

Plumer
vs.
Brewster.

Emerson, for the plaintiff.

Quincy and *L. B. Walker*, for the defendant.

RICHARDSON, C. J. The question submitted to our decision in this case is, whether a deputy sheriff, who has arrested a person upon mesne process, may lawfully become the bail of the person so arrested?

In England, it is a rule both of the king's bench and the common pleas, that no sheriff's officer be permitted to be bail. 1 *Tidd's Prac.* 230.—2 *Bos. & Pull.* 150, *Faulkner vs. Wise.*—*Doug.* 466, *Hawkins vs. Magnall.*—2 *Str.* 889.—2 *W. Black.* 799, 1180. There is also a similar rule there with respect to attorneys. 1 *Tidd's Prac.* 230.—1 *Bos. & Pull.* 356.—2 *ditto* 49, 564.—2 *East* 181.—2 *Hen. Bl.* 350.—1 *ditto* 76.—*Cowp.* 828.

But in England, if an improper person become bail, the proceeding, although irregular, cannot be treated as a nullity. 2 *East* 181, *The King vs. the Sheriff of Surry.*—1 *Tidd's Prac.* 231.

In this state, we have no rule prohibiting deputy sheriffs from becoming bail; and we are of opinion, that this action cannot be supported.

Judgment for the defendant.



JOSEPH PERKINS vs. WALTER B. KNIGHT.

Where after a cause had been opened to the jury, one of the parties made to a juror out of court statements favorable to his own side of the cause, and the jury afterwards returned a verdict in his favor, a new trial was granted.

TRESPASS for taking a horse, which had been taken by the defendant, a deputy sheriff, upon an execution against one *Ephraim Plumer*, as *Plumer's* property; and the question was, whether the plaintiff had *bona fide* purchased the horse of *Plumer* before the taking by the defendant. The cause was tried here at February term, 1822, and was opened to the jury and part of the evidence laid before them in the forenoon of the day of trial; the court then adjourned, and the cause was finished in the afternoon, and the jury, having returned a verdict for the plaintiff, the defendant moved for

a new trial on the ground, that the plaintiff had misbehaved with one of the jury while the cause was before them.

It appeared from the affidavits read by the defendant, that between the sittings of the court, on the day of the trial, the plaintiff entered into a conversation with one of the jury respecting the cause, and told the juror, "that he purchased the horse as fairly as he ever purchased any thing in his life; that the taking the horse was of great damage to him, for he could have turned him towards land for sixty dollars."

Eastman, for plaintiff.

Woodman, for defendant.

By the court. Nothing can be clearer, than that there ought to be a new trial in this case. The authorities are decisive. *Com. Di.* "Pleader," S. 45, 46.—2 *Roll. Ab.* 716,—*Trial per pais*, 315.—1 *Gall.* 364.

It would be exceedingly mischievous, if we were to give any sanction whatever to any tampering with jurors. It is of the highest importance, that they should be preserved not only from all improper bias in causes, but even from the suspicion of improper bias.

New trial granted.



ENOCH CLEMENTS *vs.* JOHN SWAIN, *executor of JOHN SWAIN, deceased.*

It is not a good plea in bar to an action against an executor or administrator, that the action was commenced within a year after proving the will or taking letters of administration; but such matter should be pleaded in abatement.

It is not a good plea in bar that the defendant is administrator, and not executor. If one who is sued as executor *de son tort*, take administration after the commencement of the suit, he cannot plead in abatement that he is administrator and not executor.

ASSUMPSIT. The defendant pleaded in bar, 1st, that said *John* deceased died intestate, and after the commencement of this action, to wit, on the 2d of September, 1821, administration of the goods and estate of the said *John*, deceased, was granted to him by the judge of probate, &c.

2d. That one year had not elapsed since the death of the said *John* deceased.

Perkins
vs.
Knight.