

tions. Story Agency, s. 126. But if it were otherwise, the evidence that, in every instance in which Gordon had sold other lands of which the defendant subsequently executed the deeds, the defendant had no interest in the premises except as security for money loaned to Gordon, negatives the idea of any relation of principal and agent between them as to those lands. But the case distinctly finds that "the plaintiff offered no evidence of the agency of Gordon further than the relationship between him and the defendant, and the fact that the defendant signed the deed" in the circumstances stated. But these facts alone were not sufficient to authorize the jury to find the additional fact of agency. The relationship, and the writing of the deed by the son-in-law, would be evidence of agency if it appeared that the latter acted as agent; but, as he was selling his own land, his relationship to the defendant and his writing the deed are not evidence upon which his agency can fairly be inferred. *Johnson v. Stone*, 40 N. H. 197, 201, 202; *Ames v. Drew*, 31 N. H. 475, 482-484.

"There was no evidence that the defendant had any knowledge of the representations made by Gordon as to the amount of land which it was proposed to sell, other than those contained in his deed to the plaintiff." The signing of the deed by the defendant was a ratification of Gordon's authority to sell no more than the defendant owned. In order to be a ratification of Gordon's representations, it must appear that the deed was signed with knowledge of all the material facts. 2 Gr. Ev., s. 66.

If it were claimed that the defendant, having received the consideration for the land which was not conveyed, is bound to return that consideration unless he would be held to have ratified the fraud, the answer would be, that the evidence, so far as it is reported upon this point, tends to show that Gordon himself owned the land conveyed, and received all the consideration that was paid, the defendant merely holding the title as security for money loaned by him to Gordon, and by the execution of the deed relinquishing that security.

The refusal to order a nonsuit, upon the evidence produced at the trial, was error, and the motion for a new trial must be granted.

*Verdict set aside.*

STANLEY, J., did not sit: the others concurred.

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FOGG v. TOWLE.

A person authorized to collect a debt, taking without authority an order payable to himself, drawn by the debtor and accepted by a third person, does not thereby become liable to the creditor for money had and received.

Nor is he rendered liable by the promise of the acceptor to give him credit for the amount of the order on a debt due from him to a firm, of which the acceptor is a member, when the promise has not been performed.

ASSUMPSIT, for money had and received by the defendant of one Lamprey for the plaintiff. Facts found by a referee. The plaintiff's attorney sent the defendant, a deputy sheriff, a trustee writ in favor of the plaintiff against one Jennell. The defendant, without authority, took an order for the amount of the debt, payable to himself, drawn by Jennell and accepted by Lamprey. Lamprey, being a member of a firm to whom the defendant was indebted, agreed to credit the defendant with the amount of the order on the debt due from the defendant to the firm; but this he has not done. He is bankrupt, and the firm have sued the defendant for the full amount of his debt.

*Andrews and Stevens & Parker*, for the plaintiff.

*Towle*, for the defendant.

BINGHAM, J. The defendant is not rendered liable for money had and received by the fact that he did not insert Lamprey's name in the writ as trustee, and did not serve the writ on him; nor by his taking the accepted order without the plaintiff's authority; nor by Lamprey's unexecuted proposition. The defendant's unauthorized action not being ratified by the plaintiff, Jennell is still the plaintiff's debtor. No part of the defendant's debt to Lamprey's firm has been paid, and the defendant has received nothing of value for which he is liable to the plaintiff as for money had and received. Had the defendant been liable for not serving the writ, his liability could not be enforced in this form of action. The case would have been different if the amount Jennell owed the plaintiff had been received by the defendant from Lamprey in cash, or in a cancellation of an equal amount of the defendant's debt to Lamprey's firm; or if, by mutual agreement, Jennell's debt to the plaintiff, and the same amount of Lamprey's debt to Jennell, and the same amount of the defendant's debt to Lamprey's firm, had been extinguished, and the plaintiff had accepted the defendant as paymaster in place of Jennell, and Lamprey's firm had accepted Lamprey as paymaster in place of the defendant. If the plaintiff had chosen to ratify what had been done for his benefit by bringing a suit in the defendant's name against Lamprey upon the accepted order, the plaintiff would have had all he was entitled to gain by a ratification of the defendant's unauthorized act of taking the order.

*Judgment for the defendant.*

STANLEY, J., did not sit: the others concurred.