to settle whether the plaintiff's land

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has been overflowed; and if overflowed, what damages the plaintiff has sustained.

I wish to make myself clearly understood.

It is true, as contended by the defendant's counsel, that a verdict by one jury, as to the height of water, will not conclude another jury upon that question, except upon a point precisely in issue.

Your verdict will conclude as to the height of the water within the time included in this declaration, that is up to May, 1847. Suppose your verdict should be in favor of the defendant, the plaintiff cannot sue for damages within that period. But should the plaintiff sue for injuries sustained since May, 1847, then your verdict will not be conclusive. It may be offered in evidence as the opinion of intelligent men, but it will not be binding upon the conscience of other jurors.

If I have made myself understood, you will perceive, gentlemen, that in the opinion of the court, in point of law, the fact is settled, that on the 1st March, 1845, that dam was too high; that consequently the plaintiff is necessarily entitled to your verdict for holding back the water on the 1st March, 1845, and therefore entitled to damages for that day, if it be only sixpence; but as to all the rest of the period, that verdict is not conclusive. The question is entirely open, and it is for you to say, upon the evidence, whether that dam has been raised by the defendant higher than it ought to have been; and if so, what damage it has been to the plaintiff.

These are questions entirely for your consideration. The evidence is fairly before you. It has been very fully and fairly discussed, and I leave it with you, with the single remark, that, as usual in water cases, there is much conflict of testimony.

The second ground of complaint is, the obstruction of the plaintiff's right to convey his cider, in leaders, from his cider-mill to his distillery, across the defendant's lot.

The right of the parties upon this point is all settled by deed. In the deed for the mill from William to John, the same deed before referred to, there is an exception of the distillery to William and his heirs, in these words: "except thereout the distillery, and every thing thereunto belonging, with the same

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privilege as it has heretofore been used for distilling, unto the said party of the first part, and to his heirs and assigns."

Now this deed clearly reserves and secures to William the right to all the privileges connected with the distillery, and consequently the right to carry the cider in leaders across the defendant's land, as he had been accustomed to do. To this claim a reasonable and common sense construction must be given. William, on the one hand, is not to be limited to the use of leaders of the same shape, or in the same place, or the same kind of cisterns, or for a given number of days, but he may use the privileges in such manner as may be most beneficial to himself, without any increase of prejudice to the rights of his brother John. On the other hand, the clause is not to be construed so as to authorize William to make such change in the enjoyment of his easement as to prejudice the property of his brother, or to interfere with the enjoyment of his property, as he had previously used it.

With this suggestion, as to the true and proper construction of the clause and of the rights of the parties, the question of fact is submitted, whether the defendant has obstructed his brother in the fair use of that easement, by improper obstructions in the exercise of the rights; and if so, what damage the plaintiff has sustained?

In case you find for the defendant, gentlemen, a verdict merely of not guilty will be sufficient. If you find for the plaintiff, it may save the parties much further difficulty; and I would recommend to you to find, separately, whether he is guilty of holding his dam too high, or of obstructing the plaintiff in the enjoyment of his distillery, or both; and also, if you find him guilty of holding back the water, whether he be guilty on any other day than the 1st March, 1845; in order that if you should find a verdict merely for that day, in compliance with the charge of the court, the defendant may have a remedy for an error in the charge upon that point.

To which charge of the court, and the opinions therein expressed, the defendant, by his counsel, objected, and prayed a bill of exceptions.

And the jury aforesaid gave their verdict, and found the de-

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fendant guilty upon the first two counts of the declaration, and assessed the plaintiff's damages, by reason of the grievances in said two counts alleged, at one hundred and twenty-five dollars; and that they found the defendant guilty upon the last count in the declaration, and assessed the plaintiff's damages, by reason of the grievances therein alleged, at two hundred and seventy-five dollars, being four hundred dollars in the whole, with six cents costs; whereupon the court rendered judgment, &c.

The reasons in error, assigned, were—

1st. Because the court, at the trial, allowed the plaintiff to give in evidence the record of a suit, and judgment thereon, in the Circuit Court of the county of Bergen, brought by John Ward against William Ward, in an action of trespass, and that he admitted the same against the objections of the defendant, urged at the time, the objection being noted.

2d. Because the court charged the jury that the finding of the jury and judgment rendered in the said suit of trespass of John Ward against William Ward was conclusive between the parties in the present suit. That it was conclusive in favor of the plaintiff in the present action that the defendant's dam was too high on the first day of March, 1845, and that therefore the plaintiff was entitled to a verdict.

3d. Because the court erred in the construction and meaning placed by him on the reservations contained in the deed from William Ward to John Ward, by which reservation the said William Ward excepted from the grant then made "the distillery and every thing thereunto belonging, with the same privilege as it has heretofore been used for distilling, unto the said party of the first part, and to his heirs and assigns."

4th. Because the said reservation did not, as charged by the court, authorize William Ward to place the leaders as stated, nor in the manner they were placed by him.

5th. Because the court charged the jury that the plaintiff had a right to place the leaders in the manner he did.

6th. Because the instructions of the court, as to the manner of rendering the verdict, and the finding of the verdict in conformity thereto, was irregular and illegal.

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7th. Because the verdict and judgment were rendered for the plaintiff, when they should have been for the defendant.

Hopper, on part of plaintiff in error, read the papers.

A. S. Pennington moved to strike out the first assignment of error, on the ground that there was no bill of exceptions sealed and allowed on that point.

Also, to strike out all the other errors assigned on the charge of the Chief Justice, because the exception taken allowed and sealed to the charge was general, without specifying any point or particular error; and, in support of his motion, he referred to *Oliver* v. *Phelps*, 1 *Spenc.* 180, and the same case in error, 1 *Zab.* 597; *Potts* v. *Clark*, 1 *Spenc.* 538; *Moran* v. *Green*, 1 *Zab.* 562; *Perth Amboy Man. Co.* v. *Condit & Bowles*, 1 *Zab.* 659.

W. Pennington, contra.

Randolph, J. There is no doubt but the first error must be stricken out. The record shows that the party objected, but not that there was any bill of exceptions signed or presented. The other objection has been several times incidentally before the Supreme Court, and also before this court; and although various opinions have been expressed, some of which are reported and others not, the point now raised has never been directly decided.

The old practice was, when a party was dissatisfied with the charge of the judge, simply to take a general exception without specification, and thus have the whole charge spread upon the record. This led to many inconveniences and much injustice, both to the court and the parties; and some years since the practice was changed, and now the judge usually requires the party objecting to specify his objections, and if he neglects to do it, the adverse party may require it; but if neither judge or party require specification, and a general bill of exception is tendered and signed to the whole charge, and thus it becomes in *extenso* a part of the record, I know of no rule of law or propriety which forbids the party to assign his errors upon any part of the charge or record. If the party

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objecting is not required to specify at the trial, he may do so in assigning errors, and set forth any error which may appear upon the record, and this court has no right to deprive him of that benefit; but if he assign for error what does not appear upon the record, or is not covered by some bill of exception, the assignment may be stricken out of course, or the same be excluded from consideration in the argument or the decision of the court. The right of the party to take exceptions to any part of the charge covered by a general bill of exception allowed and sealed as to the whole, and the weight to be given to such exception, are very different things. The charge must be taken as a whole, and the point objected to considered in that light; or if it appear that the objection was of such a character that the specification of it below would have cured the evil, then, of course, it can be of very little force in an appellate court. But if the party is suffered to take a general exception to the whole charge without objection by court or counsel below, and a bill is actually signed embracing the whole charge, it would be doing great injustice to the exceptant if he were prohibited from making a fair assignment of errors on that charge.

The first assignment of error was stricken out, and the motion refused, as to the errors assigned on the charge, by the unanimous opinion of the court.

Zabriskie, on part of the defendant in error, moved for the production of the original bills of exceptions, if any there were, that it might be seen by the court whether the judge of Bergen county Circuit Court had in point of fact signed a bill of exceptions to the charge generally.

W. Pennington, for plaintiff in error, objected to this motion as too late; that the defendant, having permitted the printed case, in which the bill of exceptions was printed, with the signature and seal of the circuit judge, to be read without objection, and the argument to be commenced, it was now too late to inquire for the bill of exceptions, and that they could not be called upon to produce any.

Zabriskie, in reply. The bill of exceptions is part of the re-

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cord and an original paper, upon which all the assignment of errors depends. The printed case is only a copy for the *convenience* of the court. It now turns out that there never was any bill of exceptions signed. It is not *laches* in counsel to suppose that when a bill of exceptions is printed in a state of the case, with the signature and seal of the circuit judge, that there is *in fact* a bill signed. The almost universal practice, in this state, of keeping the bill from the files among the private papers of the plaintiff's attorney would prevent the fact being discovered; and it is not reasonable, when, in the course of a cause, improper exceptions are sustained on the ground that the Circuit Court allowed them, to inquire if *in fact* that court did allow them. The court may hear the *argument* from the printed bill; but how can they give a judgment founded on this supposed bill of exceptions, when it has no existence on their files or elsewhere.

The court, on conference, held that in this stage of the cause the defendant in error had no right to call for any bill of exceptions.

Hopper and *W. Pennington*, for plaintiffs in error.

1st point. The verdict in the former suit was not conclusive, unless pleaded. All estoppels must be pleaded, or else only evidence that the jury may is satisfied disregarded. 2 *Paine* 493.

2d point. The Circuit Court erred in its construction of the reservation of the deed as to the distillery. The distillery itself was only reserved, which is the building, not any land or easement over any land; at all events plaintiff was confined to the use of his leaders in the same position, and no other.

3. The direction of the court, as to the verdict, was erroneous and contrary to law. 1 *Arch. Pr.* 195–6.

A. S. Pennington and *Zabriskie*, contra.

1st point. The rule, as to pleading an estoppel, is clear and well settled. It must be pleaded if a party has an opportunity to plead it, else it is not conclusive. But a deed or judgment offered in evidence, which a party has had no opportunity to plead, will be an estoppel, and conclusive when given in evi-

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dence. 1 *Salk.* 276, *Trevivian* v. *Lawrence;* 2 *Sim. L. Cas.* 430, *(S. C.)* and authorities in notes; 3 *Cowen's Phil. Ev.* 804—810, and 975; 8 *Wend.* 1 and 35, *Wood* v. *Jackson*; 2 *Hill's* (*N. Y.*) *R.* 478.

2d point. The reservation of the distillery reserves the lands on which it stands, and reserving the privileges creates an easement over the part granted. The charge of the court was, that the plaintiff must use his privileges not in precisely the same manner, but so as not to be more onerous to the defendant than they were formerly used.

3d point. As to the verdict, the separate finding on each issue is lawful, and in the case of two distinct causes of action, as here, in one declaration, peculiarly proper. 1 *Chit. Pl.* 411; 3 *Johns. R.* 189; 3 *Chit. Gen. Pr.* 921; 1 *Arch. Pr.* 195.

The court, all the judges except the Chief Justice and Justice Carpenter being present, unanimously affirmed the judgment below. No written opinion being delivered by any of the judges.

THE STATE v. ENGLISH.

The map which is required by the road act to be annexed to the return of surveyors of the highways laying out a road, may, by their direction, be both made and annexed by the practical surveyor, after they have signed their return and separated.

The writ of error in this case removed the judgment of the Supreme Court, confirming a return of surveyors laying out a public highway. The only objection to the legality of the proceedings was, that the map annexed to the return had been made by the practical surveyor employed after the surveyors of the highways had signed their return and separated. He both made the map and annexed it to their return. This was done by their direction.

The majority of the Court of Errors affirmed the judgment,

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for the reasons given by the Chief Justice in his opinion in the court below. *Ante* 291. No written opinion was given in favor of the affirmance.

The CHANCELLOR. It is admitted that a map cannot be dispensed with, and that it must be made, either by the surveyors themselves, or by some person acting under authority delegated by them. By an adjournment *sine die*, the surveyors were *functi officio*. I do not see how a deputy could act for them after the time for their own action was spent. How the power of a deputy can outlive the office of the person appointing him. Nor do I see that surveyors can make a return that they have a map, if a map be not made until after the return.

It appears to me that the judgment is erroneous.

For affirmance—Justices CARPENTER and ODGEN, and Judges SCHENCK, PORTER, and RISLEY—5.

For reversal—The CHANCELLOR and Judges SPEER and MCCARTER—3.

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CASES AT LAW

DETERMINED IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY,

AT JULY TERM, 1850.

HOPPER v. HOPPER.

1. Where a husband dies seized of lands, it is the duty of the heir or devisee to assign dower without demand, and no demand is necessary to enable the widow to recover the value from the death of her husband. The statute of New Jersey has changed the English rule in this particular.

2. *Tout temps prist* is not a good plea in dower in bar of damages for the detention of dower in lands of which the husband died seized.

