

whom was made residuary legatee, the latter only was authorized to administer, upon giving bond to pay debts and legacies.

If John Mercer was not authorized to file a bond to pay debts and legacies, we are not inclined to grant this petition, for the reason that the estate has been practically settled by the parties in interest, and ought not to be disturbed, unless the necessity for it is imperative. *Kittredge v. Betton*, 14 N. H. 401. The testator has been dead thirteen years, and the residuary legatee nearly three. The personal estate has to a great extent undoubtedly been consumed, or so changed that it can no longer be traced or identified. Payment of the legacy to Elizabeth Mercer, though never demanded, has always been ready. The amount is not large, and if the administratrix of John Mercer shall refuse to pay the legacy when the heirs of the legatee present themselves to receive it, further administration can then be granted. The only other person who has any possible interest is the widow, to whose complete satisfaction the arrangements entered into with her by John Mercer have been carried out.

Upon the facts as they now appear, the decree of the probate court must be reversed, and the

*Petition dismissed.*

ALLEN, J., did not sit.

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KELLEY v. McMINNIMAN & Tr.

The fact that a writ of foreign attachment was made, indorsed, and entered by the trustee as attorney of the plaintiff, no wrong being intended or committed, is not a cause for discharging the trustee on motion of the defendant; but such practice is irregular, and not to be encouraged.

FOREIGN ATTACHMENT. The trustee was an attorney, and, as such, made and indorsed the plaintiff's writ, and entered the action in court. There were funds of the principal defendant in the hands of the trustee. After the entry of the action the trustee withdrew his appearance as attorney of the plaintiff, and other counsel appeared. The principal defendant moved that the trustee be discharged. The court denied the motion, and the defendant excepted.

*Baker*, for the defendant.

*Colby*, for the plaintiff.

CLARK, J. It is contended that the trustee should be discharged because he made and indorsed the writ, and entered the action as the attorney of the plaintiff. There is no suggestion of fraud. The trustee is not now the attorney of the plaintiff, and it does not appear,

and is not claimed, that the rights of the principal defendant have in any way been prejudiced by the fact that the plaintiff's writ was made by him. It is admitted that there are funds of the principal defendant in the hands of the trustee, and his liability is determined by the state of facts existing at the time of his disclosure. *Smith v. Railroad & Trs.*, 33 N. H. 337.

But while it is apparent that the rights of the parties in this case have not been prejudiced, and that no impropriety was intended by the attorney who made the writ, we deem it our duty to say that such practice is irregular, and not to be encouraged.

*Exceptions overruled.*

BINGHAM, J., did not sit.

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GRAFTON.

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LAUTEN v. ALLENSTOWN.

After the governor appoints an agent to furnish liquors to town agents, according to Gen. St., c. 99, and duly notifies them, towns are not liable for liquors purchased by such agents of others.

ASSUMPSIT, for spirituous liquors, alleged to have been sold by the plaintiff to the defendants, on May 6 and 11, 1876. The plaintiff, when the sales were made, was licensed to sell spirituous liquors in Massachusetts.

One James W. Fife was duly appointed agent of the defendant town for the purchase and sale of spirituous liquors in said town, to be purchased according to the laws of this state. The appointment was duly recorded. Fife, being agent as aforesaid, purchased the liquors on the days named without the knowledge of the defendants, and the liquors were sent to Fife, who sold them and kept the proceeds. The plaintiff, when the sales were made, was not an agent appointed by the governor of the state, under the provisions of Gen. Sts., c. 99. One Sprague was then such agent, and due notice of his appointment had been given to the several town agents in the state. The questions of law raised by the case were reserved.

*Page*, for the plaintiff.

*Mugridge*, for the defendants.

BINGHAM, J. The defendants have not ratified the sales, and their