

Young
vs.
Berkley.

usury as a defence to any part of the note, after it has passed into the hands of an innocent endorsee without notice. We are therefore of opinion, that there be

Judgment on the verdict.



JABEZ KELLOGG vs. DAVID C. CHURCHILL.

Replevin cannot be maintained against a sheriff for property by him taken on execution from the possession of the judgment debtor.

THIS was replevin for a mare, waggon and harness.

The cause was submitted to the decision of the court upon the following facts.

The defendant, being a deputy of the sheriff of this county, and having in his hands an execution in favor of one *Bellows* against *Isaac Morey*, took the articles mentioned in the plaintiff's writ from the possession of *Morey*, by virtue of the said execution; and it was agreed, that if the court should be of opinion that the action could not under these circumstances be maintained, the plaintiff should become nonsuit.

Phelps, counsel for the plaintiff.

Bell, for the defendant.

WOODBURY, J. Though at common law, replevin was extended from cases of distress for rent to all cases of a tortious taking of personal property; yet such property, if taken under process of law, was always deemed an exception to the general principle. *Gilbert on Dist.* 44, 161.—2 *Stra.* 1184.—1 *Barnard's Rep.* 110.—*Willies* 672 and note.—1 *Scho. & Lef.* 327.—3 *Mass. Rep.* 304.—5 ditto 285, *Isley et al. vs. Stubbs*. Such a taking was not considered tortious, because by a legal officer and by virtue of a legal precept; or probably a better reason was, that the property when so taken went into the custody of the law, eventual indemnity to the real owner was not endangered, and by permitting a replevin, "the execution of the writ of *feri facias* might in all cases be delayed or eluded."(1)

(1) 15 John.
Rep. 403.
(2) 14 John. 66.
(3) 15 John.
401.

In *Thompson vs. Betton*(2) and *Gardner vs. Campbell*,(3) it is remarked, that replevin will lie for property taken on exe-

cution, by a person who was not the judgment debtor and who had actual possession of the property when seized. But whether this rests upon a statute or on common law principles, is not stated; though in 5 *Mass. Rep.* 280, a similar practice appears there to be founded on express statute. It is unnecessary to settle the law here upon that point, as the property in the present case was taken from the actual possession of the judgment debtor. Under such circumstances, this defendant could reclaim possession of the property even against another officer, seizing it under a subsequent precept. 15 *Mass. Rep.* 465, *Gordon vs. Jenny*.

Kellogg
vs.
Churchill.

Plaintiff nonsuit.



WILLIAM NEELSON vs. CALEB SANBORNE.

A. gives *B.* a note of hand, and afterwards *C.* signed an agreement on the back of the note as follows, "I guarantee the payment of the contents of the within note to *B.*, the one half within six months, and the other half within twelve months;" it was held, that this was a sufficient memorandum of the agreement within the statute of frauds.

ASSUMPSIT. *B. Stevens* and *M. Hall* gave the plaintiff a note of hand in the following words: "*Ryegate, August 28, 1818.* For value received, we the subscribers jointly and severally promise to pay *William Neelson*, of *Ryegate*, seventy-eight dollars by the first day of *March next.*" And the defendant signed an agreement on the back of the note, as follows: "*Barnet, Aug. 26, 1819.* I guarantee the payment of the contents of the within note to *William Neelson*, the one half within six months, and the other half within twelve months." And upon this the action was founded.

The cause was tried here upon the general issue, at *May term, 1821*, when the court being of opinion that as this was a contract to pay the debt of another, not only the promise, but the consideration also upon which the promise was founded, must be in writing; directed the jury that no action could be maintained upon the promise, no consideration being expressed in the memorandum of the contract, and the jury returned a verdict for the defendant.