On writ of error to Supreme Court, *(a)*. Upon writ of dower *unde nihil habet.*

The record brought up by the writ of error in this case was as follows, with proper *placita* and warrants of attorney:

New Jersey Supreme Court, April term, 1846, Bergen county, *ss.*—Maria Hopper, who was the wife of John J. Hopper, deceased, by A. O. Z., her attorney, demands against Jacob J. Hopper the third part in two messuages, two barns, two gardens, four orchards, two hundred acres of arable land, two hundred acres of pasture land, two hundred acres of meadow land, two hundred acres of wood land, and two hun-

(a) See 1 *Zab.* 543.

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dred acres of land covered with water, with the appurtenances, in the township of Lodi, in the county of Bergen, as the dower of the said M. H., of the endowment of the said J. J. H., deceased, heretofore her husband, and whereof she hath nothing.

And the said J. J. H., by E. R. V. W., his attorney, comes and defends the wrong and injury when, &c. And as to all that part and parcel of land, with the appurtenances, in the township of Lodi, in the county of Bergen aforesaid, bounded and described as follows, to wit: (describing three tracts by metes and bounds). All which tracts and parcels of land and premises above described are parts and parcels of the said several tracts and parcels of land, tenements, and premises, in the said demand of the said M. H. mentioned, and whereof the said M. H. claims to be endowed, he, the said J. J. H., says, that from the death of the said J. J. H., late husband of the said M. H., he, the said Jacob, hath been always ready, and is still ready to render to the said M. H. her dower of the said tenements and premises, with the appurtenances, and rendereth the same in court here to the said M. H.

And as to the residue of the said lands and tenements mentioned in the said demand of the said M. H., and whereof the said Maria claims to be endowed as aforesaid, he, the said J. J. H., says he cannot render to the said M. H. her dower thereof, or any part thereof, because he saith that he, the said J. J. H., was not, on the day of suing forth the original writ of the said M. H., nor at any time since has been tenant thereof, and this he is ready to verify: wherefore, as to the said residue of the said lands and tenements, he prays judgment of the said writ, and that the same may be quashed.

And as to the said plea of the said Jacob, by him firstly above pleaded, the said Maria, for her damages, by reason of the detention of her dower aforesaid of the lands and tenements in said first plea described, parcel of the lands in her count above mentioned, with the appurtenances aforesaid, without this, that said Jacob is seized of said lands in said first plea described, or any part thereof, as heir-at-law of said John J. Hopper, says, that the said J. J. H., formerly her husband, died at Lodi, in the county of Bergen aforesaid, seized

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in fee at the time of his death of the said lands in the said first plea described, with the appurtenances, and that, after the death of the said J. J. H., the said Jacob became seized thereof, and yet holds the same by virtue of a devise in the last will of the said J. J. H., deceased; and that she, the said Maria, after the death of the said J. J. H., and before the time of the suing out of the writ in this cause, to wit, on the first day of April, 1846, requested the said Jacob to render unto her, the said Maria, her dower in the aforesaid lands, in first plea described, with the appurtenances. Yet, nevertheless, the said Jacob, to render unto her, the said Maria, her dower in said last mentioned lands, with the appurtenances, hath wholly neglected and refused, from thence hitherto, and still doth neglect and refuse; and this she is ready to verify: wherefore she prays judgment and her damages, by reason of the detention of her dower aforesaid, to her to be adjudged.

And as to the said plea of the said Jacob, by him secondly above pleaded, the said Maria says that she cannot deny, but admits it to be true.

And the said Jacob, as to the said replication of the said Maria to the first plea of him, the said Jacob, saith, that the said Maria ought not, by reason of any thing in the replication alleged, to have her damages for the detention of her said dower, in the introductory part of the said first plea and in the declaration mentioned, because, as before, he saith, that he has been always ready, and still is ready, to render to the said M. H. her dower of the said tenement and premises, and of this he puts himself upon the country, &c.

To this rejoinder the demandant filed a general demurrer, to which the defendant put in the common joinder.

The judgment in the Supreme Court was entered in the following words: "Whereupon all and singular the premises aforesaid being seen, and by the said court now here fully understood, and mature deliberation being thereupon had, it appears to the said court here that the said plea, by the said defendant in manner and form aforesaid pleaded, and the matters therein contained, and also the said rejoinder, by the said defendant in manner and form aforesaid rejoined, and the mat-

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ters therein contained, are, and each of them is, sufficient in law to bar and preclude the demandant from having or maintaining her aforesaid action thereof against the said defendant. Therefore it is considered, that the said Maria Hopper take nothing by her said writ, but that she and her pledges to prosecute, be in mercy, &c.; and that the said Jacob J. Hopper do go thereof without day, &c. And it is further considered by the court here that the said Jacob J. Hopper do recover against the said Maria Hopper the sum of ——— for his costs and charges, by him about his defence in this behalf laid out and expended, by the court here adjudged to the said defendant, and with his assent, according to the form of the statute in such case made and provided, and that he have execution thereof."

The following errors were assigned:

1st. That the rejoinder to the replications is insufficient, and that judgment on the demurrer ought to have been given for the demandant.

2d. That the judgment does not award to the demandant her dower in the lands, in the first plea of the defendant described.

3d. That the judgment does not award to the demandant her damages, or the value of her dower, from the death of her husband.

4th. That the judgment does not award to demandant her damages, or the value of her dower, from the commencement of this suit, or direct the same to be ascertained and assessed.

5th. That the plea of said Jacob, by him firstly above pleaded, is insufficient in law to answer the count of the demandant, or preclude the demandant from recovering her damages and the value of her dower.

6th. That judgment was given for the said Jacob, whereas by law it ought to have been given for the demandant, both for her dower and her damages.

Zabriskie and *Vroom*, for plaintiff in error.

The plea is *tout temps prist* only, without averring that the defendant is heir. The replication—1, denies that he is heir; 2, avers that husband died seized; and 3, avers *a demand* on April 6, 1846. On special demurrer it might have been bad

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for duplicity, but if defendant rejoins he must answer the whole of it. The rejoinder is *tout temps prist*, no averment that he is heir or denial of the demand; this is clearly bad.

The plea of *tout temps prist* may be a good plea in New Jersey when pleaded by alienee of the husband; he is only liable for damages from demand: and as this *plea* was according to the precedents (as remarked by Justice Carpenter), it was necessary to show, by averments in the rejoinder, that the defendant was neither an alienee who, by our statute, nor an heir, who, by the decisions on the statute of Merton, was entitled to plead *tout temps prist*.

But the chief ground relied upon for reversal is, that by the statute of New Jersey, no demand is necessary where the husband died seized to entitle the husband to damages.

We hold that this question was not settled by the court in *Woodruff* v. *Brown*, 2 *Harr.* 246.

Hornblower and Dayton, Justices, held a demand necessary. Ford and Nevius, Justices, held it unnecessary. White, J., concurred with Hornblower in his decision, and so did all the judges, but, on another ground, in which all agreed. That opinion has never been reviewed; the judgment was in demandant's favor. She could not bring error, and in *this court*, at least, the question is open.

All agree that, by the *words* of the statute of New Jersey, (*Rev. Laws* 397, *Rev. Stat.* 72, § 3,) the widow is entitled to damages without demand. The language is, "if she be deforced of her dower," *or* "cannot have it without suit," *or* "if it be not assigned to her in forty days from the death of her husband," she may sue for and recover the same, with damages from the death of her husband. In either of these two cases her right is absolute to recover, not one word to require demand expressly or by implication.

But it is said that the statute of Merton did not, by words, require a demand, and yet the English courts have held a demand necessary. To this the answer is—1, that the words of the statute of Merton are different, "if a widow be deforced of her dower, *and* cannot have it without suit", she must not only be kept out, but *also* put to her suit, which would not be the

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fact if she could have it on demand; and 2, that however authority might settle the meaning of a statute against the plain meaning of the words, when they were the same, the authority ceases when the words are changed, as in this case.

There was an intention, by this statute, to change the English law of dower. The quarantine is extended from mansion house to whole farm, and from forty days until dower is assigned, and the alienee pays damages from demand. Why must the *intention* to change be denied in another case where the words are changed and the meaning unambiguous.

When a statute is re-enacted whose construction is settled, and the words are changed so as to alter the meaning, the inference is that a change was intended. 1 *Pick.* 43, *Ellis* v. *Paige;* 10 *Wend.* 528, *Tates* v. *Paddock;* 1 *Pick.* 155; *Rutland* v. *Mehan.*

Had the old statute been proposed for re-enactment, and any legislator desired to amend it, so as to make the heir liable for damages if he did not assign dower within forty days, whether demanded or not, could he have done so more effectually, as far as language is concerned, than by interlining the words "or if not assigned within forty days after the death of her husband?" Besides, else the forty days have no significancy in the statute; they do not limit quarantine, and dower and damages are now due upon demand, whether before or after the death of the husband.

But this judgment is wrongly entered in two other particulars. 1. It is that she take nothing by her writ; it denies dower as well as damages, and all agree that *tout temps prist* is only a defence to the damages. 2. This plea only protects from damages until suit brought. From the issuing of the writ damages are recovered when the plea is allowed. So are all the authorities. 1 *Lilly Ent.* 189, *Spiller* v. *Andrews; Parke* 298, 308, 303, 304, and 139; *Cases Temp. Hard.* 19, *Dobson* v. *Dobson;* 1 *Rich. Pr. C. P.* 509; 2 *Saund.* 45; *Rast. Ent.* 237.

Halsted, for defendant.

By demurring, demandant puts in issue the goodness of all

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her own pleading; court must go back to the first error. *Gould's Pl. c.* 8, § 3; 7 *Bac. Plead. N.* 605; 5 *Cranch* 261; 11 *John.* 160.

The replication is bad for duplicity. *Gould's Pl.* 420, § 3.

If *tout temps prist* is good in any case it is good here. It does not appear from declaration that husband had been dead for forty days, he may have died the day before suit brought. It does not appear how defendant held, he may have been alienee of husband; and the question is broad and open here, whether this plea is good in any case.

If these matters were the foundation of the recovery of damages, they should have been set forth in the declaration, it cannot be aided by the replication.

The Chancellor. The provisions of our statute are plain; and I think the wisdom and policy of them are equally plain. I see no reason for denying effect to them, or for construing them away. The peace of families will be much better promoted by making it the duty of the devisee or heir to assign dower within the forty days, and subjecting him to the payment of the value of it if he does not, than by furnishing him with a motive to neglect it until demand be made, by allowing him the use of it for nothing until the widow shall learn that a demand is necessary, and make demand. The plain reading of the act imposes this duty, and there is nothing in the nature of the requirement to induce us to doubt that it was the intention of the legislature. No sufficient reason can be assigned, in my judgment, why the devisee or the heir should occupy land to which the widow is entitled for her dower without compensating her for the use of it.

Instead of resorting to the decisions in England, or their statute, it seems to me we are required to say, that our legislature, by the different structure and language of our act, intended to introduce a different rule.

I concur in the reversal of the judgment.

Randolph, J. The question in this case is, whether, under our statute, *tout temps prist* is a good plea in an action of

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dower brought against the devisee. Under the English statute of Merton it is well established that the heir might appear in an action of dower, and plead that he *was always ready (tout temps prist)* to assign the dower, and thus prevent any damages being recovered against him, unless demandant replied, and proved that she had demanded her dower, and it had not been assigned to her; in which case, or in case of recovery on any other plea than *tout temps prist*, she recovered damages from the death of her husband, he dying seized. Upon the death of the ancestor the lands went directly to the heir or devisee, and not to the widow, and she had not even a right of entry for her dower, but only a right to remain in the mansion house and appurtenances for forty days, in order that the heir might, during that time, assign her dower, which she forfeited, however, if she married during the *quarantine* (forty days); but if no dower was assigned to her, or improperly assigned, then she was deforced of her dower, that is, the land which she was entitled to have in dower was withheld from her (3 *Bl. Com.* 172; *Co. Lit.* 277,) and then she was compelled to bring her action to recover her dower; but until the statute of Merton, 20 *Hen.* 3, she recovered no damages. That act gave her damages from the death of her husband, if he died seized, but never if he did not die seized. Now, inasmuch as the plea of *tout temps prist* is a good plea under the statute of Merton, it seems conceded that, if our statute be the same, it must be good under that also. It always appeared to me that our statute was different from the English act, and that it gave damages in all cases, from the death of the husband when he died seized, and from demand made when he did not die seized; and this view of the case was not entirely changed by the argument in this cause, though the question was very fully and ably argued. On examining the argument and matters more fully, however, in vacation, I feel perfectly satisfied that our statute and the English act are substantially the same, and that the former was not intended to, nor does in fact, introduce any new rule as to damages. The action of dower lies in two cases, when the husband dies seized of the lands in question, or when he was seized during coverture, but did not

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die seized of them, they having passed in his lifetime over to another. At common law no damages were recoverable in either case, which was considered exceedingly hard where the husband died seized, and the heir refused to assign dower within the forty days, during which the wife was privileged to remain in the mansion house, and after which she was compelled to leave and sue for her dower. To remedy this special grievance the statute of Merton was passed, giving to widows who were "deforced of their dowers, and cannot have their dower or quarantine without plea" in the lands whereof their husbands died seized, damages to the full value of their dower from the time of the death of their husbands. Judge Paterson, in revising the statutes of New Jersey, thought proper, in re-enacting the statute of Merton, to provide for damages in the case not provided for in the English act, *viz.* when the husband did not die seized, and in that case damages were given from the time demand was made of the tenant, because he came rightfully into possession during the life of the husband, and was entitled to notice of his death and demand of dower before he could be made liable.

