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trust, was to be divided into two equal shares, one of which shares was to be for the use of each of the testator's said daughters and her children; all interest accruing upon each share while in the hands of the executors, was to be paid to the said daughters respectively, and also such portion of the principal of each share as the executors should think advisable, not exceeding one half; the residue of each share, to be divided among the respective children of each of the daughters, and paid to them upon the death of their mother, or upon their arrival at the age of 21 years, whichever should first happen; but in case either of the daughters became a widow, then one half the share given to her and her children, was to be paid to her within six months from the decease of her husband. It seems very clear to us, that the only object of the clause of the will which has given birth to this suit, was to make the sum intended for each of the testator's daughters, payable at all events, and at once upon the death of her husband, which until that event, was to be payable only in such portions, as the executors should think advisable. It is not to be denied, that there is some ambiguity in this clause of the will; but take the whole will together, we have not been able to entertain a doubt that this is the true construction. There must, therefore, be judgment for the defendants.

Judgment for the defendants.



JOSEPH BURRILL vs. RICHARD WEST, jun.

In an action of assumpsit by *A.* against *B.* on a promise by *B.* to save *A.* harmless for selling, as a constable, a horse upon an execution in favor of *B.* against *C.* against all persons having a better claim to the horse than *C.* the record of judgment against *A.* in favor of *D.* in an action of trespass for taking and selling the horse, of which action *B.* had no notice, was held not to be evidence, that *D.* had a better title to the horse than *C.*

THIS was an action of assumpsit, founded upon a promise of the defendant to the plaintiff, who was a constable, to indemnify and save him harmless from all damage and costs he might sustain by reason of his selling a certain horse on

an execution in favor of the defendant, against one *William West*.

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The cause was tried here at September term, 1819, upon the general issue, when it appeared in evidence, that the defendant, having obtained an execution against one *William West*, delivered the same to the plaintiff, with directions to levy the same upon a certain horse, which had been attached by the plaintiff on the defendant's original writ against *William West*, and with a promise that he would indemnify the plaintiff for levying the execution upon the horse. In pursuance of the defendant's directions, the plaintiff sold the horse to satisfy the execution. Afterwards, one *Joshua Ames* brought an action against this plaintiff, for taking the horse. *Ames* brought his action in the county of Cumberland, in Massachusetts, and at the supreme judicial court in that county, in October, 1818, the action was referred to three referees, who made a report at the same term, that *Ames* should recover of *Burrill* \$70 damage and costs. Upon which report, judgment was rendered by the said supreme court, that *Ames* should recover \$70 damages, and costs taxed at \$124 90. It also appeared that *Burrill* had paid \$146 55, which had been accepted by *Ames*, in full satisfaction of the said judgment. But it did not appear, that the defendant in this action, had any notice of the pendency of *Ames'* suit against the plaintiff. Upon this evidence, the court instructed the jury that the action could not be maintained without proof, that *Ames* had a better title to the horse, than *William West* had, and that the judgment of the supreme court of Massachusetts was not under the circumstances, competent evidence to prove that fact in this case; this defendant never having had notice of the suit in which that judgment was rendered, nor an opportunity to be heard upon the question. Under this direction, the jury returned a verdict in favor of the defendant.

The plaintiff moved the court to grant a new trial, on the ground of misdirection to the jury.

Varnum, for the plaintiff.

French, for the defendant.

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RICHARDSON, C. J. delivered the opinion of the court.

This is an action of assumpsit, founded upon a promise made by the defendant, to indemnify the plaintiff, a constable, for making sale of a chattel upon a writ of execution, in favor of the defendant against one *W. West*. The amount of the defendant's undertaking, was to save the plaintiff harmless from the claims of all persons having a better title to the chattel, than the title of *W. West*, the debtor. It was then incumbent upon the plaintiff, in order to maintain this action, to shew not only that he had been subjected to the payment of damages, by reason of his having made the sale, but that he had been subjected to pay them to a person having a better title to the chattel, than the title of *W. West*. The plaintiff produced in evidence, the record of a judgment of the supreme judicial court of Massachusetts, founded upon a report of referees, by which it appeared that one *Joshua Ames* had recovered against the plaintiff damages and costs in an action of trespass, for taking the chattel in question; but the plaintiff offered no evidence to shew that the defendant had any knowledge whatever of the pendency of that suit, nor did he offer any other evidence of *Ames'* title to the chattel attached. The question is, was that judgment, evidence against this defendant, that *Ames* had a better title to the chattel, than the title of *W. West*?

A verdict or judgment, in a former action upon the same matter directly in question, is evidence not only for or against the parties to the suit, but for or against privies in blood, privies in estate, and privies in law. But neither a verdict nor a judgment can, in general, be evidence for either party in an action against one, who was a stranger to the former proceeding, who had no opportunity to examine witnesses or defend himself. It is not necessary that he against whom a judgment is to be used as evidence, should have been actually a party to the suit in which it was rendered. But in general, notice of the suit, and an opportunity to be heard, seem indispensable to make the judgment evidence. 7 *Johnson* 163, *Kip vs. Brigham et al.*—7 *do.* 173, *Waldo vs. Long.*—6 *do.* 158, *Kip vs. Brigham et al.*—1 *do.*

517, *Blasdale vs. Babcock*.—4 *Mass. Rep.* 349, *Hamilton vs. Cutts et al.*—4 *Dallas* 436, note.

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To these general rules there are however exceptions. Thus, on questions of custom, or toll, on a question of customary right of common, or a public right of way, a verdict in a former action between any other persons is admissible in evidence.(1) So the judgment offered in evidence by the plaintiff in this case was admissible to prove certain facts. It was without doubt proper evidence to prove that *Ames* had asserted his right to the chattel, and that what the plaintiff has paid, he was compelled to pay by legal process.(2) But the present case does not come within any of these exceptions, but must be governed by the general rule. The judgment offered in evidence by the plaintiff was altogether incompetent to prove *Ames'* title to the horse in this case, and there must be

(1) *Phillips' Ev.* 233.

(2) 4 D. & E. 590, *Green vs. The New River Company*.

Judgment for the defendant.



GEORGE HILTON vs. ANDREW BURLEY.

In assumpsit on an account annexed for liquor sold by retail to a "townsman," though the defendant plead the general issue; yet the plaintiff cannot, under our statute of June 14th, 1791, recover more than twenty shillings.

An item, also, "for rent," without some description of the premises and the length of the occupation, cannot be recovered. Nor can a general credit on such an account be applied, at the trial, exclusively to the payment of the liquor over twenty shillings in value, or to the payment of the rent.

When a debtor makes a payment, without directing to what claim it shall be applied, the various rules, which govern the application.

This was assumpsit on an account annexed for \$81 17; many items in which were for spirit sold in small quantities to the defendant, and one item was "for rent." A general credit was given for \$20.

At the trial here in September, A. D. 1819, on the general issue, the plaintiff and defendant being inhabitants of the same town, and the former an inn-keeper, an objection was made to a recovery of more than 20 shillings for the spirit, and of any thing for rent. On the contrary, the plaintiff contended, that if this objection prevailed to any extent, the general credit ought to be applied exclusively to the items against which it prevailed; and thereupon a verdict was