

Mrs. George only, was good, because there was no extra interest in it; and the plaintiff states that the magistrate, when inquired of by him if Mr. George ought not to sign the mortgage, said it would be good without his signature. The magistrate states that he has no recollection of making either of the statements as testified to by Mace, or the plaintiff, though he says that at the time of making the mortgage he supposed that it was good and valid without Mr. George's signature.

Laying out of the case, then, the conflicting evidence in relation to an intended fraud practised upon the plaintiff by George and his wife at the time of the conveyance, and it seems to us that the case is plain; nor do we need to inquire in relation to a resulting trust, for it seems to us that aside from all these grounds there was a mutual mistake in regard to the security. Both the plaintiff and the defendants supposed beforehand that a valid mortgage of the premises was to be given, and intended it should be so. At the time of its execution they all supposed that it was valid, and the magistrate thought the same, and long afterward the parties had no suspicion that it was otherwise.

It seems to us to be a clear case of a mutual mistake, where the instrument given and received was not in fact what all the parties to it supposed it was and intended it should be; and in such a case equity will interfere and reform the deed, and make it what the parties, at the time of its execution, intended to make it; and in this respect it makes no difference whether the defect in the instrument be in a statutory or common law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect. *Beardsley v. Knight*, 10 Vt. 185; *Canedy v. Marcy*, 13 Gray 377; *Webster v. Webster*, 33 N. H. 18; *Doe v. Doe*, 37 N. H. 268; *Browne v. Glines*, 42 N. H. 160.

It is, therefore, decreed that James George and Nancy George execute and deliver to the plaintiff within twenty days a joint quitclaim mortgage deed of the premises described in the plaintiff's bill, to secure the sum of nine hundred and ten dollars, as of May 6, 1856, upon the presentation to them of such a deed by the plaintiff; and that unless said sum of \$910, with legal interest thereon from said May 6, 1856, be paid to the plaintiff within sixty days, a writ of possession, in common form, as upon mortgage, shall issue in favor of the plaintiff.

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### BROWN v. ROLLINS.

The time of the debtor's absence in California, which continued without interruption for many years, is to be excluded in the computation of the time limited for the commencement of personal actions; although his wife and child continued to reside on his homestead farm in this State.

ASSUMPSIT. Pleas, the general issue, and statute of limitations.  
It is agreed that this action was commenced by the plaintiff to

secure the payment of the amount due on two notes annexed to the case. The plaintiff has had no other suit against the said defendant for the last ten years. The consideration of said notes was money loaned by the plaintiff to the defendant, and has not been paid except as appears by indorsement on said notes. At the date of the notes the defendant lived in Wilmot, on his homestead farm, with his wife and child; the same premises now attached in this suit. Said homestead farm has been during all the time, from the date of said notes up to the present, owned by the defendant, and occupied by his wife and child. A short time after the date of one of the notes the defendant left Wilmot for California, has remained in California to this time, and is now there. The defendant has written the plaintiff since this suit was commenced, a letter annexed to the case. The plaintiff, after receiving the defendant's said letter, soon sent the defendant a letter, stating the amount he claimed to be due on said notes, but has received no answer.

*Shirley*, for the plaintiff.

*W. W. Flanders*, for the defendant.

BELLOWS, J. The doctrine of *Ward v. Cole*, 32 N. H. 452, is, that absence from the State to prevent the running of the statute of limitations, must be such that process could not be served on the debtor, so that judgment could be obtained, to bind him personally in any jurisdiction; and this doctrine is affirmed in *Ward v. Howe*, 38 N. H. 35. And this doctrine was applied when the debtor's absence was temporary, on a voyage with his family, and expecting to be gone three years, but leaving property in this State.

The same general doctrine is found in *Gilman v. Cutts*, 23 N. H. 377, and the same case in 27 N. H. 348. In the latter case, where the debtor worked in a neighboring State during the summer seasons, but returned once a fortnight to his family in this State, where they kept house, and staid from Saturday night until Monday morning, and sometimes came oftener; it was held that legal service could have been made upon him by leaving a copy at his place of abode in this State; and that therefore such absence should not be excluded.

In the case before us, the debtor went to California, leaving his wife and child upon his homestead farm in this State, and has remained there, without returning at all, for many years; making a case much like that of *Ward v. Cole*, with the single exception that in the latter the debtor took his family with him, and therefore ceased, for the time, to have any place of abode for himself or his family in this State.

The question then is, whether, during the debtor's absence in California, he could be regarded as having his last and usual place of abode in New-Hampshire, so that service could have been made upon him by leaving there a copy of the writ.

Upon a careful consideration of this question we think he had no such place of abode in this State; although, if his intention to

return was shown, his legal domicile would have been here, yet his actual place of abode, in the meaning of the statute, must be regarded as in California, where he lived without interruption for the last twelve years.

In *Gilman v. Cutts*, 27 N. H. 348, stress is put upon the fact that the debtor returned once in a week or two to his home in Exeter; and we think very properly, because he was clearly in a position to receive notice of the suit, from the copy left at his house, although left at the last moment required for the service; and the court in that case waive the consideration of the question arising upon the continued absence of the debtor in Ohio for three or four years together.

Such an absence we think clearly comes within the policy of this statute provision, and within the principle of the adjudged cases, and the distinction between such a case and that of *Gilman v. Cutts* is strongly marked, and is in accordance, we conceive, with the practical construction given to the law.

There must, therefore, be

*Judgment for the plaintiff.*

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DAVIS v. CILLEY.

Where arbitrators, intending to decide according to law, by mistake assumed that to be law which was not, and in consequence allowed a greater sum than they otherwise would have done, upon a bill in equity the mistake will be corrected.

Where the amount of such error is clearly shown by the proof, and the court can see distinctly that it could not have otherwise affected the justice of the case, the error will be corrected by deducting the amount of it, when in favor of the prevailing party, from the sum awarded him, without setting aside the award, although the error does not appear upon its face.

THIS bill in equity was heard upon the bill, answer and proofs, and the pleadings and facts sufficiently appear in the opinion of the court.

*Fowler & Chandler*, for the plaintiffs.

*Minot & Mugridge*, for the defendants.

BELLOWS, J. The bill is brought to set aside an award, upon the ground that the arbitrators, intending to decide according to law, mistook it, and allowed the defendant large sums which were not due him; and also upon the ground of fraud, partiality and corruption in the arbitrators, or one of them. Among other things the bill alleges that the sum of \$2,246.08 was so allowed for an amount paid to Cross & Topliff upon a \$2,000 note, made by the plaintiff and defendant as partners; when in fact the defendant paid only \$1,000, which was received in full payment and discharge of the note; and that this was shown to the arbitrators; the bill alleging that the arbitrators decided, that, as matter of law, the