It is said, in argument, that our statute provides for four cases, *viz:* 1, when deforced; 2, suit brought; 3, when dower is unfairly assigned; 4, or is not assigned within forty days; and that the statute of Merton only provides for two cases—1, where deforced; 2, suit brought. But the object of both acts is the same, *viz.* when dower is withheld, to enable the widow to recover damages, if her husband died seized of the lands. The operative word of both is the word "deforced," so that suit has to be brought; and our act is only a little more specific as to what may be a deforcement, adding the cases when the dower is unfairly assigned or not assigned within forty days, to obviate any doubt that may have arisen whether these cases amounted to a deforcement. In order to recover damages under either act, the widow must be deforced, that is, her just dower withheld from her over forty days from the death of her husband, and she compelled to bring suit therefor, then she recovered damages under either act. But suppose our act did not give damages in any case where the husband did

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not die seized, and the statute had terminated with damages "from the time of her husband's death, if he died or shall die seized," and the last lines providing for the other case had been omitted, could any one then have doubted that our statute and the statute of Merton were identical, or that the connection of four causes for damages, instead of two, with the disjunctive conjunction only, would have made our act different? A widow, as before stated, can only bring her writ of dower for lands that her husband either died seized of or did not die seized of; if the latter, she recovers no damages in England, but under our act she recovers damages from the time demand made; if the former, she recovers from the death of the husband under the statutes of both countries. Under the English act, the heir could plead *tout temps prist*, because he was in by right of law, as the owner of the inheritance, from the death of the ancestor, and he was not compelled to assign dower till demand made, for the widow had not the right of entry on him, but might have her quarantine. Under our act, passed for the same purpose in substantially the same terms, the demandant can have no greater rights, and the defendant is entitled to equal privileges. That this was the intention of the legislature is the more apparent from the fact that, in the preceding section, they have extended the widow's quarantine from forty days "until such dower be assigned," thus giving ample protection to the rights of the widow and a severe penalty for the negligence of the heir. The alienee cannot plead *tout temps prist*, because he cannot say he was always ready to assign dower, he must therefore abide by his covenant; but a devisee can say so, and can therefore plead the same plea, and for the same reason that the heir can. In discussing this matter, I have not considered the policy of the English rule on the questions of convenience, or otherwise, arising therefrom, but have merely endeavored to show that the two statutes are identical, and therefore that the construction placed on each should be the same. As the widow, under our act, may remain in the mansion house till dower is assigned, she may demand it when she pleases, and if removed by the heir or devisee, may maintain trespass, ejectment, or

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dower against him, no great inconvenience can result to the widow; but if the husband die abroad, or not in the actual occupancy, it seems reasonable that the heir or devisee, who came in by right, and against whom no entry lies by the widow, should have notice of the demand, if she insists on damages, else he might be mulcted in damages for not assigning dower to one he could not find. Demand may be on the premises, and is binding on the owner, but dower can only be assigned to the widow herself; and if she presents herself in a situation to receive it, that is, demands it, and it is not assigned to her, she recovers damages not from such demand but from the husband's death. I think the plea good, and judgment should be affirmed, with costs.

For affirmance—Justice RANDOLPH and Judge PORTER—2.

For reversal—The CHANCELLOR and Judges SCHENCK, SPEER, WALL, McCARTER, and RISLEY—6.

Judgment reversed.

The Court of Errors, having given judgment for the demandant on the demurrer, both for the recovery of her dower and damages, ordered the record to be remitted to the Supreme Court, in order that they might ascertain the amount of her damages, and issue execution therefor.

At the October term of the Supreme Court, *Halsted* and *Whitehead*, for defendant, suggested to the court that he had paid to the demandant, and she had accepted satisfaction for the annual value of her dower for several years since the death of her husband, and asked leave to withdraw the plea of *tout temps prist*, and to plead, in bar of damages, that she had received satisfaction.

Zabriskie, for demandant, contended that it was not in the power of that court to alter the judgment in this cause. That judgment had been given in the Court of Errors, and the record remitted to the Supreme Court merely to inquire of the damages, and to issue execution.

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The Supreme Court refused leave to plead.

At the October term of the Court of Errors, application was made to that court to alter and amend the rule for reversal entered, so as to allow the defendant to plead that he had satisfied the demandant for the annual value of her dower and her damages, and an affidavit of the defendant was read to show the truth of the proposed plea.

Halsted and *Whitehead*, for defendant, contended that the plea of *tout temps prist* had been put in in good faith, and that the practice was to allow a defendant to withdraw a plea overruled on demurrer, and to put in a new plea.

They asked for leave to file a new plea, unless the court be of opinion that these matters might be given in evidence on the writ of inquiry, as was intimated by the Supreme Court in *Woodruff* v. *Brown*, and requested the opinion of the court as to which was the safe course for them to pursue.

Zabriskie and *Vroom*, for demandant, contended that the court could not now make an order for them to plead anew.

1. Because the judgment had been entered for the demandant on the former plea, and the record had been remitted to the Supreme Court, and was now there. This court might order an erroneous entry of the judgment given to be amended on their minutes, but could not at a subsequent term change the judgment actually given.

2. Because, in any court, leave to withdraw a plea overruled on demurrer, and to plead anew, could only be given before the entry of the judgment. In England, the practice is to move for leave to withdraw before judgment is *pronounced*, "we will give judgment for the plaintiff, unless defendant asks for leave to withdraw plea." Here the practice is more liberal, but there is no case where a new plea has ever been allowed to be put in after the judgment was entered or after the term in which judgment is given. "Let judgment be entered for the plaintiff, unless defendant plead anew in thirty days," is the usual rule for judgment.

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Again, if the intimation in *Woodruff* v. *Brown* is law, (*Zabriskie* contended it was not) that the plea is not only useless but bad.

The court, without assigning any reason, refused to grant leave to plead.

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INDEX.

ABORTION.

1. To cause or procure abortion before the child is quick, is not a criminal offence at common law, and has never been made so by statute in New Jersey.
2. An attempt made to cause an abortion when the woman is not quick with child, if made with her consent, is not an indictable assault upon her: the consent of the party takes away the criminal character of the assault.
3. To cause abortion when the child is quick, is not murder or manslaughter at common law, but a great misdemeanor.
4. Although the law, for many civil purposes, recognises the existence of a child from its conception, it does not, for the purpose of punishing its destruction, recognise it as a living being until it quickens or stirs in the womb.
5. It is not an assault to cause abortion upon a woman not yet quick with child, if done with her consent. It is only in cases of high crimes that the person assaulted is incapable of assenting. *State* v. *Cooper*, 52

ACQUIESCENCE. See BOUNDARIES, 3, 4.

ALTERATION IN WRITING. See EVIDENCE, 19.

AMENDMENT. See PRACTICE, 3, 11, 15, 19, 26, 27.

ARBITRATION.

1. If a matter in dispute is submitted by both parties to referees or arbitrators, and, in pursuance of the submission, it is made a rule of court, the submission is then irrevocable. *Ferris* v. *Munn*, 161
2. A paper containing a summary of the accounts between the parties, delivered by the arbitrator with the award, on a motion to set aside the award, considered as part of the award.
3. On motion to set aside an award, the submission having been made a rule of court for that purpose, it is not competent to read an *ex parte* statement of the oral evidence before the

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arbitrators, proved by the oath of counsel to contain the substance of the testimony there delivered.

4. When there has been no corruption or partiality in the arbitrators, or fraud practised by the party, the award is conclusive, and the court will not, on such motion, inquire whether the arbitrators have judged right or wrong on the facts.
5. Courts will not interfere with an award for mistake in law, unless it appears, on the face of the award or by the statement of the arbitrator, that he had meant to decide according to the legal rule, and had mistaken it.
6. Mistakes of fact, which can be taken advantage of on such motion, must be mere mistakes, as miscalculation of an account, or the like, and not an erroneous conclusion of the judgment on the part of the arbitrator. They must appear on the face of the award or the accompanying papers, or be established by the oath of the arbitrator.
7. On an arbitration between a surviving partner and the administrator of a deceased partner, an award that the former should pay off and discharge a bond given during the lifetime of the latter by both partners, and therefrom save harmless and indemnify the representatives of the deceased partner, is sufficiently certain. *Bell* v. *Price*, 578

ATTACHMENT.

1. If there be an attachment against A. and another against A. and B. in the hands of the same sheriff who attaches the goods of A. on both writs, it is irregular on dissolving the attachments to take one bond for the return of the goods attached in both suits. There should be a separate bond in each suit. But this does not vitiate the bond; the recital of the second writ will be considered surplusage.
2. If a creditor in attachment, to whom such bond is assigned, in declaring thereon, allege that he applied to the court, and obtained judgment against A., in such proceeding it is a sufficient averment, that he applied in the suit against A. alone.
3. It is not necessary that it should be averred in such suit, that the plaintiff applied to the court before the attachment was dissolved; the defendant is precluded from disputing that, by accepting a declaration in the attachment suit.
4. The bond, on the dissolution of an attachment, is for the benefit of, and can be prosecuted by any other creditor applying, as well as the plaintiff in attachment: the amount recovered is for the benefit of all applying creditors.
5. A breach is sufficiently set forth, if laid in the words of the condition. *Hanness* v. *Smith*, 332

BAIL BOND. See PLEADING, 18—20.

BANK NOTES.

Bank notes are not "goods or chattels," and the receiver of

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stolen bank notes cannot be indicted under the statute making it a misdemeanor to receive stolen "goods or chattels." *State* v. *Calvin*, 207

See FIERI FACIAS, 1, &c.

BANKRUPT.

1. If, after judgment against him, a defendant is discharged from his debts under the bankrupt law, it is irregular to issue execution on such judgments without an order for that purpose on notice: the debt is *prima facie* satisfied by the discharge. *Francis* v. *Ogden and McComb*, 210
2. On an application for leave to issue execution against a certificated bankrupt, on a judgment obtained before his discharge, on allegation of fraudulent preference of creditors, the court can and will, in a proper case, order an issue to try the facts. *Ogden et al.* v. *Harris*, 540

BOND.

1. It is not necessary that the assignment of a bond, when made under seal, should show any consideration.
2. It is not necessary to make profert of an assignment of a bond, even though under seal, because the seal is not necessary to the validity of the assignment.
3. The breach in a declaration on an assigned bond is bad, if it does not allege nonpayment to the obligee as well as to the plaintiff. *Gregory* v. *Freeman*, 405

See ATTACHMENT, 1—5.

BOOK OF ACCOUNT. See EVIDENCE, 12—15.

BOUNDARIES.

1. Where a deed bounds the property conveyed on a public highway, on a question of boundary the return of the surveyors laying out such highway is competent evidence without showing their appointment, or if the proceedings of their appointment are void: the only question is, where is the highway, not whether it is legally laid out.
2. If the language of a deed leaves it doubtful which of two boundaries it calls for, the practical construction given to it by the parties themselves in taking possession, is competent evidence to show where the line is.
3. Where a line is not settled, acquiescence by the parties concerned, without a positive agreement and for a less period than twenty years, will fix the boundary.
4. Where no doubt would arise as to the true location of a lot from the construction of the grant, yet if the grantee, by his acts in locating his lot, has fixed his lines differently, and induced others to act upon such erroneous location, he will be bound by such location, and will by his *acquiescence* be pre-

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vented from disputing the boundaries thus fixed, although such acquiescence be only for a year.

5. If a deed calls for only one monument, and that is the corner of two streets, as its beginning point, and these streets are laid out, but not opened and fenced off, then the beginning point called for is the mathematical point designated in the surveys; but if the streets had been opened, and the corner built upon, and thus ascertained, it would properly and more naturally refer to such actual corner. *Den* d. *Haring* v. *Van Houten*, 61

BRIDGE.

1. Whether a provision in a charter enacting, "that when a canal *shall* cross any public road, it shall be the duty of the company to make and keep in repair good and sufficient bridges across the said canal," obliges the company to erect bridges across the canal where crossed by public roads laid out since its construction? *Quere*. *State* v. *Morris Canal*, 537
2. The contract made by the commissioners by virtue of the provisions of "An act for building bridges over the Passaic and Hackensack," passed November 24, 1790, is not a lease, although the operative words are words proper to create a term.
3. A *grant* of a franchise by the state for a term of years is not a lease.
4. The toll bridges over the Passaic and Hackensack, erected under the act of 1790, are liable to be taxed as other toll bridges are. *Bridge Proprietors* v. *State*, 593

CAMDEN LIEN LAW.

