

the plaintiff would shew any exclusive possession under that deed. But, in such a case, the possession in common must be shewn to have been open and known to the former owner, and to have remained long undisturbed by him, before it can be submitted to a jury, as a legal ground of presumption in favor of a collector's sale. It does not appear from the case saved, that the possession of the plaintiff was of this character; and we think it was improperly submitted to the jury, as evidence of the regularity of the collector's proceedings.

Being of opinion, that, for the foregoing reasons, a new trial must be granted, it is unnecessary to express any opinion upon the question, whether, under the statute of March 16, 1780, (1 *N. H. Laws* 520,) a collector was authorized to sell a portion of the estate in common.

New trial granted.



A. A. W. YOUNG vs. DANIEL YOUNG, jr.

It is a good plea in abatement of a writ, that the plaintiff or demandant, who sues without a guardian, or next friend, is an infant. But the writ may, in such a case, be amended, by inserting the name of a guardian, or next friend.

THIS was a writ of entry. The tenant pleaded, in abatement of the writ, the infancy of the demandant, who sued without a guardian or *prochein amy*.

The demandant moved for leave to amend his writ, by inserting the name of a *prochein amy*.

To this the tenant objected, and contended, that the writ was not amendable, in this respect, by any known rule of practice.

Copp, for the demandant.

Hobbs and *Sawyer*, for the tenant.

By the court. It is well settled, that it is a good plea in abatement of the writ, that the demandant or plaintiff, who sues without a guardian or next friend, is an infant. *Chitty's Pl.* 436.—2 *Saunders* 117, *f. note* (1.)—1 *Tidd's Prae.* 69.—

Waldron
vs.
Tuttle.

Young
vs.
Young, jr.

7 *Johnson* 373, *Schemerhorn vs. Jenkins*.—2 *Saunders* 212.—
Comyn's Digest, Pleader 2 C. 1.

But it is very clear, that the writ may be amended. 1
Cowen 33 ; *Ex parte Scott*.—2 *Saunders* 212, and notes.—1
Tidd's Prac. 69—72.

Leave to amend granted.

STEPHEN OTIS vs. REUBEN HUSSEY.

In an action by the indorsee against the indorser of a promissory note, the plaintiff must shew, that he has used due diligence to find the maker, and to demand payment of him, although informed by the indorser, when he received the note, that the maker was a transient person, without any known place of abode. And a promise to pay, made by the indorser, will not be a waiver of the consequences of a want of demand in such a case ; unless it be shewn affirmatively, that the indorser knew, that no demand had been made, when he made the promise.

ASSUMPSIT upon a promissory note for \$15, made by one *Stephen Henderson*, payable to the defendant, or order, on demand, with interest, and by the defendant indorsed.

The cause was tried here, at February term, 1825, upon the general issue ; when it appeared in evidence, that the defendant indorsed the note in blank and delivered it to one *Warren*, who passed it to the plaintiff, for a valuable consideration. It also appeared, that the maker was a transient person, having no particular place of abode.

The only evidence, that any demand had been made of the maker, or that any inquiry had been made for him, either by the plaintiff or *Warren*, was, that when the plaintiff received the note, he inquired of *Warren*, where *Henderson* lived, and was told, that *H.* was a transient person, and his place of abode unknown.

It further appeared in evidence, that after the plaintiff received the note, he called upon the defendant for payment ; and the defendant, ignorant that no demand had been made of the maker, promised to pay the note.

The court instructed the jury, that the inquiry, which the plaintiff made of *Warren*, was not in law such diligence as entitled the plaintiff to recover, without an actual de-