

The defendant, in this case, executed his contract in part, he entered and remained on board the privateer, and did duty as a seaman, for at least part of the cruise.

Stevens
vs.
Cushing.

The action for money had and received cannot, therefore, be maintained; but the plaintiff, if injured, must seek his remedy by an action on the contract.

The verdict must be set aside, and a verdict entered for the defendant, according to the agreement of the parties.

JOHN BENNETT *versus* GIDEON DAVIS.

Items charged in a book account, within six years, do not take articles charged in the same account more than six years before suit, out of the statute of limitations, unless there are mutual accounts between the parties.

THIS was an action of assumpsit, founded upon an account annexed to the writ, amounting to ninety-one dollars thirty-four cents. All the items in the account, except the three last, were charged previous to the 28th October, 1803. The three last items were charged in the years 1811, 1812, and 1813. The action was commenced on the 16th December, 1815. Upon the trial here, in September term, 1810, the only question that arose in the case was, whether the three last items, having been charged within six years, were sufficient to take the residue of the account out of the statute of limitations.

Per curiam. The law, which must govern this case, is extremely clear. The rule is, where there are mutual accounts between the parties for any item of which credit has been given within six years, this is evidence of an acknowledgement of there being an open account between the parties and a promise to pay the balance; but where all the items are on one side, the last item which happens to be within six years shall not draw after it those that are of a longer standing. *Buller's N. P.* 149, *Cotes vs. Harris.* *Peake's Cases,* *N. P.* 121, *Cranch vs. Kirkman.* *2 Mass. R.* 217, *Cogswell vs. Dolliver.* *2 Williams Saunders* 127, notes 6 & 7. *6 Durn & E.* 189, *Catling vs. Skoulding.*

Bennett
vs.
Davis.

The present case comes within the last clause of the rule above laid down, and the three last items are not evidence of a promise to pay the preceding items.

J. P. Hale, for the plaintiff.

N. Eastman and *J. Smith*, for the defendant.

JOSEPH CHESLEY, JUN. *versus* EBENEZER SMITH.

A farmer, or renter of a turnpike gate, may maintain assumpsit for tolls in his own name, against one who has, by mistake, been permitted to pass a gate as a person exempted from toll.

The authority given to turnpike corporations, to stop and detain travellers until the tolls are paid, is a cumulative remedy.

THIS was an action of assumpsit, for certain tolls alleged to be due from the defendant to the plaintiff, as farmer and renter of tolls, at a certain gate of the *New-Hampshire Turnpike* in *Durham*. The cause was tried here, February term, 1816, on the general issue, when it appeared in evidence that the corporation had been duly organized; that the gate was, by a vote of the corporation, rented to the plaintiff for a year; and that the defendant had travelled the road and passed the gate sundry times during the term, without having paid any thing, and without having promised to pay any thing for the privilege: it having been supposed, by both parties; that the defendant was exempted from toll, although he was not in fact exempted. It appeared, also, that the act of incorporation gave authority to the corporation to stop and detain travellers until the tolls were paid.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the court upon the above facts.

Ichabod Bartlett, for the plaintiff.

J. Smith, for the defendant.

The opinion of the court was delivered by

WOODBURY, J.* This case presents some difficulties, but the court, after such examination as they have been able to give it, are inclined to render judgment on the verdict.

* The Chief Justice, having been of counsel, did not sit in this cause.