A supplement to the Camden lien law extended the law over the whole city, and repealed the section which exonerated from the operation of the lien buildings built by contract, on filing the written contract in the county clerk's office: a second supplement repealed the repealing section of the first supplement; by this the exonerating section is revived, and extended, with the act, over the whole city. *Flanagin et al.* v. *Feuring*, 387

CAMDEN AND AMBOY RAILROAD.

1. Penal statutes are to be construed strictly, remedial statutes more liberally.
2. Grants and charters to corporations are to be construed favorably to the rights of the public, and most strongly against those claiming under them.
3. Railroad, canal, bridge, turnpike, and ferry companies have no power to take toll by implication, but only by express grant in their charters, and the right granted will not be extended by implication; and on questions of tolls, freight, and

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fares, courts uniformly construe such charters most in favor of the public and against the company.

4. The restriction or rates in the sixteenth section of the charter of the Camden and Amboy Railroad and Transportation Company extends to the whole route from Philadelphia to New York, as well upon the water as the railroad.

5. If certain rates of toll and fare be fixed by the charter of a company, a subsequent act, inflicting severe penalties on the company for exceeding the charter rates, is no violation of the contract of the charter, and is not unconstitutional. *Camden and Amboy Railroad Co.* v. *Briggs*, 623

CANAL COMPANY. See NUISANCE.

COMMON CARRIER.

1. Every person who undertakes to carry for compensation the goods of all persons indifferently is a *common carrier*.

2. Common carriers, where there is no special contract, are in the nature of insurers, and liable for the safe delivery of the goods taken by them, unless prevented by the act of God or the public enemy. It is no excuse that they were guilty of no negligence. *Mershon* v. *Hobensack*, 372

COMMON COUNTS.

1. Under the common counts, if services rendered and goods furnished have been proved sufficient to raise an implied assumpsit, a special agreement may be given in evidence to fix the price stipulated; but such price must be in money, and such evidence cannot be admitted under the common counts where the contract was for payment in any thing else, as by a bond or note of a third party.

2. A special contract to give a certain sum or a specific article for uncertain services, which may greatly exceed or fall short of the value of the consideration, cannot be given in evidence under a *quantum meruit* count, which claims to recover according to the value. *Weart* v. *Hoagland's administrator*, 517

CONSIDERATION. See PROMISSORY NOTE, 1.

CONSTITUTIONAL LAW.

1. A private road, although open to the use of the public, is not a *public highway*, and therefore, not being within the exception in art. 1, § 13, of the constitution, private roads cannot now be laid out without providing compensation to the land owner. *Per* GREEN, *C. J.*, *Perrin* v. *Farr*, 356

2. If certain rates of toll and fare be fixed by the charter of a company, a subsequent act, inflicting severe penalties on the company for exceeding the charter rates, is no violation of the contract of the charter, and is not unconstitutional. *Camden and Amboy Railroad Company* v. *Briggs*, 623

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CONTINUANCE. See COURT, 3.

CONTRACT.

1. If plaintiff agrees to deliver to defendant at P. an engine for defendant's road at M., defendant takes the engine to M., and tries it there, and finds it does not answer the object for which it was bought, and which it was warranted to answer, it is a sufficient rescinding the contract to give notice thereof to plaintiff at P., without bringing back and tendering the engine there.

2. If an engine, or other article, be sold warranted to answer two purposes, the purchaser is not bound to rescind the contract as soon as he finds the warranty fails for one purpose, but may continue the trial of it until he finds that it fails in both and then may return it or rescind the contract on account of the failure of the warranty lastly tested. *Starr* v. *Torrey*, 190

3. A contract to deliver at a certain price a quantity of trees of a specified kind, to be grown after the contract, is not strictly a contract of sale, nor would it be valid as such, but it is a valid executory contract; and it does not confine the vendor to deliver any particular individual trees, or only trees raised by the contractor, but a tender of any trees answering the description in the contract will be a compliance with the contract.

4. Any beneficial contract may be assigned, and courts of law will protect the rights of the assignee suing in the name of the assignor. And such assignment, made in good faith, is a sufficient replication to a plea, that the nominal plaintiff, after such assignment, became bankrupt, or assigned all his rights and choses in action to a general assignee or to an assignee under the insolvent law. *Parsons* v. *Woodward*, 196

5. When a daughter, after arriving of age, continues to reside in her father's family, supported by him, and performing useful services in return, the law will not, except under special circumstances, imply a promise on the part of the father to pay for such services. If she demand pay, it is incumbent on her to show affirmatively that compensation was to be made, and that it was so expected by both parties, or that the services were performed under such circumstances as that the expectation was reasonable and proper. *Ridgway et ux.* v. *English's executors*, 409

6. Where a contract has been declared void by a decree in chancery, between the same parties, it cannot be given in evidence in a suit at law. *Weart* v. *Hoagland*, 517

7. G. and R., each owning a crop of corn in severalty commenced negotiating with a miller for the sale of their crops jointly. At a subsequent time G., alone, completed the bargain for the sale of both crops, which R., by subsequent ad-

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missions to third persons, recognised; this is a joint bargain, and this proof will sustain a count on a joint bargain.

8. If corn be sold at a mill to the miller, to be delivered at a certain time, and is in part delivered at the mill, this is sufficient to authorize the jury to infer that the delivery was to be at the buyer's mill, although there be no express proof of any place of delivery being mentioned.

9. When a joint contract is proved by two parties, to sell and deliver corn owned by them in severalty, and one of them delivers part of his parcel, this is a sufficient part delivery to comply with the statute of frauds. *Field and Field* v. *Runk*, 525

CORPORATION BOOKS. See EVIDENCE, 18.

COSTS. See FEES AND COSTS.

COURT.

1. It is correct, in the caption of an indictment, to style the Court of Oyer and Terminer "The Court of Oyer and Terminer and General Jail Delivery in and for the county of M.," without saying "of the state of New Jersey."

2. The justice of the Supreme Court and judges of the Common Pleas, who hold the Oyer and Terminer, are properly styled "*the judges* of the Court of Oyer and Terminer and General Jail Delivery."

3. When it appears by the record that a trial was held in a certain term, but on a day subsequent to the first day of the term, it is not error that the record does not show how the cause was *continued* from the first day of the term to the day of the trial. *Berrian* v. *State*, 9

COVENANT.

If a deed *inter partes*, whereby an estate is conveyed to the grantee, and the estate conveyed is accepted by the grantee, although only signed and sealed by the grantor, it is the deed of both parties, and the grantee is bound by the covenants therein contained on his part, and can be held in an action of covenant for the breach of them. *Finley* v. *Simpson*, 311

See PERFORMANCE. USAGE.

CRIMES.

1. An attempt to do a wrongful act is not a crime or misdemeanor, if the act attempted is not a criminal offence.

2. To cause or procure abortion before the child is quick, is not a criminal offence at common law, and has never been made so by statute in New Jersey.

3. An attempt made to cause an abortion when the woman is not quick with child, if made with her consent, is not an in-

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dictable assault upon her; the consent of the party takes away the criminal character of the assault.

4. To cause abortion when the child is quick, is not murder or manslaughter at common law, but a great misdemeanor.
5. Although the law, for many civil purposes, recognises the existence of a child from its conception, it does not, for the purpose of punishing its destruction, recognise it as a living being until it quickens or stirs in the womb.
6. It is not an assault to cause abortion upon a woman not yet quick with child, if done with her consent. It is only in cases of high crimes that the person assaulted is incapable of assenting. *State* v. *Cooper*, 52
7. Bank notes are not "goods or chattels," and the receiver of stolen bank notes cannot be indicted under the statute making it a misdemeanor to receive stolen "goods or chattels." *State* v. *Calvin*, 207

DAMAGES.

Where, in one suit, there are several distinct causes of action, it is proper to direct the jury to find the issues separately and to assess the damages for each matter separately. *Ward* v. *Ward*, 699

See DEED, 5.

DEED.

1. If a deed *inter partes*, whereby an estate is conveyed to the grantee, and the estate conveyed is accepted by the grantee, although only signed and sealed by the grantor, it is the deed of both parties, and the grantee is bound by the covenants therein contained on his part, and can be held in an action of covenant for the breach of them. *Finley* v. *Simpson*, 311
2. A sheriff's deed is admissible in evidence without proof of the sheriff's authority to make the deed when the object is merely to show some collateral fact.
3. The grantor of a deed, in an action for the purchase money, is not estopped by the usual acknowledgment in the deed, that the money has been paid. Where the intention in regard to the estate is not disputed, nor the operation of the conveyance, as such, sought to be changed, this clause is regarded as formal merely, and open for explanation by parol.
4. Upon a sale of land by deed, which acknowledged the receipt of the purchase money, and which also contained full covenants of title and against encumbrances, the deed was given upon an agreement by the grantee that he would discharge a mortgage of $1000 upon the premises, and indemnify the grantor therefrom, the grantee retaining so much of the consideration money for that purpose. The grantor, having been compelled to pay the debt, *held* that, in an action against the grantee upon his undertaking, the plaintiff was not

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estopped by his deed from proving the encumbrance and the agreement to discharge it. The agreement was considered to be collateral to the deed.

5. The damnification of the plaintiff under such an agreement, when the payment by him was the giving a new security, is to the whole extent of the failure by the defendant to appropriate to the discharge of the mortgage the consideration money left in his hands for that purpose. *Bolles* v. *Beach*, 680

DEVISE.

1. If a will devise lands to W. and his heirs and assigns for ever, and if W. should die without lawful issue and without leaving a will, or if he should by will, or in any other way, after the date of said devise, give any thing to T., or any of his descendants, then over: this devise vests an estate in fee in the first taker, and the limitation over being upon a *definite* failure of issue, is not void as an executory devise on account of remoteness. If this condition should be held void, as being contrary to policy or good morals, as it is a condition subsequent, it would only defeat the limitation over, and not the estate devised to W. *Den* d. *Trumbull* v. *Gibbons*, 117
2. A testator gave to S. A. and her heirs for ever all the residue of his real and personal estate; but if S. A. should depart this life *without leaving lawful issue*, then to A. R. and E. W. H., and their heirs, as tenants in common. This limitation over is upon an indefinite failure of issue, and fails as an executory devise; S. A., therefore, would, under the statute *de donis*, take an estate tail, and in New Jersey an estate for life, with remainder to her children. *Morehouse* v. *Cotheal*, 430
3. When lands are devised to any person for life, and at his death to go to his heirs, the children of the tenant for life take immediately a *vested* remainder in fee, by virtue of the first section of the act further regulating the descent of real estates. *Rev. Laws* 774. *Demarest* v. *Den* d. *Hopper*, 599

DOWER.

1. A widow is dowable of an equity of redemption, the mortgagor being considered as the legal owner, except as against the mortgagee, and those claiming under him, and the *mere assignee* of the husband is concluded from denying his seisin.
2. But she cannot claim dower at law against the mortgagee or his assigns, where the mortgage was before coverture, and the equity of redemption has been united by release or conveyance to the legal title of the mortgagee. *Semble*, the only remedy of the widow in such case is in equity on bill to redeem *pro tanto*.
3. The assignee of the mortgagee purchased the equity of redemption of the executors of the husband, who sold the land under the authority of a private act, which directed the pro-

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ceeds of the sale to be first applied to the discharge of the mortgage. The conditions of sale were, that the executors would give a title to the land free of encumbrance, but the holder of the mortgage, who purchased at the auction sale, paid only the balance over the amount due on the mortgage from which he released the executors, and insisted on retaining the mortgage as a muniment of his title. *Held*, that the mortgage was not satisfied or extinguished; that he held by virtue of the mortgage, and that the widow was not entitled to dower. *Thompson* v. *Boyd*, 543

4. Where a husband dies seized of lands, it is the duty of the heir or devisee to assign dower without demand, and no demand is necessary to enable the widow to recover the value from the death of her husband. The statute of New Jersey has changed the English rule in this particular.

5. *Tout temps prist* is not a good plea in dower in bar of damages for the detention of dower in lands of which the husband died seized. *Hopper* v. *Hopper*, 715

ESTOPPEL.

1. The general rule of law is, that a tenant cannot dispute the title of his landlord or of the person under whom he entered. The cases where the landlord's title has expired, or has been changed by act of law, as by a sheriff's sale, are exceptions to this rule. But the case of an adverse latent title arising from a defect in the conveyance to the landlord, which is set up only by the tenant as an outstanding title, without any right under it, or attornment to the owner, is not within the exceptions. *Den* d. *Howell* v. *Ashmore*, 261

2. The grantor of a deed, in an action for the purchase money, is not estopped by the usual acknowledgment in the deed, that the money has been paid. Where the intention in regard to the estate is not disputed, nor the operation of the conveyance, as such, sought to be changed, this clause is regarded as formal merely, and open for explanation by parol.

