

Strong
vs.
Perkins.

commenced here before probate of the will ; because we always declare at the commencement of the action. But we never, in our practice, insert a profert of the letters testamentary, in the declaration. There is, therefore, nothing in our practice, which can create any embarrassment in commencing an action before the will is proved.

In our system of jurisprudence, a will cannot be used as evidence, in any court of common law, until it has been duly proved and allowed in a court of probate. When it has, however, been proved and allowed there, it becomes conclusive evidence in all other courts ; and neither the due execution of the instrument, nor the capacity of the testator can be called in question. Yet still the authority of the executor is derived not from the court of probate, but from the testator. That court settles the question, whether the instrument is the will of the testator, and by its decree allowing it as such gives it authenticity. But this is the whole effect of the decree. When the instrument has been duly proved and allowed in the court of probate, no new authority is given to the executor ; but it is conclusively settled, that the instrument, from which the executor claims to derive his authority is the will of the testator, and is to be considered as such from the time of his death.

We are therefore of opinion, that the plaintiff, in this case, is entitled to judgment, and that the defendant must, according to the agreement, be defaulted.



RICHARD I. BLANCHARD vs. JONATHAN NOYES.

A plea, simply alleging the payment and acceptance of a less sum of money, in satisfaction of a larger sum, is bad.

But a plea, alleging the payment and acceptance of a less sum before the day, or at a different place, or from a third person, in satisfaction, is good.

Upon a plea of payment, the acceptance of a less sum in satisfaction, may be left to a jury as evidence, that the rest has been paid.

DEBT upon a judgment, rendered by a justice of the peace, for \$9 91, debt and \$4, costs of suit. At November term, 1825, the defendant pleaded in bar of the further maintenance of the action, that since the last continuance, to wit, on the

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23d March, 1825, the said *Noyes* paid to the said plaintiff the sum of ten dollars, in full satisfaction of the said judgment, which said sum the plaintiff accepted, in full satisfaction of the same. To this plea the plaintiff demurred, and the defendant joined in demurrer.

Pearson and Bell, for the plaintiff.

Sheafe, for the defendant.

By the court.—It is well settled, that a plea simply alleging the acceptance of a smaller sum of money, in satisfaction of a larger sum, is bad. 5 *Coke's Rep.* 117, *Pinnel's case*.—9 *Coke's Rep.* 80, *Peytoe's case*.—5 *Johns.* 386, *Watkinson vs. Inglesby*.—5 *D. & E.* 513, *Kearlake vs. Morgan*.—2 *D. & E.* 24, *Heathcote vs. Crookshanks*.—1 *Strange* 425, *Cumber vs. Wane*.—5 *East* 230, *Fitch vs. Sutton*.—17 *Johns.* 169, *Seymour vs. Minturn*.—2 *Johns.* 448, *Harrison vs. Wilcox*.

But it has always been held, that a plea alleging the payment of a less sum, before the day of payment stipulated in the contract, or at a different place, or the delivery of a specific article, in satisfaction, and an acceptance in satisfaction by the plaintiff, was a good plea. 5 *Co.* 117, *Pinnel's case*.

So a plea alleging the payment of a less sum by a third person, and the acceptance of it by the plaintiff in satisfaction, is a good bar. 1 *N. H. Rep.* 279, *Coburn vs. Gould*.—11 *East* 390, *Steinman vs. Magnus*.—2 *D. & E.* 763, *Cockshot vs. Bennett*.

The reason, why the payment of a less sum by the debtor in satisfaction of a larger sum, cannot be adjudged a satisfaction, is, according to *Lord Coke*, “because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.” But the gift of a chattel is good, because it may be intended to be more beneficial to the plaintiff, although of less value, than money.

It is very clear, that the plea in this case must be adjudged bad.

But the defendant may have leave to amend upon terms, and plead payment; and the agreement to accept the \$10, in satisfaction, may be left to the jury as evidence, that the rest has been paid. 5 *Cranch* 11, *Henderson vs. Moore*.

Leave to amend.

Blanchard
vs.
Noyes.