

pend so entirely upon the fact that the witness has since forgotten the facts stated in such memorandum. *Watson v. Walker*, 23 N. H. 495; *Webster v. Clark*, 30 N. H. 253.

But in *State v. Shinborn*, 46 N. H. 504, this distinction is again particularly noticed, and the true rule as established in *Haven v. Wendell* is stated, viz.: that such memorandum may be read in evidence when the witness can verify the same, as having been true when it was made, and "has since forgotten the transaction." We understand the rule to be well settled here, that a witness may consult any memorandum, and then if he is able to swear to a fact from recollection, the memorandum does not become evidence to go to the jury. But when the witness knows that the memorandum was made at or near the time of the transaction, and knows that it was correct when made, but has since forgotten the circumstances, so that even after examining the memorandum, he is still unable to recall them to mind so as to state them from memory, then the memorandum may be admitted, for it is the best evidence the case admits of. In the case before us, although the particulars stated in the memorandum had passed from the memory of the witness until he saw the memorandum, yet upon examining that, his memory was refreshed so that he could state all the particulars from memory. There was therefore no need of the memorandum, and it was properly rejected.

The price at which the brindled cow was sold by plaintiff three years after the transaction, was properly admitted in evidence. If the objection was that the sale was *after* a controversy had arisen concerning the value, or if it was that the sale was too far removed from the scene of the bargain in question, either in point of time or distance, we think the exception must be overruled, and that it was within the discretion of the court to admit the testimony. *Robinson v. Railroad*, 7 Gray 92; *White v. Railroad*, 30 N. H. 208; *Carr v. Moore*, 41 N. H. 131; *Cross v. Wilkins*, 43 N. H. 332; *French v. Piper*, 43 N. H. 439; *Kingsbury v. Moses*, 45 N. H. 222; *Thornton v. Campton*, 18 N. H. 20.

*Judgment on verdict.*

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WHITE v. TAYLOR.

The endorsement on the back of a writ is no part of the writ or of the declaration, and therefore when a writ is required to be served by copy, such copy need not contain a copy of such endorsement.

The defendant pleaded in abatement that the copy of the writ delivered to him by the officer who served said writ is not a true copy in this,

that the same does not set forth the endorsement on the back of said writ; and without this that no service of the plaintiff's said writ has been made. The service aforesaid was made in Massachusetts.

To this plea there was a demurrer and joinder. The court sustained the demurrer and the defendant excepted, and the questions of law arising on the case were reserved.

*Whidden*, for defendant.

*Fletcher & Haywood*, for plaintiff.

SARGENT, J. In *Knowles v. Rowell*, 8 N. H. 542-5, it is said by Parker, J., that "the endorsement on the back of the writ forms no part of the writ or of the declaration. It is in effect a bond that the endorser will be responsible to the defendant for costs on certain contingencies. And so the endorsement of the name of the officer who served the writ, on the back of the summons, is required by the statute for the information of the defendant, but forms no part of the summons itself."

Sec. 5, chap. 204, General Statutes, provides that "if the defendant is not an inhabitant of the State, and the writ is not served on him in person, but his goods or estate are attached, an attested copy of the writ and of the return of the attachment may be given to him," &c. Sec. 6 of the same chapter provides that in actions for the *recovery of real estate*, and in actions of replevin, or other local actions, when the defendant is not an inhabitant of this State, &c., and the writ is not served on the defendant in person, *such copy of the writ, and in case of replevin, of the return of the goods replevined*, may be given, &c., and by sec. 7 it is provided that writs of review and *scire facias* may be served by leaving a copy, &c.

The object of the statute seems to be to provide that the defendant, not being a resident of the State, shall be served with a copy of the writ, only where no property is attached; but where his property has been attached on the writ, then it provides that the officer's return or a copy of it shall also be given him, so that he may know what has been done in the premises; but there is nowhere any provision that any copy of any endorsement shall be served upon such defendant, or that he shall have any notice, on or with the copy of the writ, in relation to any endorsement, and as it is expressly held that the endorsement is no part of the writ or the declaration, we conclude, in this case, it being for the recovery of real estate, that service by a copy of the writ alone was sufficient.

We see no occasion for requiring any notice to the defendant who lives out of the State, as to the endorser of the writ, any more than in cases where defendant lives within this jurisdiction, and his goods have been attached. In that case the law provides that service shall be by a summons, and the statute provides the form of the summons, G. S. p. 412, that it shall contain the substance of the declaration, (p. 413, sec. 4,) and shall be endorsed by the officer serving the same; but there is

no provision in the form of the summons or in any statute, for giving the defendant any notice as to the endorsement of the original writ, or whether it is endorsed at all.

We find, then, no provision of the statute requiring notice of such endorsement of the writ to be given in any case, whether the defendant is a resident or not; no such notice is given in case of resident defendants, and we see no reason why such notice should be required in case of non-residents. Exception of defendant overruled.

*Demurrer sustained.*

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MORRISON, ADMINISTRATRIX, v. JOHN R. ANNIS, PR., & SENECA S. MERRILL, TR.

Under the General Statutes the answers of the trustees are to be written by the magistrate, as in the case of other depositions; and they cannot insist upon the right to retire with their counsel and prepare the answers.

But the provisions of the General Statutes do not apply to pending suits, no intention that they should being expressed; and therefore trustees in suits then pending have the right to retire and prepare their answers with the aid of counsel.

THIS action was entered at April Term, 1867. July 7th, 1868, the trustee having been duly summoned by plaintiff, and having received his lawful fees, appeared before a magistrate to give his deposition. Upon the propounding of a question, the trustee and his counsel prepared to retire to an adjoining room and prepare his answer in accordance with the practice in this State before the adoption of the General Statutes; to which plaintiff's counsel objected, insisting that the trustee should answer the question without consultation with his counsel, or leaving the room, and in the ordinary manner of taking depositions. The trustee, under the advice of his counsel, declined to answer unless he could have the opportunity to prepare his answer in the manner above mentioned.

Plaintiff, at this term, moved that the trustee be defaulted. The court ruled that the trustee had no right to prepare his answer in the manner claimed by him. No ruling was made directly on the motion for a default.

*Ray & Ladd*, for trustee.

The rule laid down by our court in *Whitney v. Cilley*, 18 N. H. 334, and in *Boston & Maine R. R. v. Salmon Falls Bank*, 27 N. H. 455, is too well fortified by sound reason, and too clearly in accordance with the dictates of common sense as well as justice, to be shaken except by arbitrary and positive statute.