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lien while the action is still pending, is not now the question. In the present case judgment has perfected the claim. William Brown did not obtain his discharge until September 21, 1842. Judgment had been rendered against him in favor of Perley in March, of the same year. At the time of rendering judgment, therefore, Brown had no defence to the action, and a demand having been seasonably made upon the present defendant, his liability was fixed thereby. No subsequent discharge of the bankrupt can relieve him from that liability.

Judgment for the plaintiff.

LAWRENCE vs. LANGLEY.

In order to charge the indorser of a promissory note, a demand of payment must be made upon the maker; and notice thereof, and of the non-payment of the note, and that the holder relies upon the indorser for payment, must be seasonably given to him, or a waiver of demand and notice, or sufficient grounds of excuse, must be shown.

A notice to the indorser, prior to the demand upon the maker, or prior to the maturity of the note, is invalid.

And it is not a sufficient ground of excuse, that the promiser is bankrupt, or insolvent, at the maturity of the note.

A new or difficult cause of action is not admissible in a declaration, by way of amendment.

ASSUMPSIT against the defendant, as indorser of a promissory note, made by David J. Lancaster and William Richardson, dated September 1, 1835, and payable to the defendant, or order, in one year from date, with interest, and by him indorsed to the plaintiff.

On or about the first of August, 1835, the plaintiff, being the owner of certain stage property, sold the same to the defendant for \$1125. The defendant paid \$625 of the purchase money in cash, and transferred the note in suit to the

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plaintiff, as security for the payment of the balance. Before the note became due, Lancaster became bankrupt, and Richardson died insolvent.

On the second day of September, 1836, the defendant was notified of the non-payment of the note, and payment thereof was demanded of him, which he refused. The plaintiff moved to amend the declaration by adding a count for the property sold the defendant.

The amendment was admitted in the count below, subject to the opinion of this court.

If the court should be of opinion that the action is sustained upon the present declaration, judgment is to be rendered for the plaintiff. Or, if the court should be of opinion that the proposed amendment is admissible, the case is to be transferred to the court of common pleas for trial. If otherwise, judgment is to be rendered for the defendant.

Lyford, for the plaintiff.

Hazelton and *Hale*, for the defendants.

WOODS, J. The defendant in this case is attempted to be charged as the indorser of the note declared on. In order to that result, it must appear that a demand of payment was duly made upon the maker, and notice thereof, and of its non-payment, and that the holder relied upon the indorser for payment, was seasonably given to the defendant, or demand and notice was waived, or the want thereof excused.

By virtue of the statute, the note was payable with grace. When a note is payable on time, a demand, to be of any avail, should be made on the last day of grace. An earlier demand is insufficient to charge an indorser. *Leavitt vs. Simes*, 3 N. H. Rep. 14. But in this case it does not appear that any demand at all was made. And the notice shown was insufficient, even if a proper and seasonable demand had been shown; for, if a proper demand had been

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proved, then the notice, being before the last day of grace, would have preceded the demand in point of time, and would for that reason have been merely nugatory. Besides, notice before the last day of grace is insufficient, and void, unless sustained by some usage assented to by the indorsee, which is not pretended in this case. *Dennie vs. Walker*, 7 N. H. Rep. 199. Here, then, no demand is shown, and no sufficient or available notice.

Does the case find grounds of excuse, relieving the plaintiff from the ordinary duty and necessity of seasonable demand and notice?

If the death of a maker before the maturity of the note, or that and other circumstances, may, and do, in certain cases, thus excuse the holder of a note, (*Hale vs. Burr*, 12 Mass. Rep. 86; *Burrill vs. Smith*, 7 Pick. 291,) the bankruptcy or insolvency of the maker alone will not. (*Crossen vs. Hutchinson*, 9 Mass. Rep. 205; *Sandford vs. Dillaway*, 10 Ditto 52; *Granite Bank vs. Ayers*, 16 Pick. 392.) It was the duty of the plaintiff to have made a demand of Lancaster at least, if no more, in order to charge the defendant as indorser.

The amendment in question was improperly admitted. By it a new and different cause of action was introduced into the declaration. At least, it does not appear that the ground of action in the amended count is the same as that in the original count. It is not to be inferred, from anything stated in the case, that it is the same in both counts; but, on the contrary, that the causes of action are entirely different. In the original count the ground of action is the liability of the defendant as indorser of a note, not given upon the consideration of the sale of the stage property, but upon some other and different consideration; while the promise alleged in the amended count is based upon the sale of the stage property to the defendant. The contracts set forth in the two counts are, therefore, not the same. Such an amendment of the declaration is not in accordance with the deci-

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sions of this court upon that subject, and is not admissible. *Butterfield vs. Harvell*, 3 N. H. Rep. 201; *Stevenson vs. Mudgett*, 10 Ditto 338; *Merrill vs. Russell*, 12 Ditto 74. According to the provisions of the case there must be

Judgment for the defendant.

 HEYWOOD vs. WINGATE & a.

This court has authority to discharge a case, brought here by way of transfer, upon an agreed statement of facts, from the common pleas, for its consideration.

The rule of practice, however, has gone no farther than to authorize such discharge, when it is made to appear that through fraud, accident, mistake, or misapprehension, the case embraces matters which did not exist, or does not contain facts which did exist at the time of the agreement and transfer, and which were material to a proper determination of the rights of the parties; or in a case in which the court may, for some special reason, properly decline deciding the questions submitted.

The court will not discharge a case, for the reason alone that since the transfer the defendant has become a voluntary bankrupt, and has procured a discharge in bankruptcy, and to enable him to file a plea of discharge in the court of common pleas.

Where the questions of law, duly arising upon the case, are transferred to this court, and not the action generally, no pleas can be filed in this court, but all pleas must be filed in the court of common pleas, where the action remains.

A promissory note, signed by several persons, and payable to one of their number, or his order, cannot, in the name of the payee, be enforced at law, as a joint promise against all the signers.

But when such note is indorsed to a third person, it immediately becomes operative as a valid contract, from the date of the transfer, and may be enforced by a joint action against all the makers, in the name of the indorsee.

ASSUMPSIT upon a promissory note, of which the following is a copy: "Wakefield, August 25, 1835. For value received we jointly and severally promise to pay to Luther