

ASSUMPSIT, on an account of many items. Facts found by a referee. The statute of limitations being pleaded, it became a material question whether a payment made by the defendant, and not expressly applied by either party to any particular items, should be applied, at the date of the writ, to items not then barred by the statute.

Faulkners & Batchelder, for the plaintiff.

Lane & Dole, for the defendant, cited *Hilton v. Burley*, 2 N. H. 193, 196; *Livermore v. Rand*, 26 N. H. 85, 91; *Young v. Woodward*, 44 N. H. 250, 253.

DOE, C. J. The payment having been made and received on a general account of many items of existing legal indebtedness, without any express application of it by either party to any particular items, the law infers the parties intended a just application at the time of payment. There is no ground for a presumption that they then intended the application should be made at a future time, at the date of the writ in this action. The question is, What was their intention when the payment was made? At that time they did not anticipate this suit. The legal presumption is, that they applied the payment to the oldest items due at the time of the payment, there being no equity or other evidence tending to show an intention to make a different application. *Parke v. Ingram*, 22 N. H. 283, 295; *Thompson v. Phelan*, 22 N. H. 339, 350.

Case discharged.

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

TAYLOR & FARLEY ORGAN CO. v. STARKEY.

The authority of an agent to sell goods is not authority to exchange them in barter.

TROVER, for an organ. Facts found by the court. The organ was delivered by the plaintiffs to one Davis, under a contract, in writing, in which it was, among other things, stipulated that Davis should make efforts to sell it for them, and pay over the proceeds less his commissions. It was agreed that the plaintiffs should not part with their title until they were paid. The contract was admitted in evidence, subject to the defendant's exception.

The defendant received the organ of Davis in exchange for a buggy and \$40 cash. When the exchange was made, Davis in-

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formed the defendant that he was the plaintiffs' agent. The organ was demanded before this suit was brought.

Healey and Lane, for the plaintiffs.

Faulkners & Batchelder, for the defendant.

STANLEY, J. The contract between the plaintiffs and Davis was properly admitted. It was evidence of the agreement under which Davis was in possession, and tended to show that his authority was to sell, and not to exchange. In the absence of evidence to the contrary, to sell means to sell for cash. Davis, having no authority except to sell for cash, could not lawfully exchange for other property, either in whole or in part (*Story Agency*, s. 78), and if he did the title would not pass, for the plaintiffs did not hold Davis out, or authorize him to hold himself out, as owner of the organ. *Holton v. Smith*, 7 N. H. 446; *Burnham v. Holt*, 14 N. H. 367; *Towle v. Leavitt*, 23 N. H. 360.

Judgment for the plaintiffs.

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

STEBBINS v. THE LANCASHIRE INS. CO.

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An amendment may be made, in any action, in any stage of the proceedings, to prevent injustice.

The form of action may be changed by amendment.

ASSUMPSIT, on a policy of insurance. The policy purported to be under seal. The seal was the printed impression of the corporate seal on the paper on which the policy was written. The plaintiff excepted to the refusal of the court to allow an amendment changing the form of action to covenant. The question of discretion was reserved.

Lane and Davenport & Eddy (of Vermont), for the plaintiff.

Faulkners & Batchelder and Cushing, for the defendants, to the point that the policy was under seal, cited *Allen v. Sullivan R. R.*, 32 N. H. 446, and Gen. St., c. 1, s. 10, and, to the point that the form of action could not be changed by amendment, *Little v. Morgan*, 31 N. H. 499, and *Brown v. Leavitt*, 52 N. H. 619.

STANLEY, J. The policy was under seal, and the form of action should have been debt or covenant. The amendment proposed