3. Upon a sale of land by deed, which acknowledged the receipt of the purchase money, and which also contained full covenants of title and against encumbrances, the deed was given upon an agreement by the grantee that he would discharge a mortgage of $1000 upon the premises, and indemnify the grantor therefrom, the grantee retaining so much of the consideration money for that purpose. The grantor, having been compelled to pay the debt, *held* that, in an action against the grantee upon his undertaking, the plaintiff was not estopped by his deed from proving the encumbrance and the agreement to discharge it. The agreement was considered to be collateral to the deed. *Bolles* v. *Beach*, 680

4. A former verdict, with judgment thereon between the same parties upon a point in issue in the former suit, will conclude and estop in a suit between the same parties, although not

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pleaded in the latter suit, if the party offering it as an estoppel has had no opportunity to plead it. *Ward* v. *Ward*, 699

See CONTRACT, 6. JUDGMENT, 1. BOUNDARIES, 4.

EVIDENCE.

1. A receipt is never conclusive, but can always be explained by parol, and fraud or mistake shown and corrected.
2. A jury may infer fraud from the circumstances attending a transaction, without any direct or positive proof; and when a jury infer fraud against the weight of evidence, or from insufficient evidence, the remedy is by motion for new trial, and not by writ of error. *Cole* v. *Taylor*, 59
3. If a letter from defendant to plaintiff, produced by defendant, is proved to have been mailed to plaintiff at the proper post office, and has the proper post mark upon it, and the possession of it by the defendant is accounted for in a way that shows a presumption that he received it from plaintiff, it is sufficient proof to permit the whole evidence to go to a jury, to determine therefrom if the letter had been received by plaintiff.
4. What circumstances are sufficient evidence to warrant a jury in finding that the endorsee of a promissory note had notice of the failure of consideration. *Starr* v. *Torrey*, 190
5. Parol evidence may be given of the contents of a writing, the absence of which is not accounted for, if the object of such evidence is not to prove such facts as the writing would prove if produced, but only a collateral matter, as its identity with or diversity from another writing.
6. On the trial of an indictment for forgery, it is not error to admit proof that the signature of C. S., one of the subscribing witnesses, is not the handwriting of a man named C. S., without first proving that he is the same C. S. who purports to be the subscribing witness: that fact may be made out by after testimony.
7. On an indictment for forging a deed, as a link in the chain of title to a certain tract of land, it is competent to prove that, shortly before the uttering, the defendant said he claimed title to the tract through a different document, and that he was informed that there was no such document in existence.
8. The direction of the *manner* of cross-examining a witness is in the discretion of the court, and error cannot be assigned on matters resting in discretion.
9. A document offered to contradict a witness who referred to such a one, must first be identified as the one referred to by him.
10. To prove handwriting, in general a witness must know it by having seen the person write, or having corresponded with him; but in the case of ancient deeds or papers, so old that no living witness can be produced, the genuineness of hand-

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writing may be proved by an expert, by comparison with papers whose genuiness is acknowledged. *West* v. *State*, 212

11. If the interest of a witness appear at any time during the examination in chief, either in direct or cross-examination, his testimony should be overruled. And, for the purpose of showing such interest, he may be asked, on his cross-examination, the contents of a writing under which such interest arises, without accounting for its absence, in the same manner as he might upon his *voir dire*. *Den* d. *Howell* v. *Ashmore*, 261

12. A book of account is admissible in evidence, even where the items on the face of the book are not charged on the same day when the services were rendered, if the charge be made in the usual course of such business.

13. A charge in a book of accounts is sufficient, even where it mixes up several items in the same general charge, and does not give any information as to the amount or value of each or of either of the items charged.

14. It is no variance from the bill of particulars rendered if the book of accounts charge to A. B., overseer of the poor, &c., items which in the bill are rendered as charged to A. B.

15. It is not a fatal objection to a physician's bill or charge in his book, that it contains well known and usual abbreviations. *Bay* v. *Cook*, 343

16. It is no ground of error that, on the trial, the court permits a leading question to be put to a witness, by the party calling him.

17. Persons giving out themselves as partners, will be held liable as such, although they really are not. *Mershon* v. *Hobensack*, 372

18. The books of a corporation, or of the managers of a corporation, are competent evidence of the proceedings of the corporation; and although not usually evidence against third persons, yet are evidence of such proceedings in cases where it is competent or necessary to prove them. *North River Meadow Co.* v. *Shrewsbury Church*, 424

19. An alteration, apparent upon the face of a writing, is presumed to have been made before execution. It is incumbent upon the party objecting on that account to show that it was not.

20. If a party, in cross-examining a witness of the other side, ask whether the party whose witness he is has had a conversation with him on a certain subject, without showing what was said, the party producing him has a right, on re-examination, to show what that conversation was.

21. It is not competent to rebut the opinions of witnesses who think that the proximity of a railroad would injure the value of building lots, by showing that, in point of fact in other places, a like proximity has increased their value. It would

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raise too many collateral issues. *Somerville and Easton Railroad Co.* v. *Doughty*, 495

22. Under the common counts, if services rendered and goods furnished have been proved sufficient to raise an implied assumpsit, a special agreement may be given in evidence to fix the price stipulated; but such price must be in money, and such evidence cannot be admitted under the common counts where the contract was for payment in any thing else, as by a bond or note of a third party.

23. A special contract to give a certain sum or a specific article for uncertain services, which may greatly exceed or fall short of the value of the consideration, cannot be given in evidence under a *quantum meruit* count, which claims to recover according to the value.

24. Where a contract has been declared void by a decree in chancery, between the same parties, it cannot be given in evidence in a suit at law. *Weart* v. *Hoagland's administrator*, 517

25. The permission of leading questions to a witness in direct examination, is in the discretion of the court, and no ground for reversal: if improperly permitted, the remedy is a new trial. When a witness is examined by commission, the proper time to object to a question, as too leading, is on the settlement of the interrogatories, and not at the trial.

26. It is error to prove what a deceased witness testified to upon a former trial between the same parties, without proving the fact of such trial by the record; but the error is cured if such record proof be produced before the close of the evidence.

27. The fact of payment may be proved by parol, although there is written evidence, as a receipt, by which it might be proved. But when the fact of payment is attempted to be proved by the giving of a bill or order, the contents of such bill or order, or of the receipt of the party receiving the same, cannot be given in evidence without first satisfactorily accounting for the absence of the paper itself. *Chambers* v. *Hunt*, 552

28. The issuing and return of writs, as part of the proceedings of the court, are properly entered in the book of minutes of the court. *Held*, in an action of escape against a sheriff, that the *ca. sa.* having been lost, an abstract (being a copy of the endorsement on the writ), with a copy of the return, recorded in a supplemental book of minutes, called a "sealing docket," was sufficient secondary evidence of the writ.

29. Such book is an official register, which, its authenticity and character being first shown, may be read in evidence without the oath of the officer by whom the entries were made.

30. *Semble*, that other entries, not entitled to the character of an official register, can only be read in evidence when aided by collateral proof. If alive and not insane, the person by whom made must be produced to sustain them by his oath.

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31. The writ of *ca. sa.*, when proved, was accompanied by a return of *non est inventus* by the sheriff against whom the action was brought. *Held*, that such return did not conclude the plaintiff, who might still, on proof of the arrest and escape, recover in this form of action, notwithstanding the return.

32. How far a sheriff's return is conclusive considered: The defendant, in order to show that the judgment had been satisfied prior to the issuing of the *ca. sa.*, produced a *fi. fa.* issued on the same judgment, with a return endorsed by a former sheriff, to whom such *fi. fa.* had been directed and delivered, that "By virtue of the within writ, &c., I have levied and sold of the personal property of the defendant to the amount of $1400.60:" and also, that he had levied on certain specified land of the defendant, "subject to prior encumbrances, value $1, which remain," &c. *Held*, that the said former sheriff might be called to testify that money in his hands, as well as the real estate mentioned in the return, was subject to prior encumbrances and absorbed by prior executions, and that no money was in fact made upon, and applicable to the said *fi. fa.*, no record proof being made of such prior liens, by which it was said the said money was absorbed. *Browning* v. *Flanagin*, 567

33. On error, the court will not inquire as to the weight of the evidence.

34. A sheriff's deed is admissible in evidence without proof of the sheriff's authority to make the deed when the object is merely to show some collateral fact.

35. The grantor of a deed, in an action for the purchase money, is not estopped by the usual acknowledgment in the deed, that the money has been paid. Where the intention in regard to the estate is not disputed, nor the operation of the conveyance, as such, sought to be changed, this clause is regarded as formal merely, and open for explanation by parol.

36. Upon a sale of land by deed, which acknowledged the receipt of the purchase money, and which also contained full covenants of title and against encumbrances, the deed was given upon an agreement by the grantee that he would discharge a mortgage of $1000 upon the premises, and indemnify the grantor therefrom, the grantee retaining so much of the consideration money for that purpose. The grantor, having been compelled to pay the debt, *held* that, in an action against the grantee upon his undertaking, the plaintiff was not estopped by his deed from proving the encumbrance, and the agreement to discharge it. The agreement was considered to be collateral to the deed. *Bolles* v. *Beach*, 680

EXCEPTIONS.

1. Error cannot be assigned on the admission of evidence to

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which the plaintiff in error objected, wishing the court to note the objection, if no bill of exception is sealed.

2. It is not proper to except to the charge of the court to the jury generally, without specifying the points excepted to; and the court below can refuse to allow such general exception. But if the court below allow and seal such general exception, error may be assigned on any part of the charge.

3. After the case is read and the argument commenced it is too late for the defendant in error to call for the bill of exceptions. And the court will hear and determine reasons of reversal assigned upon the printed bill of exceptions, although there should in fact be no bill of exceptions. *Ward* v. *Ward*, 699

EXECUTORS AND ADMINISTRATORS.

1. In an action against an administrator upon a judgment of assets *quando*, it is sufficient to allege in the declaration that assets came to the administrator's hands since the judgment. It is not necessary further to show that the plaintiff is entitled to have them applied to his debt. It seems that is matter of defence to be pleaded.

2. *Plene administravit* is a good plea in New Jersey, and *(semble)* a decree of insolvency and distribution under it may be given in evidence to sustain this plea.

3. To an action or a *scire facias* on a *general* judgment against an administrator, *plene administravit* cannot be pleaded, but it may to a judgment *quando*.

4. An *administrator* defendant may plead that he has fully administered, except a certain sum, which he is ready to pay over; and the plaintiff may take judgment for that sum, or may traverse the plea by alleging that the defendant has more assets; and on an issue on such traverse the question would be, whether there was any greater sum which the plaintiff was by law entitled to have paid on his debt. *Southard* v. *Potts*, 278

FEES AND COSTS.

1. A sheriff, on sale of lands, cannot charge to the defendant the fee for acknowledging the sheriff's deed or the printer's bill for advertising: all the law allows for advertising in the newspaper is one dollar and fifty cents. *Anonymous*, 211

2. Costs cannot be awarded on a successful motion to set aside a return of surveyors laying out a road; there is no statute or settled practice to authorize it. *Matter of highway*, 293

FIERI FACIAS.

1. Shares of stock in a bank, or other incorporated company, are not bound by the delivery of a *fi. fa.* against their owner to the sheriff, but may be transferred before an actual levy.

2. It is not a sufficient levy on stock to make an inventory of it, and return it with the *fi. fa.*, but to bind it, the sheriff must go

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to some proper officer of the company (and it would seem to the defendant also) and give notice of the levy; nor would the delivery of a *fi. fa.* or making a levy by inventory bind *bank notes.* Of such property the officer must take actual or constructive possession. *Princeton Bank* v. *Crozer & Moore,* 383

3. The defendant, in order to show that the judgment had been satisfied prior to the issuing of the *ca. sa.*, produced a *fi. fa.*, issued on the same judgment, with a return endorsed by a former sheriff, to whom such *fi. fa.* had been directed and delivered, that "By virtue of the within writ, &c., I have levied and sold of the personal property of the defendant to the amount of $1400.60; and also, that he had levied on certain specified land of the defendant, subject to prior encumbrances, value $1, which remains," &c. *Held,* that the said former sheriff might be called to testify that money in his hands, as well as the real estate mentioned in the return, was subject to prior encumbrances and absorbed by prior executions, and that no money was in fact made upon, and applicable to the said *fi. fa.*, no record proof being made of such prior liens, by which it was said the said money was absorbed. *Browning* v. *Flanagin,* 567

FRANCHISE.

A *grant* of a franchise by the state for a term of years is not a lease. *Bridge Proprietors* v. *State,* 593

FRAUD.

1. A receipt is never conclusive, but can always be explained by parol, and fraud or mistake shown and corrected.
2. A jury may infer fraud from the circumstances attending a transaction, without any direct or positive proof; and when a jury infer fraud against the weight of evidence, or from insufficient evidence, the remedy is by motion for a new trial, and not by writ of error. *Cole* v. *Taylor,* 59

See IMPRISONMENT FOR DEBT, 1, &c.

FRAUDS, STATUTE OF.

When a joint contract is proved by two parties, to sell and deliver corn owned by them in severalty, and one of them delivers part of his parcel, this is a sufficient part delivery to comply with the statute of frauds. *Field et al.* v. *Runk,* 525

HABEAS CORPUS. See PARENT AND CHILD.

