

Watts
vs.
Welman.

within the meaning of the defendant's covenant at the time of the conveyance? It seems to us very clear, that it is not to be so considered. The moment the land was conveyed by the defendant to the plaintiff, the debt due to *Jones* became the debt of the plaintiff, and ought as between him and the defendant to be considered as paid, and as no longer an incumbrance upon the land. The case is in principle the same as if the defendant had conveyed the same parcel to *Jones* with a similar covenant, in satisfaction of *Jones*' debt, and *Jones* had brought an action on the covenant, and set out his mortgage as a breach of it. In the case of *Fitch vs. Baldwin*,⁽¹⁾ the court say, "it never can be permitted to a person to accept a deed with covenants of seisin, and then turn round upon his grantor and allege that his covenant is broken, for that at the time he accepted the deed, he himself was seized of the premises." And we are of opinion, that the plaintiff in this case can never be permitted to assign as a breach of the defendant's covenant, a mortgage which he himself, for an adequate consideration, had undertaken to discharge.

(1) 17 John.
166.

Judgment for the defendant.



ELIJAH PARKER, *Petitioner*, vs. ZADOCK NIMS *et al.*

A. died seized in fee of land, which had descended to him from his father, leaving uncles and aunts on his father's and on his mother's side, who were the next of kin, and also children of a deceased aunt.—It was held that the land descended in equal shares to the uncles and aunts on both sides, but nothing descended to the children of the deceased aunt.

This was a petition for partition of certain real estate, in which the petitioner alleged that he was seized of two eighth parts of the land as tenant in common with *Zadock Nims* and others, and prayed partition.

The case was submitted to the decision of the court upon the following facts. One *David Nims*, being seized of the land mentioned in the petition, conveyed the same to his son *Alpheus Nims*, upon whose death the same descended to his son *George Nims*, who entered and became seized as the law requires, and remained seized until the year 1818, when

he died, leaving no father, mother, brother, or sister, or children; but leaving five uncles and aunts on his father's side, and three uncles and aunts on his mother's side, and several children of a deceased aunt on his father's side. The petitioner claimed the shares of an uncle and an aunt on the mother's side.

Parker
vs.
Nims.

By the court. Our statute of February 3, 1789,(1) enacts, that "where there are no children or child of the intestate, the inheritance shall descend equally to the next of kin, in equal degree, and those who represent them. No person to be admitted as a legal representative of collaterals beyond the degree of brothers' and sisters' children." It is very clear that the children of the deceased aunt take nothing in this case. They are beyond the degree of brothers' and sisters' children. 1 *Pierre Williams* 593, *Bowers vs. Littlewood*.—*Lovell on Wills* 77. It is equally clear, that the uncles and aunts on the mother's side are in this case as well entitled to a share as those on the father's side. Our statute of descents is copied, in substance, from the English statute of distributions;(2)and we never look to the source whence the estate was derived, to determine who shall inherit, except in cases where our statute has made that circumstance material. 1 *P. Williams* 53.—*Lovell on Wills* 80. We are therefore of opinion, that the petitioner is entitled to two-eighth parts of the land.

(1) 1 N. H. Laws 207.

(2) 22 and 23 Car. 2. c. 10.

JOHN WEBBER vs. JOHN ALDRICH, Jun.

Assumpsit does not lie to recover back money paid for the release of goods illegally taken by virtue of a warrant of distress.

This was an action of assumpsit for \$4 34 money had and received by the defendant for the use of the plaintiff. The cause was submitted to the decision of the court, upon the following facts:

The defendant, being the captain of the seventh company in the thirty-second regiment of the New-Hampshire militia,

2	461
66	269
2	461
69	583