

what was created by the wager itself; and if the wager had been won, by Bunker, on the 7th August, 1830, Hodge would have been entitled to recover of Hoit the money he deposited, if demanded at any time before it was paid over to Bunker. All wagers, upon matters, in which the parties have no interest, are void contracts. 3 N. H. Rep. 152, *Perkins v. Eaton*; 1 B. & A. 683; 3 Starkie's Ev. 1655; 16 East, 150; 1 Carr. & Payne, 613.

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That part of the contract, which stipulated, that if either should refuse to let his horse run, he should forfeit to the other the money deposited, was nothing more nor less than a wager upon the courage of the parties to have the bet, upon the horses, decided, and stands upon the same ground as the bet upon the horses.

The instruction given to the jury, in the court below, was correct, and the judgment must be affirmed.

**BENJAMIN MATHES *versus* ENOCH JACKSON,  
executor.**

In an action against an executor or administrator, even when the general issue only is pleaded, the plaintiff must prove, in order to entitle himself to a verdict, that the demand was exhibited to the defendant, previous to the commencement of the action.

ASSUMPSIT upon a note, made by the testator, dated, November 16, 1825, for \$100, payable to the plaintiff, or order, on demand with interest.

The cause was tried, upon the general issue, at January term, 1832, when it appeared that the testator made

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the note, but it did not appear that the note had been exhibited to the defendant, the executor, previous to the commencement of this action. It was objected, on behalf of the defendant, that the action could not be maintained, without proof that the note had been so exhibited, and a verdict taken for the plaintiff, subject to the opinion of the court upon the question, whether, as the pleadings stood, such proof was necessary to entitle the plaintiff to a verdict.

*Mitchell*, for the plaintiff.

*Bartlett*, for the defendant.

*By the court.* The question in this case, is, whether, on a trial of the cause, under the general issue, the plaintiff was bound to show that the note had been exhibited to the defendant, previous to the commencement of the suit ?

The statute enacts, "that no action, for any cause of action, against a person deceased, shall be sustained against the executor or administrator, if commenced at any time within one year after the original grant of administration ; nor shall any such action be ever sustained against any executor or administrator, unless the demand was exhibited to the executor or administrator, or one of the executors or administrators sued." That this clause in the statute has made it necessary, in order to maintain an action against an executor or administrator, to exhibit the demand before the commencement of the suit, is too clear to admit a question. The only question, then, is, whether the want of notice must be pleaded, or whether the defendant may insist upon proof of the exhibition of the demand, under the general issue ?

We are not aware that there has been any settled practice on this subject, in this state. Under the English statutes, which in certain cases require notice of bringing an action to be given to certain persons, a certain time previous to the commencement of the suit, the plaintiff is nonsuited unless he prove the notice. 5 D.

& E. 1, *Daniel v. Wilson* ; 7 ditto, 631, *Lovelace v. Curry* ; 7 Taunton, 63 ; 1 ditto, 383 ; 2 Starkie's Ev. 792.

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The practice in Pennsylvania seems to be the same. 4 Binney, 20, *Mitchell v. Cowgill*.

And we are of opinion, that, in this case, the plaintiff was not entitled to a verdict until he proved that the demand was exhibited to the executor, before the commencement of the suit.

*New trial granted.*

### JEREMIAH SAWYER *versus* JOSEPH FELLOWS.

A parol agreement, between owners of adjoining lands, that a surveyor shall run the line between them, and that it shall be thus ascertained and settled, is, when executed, conclusive against them, and all persons claiming under them.

This was a writ of entry, brought to recover a tract of land in Gilmanton. The cause was tried, upon the general issue, at August term, 1832, when it appeared in evidence that the demandant was the owner of lot, No. 7, in the third range of lots in Gilmanton, and the tenant owner of the adjoining lot, No. 9, in the fourth range of lots. The demanded premises were, a tract of land lying near the line between the said lots.

The demandant introduced evidence tending to prove that, in April, 1822, he and William Moody, under whom the tenant claims the demanded premises, and who was then the owner of the lot, No. 9, in the 4th range, procured a surveyor to run the line between the said lots ; that the line was accordingly run, that Moody and the demandant agreed to the line, so run, as the boundary line between them, and put up stakes, and built a fence.