IMPRISONMENT FOR DEBT.

1. The officer who makes the order to hold a debtor to bail on the ground of fraud, is the exclusive judge of the weight of the evidence, and this court will not review or set aside his order upon the weight of evidence; but when there was no evidence before him of any legal fraud they will review it.

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2. Fraudulent conduct in a debtor, in inducing his creditors to accept a worthless security from him for a former debt, is such fraud in contracting this last debt as will authorize an order that he be held to bail. *Van Wagenen* v. *Coe*, 531

INDICTMENT.

1. It is correct, in the caption of an indictment, to style the Court of Oyer and Terminer "The Court of Oyer and Terminer and General Jail Delivery in and for the county of M.," without saying "of the state of New Jersey."

2. It is not necessary, in the caption of an indictment, to state that the grand jury were summoned, or by what authority they were summoned.

3. It is not error to join issue by adding the *similiter* in the name of *the state*, instead of in the name of the attorney general; and *semble*, any error in adding the *similiter*, or by not adding it at all, is amendable.

4. It is error in an indictment to express numbers or dates by Arabic figures or Roman numerals; they must be written in *words at length*, except when the indictment, as in forgery, professes to set forth the exact tenor or a *fac-simile* of any instrument. *Berrian* v. *State*, 9

5. It is not necessary in the record of a criminal conviction to state *where* the trial was had. In New Jersey the court can be held at but one place, that designated by statute, and it will be intended that the trial was had there.

6. It is not necessary to aver in the record that the trial jury were "good and lawful men."

7. It is not necessary, except in capital cases, that the court, in pronouncing sentence, should first demand of the prisoner "if he has aught to say why sentence should not be passed upon him."

8. When the sentence inflicts any corporal punishment it is necessary that the prisoner should be present in person; but it is not necessary that this should be averred in express terms in the record; it is sufficient if it can be collected therefrom by fair intendment.

9. A verdict without judgment in civil cases cannot be given in evidence; but in criminal cases it is otherwise, and on a plea of *autre fois acquit* a verdict of acquittal may be given in evidence without judgment thereon: it is therefore no error in a record of conviction that no formal entry of a judgment of acquittal is entered upon the counts on which the defendant was acquitted.

10. Technical errors in the mere making up the record, even in criminal cases, are not to be received with favor; and the better practice is to remit the record for amendment of such defects, even after errors assigned.

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11. In an indictment for forgery, with intent to defraud, it is sufficient to allege the intent to be "to defraud A.," without showing how, or alleging the interest of A. in the subject.

12. If an indictment contain some good and some bad counts, a general conviction under it will be sustained. *West* v. *State*, 212

13. It is not a defect in an indictment, that it purports to be made upon the "oaths," instead of the "oath" of the grand inquest.

14. When, by statute, the duty of building and keeping in repair a public bridge is imposed upon any person or corporation, such person or corporation is liable to indictment at the common law for neglecting such duty, and the allegation *contra formam statuti* will be applied to the statute, as creating the duty, and not as imposing the penalty. *State* v. *Morris Canal and Banking Co.*, 537

15. In general, figures may not be used in an indictment. *State* v. *Berrian*, 679

INSOLVENT ESTATE.

After the Orphans' Court have, upon application of executors or administrators, regularly declared an estate to be insolvent, no action can be brought and maintained against the executor or administrator, except upon a claim presented and disputed, for the purpose of adjusting it; and the decree of insolvency may be pleaded in bar. *Reeves* v. *Townsend*, 396

INTEREST.

1. The rate of interest on money due before 1824, though not due by contract, is seven per cent.

2. Interest cannot be recovered on a debt under a count for money borrowed, but must be assessed as damages for the detention. *North River Meadow Co.* v. *Shrewsbury Church*, 424

JOINT CONTRACT. See CONTRACT, 7, 8.

JUDGMENT.

A decision upon a *certiorari* as to the validity of an assessment, is conclusive in a suit to recover the assessment where the parties to the suit are substantially the same as to the *certiorari*, though in name different. *North River Meadow Co.* v. *Shrewsbury Church*, 424

See CONTRACT, 6.

JURISDICTION.

1. To justify under the proceedings of any special tribunal, its jurisdiction must first be shown, it cannot be presumed. *Perrine* v. *Farr*, 356

2. In pleading the proceedings of a court of limited jurisdiction, it is necessary only to allege such facts as are necessary to

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show the jurisdiction and the final decree. If the jurisdiction appears, the proceedings will be presumed to be regular. *Reeves* v. *Townsend*, 396

3. When general powers over a whole subject matter are conferred by statute on courts of general jurisdiction, although their jurisdiction over the subject matter must appear on the face of their proceedings, every intendment will be made in favor of the correctness of their proceedings. *State* v. *Lewis*, 564

JURORS.

1. If jurors, pending a trial, go with the witnesses of one of the parties to the place in dispute, without the knowledge of the other party, for the purpose of having the premises shown, or the evidence explained by these witnesses *ex parte*, it is such misconduct in the jurors as will set aside the verdict.
2. The affidavits of jurors, or evidence of their admissions, are not competent testimony to prove their own misconduct; but it may be proved by the oath of a fellow juror, who is not inculpated in such misconduct. *Deacon* v. *Shreve*, 176

JUSTICES' COURT.

1. Since the act of 1846, (*Rev. Stat.* 229) constituting courts for the trial of small causes, the Court of Common Pleas, in cases of appeal from these courts, cannot grant a new trial.
2. The fifty-second section of that act is a *restraining*, not a *repealing* clause, and is not affected by the second section of the general repealing act, which provides that the *repeal* of any statutes should not affect any action then pending: it took away the power of granting new trials in causes then pending.
3. A *mandamus* is the proper remedy to compel an inferior court to give judgment on a verdict when it cannot grant a new trial; or, in general, to compel the performance of any act which the inferior court has no discretion to refuse. *Cortleyou* v. *Ten Eyck*, 45

LANDLORD AND TENANT.

The general rule of law is, that a tenant cannot dispute the title of his landlord or of the person under whom he entered. The cases where the landlord's title has expired, or has been changed by act of law, as by a sheriff's sale, are exceptions to this rule. But the case of an adverse latent title arising from a defect in the conveyance to the landlord, which is set up only by the tenant as an outstanding title, without any right under it or attornment to the owner, is not within the exceptions. *Den* d. *Howell* v. *Ashmore*, 261

LEVY. See FIERI FACIAS, 1, 2.

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LIEN LAW.

A supplement to the Camden lien law extended the law over the whole city, and repealed the section which exonerated from the operation of the lien buildings built by contract, on filing the written contract in the county clerk's office: a second supplement repealed the repealing section of the first supplement; by this the exonerating section is revived, and extended, with the act, over the whole city. *Flanagin et al.* v. *Feuring*, 387

LIMITATIONS, STATUTE OF.

1. The statute of limitations is no bar to recovering damages done within six years, by a nuisance erected before the six years, in cases where the nuisance has not been so long continued as to raise presumption of a grant. *Delaware and Raritan Canal Co.* v. *Lee*, 243
2. Assumpsit by husband and wife against the executors of the wife's father, to recover compensation for services performed by the daughter, the promises being laid to have been made by the father to her while yet sole. The defendants having pleaded the statute of limitations, *held*, that a promise by the father in his lifetime, but after the marriage of the daughter, did not support the issue. The subsequent promise to take the case out of the statute must be conformable to, and maintain the promise, as laid in the declaration. *Ridgway et ux.* v. *English*, 409

LIMITATION OVER. See Devise, 1, 2.

MANDAMUS. See Practice, 9, 22.

MORRIS CANAL. See Bridge.

MORTGAGE.

The assignee of the mortgagee purchased the equity of redemption of the executors of the husband, who sold the land under the authority of a private act, which directed the proceeds of the sale to be first applied to the discharge of the mortgage. The conditions of sale were, that the executors would give a title to the land free of encumbrance, but the holder of the mortgage, who purchased at the auction sale, paid only the balance over the amount due on the mortgage, from which he released the executors, and insisted on retaining the mortgage as a muniment of his title. *Held*, that the mortgage was not satisfied or extinguished; that he held by virtue of the mortgage, and that the widow was not entitled to dower. *Thompson* v. *Boyd*, 543

NEGLIGENCE.

1. An engineer in charge of a locomotive engine, held not to be liable for an accidental injury to a cow, which, suffered to go at large, had strayed on the railroad.

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2. The owner of cattle is bound to keep them in his own close at his peril; and nothing but wilfulness on the part of the engineer would make him liable for the loss of a cow so exposed by the fault of the owner. *Vandegrift* v. *Rediker*, 185

NEW TRIAL. See PRACTICE, 7, 8, 9, 33.

NONSUIT.

A judgment will not be reversed because the court improperly refused to nonsuit, if the evidence subsequently adduced in the course of the trial is sufficient to sustain the plaintiff's case. *Mershon* v. *Hobensack*, 372

NUISANCE.

1. An actionable nuisance may be caused by an act perfectly lawful in itself when the nuisance complained of is only a consequence of that act, as if a canal constructed by authority of law across land of A., by his consent, throw backwater on land of B., it is an actionable nuisance.
2. If one part of a farm or tract of land be taken by a canal company for a canal, and the value thereof, and the damage done to the farm by taking it, be assessed by commissioners, or if the owner convey to the company such part for the purpose of their canal, the owner of the farm is not thereby barred from recovering the damages done to his farm in consequence of the construction of the canal on another part of the route distinct from his farm.
3. A conveyance of land by the owner to a company for a canal, or the assessment of the value and damages by commissioners, only bars the recovery of such damages as naturally and necessarily arise from the construction of a canal there; but not such damages as arise from an unskilful or improper construction, as the stoppage of a watercourse that might by a proper culvert have been left open.
4. The statute of limitations is no bar to recovering damages done within six years, by a nuisance erected before the six years, in cases where the nuisance has not been so long continued as to raise presumption of a grant. *Delaware and Raritan Canal Co.* v. *Lee*, 243

ORDINARY.

1. In a suit on a bond given to the ordinary by a guardian or administrator, it is not error to insert the name of the person who is ordinary as plaintiff, before the words "The ordinary," &c.: the name is mere surplusage if correctly given, but it may in some cases embarrass the suit.
2. The most correct and safe mode, however, is to bring the suit in such case in the name of office alone, *i. e.* "The ordinary of the state of New Jersey." *Halsted (Ordinary)* v. *Fowler*, 48

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ORPHANS' COURT.

After the Orphans' Court have, upon application of executors or administrators, regularly declared an estate to be insolvent, no action can be brought and maintained against the executor or administrator, except upon a claim presented and disputed, for the purpose of adjusting it; and the decree of insolvency may be pleaded in bar. *Reeves* v. *Townsend*, 396

PARENT AND CHILD.

1. The father of a legitimate child is entitled to its custody and possession, in preference to the mother, when the father and mother are living separate.
2. When children of sufficient age to have a discretion to choose are brought up on *habeas corpus* to be removed from the custody of one parent to that of the other, the court or judge will ordinarily make no order for their delivery, but will see that the children are allowed to go with such parent as they may choose.
3. When a child of tender years, having no discretion to choose, is in the custody of the father, it will not be taken from his custody, and given to the mother, *(semble)* however gross the father's conduct or character might be.
4. When a child of *very tender* years is in the custody of the mother, it is in the discretion of the court or judge to deliver it to the father, or permit the mother to retain it, as from their character and circumstances may seem most for the advantage of the child.
5. In a case where no other facts appeared, than that the father and mother were living separate, with mutual recriminations, on a *habeas corpus* prosecuted by the father to remove their infant children from the custody of the mother, who was living with her father, the court ordered that the eldest boy, of five years old, be delivered to the father, and that the others, a girl of one year and boy of three and a half years old, remain with the mother. *State* v. *Stigall*, 286
6. When a daughter, after arriving of age, continues to reside in her father's family, supported by him, and performing useful services in return, the law will not, except under special circumstances, imply a promise on the part of the father to pay for such services. If she demand pay, it is incumbent on her to show affirmatively that compensation was to be made, and that it was so expected by both parties, or that the services were performed under such circumstances as that the expectation was reasonable and proper. *Ridgway* v. *English*, 409

PARTNERS.

Persons giving out themselves as partners, will be held liable as such, although they really are not. *Mershon* v. *Hobensack*, 373

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PAUPER.

1. A justice's order for relief is absolutely necessary to make the township liable on the contracts of an overseer of the poor for the support of a pauper, or to make the board of freeholders or trustees of the poor house liable where there is a county poor house. An order of removal is not sufficient without the order for relief.
2. Where an overseer of the poor, or any other agent, makes contracts without sufficient authority legally to bind the township or his principal, he is personally responsible, although the contract may be in the name of the principal, and credit given to the principal. *Bay* v. *Cook*, 343

PAYMENT. See Receipt.

PERFORMANCE.

