

HOWARD *v.* HUNT.

If a writ of review is issued within a year after the judgment, though the service is delayed till after its expiration, the action of review is seasonably brought and may be prosecuted.

REVIEW of an action upon the case. The original judgment was rendered in favor of the plaintiff, at the April term of the court of common pleas, for this county, 1844, which term closed on the sixteenth day of that month.

The writ of review was issued from the clerk's office of said court, March 18, 1845, returnable at the September term, 1845, but it was not served upon the plaintiff until the 26th of April, 1845.

The plaintiff moved to dismiss the review, on the ground that it was not commenced within the term limited by the statute, and it was ordered that the question arising upon that motion should be assigned to this court for decision.

Edwards and *Handerson*, for the defendant in review.

Lane, for the plaintiff in review.

Woods, J. The question here presented, is substantially the same which arose in *Society for Propagating the Gospel v. Whitcomb*, 2 N. H. Rep. 227. It was there held, that the commencement of an action, or the suing out of a writ, is by our practice, the time when the writ is in fact filled up for service. The writ of review was in that case issued within the period limited, though not served till afterward; and it was held that the review was commenced by the issuing of the writ.

Such is the present case. The writ was filled and issued within the year. The delay to serve it did not impair the right of the party to prosecute the review. The motion must therefore be denied.

Motion denied.

SULLIVAN,

DECEMBER TERM, A. D. 1845.

WAX v. CUTTING.

Where a party agrees to convey his interest in several parcels of land for a gross sum, which is paid by the grantee, and he makes a deed conveying only part of the lands agreed upon, the grantee cannot, if he retain the portion conveyed, recover back a part of the contract price in an action for money had and received; but his remedy, where there is no written contract, is in equity.

ASSUMPSIT, for \$400, money had and received, submitted to the consideration of the court upon the following statement:

On the 19th of September, 1838, the defendant, upon application of the plaintiff, agreed to sell and convey to him all his interest in certain lands, situated in Newport, at a sum to be determined by appraisal. Said lands had been appraised at \$4,150, and the plaintiff has paid and secured that sum to the defendant, who thereupon executed and delivered to the plaintiff a deed of certain lands, which the plaintiff supposed to be all the lands included in the appraisal. The plaintiff has since discovered that the defendant had not conveyed his interest in "The Mountain Pasture," so called, which was included in the appraisal, and, as the plaintiff alleges, was of the value of \$250. This action is brought to recover the value of that tract at the time of the conveyance, with interest thereon.

Before the commencement of this action the plaintiff demanded of the defendant a deed of his interest in said