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 Colony v. Dublin and Marlborough.
 

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from possession. He cannot have it a second time. The position of the security is essentially changed. Before payment, every presumption is in favor of the holder. After payment, the natural presumption is otherwise. Presumptions in cases of this kind rest on the customs and usages of business. It is not in the ordinary course of business that a note which has been once paid is again put in circulation. It is not ordinarily to be supposed that a party will accept, as a valid security, a note which has been paid. The natural presumption, if any were allowed, is that a note once paid has been delivered to a third person for some other purpose than as a valid security. The burden of proof must consequently be on the party who asserts an unusual transaction, to introduce evidence sufficient to prove it. It is not necessary to assume that the holder has come to the possession of the note wrongfully, since it may have properly come to his hands for a variety of other entirely lawful purposes. To hold that possession alone was *prima facie* evidence of a rightful reissuing and negotiation of a note once paid to the holder, would render the proof of payment entirely immaterial, since the same proof which was sufficient to establish the title of the plaintiff at first, would be sufficient to meet the defence of payment. Had this ever been held or supposed to be the law, it could hardly have failed to have a place in some case or book to which we could have been referred, but we are aware of no such dictum. Upon these views of the law there must be

*A new trial.*

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 COLONY & a. v. DUBLIN AND MARLBOROUGH.

The act of July 13, 1855, providing that no highway should thereafter be laid out except on the unanimous report of the road commissioners, does not apply to the case of a petition which was pending when the act was passed.

PETITION for a new highway in Dublin and Marlborough. The petition was referred to the road commissioners, who, at

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March term of the Common Pleas, 1855, made their report, laying out the road, and at that term the petition was recommit-  
ted. At the September term, 1855, a report was made, signed  
by two only of the three road commissioners. It appeared by  
the report that the commissioners met in June, 1855, and a ma-  
jority of them being in favor of laying out the road, made their  
report accordingly. The towns objected to the acceptance of the  
report, for the reason that it was signed by two only of the  
commissioners.

*Wheeler & Faulkner*, for the petitioners.

*Vose*, for the towns.

PERLEY, C. J. The act of July 13, 1855, which took effect  
on its passage, provides as follows: "No highway shall hereafter  
be laid out upon the report of the commissioners, unless the  
report shall be concurred in and signed by all the commissioners,  
to whom the application for the highway shall be committed." Under  
the law as it existed prior to this statute, the report of the  
majority of the road commissioners, to whom a petition had  
been referred, would have been valid. Rev. Stat., ch. 1, sec. 16.  
And the question is, in this case, whether the late act changed  
the law in regard to this petition, which was pending when the  
act was passed, so as to require the concurrence and signature of  
all the commissioners.

The language of the statute, in literal and grammatical con-  
struction, is broad enough to reach this case. "No highway  
hereafter to be laid out," is the language used, and this highway  
was not then laid out. We are not inclined to deny that the Leg-  
islature have power to change the mode of proceeding on a  
pending petition for a highway by a general law, applicable to the  
subject, though the change might be such as in a particular in-  
stance would defeat the object of the petition. The laying out  
of highways is a matter of public concern; and it would perhaps  
be difficult to show that an individual could acquire a vested  
interest in a public proceeding of this nature, unless a decree or

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judgment had passed which gave him a right to damages, or costs, or something of that kind. Was it, then, the intention of the Legislature that the act should apply to pending cases?

In cases where it would be within the acknowledged scope of legislative power to change the law, so as to defeat a legal proceeding already commenced, it would in most instances be unjust to exercise the power. Though it might not be legally within the prohibition of the Constitution, which denies to the Legislature the authority to pass a retrospective act, it would be unfair to those who had engaged in the suit on the faith of the existing law, and would practically have a retrospective operation, though no vested right were defeated by it. And it is an established rule in the construction of statutes, that the Legislature will not be presumed to have intended that a statute should have a retrospective action, unless that intention is very clearly expressed. *Gilmore v. Shooter*, 2 Modern 310; *Gilmore v. Shuter*, 2 Levins 227, S. C.; *Couch v. Jeffries*, 4 Burrow 2460; *Dash v. Van Cleeke*, 4 Johns. 495; *Torrey v. Corlis*, 33 Me. 333.

The first chapter of the Revised Statutes provides certain rules of construction, evidently intended to be of general application in subsequent legislation, and apparently designed to prevent the necessity of inserting the rule in each separate act to which it might be applicable. It is plain that these statutory rules of construction can have no binding force on subsequent legislation. Like other general laws, they are, of course, liable to be repealed. But while they stand unrepealed, it may well be presumed that they are intended to be recognized in subsequent legislation. Until they are repudiated by a direct or implied repeal, they must, we think, be held to control the construction of later acts to which they are applicable. It has been held that general statutes fixing the time at which future acts shall take effect, are operative, unless controlled by a subsequent law. *Cooper v. Curtis*, 30 Maine 488. And the general limitation of penal actions applies to actions for the recovery of penalties created after the passage of the limitation act. *Espinasse on Penal Statutes* 79.

The Revised Statutes, chapter 1, section 26, provide that

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“the repeal of any act shall in no case affect any act done, or any right accrued, accruing or established, or any suit or proceeding had or commenced in any civil case, before the time when said repeal shall take effect.” The 13th section of the same chapter enacts that “all words purporting to give a joint authority to three or more public officers, shall be construed as giving such authority to a majority of them, unless otherwise expressly declared.” The law of July, 1855, repeals this last provision, so far as it relates to the authority of road commissioners, and is within the rule laid down in the 26th section, which provides that the repeal shall not affect a pending proceeding in a civil suit; and we think the general rule of construction established in the Revised Statutes must be applied to the act of 1855, and that the report ought to be accepted.

DAVID BALL v. THE TOWN OF WINCHESTER.

A town is not liable for damage occasioned by the acts of a surveyor of highways within the scope of his authority, except in cases where such liability is imposed by statute; and he is not to be considered the agent of the town in making repairs upon highways within the town, so as to charge the town for damage occasioned by his illegal acts.

Whether a town may be made liable for special damage happening through the neglect of the town to perform a duty imposed upon them without a statute provision giving the suffering party an action for such damage, *quære*?

If the town is to be made liable in such case, *semble* that the duty from the neglect of which the damage results, must be one owing from the town to the suffering party, and that the duty which the town is under to keep the highways within it in suitable repair, is a duty owing to such persons as have occasion to travel upon the highways, and not to the owner of the adjoining land as such.

The provisions of the statute, giving an action against the town for damage resulting through defects in the highway, limit the remedy to such injuries as are received by a person, his team, or carriage, directly from the defect, in using or attempting to use the highway as such.

THE declaration in this case contains three counts, as follows:

1. For that on the 1st day of November, 1853, at said Win-

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| 32 | 435 |
| 68 | 287 |
| 32 | 435 |
| 70 | 108 |
| 70 | 109 |
| 70 | 114 |
| 70 | 416 |