

Marble
v.
Marble Jr.

tiff except to write a deed. There is no ground on which even a court of equity could enforce the contract.

By the Court. We are all of opinion, that the evidence in this case was properly rejected. It was clearly a contract for the sale of land, and not being in writing, no action can be maintained upon it. 2 Starkies, 598—601; 5 B. & C. 829, *Evans v. Roberts*; 5 Cowen, 162, *Van Alstine v. Wimple*; Newland 182; 3 Vesey, 38, note; 2 Starkies, N. P. C. 379, *Thompson v. Wilson*; 7 Taunton, 157, *Hoby v. Roebuck*; 2 Taunton, 38, *Emerson v. Heelis*; 6 Cowen, 445, *Gale v. Nixon*.

Judgment on the verdict.

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JOHN STEELE and Wife *versus* STEPHEN FRANKLIN.

When a note, by which unlawful interest is secured, is taken up and a new note given to the administrator of the original payee, for its contents, the new note is subject, under the statute, to a deduction, on account of the usury in the first note.

ASSUMPSIT on a note made by the defendant, and payable to Mrs. Steele, when sole, dated January 7, 1824, for \$81,36, on demand with interest.

Plea, usury.

The cause was tried here, at October Term, 1830, when it appeared that Mrs. Steele was the administratrix of the estate of her late husband, Jonathan Hammond; that the defendant, on the 7th January, 1822, gave Hammond a note for \$65,62, in which unlawful interest to the amount of \$12,23, was included, for part forbearance for part of the sum mentioned in the note; that the note now in suit was given to Mrs. Steele, as administratrix as aforesaid, for the said note given to Hammond, and interest thereon, at the rate of twelve per cent. per an-

num, so that Mrs. Steele secured by this note \$7,87 above lawful interest, for forbearance of the sum mentioned in the said other note. But it did not appear that she was aware that any unlawful interest was reserved in the note given to Hammond as aforesaid.

Steele et ux.
v.
Franklin.

The court being of opinion that the defendant was not, under the circumstances, entitled to any deduction on account of the usury reserved in the first note, directed a verdict in favour of the plaintiff for the sum due upon the note, after deducting \$23,61, being three times the amount of the unlawful interest reserved by Mrs. Steele in this note. But the verdict was taken subject to the opinion of the court, whether, upon the above facts, the defendant was entitled to any further deduction.

Wilson & Walker, for the plaintiff.

Joel Parker, for the defendant.

By the Court. There must be a new trial in this case. When a note, given upon a usurious contract, has been transferred to a third person for a valuable consideration, without notice of the usury, and has been taken up, and a new note given to such third person for the amount of the first note, no deduction can be claimed in a suit on the new note, on account of usury in the first note. Ord, 103, a; 8 D. & E. 390, *Cuthbert v. Haley*; 10 Johns. 185, *Jackson v. Henry*; 4 Espin. N. P. C. 21, *Turner v. Hulme*; 2 N. H. Rep. 410, *Young v. Berkley*; 9 Mass. Rep. 45 *Bearce v. Barstow*.

But when a note, by which unlawful interest is secured, is taken up, and a new note given to one who was a party to the usury, or to his executor or administrator, for the contents of the first note, no doubt is entertained that the new note is subject to a deduction on account of the usury in the first note.

Ord, 103, a; D. & E. 531, *Tate v. Wellings*; 8 Cowen, 669, *Powell v. Waters*; 1 Green. 167, *Warren v. Crabtree*; 10 Mass. Rep. 121, *Chadburne v. Watts*; 2 Starkie's N. P. C. 237, *Preston v. Jackson*.

Steele et ux. In this case the illegal interest in the first note is
 v.
 Franklin. transferred to this note. A mere change of the security
 is not regarded. 3 N. H. Rep. 185, *Gibson v. Stearns.*
Verdict set aside and a new trial granted.

LUTHER WHITNEY *versus* LUTHER ABBOT.

A, being indebted to B, passed to the latter in payment, the note of C, payable to A, or bearer, at a future day, and endorsed by A. Before the note became due, C failed, and thereupon A told B, he should have no trouble about it, and that the note should be paid—it was held, that B might maintain an action against A, upon the note, as upon an order not accepted, without showing that payment had been demanded of C.

ASSUMPSIT. The first count was upon an order not accepted, drawn by the defendant, in favor of the plaintiff, upon Nathan Whitcomb, & Company.

There were also counts for money had and received, and for money lent.

The cause was tried here, upon the general issue, at October term, 1830, when the plaintiff produced a note made by Nathan Whitcomb, & Company, dated May 1, 1828, for \$437,50, payable to the defendant, or bearer, in one year, and endorsed "Luther Abbott to Luther Whitney." It appeared in evidence, that the defendant being indebted to the plaintiff, the latter agreed, in the summer of 1828, to receive the said note in payment, provided the defendant would endorse it. And thereupon the defendant endorsed it as above stated, and passed it to the plaintiff.

Whitcomb & Company failed in 1828, soon after the note was delivered to the plaintiff.

On the 4th April, 1829, the defendant told the plaintiff that he, the plaintiff, should have no trouble about the note, that he, the defendant, would pay it; that it should