

Davis
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Huggins.

But this principle is believed to have been adopted only in the state of New-York, and stands opposed there by the opinions of men, whose legal talents and sound reasonings more than counterbalance the weight of authority, which the decisions, that sanction the principle, carry with them. 2 *Johns. Ch. R.* 554.—17 *John.* 384.

And we are of opinion, that a surety is not discharged by a mere delay of the creditor to call upon the principal, when requested so to do by the surety. It seems to us unnecessary to establish such a principle, because the surety may in any case, if he feel any anxiety, pay the debt and call upon the principal by a suit in his own name. This, we think, is a sufficient protection for the surety; and we are of opinion, that there must be judgment in this case, that the plea is insufficient.

Judgment for the plaintiff.

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GRAFTON, MAY TERM, 1825.

PLUMER DODGE, *Administrator of* ISAAC DODGE,
vs.
ROBERT MORSE.

When issue is joined upon the matter of a plea in abatement, and found against the defendant, the jury must assess the damages in the same manner, as when an issue is taken upon the matter of a plea in bar.
The book of accounts of an intestate, supported by the supplementary oath of his administrator, are in this state competent evidence.

ASSUMPSIT upon an account, annexed to the writ, of goods sold and delivered by the plaintiff's intestate to the defendant.

The defendant pleaded in abatement of the plaintiff's writ, that the promise in the declaration mentioned, if any such were made, was made by him jointly with several other persons, and not by him alone.

To this plea the plaintiff replied, that the promise was made by the said *Morse* alone, as alleged in the declaration; and upon this issue was joined.

The cause was tried here, at November term, 1824. The plaintiff, among other evidence, produced a book of ac-

3	229
66	352
3	232
68	255

counts, and, being sworn to make true answers, stated, that the book came to him as administrator, and that the charges in it against the defendant, which were the same as the charges mentioned in the declaration, were in the hand writing of *Isaac Dodge*, his intestate. Whereupon, the book was permitted to go to the jury, as evidence in the cause.

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The court instructed the jury, that in case they found the issue, submitted to them, in favor of the plaintiff, they might consider the plea as an admission, that the articles were delivered, and that they must inquire of the value of the goods charged, and give that value in damages to the plaintiff.

The jury having returned a verdict in favor of the plaintiff, the defendant's counsel moved the court to grant a new trial, on the ground, that improper evidence had been submitted to the jury, and that the jury had been misdirected.

Noyes, for the plaintiff.

Quincy, for the defendant.

By the court. On behalf of the defendant in this case it is urged, that the jury were misdirected, because they were instructed, that in case they found the issue in favor of the plaintiff, it would be their duty to give him in damages the value of the goods charged, without any further inquiry into the merits of the case. But this objection is altogether without any foundation. For it is well settled, that if issue be taken upon a plea in abatement, and the jury find for the plaintiff, they must assess the damages in the same manner, as when an issue is found for the plaintiff upon a plea in bar. 2 *Wils.* 367, *Eichorn vs. Le Maitre*.—3 *Saund.* 210, *g. note* 3.—*Yelv.* 112, *Tompson vs. Colier*.—*T. Ray.* 118.—1 *Lev.* 163.

It is a rule of law, that whatever is traversable and not traversed is admitted. 19 *John.* 95, *Briggs vs. Dorr*.—2 *N. H. Rep.* 378. And no doubt is entertained, that this rule applies in cases, where a defendant pleads in abatement matter, which is found by a jury to be false.

It is further objected, that the book of the deceased, supported only by the supplementary oath of his administrator, was improperly permitted to go to the jury. It has lately

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been decided in this court, that the book of a party, supported by his oath, that it is his book of original entries, and that the charges are in his own hand writing, may go to a jury as evidence. *Eastman vs. Moulton, 3 N. H. Rep.*

And it is believed, it will be difficult to shew a good reason, why the book of the intestate, supported by the supplementary oath of his administrator, should not be considered as good evidence, as if supported by the oath of *Isaac Dodge* himself. And we are of opinion, that this objection must be overruled.

Judgment on the verdict.

MERRIMACK, AUGUST TERM, 1825.

ANDREW FRENCH vs. GEORGE FRENCH.

No deed is valid to pass real estate under the statute of February 10, 1791, unless it be signed by two or more witnesses.

But a deed signed by only one witness may, in certain cases, operate as a covenant to stand seized, or as a bargain and sale, and thus pass the estate.

The statute of 27 H 8. cap. 10, has been adopted in this state.

If a consideration of blood appear upon the face of the deed, it is sufficient to raise a use, although blood be not particularly expressed as the consideration.

This was a writ of entry, in which the demandant counted upon his own seisin of land in *Pembroke*, in this county, and upon a disseisin by the tenant; and was submitted to the decision of the court upon the following facts:

The tenant, being seized of the demanded premises, on the 13th January, 1812, made and executed a deed as follows:

“ Know all men, that this indenture of lease witnesseth,
“ that I, *George French*, of *Pembroke*, &c. do hereby lease,
“ and release, and quit-claim to my honored father, *Andrew French*, the use and improvement, during his natural life,
“ of that half of his farm, which he hath this day given a
“ deed of to me: the true meaning of this is, that I, the
“ said *George*, shall not convey the land, he hath given me
“ a deed of, during his natural life.

“ Dated *Pembroke*, Jan. 13, 1812.

“ GEORGE FRENCH, & seal.

“ Attest— NATHANIEL HEAD.”