In an action on a covenant to deliver a number of trees at a certain time and place, if plaintiff proves that he offered the trees at such time and place, and left them there, it is no defence, that no one was there, on the part of the defendant, to examine, count, and receive the trees. A party cannot evade a contract by absenting himself from the time and place of performance. *Barton* v. *McKelway*, 165

See Contract, 4.

PLEADING.

1. In a suit on a bond given to the ordinary by a guardian or administrator, it is not error to insert the name of the person who is ordinary as plaintiff, before the words "The ordinary," &c.: the name is mere surplusage, if correctly given, but it may in some cases embarrass the suit.
2. The most correct and safe mode, however, is to bring the suit in such case in the name of office alone, *i. e.* "The ordinary of the state of New Jersey." *Ordinary* v. *Fowler*, 48
3. Any pleading which takes issue upon an immaterial allegation will be overruled or stricken out as frivolous. A matter does not become material and issuable by the mere fact of its being averred in pleading. *Howe* v. *Lawrence*, 99
4. In an action for slander an innuendo cannot be used to enlarge or extend the meaning of the words spoken; it can only explain them, by connecting them with the inducement or *colloquium* previously averred.
5. The slander must appear substantially by the *colloquium* or inducement and the words alleged, and, unless it can be collected from them, it cannot be created by an allegation in the innuendo; it must appear by the natural meaning of the words in the conversation and circumstances in which their use is alleged. *Joralemon* v. *Pomeroy*, 271
6. In an action against an administrator upon a judgment of as-

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sets *quando* it is sufficient to allege in the declaration that assets came to the administrator's hands since the judgment. It is not necessary further to show that the plaintiff is entitled to have them applied to his debt. It seems that is matter of defence to be pleaded.

7. *Plene administravit* is a good plea in New Jersey, and *(semble)* a decree of insolvency and distribution under it may be given in evidence to sustain this plea.

8. To an action or a *scire facias* on a *general* judgment against an administrator, *plene administravit* cannot be pleaded, but it may to a judgment *quando.*

9. An *administrator* defendant may plead that he has fully administered, except a certain sum, which he is ready to pay over; and the plaintiff may take judgment for that sum, or may traverse the plea by alleging that the defendant has more assets; and on an issue on such traverse the question would be, whether there was any greater sum which the plaintiff was by law entitled to have paid on his debt. *Southard* v. *Potts*, 278

10. If a creditor in attachment, to whom the bond is assigned, in declaring thereon, allege that he applied to the court, and obtained judgment against A., in such proceeding it is a sufficient averment, that he applied in the suit against A. alone.

11. It is not necessary that it should be averred in such suit, that the plaintiff applied to the court before the attachment was dissolved; the defendant is precluded from disputing that, by accepting a declaration in the attachment suit.

12. A breach is sufficiently set forth, if laid in the words of the condition. *Hanness* v. *Smith*, 332

13. Those allegations, only, in pleadings that are wholly foreign or irrelevant to the issue, and which need not to have been made at all, can be treated as surplusage.

14. To justify under the proceedings of any special tribunal, its jurisdiction must be first shown; it cannot be presumed. *Perrine* v. *Farr*, 356

15. The non-joinder of defendants can be taken advantage of only by plea in abatement. *Mershon* v. *Hobensack*, 373

16. It is not necessary to make profert of an assignment of a bond, even though under seal, because the seal is not necessary to the validity of the assignment.

17. The breach in a declaration on an assigned bond is bad, if it does not allege nonpayment to the obligee as well as to the plaintiff. *Gregory* v. *Freeman*, 405

18. In debt on bail bond it is not necessary that the declaration should aver that the writ on which the defendant was arrested was issued on an affidavit of debt, and endorsed with the sum sworn to.

19. The affidavit is part of the process to bring the defendant into court, any irregularity in regard to which must be taken

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advantage of in the first instance: it is, therefore, not a good plea in an action on the bail bond, that no affidavit of the cause of action had been made and filed before issuing the *capias* in the original suit.

20. The assignee of the sheriff may bring suit on the bail bond in his own name: it is not necessary that he should be styled assignee in the writ.

21. Judgment in this action must be entered for the penalty of the bond, but the court gave time to permit such clerical error in making up the record to be amended. *Hunt* v. *Allen*, 533

22. In replevin, when defendant pleads property in himself, and traverses the allegation of property in the plaintiff, and plaintiff replies by denying property in defendant, and reaffirming it in himself, the burthen of proof lies on the plaintiff, who must show property in himself; and if plaintiff and defendant appear to be joint owners the defendant is entitled to a verdict.

23. In such case the only issue is property in plaintiff, or not; the allegation of property in defendant is only inducement, and not traversable, but *it would seem* that, to entitle defendant to a judgment of return, the allegation of property in himself must be found for him. *Chambers* v. *Hunt*, 552

24. A former verdict, with judgment thereon between the same parties upon a point in issue in the former suit, will conclude and estop in a suit between the same parties, although not pleaded in the latter suit, if the party offering it as an estoppel has had no opportunity to plead it. *Ward* v. *Ward*, 699

25. *Tout temps prist* is not a good plea in dower in bar of damages for the detention of dower in lands of which the husband died seized. *Hopper* v. *Hopper*, 715

PLENE ADMINISTRAVIT. See PLEADING, 7, 8, 9.

PRACTICE.

1. It is correct, in the caption of an indictment, to style the Court of Oyer and Terminer "The Court of Oyer and Terminer and General Jail Delivery in and for the county of M.," without saying "of the state of New Jersey."

2. It is not necessary, in the caption of an indictment, to state that the grand jury were summoned, or by what authority they were summoned.

3. It is not error to join issue by adding the *similiter* in the name of *the state*, instead of in the name of the attorney general: and *semble*, any error in adding the *similiter*, or by not adding it at all, is amendable.

4. The justice of the Supreme Court and judges of the Common Pleas, who hold the Oyer and Terminer, are properly styled "*the judges* of the Court of Oyer and Terminer and General Jail Delivery."

5. When it appears by the record that a trial was held in a cer-

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tain term, but on a day subsequent to the first day of the term, it is not error that the record does not show how the cause was *continued* from the first day of term to the day of the trial.

6. It is error in an indictment to express numbers or dates by Arabic figures or Roman numerals; they must be written in *words at length*, except when the indictment, as in forgery, professes to set forth the exact tenor or a *fac simile* of any instrument. *Berrian* v. *State*, 9

7. Since the act of 1846, (*Rev. Stat.* 229) constituting courts for the trial of small causes, the Court of Common Pleas, in cases of appeal from these courts, cannot grant a new trial.

8. The fifty-second section of that act is a *restraining*, not a *repealing* clause, and is not affected by the second section of the general repealing act, which provides that the *repeal* of any statutes should not affect any action then pending: it took away the power of granting new trials in causes then pending.

9. A *mandamus* is the proper remedy to compel an inferior court to give judgment on a verdict when it cannot grant a new trial; or, in general, to compel the performance of any act which the inferior court has no discretion to refuse. *Cortleyou* v. *Ten Eyck*, 45

10. It is not assignable for error, that the court omitted or neglected to charge on a particular point of law in question in the cause, if no charge was requested on that point. *Cole* v. *Taylor*, 59

11. After a decision upon a demurrer filed in good faith, the settled practice now is to permit the party against whom judgment is given to amend his pleading or to plead anew, so as to submit his substantial defence.

12. An agreement between attorneys, that after judgment on demurrer the defendant "should have leave to amend his plea, such leave not to embrace the right to put in a new plea," does not preclude the defendant from applying to the court for leave to put in a new plea: its fair construction is only a limitation on the leave granted by *the agreement*. But leave of the court must be obtained to put in a new plea.

13. The court, in a proper case, will grant leave to plead the general issue after the overruling a special plea on demurrer, in a case where the general issue had been pleaded and withdrawn by consent.

14. The judgment on demurrer is final and concludes the right of action, unless it is set aside and leave given to withdraw the plea or demurrer and to plead anew. If for plaintiff it is *quod recuperat*, for defendant *quod eat sine die*.

15. When judgment on demurrer is reviewed in a court of error, the judgment given should be the same as they decide ought to have been given by the court below, that is, a judgment in

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the cause for the plaintiff or defendant; but the court of error, after reversing a judgment, may, instead of ordering such judgment as ought to be given, grant leave to amend.

16. If a court of error, after reversing a judgment on demurrer, order judgment to be entered for either party, and remit the record of that judgment to the court below, it is not in the power of the court below to open that judgment, and give leave to amend the pleadings or to plead anew; the judgment is conclusive in the cause.

17. If a court of error, in reversing a judgment given on demurrer, merely reverse the judgment below, and remit the record without giving any judgment for the plaintiff in error, the court below may give judgment, or may allow the parties to amend or withdraw their pleadings.

18. If in such case the remittitur is filed in the Supreme Court on the last day of their term, concurrent with that of the Court of Errors in which the judgment is given, without the knowledge of the attorney of the defendant in error, he will not be in *laches* in not applying at that term for leave to amend. *Hale* v. *Lawrence*, 72

19. If a judgment on demurrer be removed by writ of error and affirmed, and the record after judgment of affirmance remitted, the court below are bound by the judgment, which concludes the rights of the parties, and cannot grant leave to amend or withdraw the pleadings, even by the consent of the opposite party.

20. Agreements made by attorneys and counsel, as to the manner of conducting a cause, will be respected and enforced by the court; but such agreements are not legal contracts, and are under the discretion and control of the court; and an agreement wanting in mutuality, and by which, without the consent of his client, an attorney has waived his client's substantial legal right, will not be enforced.

21. Any pleading which takes issue upon an immaterial allegation, will be overruled or stricken out as frivolous. A matter does not become material and issuable by the mere fact of its being averred in pleading. *Howe* v. *Lawrence*, 99

22. A *mandamus* will not issue to a court below to direct their proceedings in a matter of sound discretion within their jurisdiction. *Ferris* v. *Munn*, 161

23. If jurors, pending a trial, go with the witnesses of one of the parties to the place in dispute, without the knowledge of the other party, for the purpose of having the premises shown, or the evidence explained by these witnesses *ex parte*, it is such misconduct in the jurors as will set aside the verdict.

24. The affidavits of jurors, or evidence of their admissions, are not competent testimony to prove their own misconduct; but it may be proved by the oath of a fellow juror, who is not inculpated in such misconduct. *Deacon* v. *Shreve*, 176

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25. If after judgment against him, a defendant is discharged from his debts under the bankrupt law, it is irregular to issue execution on such judgments without an order for that purpose on notice; the debt is *prima facie* satisfied by the discharge. *Francis* v. *Ogden and McComb*, 210

26. A verdict taken erroneously in point of *form*, will be corrected by amending the *postea*. *N. River Meadow Co.* v. *Shrewsbury Church*, 424

27. In an action on a bail bond, judgment must be entered for the penalty of the bond, but the court gave time to permit such clerical error in making up the record to be amended. *Hunt* v. *Allen*, 533

28. On an application for leave to issue execution against a certificated bankrupt, on a judgment obtained before his discharge, on allegation of fraudulent preference of creditors, the court can and will, in a proper case, order an issue to try the facts. *Ogden et al.* v. *Harris*, 540

29. Error cannot be assigned on the admission of evidence to which the plaintiff in error objected, wishing the court to note the objection, if no bill of exception is sealed.

30. It is not proper to except to the charge of the court to the jury generally, without specifying the points excepted to; and the court below can refuse to allow such general exception. But if the court below allow and seal such general exception, error may be assigned on any part of the charge.

31. After the case is read and the argument commenced, it is too late for the defendant in error to call for the bill of exceptions. And the court will hear and determine reasons of reversal assigned upon the printed bill of exceptions, although there should in fact be no bill of exceptions.

32. Where, in one suit, there are several distinct causes of action, it is proper to direct the jury to find the issues separately and to assess the damages for each matter separately. *Ward* v. *Ward*, 699

33. It is no ground for a new trial, that one, of two counsel of the plaintiff engaged in the trial, was called away during the trial, if the other counsel proceeded and tried the cause in his absence, without requesting an adjournment. *Starr* v. *Torrey*, 190

See INDICTMENT.

PRINCIPAL AND AGENT.

Where an overseer of the poor, or any other agent, makes contracts without sufficient authority legally to bind the township or his principal, he is personally responsible, although the contract may be in the name of the principal, and credit given to the principal. *Bay* v. *Cook*, 343

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PROMISSORY NOTE.

1. It is a good defence to a promissory note in the hands of the payee or endorsee, with notice of the fact, that it was given for a consideration which has totally failed.
2. It is no ground for a new trial, that one of two counsel of the plaintiff engaged in the trial, was called away during the trial, if the other counsel proceeded and tried the cause in his absence, without requesting an adjournment.
3. What circumstances are sufficient evidence to warrant a jury in finding that the endorsee of a promissory note had notice of the failure of consideration. *Starr* v. *Torrey*, 190

RAILROAD.

