

French, for the demandant, cited *Parker vs. Murphy*, 12 *Mass. Rep.* 485.—*Keith vs. Swan*, 11 *ditto* 216.—*Booth* 28.—*Rastall's Entries* 225, 381, 404, 539.

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By the court. If in this state as in Massachusetts all pleas in abatement must by law be filed on the first day of the term, at which the action is entered, we should probably be induced to follow the decisions of the courts of that state, and permit nontenure to be pleaded in bar. But in this state pleas in abatement may be filed by our rules of practice any time during the first term; so that tenants in real actions have ample time to instruct counsel, and avail themselves of a plea of nontenure in abatement, if they see fit. On the other hand, if the tenant be not in fact tenant of the freehold, it is proper that he should be compelled to disclose that circumstance at the first term, and not be permitted to protract a suit, in which nothing can be settled. We are therefore of opinion, that there is no reason why we should depart from the rules of the common law on this subject, and that the plea in this case must be adjudged insufficient.

Judgment for the demandant.

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JACOB THRASHER vs. DAVID HAINES, jun.

A. and *B.* having a controversy respecting certain accounts between them, agreed to refer the same to arbitrators; *C.* appeared before the arbitrators at the hearing as *B.*'s agent, and assisted in managing the case. The arbitrators made a report in favor of *A.*, who procured a judgment upon the same report, sued out an execution, and caused the execution to be extended upon land which *B.* had conveyed to *C.*, and then brought a writ of entry against *C.* to recover the land: it was held, that *C.* was not estopped by the judgment to shew that there was nothing due from *B.* to *A.*

This was a writ of entry, in which *Thrasher* demanded a farm in Deerfield, in this county, and counted upon his own seisin within twenty years, and upon a disseisin by the tenant.

The cause was tried here at February term, 1820, upon the general issue.

It was admitted, that one *Jonathan Eastman* was once seized of the demanded premises. The demandant shewed the record of a judgment in his favor against the said *East-*

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man, rendered by this court at December term, 1813, in the county of Cheshire, upon a report of referees for \$1478 83 debt, and \$125 18 costs, and the copy of an execution, issued upon said judgment, and duly extended upon the demanded premises in February, 1814.

The tenant's title was a deed from *Eastman* to him, dated July 23, 1811; and he proved, that the consideration of the conveyance was a bond given by *Haines* to *Eastman*, with condition, that *Haines* should maintain *Eastman* and his wife during their natural lives.

The demandant introduced evidence to shew, that the conveyance from *Eastman* to *Haines* was fraudulent and void as respected creditors; and *Haines* offered to prove, that, at the time of the recovery by the demandant against *Eastman*, *Thrasher* had not in fact any subsisting debt against *Eastman*. But the demandant proving that *Haines* was present, and acting as the agent of *Eastman* before the referees, the court rejected the evidence offered by *Haines* to impeach the judgment, and the jury returned a verdict for the demandant.

Haines' counsel moved the court to grant a new trial, on the ground, that the evidence rejected ought to have been admitted.

Cutts, Smith and *Mason*, for the tenant.

Sullivan and *Bartlett*, for the demandant.

RICHARDSON, C. J. There is no doubt that the judgment which *Thrasher* recovered against *Eastman* would be conclusive evidence of a debt in any suit between the parties to it. *Phil. Ev.* 223.—3 *John.* 157, *Smith vs. Lewis.*—3 *East* 346, *Outram vs. Morewood.*

It is equally clear, that in general a judgment is not conclusive evidence of a debt against strangers, whose interest may be affected by it. 1 *Mass. Rep.* 165, *Alexander vs. Gould.*—11 *ditto* 89, *Young vs. Hosmer.*—6 *ditto* 242, *Pierce vs. Jackson.*

But there are cases where a judgment will be plenary evidence of a debt, even against strangers to it. Thus, where a third person is answerable to a defendant in a suit for

what may be justly recovered against him, if, after due notice of such suit given to such third person, a judgment is, without fraud, recovered against such defendant, it will be conclusive evidence against such third person of a just debt. 4 *Mass. Rep.* 349, *Hamilton vs. Cutts*.—4 *Dall.* 436.—6 *John.* 158, *Kip vs. Brigham et al.*—1 *ditto* 517, *Blasdale vs. Babcock*.—7 *ditto* 168, *Kip vs. Brigham et al.*

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These decisions are founded upon this principle, that it would be unreasonable to permit such third person to contest the justice of the claim in the suit against himself, after having neglected, or failed to shew its injustice in the suit against the person he was bound to indemnify. And in these cases it seems that notice and a refusal to defend the action is tantamount to notice and a judgment. For, "if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." *Buller, J., in Duffield vs. Scott*, 3 *D. & E.* 377.

In the case now before us, the question is, whether *Haines* is, under the circumstances of the case, precluded from shewing that, notwithstanding *Thrasher* recovered judgment against *Eastman* for a large sum of money, there was in fact nothing justly due, but that the judgment was founded altogether upon fraud and injustice? *Haines* was not, in the proper sense of the terms, either a party or privy to the judgment. He was not bound to indemnify either party; and of course this case does not come within the principle of that class of cases. Is he, then, precluded by the judgment from shewing, that there was in fact no just debt, merely because he was *Eastman's* agent? There is no case to be found in the books in which it has been decided, that he is precluded by that circumstance; and there are certainly strong reasons why he should not be. He was the agent of *Eastman*, but he might not have had any suspicion that *Thrasher*

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would extend any execution he might obtain against *Eastman*, on land previously conveyed to himself; and *Eastman* might have neglected to furnish him the means, and to give him proper instructions for resisting *Thrasher's* claim. And what is still more decisive, the reference may have been entered into, not only without consulting him, but even against his will. We are clearly of opinion, that he ought to have been permitted to impeach *Thrasher's* judgment, and that there ought to be

A new trial granted.

HILLSBOROUGH, APRIL TERM, 1822.

SAMUEL FOSTER vs. NATHANIEL SHATTUCK *et al.*

A note payable to *M. F.* or order, cannot be sued in the name of an endorsee, unless negotiated by the same *M. F.*, who was intended to be the payee.

Where no particular person of that name was intended to be the payee, or had any interest in the note, the name of the payee is to be regarded as fictitious.

In such case, where money passed between the parties to the action, a recovery may be had on the money counts; and when it did not pass between them, a recovery can be had on a count, alleging the note to be made payable to bearer.

THIS was assumpsit on a promissory note, made by the defendants. The note was dated July 27, 1808, for \$1666 67, payable to *Moses Foster*, or order, in three years, and was declared on as having been endorsed to the plaintiff by the payee in July, 1819.

At the trial here, October term, 1820, the signature of the note was admitted, but the endorsement of it appeared to have been made by a person in Milford, of the name of *Moses Foster*.

The defendants contended, that one *Moses Foster*, of Andover, was intended to be the payee, and the cause being submitted to the jury, they found that the plaintiff alone had always possessed the note, and loaned the money for which it was given to two of the defendants, and that no person by the name of *Moses Foster* had ever possessed any interest in it, or been particularly intended as payee. On this finding, the cause was continued for advisement.