

defendant and Putnam and Patridge came there. The ground of the plaintiff's exception was, that the evening was not fixed by Marsh as the same on which the plaintiff was overtaken and passed by the defendant.

A verdict was returned for the defendant, which the plaintiff moved to set aside because of the foregoing exception, and because of the misconduct, partiality, and previously formed opinions of certain members of the jury.

*L. W. Barton*, for the plaintiff.

*Cushing*, and *Bowers*, for the defendant.

BARLETT, J. As the only objection taken to the testimony of Marsh was that the occurrence he stated was not fixed by him as on the evening of the alleged injury to the plaintiff, the exception can not prevail if there was competent evidence on which the jury could have found such to have been its date. We think the coincidence in the time of the day and year, the fact that the plaintiff was traveling in the same direction over the same road as at the time of the alleged injury, and the fact that the defendant and the two men who went over the same road to Croydon together on that occasion, came to Croydon together at this time, were competent evidence on which the jury might have found that Marsh's testimony related to the evening of the alleged injury.

There is a motion to set aside the verdict because of the alleged partiality of one of the jurors, but upon the evidence we do not think the fact is made out. There must be

*Judgment on the verdict.*

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### LEAZAR v. COTA.

A new indorser will not be ordered by reason of the poverty of the plaintiff and of his next friend, if both are residents of the State.

THE plaintiff, Sarah Leazar, is an infant under twenty-one years of age, and Frank Leazar, who brings this suit as her next friend, is destitute of property, and irresponsible. The writ is indorsed by Sarah Leazar and Frank Leazar. At this term the defendant, upon proof of the irresponsibility of Frank Leazar, moved the court that the plaintiff be ordered to furnish a new indorser, which motion the court granted, subject to the plaintiff's exception.

*Morris*, for the plaintiff.

*Blaisdell*, for the defendant.

BELL, C. J. By the statute, original writs must be indorsed "by the plaintiff, his agent, or attorney, being an inhabitant of the State;

if the plaintiff is not an inhabitant of this State, by some responsible person who is an inhabitant."

By the construction always given to this statute, if the plaintiff is an inhabitant of the State, his indorsement, or that of his attorney or agent, is sufficient without reference to their responsibility. A different rule would operate as a denial of justice to every one who had the misfortune to be poor. The next friend, guardian, &c., who prosecutes in behalf of a minor, has always been deemed the party, or agent of the party, for this purpose. *Crossen v. Dyer*, 17 Mass. 222.

The rule that a resident plaintiff, though insolvent, can not be required to furnish a new indorser, has been held subject to exceptions, none of which apply in this case.

1. If a resident plaintiff removes from the State, pending the suit, it is customary, upon a seasonable application, to order security for the costs.

2. If the plaintiff is not the party in interest, but the suit is prosecuted for the benefit of a third person, security for costs is usually ordered, if seasonably asked. *Gookin v. Upham*, 21 N. H. 38.

3. If the plaintiff is in default, and obliged to apply to the court to be relieved, the court, in the exercise of their discretion, may order such security as terms of the relief. *Senter v. Carr*, 15 N. H. 380.

4. If a third person has leave to prosecute or defend an action, he is required to give security to pay all costs of his interference to both parties. *Carleton v. Patterson*, 29 N. H. 586; *Holland v. Seaver*, 21 N. H. 388.

If a writ is not properly indorsed, the defendant must make his objection at the first term, otherwise it will be deemed waived. *Carpenter v. Aldrich*, 3 Met. 58; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Whiting v. Hollister*, 2 Mass. 102; *Ripley v. Warren*, 2 Pick. 592, 595; *Hanson v. Hoitt*, 14 N. H. 56; *Foss v. Strafford*, 25 N. H. 78; *Goodrich v. Pendleton*, 3 Johns. Ch. 520. By the case it does not appear when the action was entered, but the record shows it had been entered at a previous term, and this motion is stated in the case to have been made at the term of the transfer.

It is suggested in the argument that the court, in their discretion, may remove a next friend, or require another person to be substituted, and that such a power is indispensable for the safety of the minor's rights; and we have no doubt that the court may, on application of the minor or his friends, or on its apparent propriety, make any order which seems necessary for the security of the minor's rights. *Fulton v. Roosevelt*, 1 Paige 178.

But this is not an application for the security of the infant, but for the benefit of the defendant, which presents a very different question. Without doubt the court would interfere, even on motion of the defendant, on suggestion of want of good faith in the *prochein ami*, but we think not upon the suggestion that the plaintiff and next friend were poor. See 1 Paige 178, and cases cited.

*Exceptions sustained. Motion denied.*