1. An engineer in charge of a locomotive engine held not to be liable for an accidental injury to a cow, which, suffered to go at large, had strayed on the railroad.
2. The owner of cattle is bound to keep them in his own close at his peril; and nothing but wilfulness on the part of the engineer would make him liable for the loss of a cow so exposed by the fault of the owner. *Vandegrift* v. *Rediker*, 185
3. In assessing damages for crossing land by a railroad, the jury must take into consideration the deterioration in value of the adjacent parts of the same tract by the proximity of the railroad, either for agricultural purposes or for sale as building lots, the increased risk of an increased care required for family and stock, the risk of fire, the inconvenience caused by embankments and excavations, and the obstruction to the free use of the buildings. OGDEN, J., dissenting, as to risk to family and stock and by fire.
4. The present value of lands taken must be awarded, and damages to adjoining lots must be assessed on the basis of their present value: but, to ascertain the present value of lands, it is right to regard their location, and to judge by the probable uses to which they will be put, and for which they can be sold, in the same manner as their value would be fixed by a prudent seller or purchaser.
5. A jury, in assessing the value of lands, are not to be governed by the prices which they would bring at a forced cash sale, but by such price as they believe the lands would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale. *Somerville and Easton Railroad Company* ads. *Doughty*, 495

See CAMDEN AND AMBOY RAILROAD COMPANY.

RECEIPT.

1. A receipt is never conclusive, but can always be explained by parol, and fraud or mistake shown and corrected. *Cole* v. *Taylor*, 59
2. The fact of payment may be proved by parol, although there

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is written evidence, as a receipt, by which it might be proved. But when the fact of payment is attempted to be proved by the giving of a bill or order, the contents of such bill or order, or of the receipt of the party receiving the same, cannot be given in evidence without first satisfactorily accounting for the absence of the paper itself. *Chambers* v. *Hunt*, 552

RECORD.

1. The issuing and return of writs, as part of the proceedings of the court, are properly entered in the book of minutes of the court. *Held*, in action of escape against a sheriff, that the *ca. sa.* having been lost, an abstract (being a copy of the endorsement on the writ), with a copy of the return, recorded in a snpplemental book of minutes, called a "sealing docket," was sufficient secondary evidence of the writ.
2. Such book is an official register, which, its authenticity and character being first shown, may be read in evidence without the oath of the officer by whom the entries were made.
3. *Semble*, that other entries, not entitled to the character of an official register, can only be read in evidence when aided by collateral proof. If alive and not insane, the person by whom made must be produced to sustain them by his oath. *Browning* v. *Flanagin*, 567

REMAINDER.

When lands are devised to any person for life, and at his death to go to his heirs, the children of the tenant for life take immediately a *vested* remainder in fee, by virtue of the first section of the act further regulating the descent of real estates. *Rev. Laws* 774; *Demarest* v. *Den* d. *Hopper*, 599

REPLEVIN.

1. In replevin, when defendant pleads property in himself, and traverses the allegation of property in the plaintiff, and plaintiff replies by denying property in defendant, and reaffirming it in himself, the burthen of proof lies on the plaintiff, who must show property in himself; and if plaintiff and defendant appear to be joint owners, the defendant is entitled to a verdict.
2. In such case the only issue is property in plaintiff, or not; the allegation of property in defendant is only inducement, and not traversable; but *it would seem* that, to entitle defendant to a judgment of return, the allegation of property in himself must be found for him. *Chambers* v. *Hunt*, 552

RIPARIAN OWNER.

1. At common law, the right of the owner of lands along the shore of the sea, or of navigable waters in which the tide ebbs and flows, extends only *to* the shore or ordinary high water mark; the shore, which is the land between ordinary high

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water mark and ordinary low water mark, and the lands under water, belong to the state, and are part of the sovereignty.

2. But in New Jersey the owner of lands along the shore of tide waters may extend his improvements by wharves or filling up, *over* the shore in front of his lands to low water mark, unless prevented by the state, provided he do it so as not to interfere injuriously with navigation; and when he has so improved or reclaimed the shore, his title will extend to *actual* high water mark; and the state cannot grant the shore so recovered, nor appropriate it to public use without adequate compensation.

3. Whether the owner of lands on tide water has such *right* to the use of the water, that the state cannot authorize any imimprovements in front of his lands, which will destroy or abridge that right without compensation, *quere?* *Gough* v. *Bell*, 441

ROADS.

1. Where a deed bounds a property conveyed on a public highway, on a question of boundary the return of the surveyors laying out such highway is competent evidence without showing their appointment, or if the proceedings of their appointment are void; the only question is, where is the highway? not whether it is legally laid out? *Den* v. *Van Houten*, 61

2. The map annexed to the return of surveyors of the highways laying out a road may be made and annexed by the practical surveyor by their direction. It is not necessary that they should sign it, or that they should see it. *State* v. *English*, 291 and 713

3. If a turnpike company, whose charter has expired by its own limitation, sell their road and bridges to an individual, all the franchises connected therewith are destroyed, and the property is held as private property, unprotected by any contract or franchise in the charter.

4. If a road already formed and bridges already built be owned by an individual as private property, a public highway cannot be laid over them by surveyors, so as to take the improvements for the use of the public. The word *land*, in the road acts of New Jersey and in the exception in the constitution, means land in its popular sense, without the improvements upon it.

5. Costs cannot be awarded on a successful motion to set aside a return of surveyors in laying out a road; there is no statute or settled practice to authorize it. *In matter of highway*, 293

6. A private road, laid out under the statute of this state, is not a private way, or right of way, which is a species of real property known to the common law, but is open to the use of all the public.

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7. To justify under the proceedings of any special tribunal, its *jurisdiction* must be first shown; it cannot be presumed.

8. The authority of three chosen freeholders, as to opening by-roads, depends upon the fact, that there had existed before a by-road, used as such by the inhabitants: they have no power to determine that *there is* a by-road, but only to order it to be opened; and their authority can only be exercised where the obstruction is recent.

9. A private road, although open to the use of the public, is not a *public highway*, and therefore, not being within the exception in art. 1, § 13, of the constitution, private roads cannot now be laid out without providing compensation to the land owner. *Per* GREEN, *C. J.* *Perrine* v. *Farr*, 356

10. Although the words of the road act direct surveyors to be appointed by the Common Pleas, on "due proof being made that the advertisements have been set up according to law," an order which, reciting that "the court, being satisfied that due and legal notice of this application has been given," appoints surveyors, sufficiently shows that proof has been given. It will be intended that the court was not satisfied without legal proof.

11. When general powers over a whole subject matter are conferred by statute on courts of general jurisdiction, although their jurisdiction over the subject matter must appear on the face of their proceedings, every intendment will be made in favor of the correctness of their proceedings. *State* v. *Lewis*, 564

SHEEP.

1. If sheep are destroyed or wounded by dogs within any township in this state, the owner of the sheep, although he resides out of that township, is entitled to remuneration out of the dog tax of that township, the fund provided for relief in such cases.

2. If the town committee improperly refuse relief out of such fund, to any person entitled to it, he has no remedy by an action against the township: the town committee, in the distribution of this fund, are not the agents of the township, but trustees of this fund, with certain judicial powers. *Washington* v. *Applegate*, 42

SHERIFF. See FEES, 1.

SHORE. See RIPARIAN OWNER.

SLANDER. See PLEADING, 4, 5.

STATUTES, CONSTRUCTION OF.

1. A supplement to the Camden lien law extended the law over the whole city, and repealed the section which exonerated

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from the operation of the lien buildings built by contract, on filing the written contract in the county clerk's office: a second supplement repealed the repealing section of the first supplement; by this the exonerating section is revived, and extended, with the act, over the whole city. *Flanagin et al.* v. *Feuring*, 387

2. When lands are devised to any person for life, and at his death to go to his heirs, the children of the tenant for life take immediately a *vested* remainder in fee, by virtue of the first section of the act further regulating the descent of real estates. *Rev. Laws* 774; *Demarest* v. *Den* d. *Hopper*, 599
3. Penal statutes are to be construed strictly, remedial statutes more liberally.
4. Grants and charters to corporations are to be construed favorably to the rights of the public, and most strongly against those claiming under them.
5. Railroad, canal, bridge, turnpike, and ferry companies have no power to take toll by implication, but only by express grant in their charters, and the right granted will not be extended by implication; and on questions of tolls, freight, and fares, courts uniformly construe such charters most in favor of the public and against the company.
6. The restriction or rates in the sixteenth section of the charter of the Camden and Amboy Railroad and Transportation Company extends to the whole route from Philadelphia to New York, as well upon the water as the railroad.
7. If certain rates of toll and fare be fixed by the charter of a company, a subsequent act, inflicting severe penalties on the company for exceeding the charter rates, is no violation of the contract of the charter, and is not unconstitutional. *Camden and Amboy Railroad Co.* v. *Briggs*, 623

See BRIDGE.

STOCK.

1. Shares of stock in a bank, or other incorporated company, are not bound by the delivery of a *fi. fa.* against their owner to the sheriff, but may be transferred before an actual levy.
2. It is not a sufficient levy on stock to make an inventory of it, and return it with the *fi. fa.*; but to bind it, the sheriff must go to some proper officer of the company (and it would seem to the defendant also) and give notice of the levy; nor would the delivery of a *fi. fa.* or making a levy by inventory bind *bank notes*. Of such property the officer must take actual or constructive possession. *Princeton Bank* v. *Crozer & Moore*, 383

TAXES.

The toll bridges over the Passaic and Hackensack, erected under the act of 1790, are liable to be taxed as other toll bridges are. *Bridge Proprietors* v. *State*, 593

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TESTAMENTARY CAPACITY.

1. Every testator is presumed to be of sound mind, until the contrary is proved. The burthen of proof is upon the party alleging insanity.
2. A will cannot be set aside on account of any moral obliquity or prejudice of the testator exhibited in the devises in it, or because the disposition of property in it is unnatural or unjust.
3. Strong, violent, and unjust prejudices, if not founded on delusion, do not show mental incapacity.
4. Influence acquired over a testator by kind offices or persuasion, unconnected with fraud, is not such undue influence as would invalidate a will induced by it. *Den* d. *Trumbull* v. *Gibbons*, 117

TIDE WATERS. See RIPARIAN OWNER.

TOLLS.

Railroad, canal, bridge, turnpike, and ferry companies have no power to take toll by implication, but only by express grant in their charters, and the right granted will not be extended by implication; and on questions of tolls, freight, and fares, courts uniformly construe such charters most in favor of the public and against the company. *Camden and Amboy Railroad Company* v. *Briggs*, 623

TOWNSHIP.

1. If sheep are destroyed or wounded by dogs within any township in this state, the owner of the sheep, although he resides out of that township, is entitled to remuneration out of the dog tax of that township, the fund provided for relief in such cases.
2. If the town committee improperly refuse relief out of such fund, to any person entitled to it, he has no remedy by an action against the township: the town committee, in the distribution of this fund, are not the agents of the township, but trustees of this fund, with certain judicial powers. *Washington* v. *Applegate*, 42
3. A justice's order for relief is absolutely necessary to make the township liable on the contracts of an overseer of the poor for the support of a pauper, or to make the board of freeholders or trustees of the poor house liable where there is a county poor house. An order of removal is not sufficient without the order for relief. *Bay* v. *Cook*, 343

USAGE.

In an action on a covenant to deliver a number of morus multicaulis trees of not less than one foot high, it is competent for the defendant to show that, by the universal custom and usage of all dealers in that article, the length was measured only to the top of the ripe wood, rejecting the green immature top;

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and this, although the trade had existed only for a few years. It is not necessary that such usage be immemorial. Usage can be proved to explain a doubtful contract, not to contradict an explicit one. *Barton* v. *McKelway*, 165

VARIANCE.

When an assessment, not required by law to be in writing, is declared upon as made by three managers, it is no variance that a written assessment is produced signed only by two, if it purports to have been made, and was made, by all three. *North River Meadow Company* v. *Shrewsbury Church*, 424

VERDICT. See JURORS.

WAY. See ROAD.

WILL.

1. If a will devise lands to W. and his heirs and assigns for ever, and if W. should die without lawful issue and without leaving a will, or if he should by will, or in any other way, after the date of said devise, give any thing to T., or any of his descendants, then over; this devise vests an estate in fee in the first taker, and the limitation over being upon a *definite* failure of issue, is not void as an executory devise on account of remoteness. If this condition should be held void, as being contrary to policy or good morals, as it is a condition subsequent, it would only defeat the limitation over, and not the estate devised to W.
2. Every testator is presumed to be of sound mind, until the contrary is proved. The burthen of proof is upon the party alleging insanity.
3. A will cannot be set aside on account of any moral obliquity or prejudice of the testator exhibited in the devises in it, or because the disposition of property in it is unnatural or unjust.
4. Strong, violent, and unjust prejudices, if not founded on delusion, do not show mental incapacity.
5. Influence acquired over a testator by kind offices or persuasion, unconnected with fraud, is not such undue influence as would invalidate a will induced by it. *Den* d. *Trumbull* v. *Gibbons*, 117

WITNESS, EXAMINATION OF. See EVIDENCE, 16, 25.

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