

MERRIMACK, JANUARY TERM, 1826.

JOHN EASTMAN vs. ELIJAH B. FIFIELD *et al.*

When a promissory note is made payable at a particular time and place, it is not necessary, in order to maintain an action upon it, to shew a demand at the time and place.

ASSUMPSIT upon a note in the following words :

“ November 19, 1817. For value received, I promise
“ *John Eastman*, to pay him, or order, one hundred dollars,
“ to be paid at *Esqr. Jackman's*, in Bradford, in the month
“ of February, 1823, with interest.”

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

It was agreed, that the defendants made the note, that the plaintiff was not at *Esqr. Jackman's*, in Bradford, in the month of February, 1823, and that no demand of payment was made there previous to the commencement of this suit.

And it was agreed, that if the court, upon these facts, should be of opinion, that the plaintiff was entitled to recover, he should have judgment for the amount of the note and interest ; otherwise a nonsuit to be entered.

H. G. Harris, for the plaintiff.

E. Webster, for the defendant.

RICHARDSON, C. J. delivered the opinion of the court.

The contract of the defendants in this case was to pay in the month of February, 1823, and would have been performed by a payment at any time during that month. It may be, therefore, considered as a contract to pay on or before the last day of February, 1823 ; and the question to be decided is, whether, when a promissory note is made payable at a particular time and place, it is necessary, that the payee shew a demand at the place, in order to enable him to maintain an action ?

It is well settled, that, when a promissory note is made payable at a particular place on demand, no action can be maintained without a demand. 14 *East* 500, *Saunderson vs. Bowes et al.*—16 *ditto* 110, *Dickinson vs. Bowes et al.*—5 *Taunt.*

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30, *Bowes vs. Howe*.—18 *John*. 493, *Bank of Niagara vs. M Cracken*.

There has been, in England, a difference of opinion as to the nature of an acceptance of a bill of exchange, payable at a particular place. In the court of common pleas, the place, in such a case, has been held to be part of the contract, and to render a demand at the place necessary to charge the acceptor, or the drawer. 3 *Taunt*. 397, *Callaghan vs. Aylett*.—5 *Taunt*. 344, *Gammon vs. Schmoll*.—2 *Taunt*. 61, *Ambrose vs. Hopgood*.

In the court of King's bench, the place, in such a case, has been held not to be a part of the contract, but a mere direction introduced for the convenience of holders of the bills, and it has been decided, that a demand, at the place, is not necessary to charge the acceptor. 13 *East* 459, *Fenton vs. Goundry*.—17 *Johns*. 248, *Wolcott vs. Van Santvoord*.

But in the case of *Rowe vs. Young*, (*Brod. & Bing*. 165,) it was decided, in the house of lords, that, in an action against the acceptor of a bill of exchange, payable at a particular time and place, a presentment at the place must be averred and proved.

It does not seem to have been settled, in England, whether, when a promissory note is made payable at a particular time and place, a demand is necessary. In the case of *Sanderson vs. Bowes*, (14 *East* 504,) *Ld. Ellenborough* admitted, that there might be a distinction between a promise to pay, at a particular place, on demand, and a promise to pay at a particular time and place; because, in the latter case, the promissor might aver, that he was ready, at the time and place, but, in the former case, the time of payment depended upon the pleasure of the promisee. And, in the case of *Carley vs. Vance*, (17 *Mass. Rep.* 389,) the supreme court of Massachusetts held, that, when a promise was made to pay, at a particular time and place, no demand was necessary; but if the promissor was ready, at the time and place, it was matter of defence. The same point was decided in the case of *Ruggles vs. Patten*, (8 *Mass. Rep.* 480.) And we are, on the whole, of opinion, that, when a note is made payable at

a particular time and place, no demand is necessary, and that there must be

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Judgment for the plaintiff.



BENJAMIN PRICHARD vs. SIMEON ATKINSON.

A public highway through land is a breach of a covenant, which stipulates, that it is free of all incumbrances.

Selectmen have authority to lay out highways only in cases, where applications are made to them for the purpose.

The doings of selectmen, in laying out highways, cannot be supported, unless it appear, that due recompence was allowed to the owners of lands, through which they were laid out, and that the owners had an opportunity to be heard upon the subject of the damages.

But long use of a way is evidence, that it was duly laid out.

COVENANT broken. The plaintiff alleged in his declaration, that the defendant, by deed, dated December 10, 1813, conveyed to him a tract of land in Boscawen, and by the same deed covenanted with the plaintiff, that the same land was free of all incumbrances. The breach of the covenant assigned was a public highway laid out across the land, previously to the said conveyance.

The plea of the defendant traversed the existence of a highway ; upon which issue was joined.

Upon the trial of that issue here, at August term, 1825, the plaintiff produced the copy of a record, as follows :

“ A return of a highway laid out by us, the subscribers, as follows, viz. beginning at a pine stump, which stands on the south line of land now owned by *John Mannuel*, and is also the south-east side of the highway, thence running south twenty-five degrees east 100 rods to a pine tree, near the end of the bridge. The above highway is to be four rods broad, on the northerly side of the above described line.

“ Boscawen, July 26, 1796. W. C. }
 T. T. } Selectmen.”
 E. L. }

And then shewed in evidence, that, before the making of said record, the selectmen of Boscawen marked out a high-