

In this case the defect in the road was well known. The road was overflowed with very turbid water, so that the pathway was wholly invisible; the horse was not lost in the defective part of the road, but by being led out of the travelled road through the mistake of the guide; and we are clearly of opinion, that the loss is to be attributed not to the defect in the highway, but to the overflowing of the water and the mistake of the guide. Indeed, under the circumstances, we are not prepared to say, that this action could have been maintained, had the horse sunk in the defective part of the road and been drowned. For it is by no means clear, that any person, acquainted with the defect in the road, had a right to attempt to pass at the risk of the town. But on this point we give no opinion, being very well satisfied that this action is not maintained by the evidence.

There is no foundation for the supposition, that this action can be maintained on the ground that the town of *Concord* were bound to raise the road above the floods of the river. For, admitting the town was by law bound to do that, and might have been compelled to do it, still it by no means follows that this action can be maintained. The situation and state of the road was well known; and we are clearly of opinion, that whoever, with a full knowledge of the state of a road in such a case, chooses to run the risk of passing, does it at his own peril, and the town is not liable.

Judgment on the verdict.



SAMUEL SMITH vs. LUCINDA PHILBRICK.

A guardian can maintain no action against his ward for money advanced, or services rendered as guardian to the ward, until he has settled his guardianship account in the probate court.

ASSUMPSIT for monies expended, services done, and supplies and clothing furnished for the defendant, according to an account annexed to the writ.

The cause was submitted to the decision of the court upon a statement of facts, in substance as follows :

Farnum
vs.
Concord.

Smith
vs.
Philbrick.

In 1815, the plaintiff was chosen by the defendant, then just arrived at the age of 14 years, her guardian, and was appointed her guardian by the judge of probate, in this county. In 1819, this guardianship was repealed, at the instance of the defendant, by the same judge of probate. The plaintiff never returned any inventory of any estate of his ward, no estate of any kind ever having come into his possession. Nor has he ever settled, or been cited to settle, any account of his guardianship in the probate court: This action was brought to recover the monies expended, and for services performed, while the plaintiff was guardian and the defendant his ward as aforesaid.

Porter, for the plaintiff.

Mason, for the defendant.

RICHARDSON, C. J. In this state guardians are appointed by the judge of probate, and are by statute required to give to the judge "sufficient security for the faithful discharge" of their trust according to law, and to account either to "the judge or minor, when such minor shall arrive at full age, or at such other time as the judge, upon complaint to him made, shall see cause." It cannot admit of a doubt, that accounts between guardians and wards can be more conveniently settled, and with less expense to the parties, in the courts of probate, than by actions at law in this court. Besides, according to the course of proceedings in those courts, guardians must there make oath to the truth and justice of their claims, which may in many cases be of much importance to the ward. The statute has, therefore, with peculiar propriety, required guardians to give security to account to the judge of probate, and it seems to us that it would be highly improper and inconvenient to permit guardians to maintain against their wards actions for money advanced and services rendered by them as guardians, while their accounts remain unadjusted in the courts of probate. For, in such cases, we must go into an investigation of the whole guardianship account, or permit the guardian in many cases to recover, when, if the whole account were investigated, he would be found to be indebted to the ward. It is

a strong argument against the plaintiff, that this suit is the first of the kind—no trace of such a suit is to be found any where within the regions of the common law. Had this remedy been necessary, it would certainly have been resorted to before this day.

It is the opinion of the court, that this action is not maintainable.

Smith
vs.
Philbrick.



BENJAMIN WHEELER vs. CHRISTOPHER S. THOM AND
ISAAC THOM.

In an action of assumpsit against two defendants, a count upon a promise made by the two only, may be joined with counts upon promises made by the two defendants and a third person deceased.

ASSUMPSIT. The three first counts were founded upon promises alleged to have been made by the defendants jointly with one *William S. Thom*, deceased. The fourth count was upon a promise alleged to have been made by the defendants alone. The defendants demurred to the declaration, and the plaintiff joined in demurrer.

Thom and *Mason*, for the defendants, contended, that the fourth count was of a nature not to be joined with the other counts in the declaration, and they cited 6 *D. & E.* 363, *Spalding et al. vs. Mure et al.*—6 ditto 611, *Gordon vs. Austin.*—6 ditto 347, *Jennings vs. Newman.*—6 *Mass. Rep.* 444, *Meagher vs. Batchelder et al.*—5 ditto 196.—3 *Es. Rep.* 76, *Chandler vs. Parkes et al.*—5 ditto 47, *Jaffray vs. Frebair et al.*

Porter, for the plaintiff.

RICHARDSON, C. J. If there is in this case a misjoinder of counts, the consequences for which the counsel of the defendants contend, must follow. The declaration must be adjudged insufficient even on a general demurrer. 1 *Hen. Black.* 108, *Rose vs. Bowler.*—2 *Bos. & Pull.* 424, *Brigdon vs. Parkes et al.*—4 *D. & E.* 347, *Jennings vs. Newman.*

But we have attentively examined this case without being able to conjecture any good reason, why the several counts in the declaration should not be joined. It has been said,