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Sanborn v. Emerson.

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delivery of the executions to the officer for collection, as is prescribed by law for the sale of personal property on execution ; for such was the extent of the liability of the officer himself to the creditors, according to the decision in *Fairfield vs. Baldwin*.

Moreover, if the verdict were manifestly too large, for the reason alleged, the excess, being a sum readily ascertainable by mere arithmetical computation, might be remitted, and the court would not, in such case, set aside a verdict and grant a new trial, on account of the excess so remitted. *Lambert vs. Craig*, 12 *Pick.* 199.

On the whole, we are all of the opinion that in this case the exceptions taken at the trial cannot prevail, and that there must be

*Judgment on the verdict.*

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**RAND & a. vs. DODGE & a.**

At common law, tenants in common must sever in a real action ; and if they join, in this state the defect is fatal, and cannot be remedied.

There is no statute in this state which authorizes an amendment in such case.

WRIT OF ENTRY, brought by the demandants, as tenants in common of certain real estate.

The tenant moved for a nonsuit, contending that the defect was fatal, and could not be amended.

*Livermore*, for the demandants.

*Goodall*, for the tenants.

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Rand v. Dodge.

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GILCHRIST, J.\* There is no provision by statute in this state which will enable the demandants to obviate the objection taken by the tenants.

The act of January 5, 1833, applies only to cases where there are other defendants who shall have been made parties to the suit ; and the second section provides merely that when a feme sole, plaintiff, shall marry pending the suit, the writ shall not abate, but the husband may become a party thereto.

The act of July 4, 1834, provides that when any of the defendants are not liable, and ought not to have been joined in the action, the suit shall not abate, but they may be discharged, and the suit prosecuted to judgment against the defendants who are properly parties.

There is nothing, then, in these acts which applies to this case, and we have no other legislation relating to defects of this character.

It is well settled at common law, that tenants in common must sever in real actions, because they have several freeholds, and claim by several titles. *Co. Litt.* 195, b. ; *Hammond on Parties to Actions*, 251 ; and the case of *Pickett vs. King*, 4 *N. H. Rep.* 212, decides that, in this state, the defect is fatal, and cannot be amended by striking out the name of one of the demandants.

*Demandants nonsuit.*

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#### HADLOCK vs. CLEMENT & a.

In an action of trover, the plaintiff, upon default, entered up judgment for the alleged value of the property, without an enquiry, or assessment of damages. Execution was issued, and served, and the money paid by the defendant—*Held*, that after the money had been paid, an *audita querela* would not lie to set aside the judgment and execution.

AUDITA QUERELA. The defendants in this process were summoned to answer to the plaintiff, upon his complaint,

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\* Woods, J., having been of counsel, did not sit.