

why, when a prevailing party dies after judgment, a writ of review should not be immediately brought against his executor or administrator. For, whether the estate is solvent or insolvent, the review must be tried. An executor or administrator, against whom a review is brought, is of course entitled to sufficient time to examine the case, and make preparation for the trial; and if the party bringing the review, should prevail, before the executor or administrator could ascertain the circumstances of the estate, this would be a sufficient ground to warrant the court to stay execution a reasonable time, and in case the estate turns out to be insolvent, no execution can ever issue, but the judgment will be a liquidated claim, entitled to a dividend.

Colman  
vs.  
Churchill.

*Motion overruled.*

CHESHIRE, OCTOBER TERM, 1821.

SAMPSON DRURY vs. JOSHUA LELAND.

Where an estate has been represented insolvent, and the administrator appeals from a decision of the commissioners allowing the claim of a creditor, if a less sum is allowed the creditor in this court than was allowed by the commissioners, the administrator is entitled to costs.

In this case, the commissioners appointed by the judge of probate to examine the claims against the estate of *E. Sherman*, deceased, which had been represented insolvent by *Leland*, the administrator, allowed *Drury*, on his claims against the estate, \$291 28. *Leland* signified to *Drury* his objections to the sum allowed, and *Drury* filed his declaration upon his demands in this court, in pursuance of the statute of February 11, 1791.

The cause was tried here at May term, 1821, when the jury returned a verdict in favor of *Drury*, and assessed his damages at \$255 69. Each party moved the court for costs, and the question was whether either, and if either, which was entitled to costs?

RICHARDSON, C. J. This is a question of costs. The statute makes no express provision for the case, but the rule

Drury  
vs.  
Leland.

(1) 1 N. H.  
Laws 220, 221.

which must be applied is in our opinion extremely clear. The act for the equal distribution of insolvent estates, provides, that when a creditor appeals from the decision of the commissioners, if something, but not more than the commissioners allowed, is given to the creditor by the judgment of this court, costs shall not be taxed for the creditor, but may be taxed for the executor or administrator; and that when an executor or administrator appeals from the decision of commissioners, if the same or as much as the commissioners allowed, is allowed by the judgment of this court, the creditor shall have his full costs.<sup>(1)</sup> These provisions we consider as placed in the statute by way of example, to shew who was intended to be considered as the prevailing party and entitled to costs. And we entertain no doubt, that when the creditor appeals, and recovers more than the commissioners allowed him, he must be considered as the prevailing party and entitled to costs; and when the executor or administrator appeals, if the creditor recovers less than the commissioners allowed, the executor or administrator must be considered as the prevailing party and entitled to costs. In the present case, the administrator appealed, and the sum allowed here is less than that allowed by the commissioners. The administrator must be allowed his costs.



GRAFTON, NOVEMBER TERM, 1821.

LIFE YOUNG vs. CYRUS BERKLEY.

In an action between the endorsee and the maker of a note, if it appear that the endorsee is a *bona fide* holder of the note without notice, the maker cannot be permitted to set up usury as a defence.

ASSUMPSIT upon a note of hand for \$200, made by the defendant and payable to *John Young*, and by him endorsed to the plaintiff.

The cause was tried here at May term, 1821, upon the general issue. The plaintiff having proved the making and endorsement of the note, the defendant proposed to prove,