

Daniels  
vs.  
Ellison

But it is further objected in this case, that *John Ellison*, the administrator, was not the person to be called upon to appoint an appraiser ; because, upon the death of *Abraham Ellison*, his real estate descended and vested in his heirs ; and if the estate of the heirs was to be taken to pay a debt of *Abraham Ellison*, the heirs ought to have been notified to appoint an appraiser. But we think, that this objection cannot prevail. A judgment, recovered against an administrator, may be satisfied by an extent upon land, which has descended from the intestate to his heirs. And as the law intrusts the administrator to defend the suit, in which the judgment may be recovered, without notice to the heir ; *a fortiore*, he shall be intrusted to appoint an appraiser, when the execution is extended upon the land, which the heir has by descent from the intestate. The uniform practice, it is believed, has been to notify the executor or administrator in such cases ; and we cannot entertain a doubt, that it is the correct course. If the administrator misdemeans himself in the business, to the injury of the heirs, he may be called to an account ; and, if he misjudges, the heirs may have an adequate remedy by redeeming the land.

*Verdict set aside, and new trial granted.*

ROCKINGHAM, SEPTEMBER TERM, 1825.

DANIEL GOOKIN, *Judge of Probate*, vs. A. TRUE.

The non-payment of a legacy charged upon land is no breach of the condition of a probate bond.

DEBT upon a probate bond, given by the defendant upon his taking upon himself the burthen of executing the will of *Samuel Davis*, deceased.

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

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*Samuel Davis*, having made his will, and therein appointed the defendant his executor, died on the 3d January, 1808. The will was duly proved and allowed on the 20th January, 1808; and the defendant took upon himself the burthen of executing it. The testator, after devising all his real estate, with certain exceptions, to his grandson *Samuel Davis*, inserted in his will the following clauses:

“I further say, that my grandson *Samuel Davis*, or my executor, pay or cause to be paid to my son *Samuel Davis*'s two daughters, *Sarah Bickford* and *Hannah Davis*, fifty dollars each, in six months after the decease of their parents.”

“I further say, that my executor shall sell so much of my personal estate as shall pay my debts and incidental charges, and if there shall be any more, it shall be the property of my daughter-in-law *Abigail Davis*.”

The whole amount of the personal estate, which came to the hands of the defendant, was \$95 26, for the whole of which he has accounted in the probate court; and there is nothing in his hands. The legacies to *S. Bickford* and *Hannah Davis* have never been paid; although they became payable by the decease of their parents on the 10th Jan. 1820.

The testator's grandson, *Samuel Davis*, entered and took possession of all the real estate devised to him as aforesaid.

And it was agreed, that if the court should be of opinion, that this action could be maintained against the defendant to recover the legacies given to *S. Bickford* and *Hannah Davis*, as aforesaid, the defendant should be defaulted; but, if the court should be of a different opinion, then the plaintiff to become nonsuit.

*Sullivan*, for the plaintiff.

*Tilton*, for the defendant.

*By the court.*—Upon a view of all the provisions in the will of *Samuel Davis*, it does not seem to us to admit of a question, that it was the intention of the testator to make the legacies given to his grand-daughters, *Sarah Bickford* and *Hannah Davis*, a charge upon the real estate devised to his grandson *Samuel Davis*. *Prec. Ch. 288, Jones vs. Jay.* As *Samuel Davis* has entered into the land devised to him, he has become liable to pay these legacies; and they cannot be

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considered as a charge upon the estate generally, which the executor is bound to pay. The devisee, who has entered into the land and now holds it under the will, is the debtor in fact, and not the estate of the testator. 2 *N. H. Rep.* 439, *Piper vs. Piper*. We are therefore of opinion, that the non-payment of the legacies, thus charged upon the land, cannot be a breach of the condition of the bond, on which this action is founded, and that the plaintiff must be

*Nonsuit.*



LEE vs. DEERFIELD.

Where a pauper is shewn to have actually stood in need of relief, and supplies to have been furnished, by order of one of the selectmen of the town, where he happened to be, the assent of the other selectmen, to the furnishing of necessary supplies, may be presumed by a jury.

In order to maintain an action against a town for supplies furnished to a pauper, it is not necessary that the town, bringing the action, should shew that it had paid for the supplies furnished before notice was given to the town chargeable.

*Assumpsit* for the support of a pauper. The cause was submitted to the decision of the court, upon the following facts.

The pauper had a legal settlement in the town of *Deerfield*, and, being sick in *Lee*, and unable to support himself, and standing in need of relief he made application to one of the selectmen of *Lee*, who ordered supplies to be furnished to him. But no application was made to the other two selectmen of *Lee*.

At the time notice was given to *Deerfield*, that the pauper had become chargeable, nothing had been actually paid by the town for the supplies furnished to the pauper.

*Bartlett*, for the plaintiff.

*Sullivan*, for the defendant.

*By the court.*—It is contended, that the town of *Deerfield* is not liable for the supplies furnished in this case, because they were furnished by the order of only one of the selectmen of *Lee*, and so must be considered as furnished without the authority of the selectmen. But the statute of June 27, 1809, sec. 2, (1 *N. H. Laws* 359,) enacts, “that, when any