

years before the time of pleading, and the plaintiff issued process to prevent the statute of limitations affecting his demand, it will equally prevent the statute from barring the defendant's set-off, although the latter issued no process. *Ord v. Ruspine*, 2 Esp. 569; 1 Chit. Pl. 575.

Our statute provides that "if there are mutual debts or demands between the plaintiff and defendant at the time of the commencement of the plaintiff's action, one debt or demand may be set off against the other." Rev. Stat., ch. 187, sec. 4; Comp. Stat. 483.

Our statute was evidently intended to have the same force and effect as the English statute had been held to have before; and we can not doubt that if, upon the bringing of the plaintiff's suit, the defendant, having a proper demand to file in offset, shall elect thus to file it instead of bringing a suit upon it as he might; and does in fact so file it at the earliest opportunity, such offset would not be barred by the statute of limitations, although it had run more than six years at the time of filing it, provided it was not barred at the date of the plaintiff's writ.

The offset in this case was, therefore, properly allowed.

SHANNON v. CANNEY.

A married woman is not bound by a promissory note given during coverture, although at the time of her marriage she had, by inheritance, both real and personal estate; unless it be shown that such estate was held to her sole and separate use, and that the promise was made in respect to that estate.

ASSUMPSIT on a promissory note for \$57.46, dated October 7, 1857, signed by the defendant, Mary J. Canney, and payable to the plaintiff, Thomas Shannon, in one year, with interest.

Plea; coverture at the time the note was given. The writ was dated April 5, 1862, an attachment was made April 7, 1862, and a summons was given to the defendant September 27, 1862.

The case was submitted upon the following agreed statement of facts:

At the time the note was given the defendant was the wife of one Ira Canney, who died in August, 1862. When she married Canney she was the widow of one Smith. Before she married Canney, and after the death of Smith and her father, she had given a note, signed by herself, to the plaintiff, for one or two hundred dollars, for his services as a physician in her family during the life of Smith and afterwards. About a month after Smith's death the defendant's father died, leaving her heir to real and personal estate to the amount of fifteen hundred or two thousand dollars. The defendant gave the note in suit and two others to renew and take up the note for \$100 or \$200, before mentioned, when it was nearly barred by the statute of limitations.

Canney had no property except a lot of land worth \$100, and was an invalid, and confined to his bed most of the time for about two years before his death.

Samuel Emerson, for the plaintiff, cited Comp. Stat., ch. 158, secs. 3, 15; *Bailey v. Pearson*, 29 N. H. 77.

Batchelder, for the defendant, cited Chitty on Bills 18; 8 T. R. 545; 1 Pa. on Cont. 286; 2 Stark. Ev. 894, in note.

BELLOWS, J. It appears that after the death of the first husband the defendant gave her own note to the plaintiff for his services in her husband's family during his life; and after her second marriage, and during its continuance, she gave the note now in suit in renewal of the other, and the question is whether she is bound by it. Assuming that there was sufficient consideration for the promise, we still think there is nothing to bring this case within any exception to the general disability of a married woman to make contracts. The fact that at the time of her second marriage she possessed property by inheritance avails nothing, for it neither appears that she held it to her sole and separate use, or that the promise was made in respect to such property; and therefore the common law disability remains. *Bailey v. Pearson*, 29 N. H. 77; *Ames v. Foster*, 42 N. H. 381. The circumstance of there having been a good consideration for the promise makes no difference, any more than in the case of a contract of an infant by way of a promissory note to pay for necessities. Indeed, the rule that renders a married woman unable to contract, would be wholly inoperative if she could bind herself whenever there was good consideration for her promise; for, by the general law applicable to all persons, a good consideration is essential. There must, therefore, be

Judgment for the defendant.

JUDGE OF PROBATE v. STONE.

The right to close depends not upon whether there is any affirmative issue on the plaintiff, but whether the primary burden of proof is on him.

Though the burden of proof may change ever so often during the trial upon the different issues, yet the party who has the primary burden of proof resting on him has the right to close, and an error in the ruling of the court in this respect is good ground of exception, and a sufficient cause to set aside a verdict.

To determine which party is to begin (and of course which shall close), consider which would get the verdict if no evidence were given on either side, and the right to begin is with the one who would in that way lose his case.

It is within the discretion of the court to rule out evidence after it has been admitted, with proper directions to the jury, but ordinarily such evidence should be ruled out before the closing arguments of the counsel and the charge of the court to the jury.

Where A, by fraud, obtained an assignment from B of all his interest in a large estate of which A was administrator, for \$4,000, and B, without discovery of the fraud, spent all the money he received, and died, his administrator, on discovery of the fraud, may rescind the contract; and if A has in his hands of the said estate which he administers, a larger amount which would belong to B than said \$4,000, the administrator of B may rescind the assignment made by B to A, without first paying back the \$4,000; leaving A to deduct the amount he paid to B for the assignment from the money in his hands belonging to B; and B's administrator may bring suit against A, and recover the balance in his hands, after demand.

44	593
66	546
44	593
67	527
44	593
70	580