

the non-performance of a contract, a consideration must be alleged and proved. But when one man does another an injury by unskilfully and improperly doing what he had promised to do, an action may be maintained to recover the damage, although there was no consideration for the promise. The reason of this distinction is very obvious, but it is a distinction that cannot avail the defendant in error. His action was assumpsit, founded upon the breach of certain promises alleged to have been made upon certain considerations. The very gist of the action was the breach of a valid contract. But if the promises were made without consideration, they were mere *nuda pacta*, and no action could be maintained upon them. And if the consideration alleged were not proved, the action was not supported. But if, instead of assumpsit, a special action upon the case had been brought for misfeazance, it is very clear that no consideration need have been alleged or proved. The gist of such an action would have been the misfeazance, and it would have been wholly immaterial whether the contract was a valid one or not. 5 *D. & E.* 143, *Elsee vs. Gatwood*.—2 *Wilson* 359, *Stater vs. Barker*.—1 *Saund.* 312, note 2.—*Comyn's Rep.* 133, *Coggs vs. Barnard*.—*Lawes' Plead. in Assumpsit* 61.

We are of opinion that the court below erred in directing the jury that the evidence was sufficient to prove the alleged consideration in the first count, and that the judgment must be reversed.



## BENJAMIN THOMPSON vs. JAMES WILSON.

*A.* an inhabitant of this state gave a negociable note to *B.* an inhabitant of Massachusetts, who, having made his will and appointed *C.* his executor, died: *C.* having proved the will in a probate court of Massachusetts, and there taken upon himself the burthen of executing the will, by endorsement ordered the contents of the note to be paid to *D.* who brought an action upon the note against *A.* here: it was held that *C.* the executor had no interest in the note and could not transfer it by endorsement, and that the endorsee could maintain no action upon it.

This was an action of assumpsit upon a note of hand made by *Wilson*, dated January 24, 1816, for \$400, payable to *Hough Clark* or order on demand, and endorsed to the

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plaintiff by *Benjamin Humphreys*, the executor of the last will of *Clark*, who is deceased.

The cause was submitted to the decision of the court upon a statement of facts as follows. *Hough Clark* was an inhabitant of Massachusetts, where the note was made; and where, having made his will, and appointed *Humphreys* his executor, he died. *Humphreys* caused the will to be proved and allowed in a probate court of Massachusetts, and took upon himself the burthen of executing it. The note came into the hands of *Humphreys*, as executor, and he afterwards, by endorsement, ordered the contents of it to be paid to the plaintiff. *Clark's* will has never been filed and recorded, nor has administration of his estate been granted to any person in this state. The parties agreed that if upon these facts, the court should be of opinion, that the plaintiff could maintain the action, then the defendant to be defaulted, otherwise the plaintiff to become nonsuit.

*Atherton*, for the plaintiff.

*Ed. Parker*, for the defendant.

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

The question which this case presents for our decision is an extremely clear one. It is well settled that debts due on simple contract are *bona notabilia* where the debtor lives. *Lovelass* 6, 7 & 12.—*Went. Ex'r.* 46.—3 *Mass. Rep.* 514, *Goodwin vs. Jones.*—11 ditto 256, *Stevens vs. Gaylord.*—*Godolphin* 70.

*Humphreys*, then, by proving the will in a probate court of Massachusetts, and by there taking upon himself the burthen of executing it, acquired no interest in a simple contract debt due from an inhabitant of this state; (6 *Mod.* 134, *Adams vs. Savage.*—1 *Salk.* 40, *S. C.*—2 *Lord Raymond* 854, *S. C.*) and of course had no authority to endorse the note in question.

A copy of the will must be filed and recorded in some probate court in this state, and the executor must give bond, or administration of the estate, with the will annexed, be granted to some other person, before this note can be legally ne-

gociated, or the payment of it enforced by a suit in our courts. 1 *Laws of N. H.* 205, *Statute of January 22, 1790.*

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*Plaintiff nonsuit.*



CHESHIRE, OCTOBER TERM, 1820.

ISAAC GREEN vs. TIMOTHY A. EDSON.

A sheriff, who arrests upon an execution a person privileged from arrest, and voluntarily lets him go at large, is not liable for an escape.

THIS was a writ of error to the court of common pleas in this county. The original action was debt, brought by *Green* against *Edson*, late sheriff of the county of Grafton, for the escape of one *Simon P. Hoffman*, who had been arrested by one of *Edson's* deputies on an execution in favor of *Green*, and was tried in the court below upon the plea of *nil debet*, when the jury returned a special verdict as follows.

“ The jury find that the several facts set forth in the plaintiff's declaration are true in manner and form as is therein pleaded, except as is hereinafter mentioned; the jurors also find that the said *S. P. Hoffman*, on the 7th September, 1814, was a private soldier duly enlisted into the army of the United States, and on the 2d Tuesday of March, 1814, took the oaths by law prescribed to be taken by private soldiers of the United States' army; that on the seventh day of September, aforesaid, the said *Ziba Huntington*, being a deputy of the said *T. A. Edson*, sheriff, &c. and then having in his possession the said execution of the said *Isaac Green* against the said *S. P. Hoffman*, by virtue thereof, at Lebanon, arrested the body of the said *Hoffman* and had him in custody; that the said *Hoffman* was then in the company of a United States' officer, who then and there forbid the said *Huntington* from holding said *Hoffman* as a prisoner by virtue of said execution, and ordered the said *Hoffman* to go with him the said officer, which order the said *Hoffman*, with consent of said *Huntington*,