

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

Josiah H. Hobbs and *Fred B. Osgood*, for the plaintiff.

John B. Nash and *Walter D. H. Hill*, for the defendants.

Carroll, }
June, 1900. }

ALDRICH & a., Adm'rs, v. WHITAKER & a.

BILL IN EQUITY, to foreclose a mortgage given by the defendants to the plaintiffs' testator to secure their joint note. Trial by the court. Subject to exception, the defendants were permitted to show that there was no consideration for the note. The court found that the note was without consideration and ordered the bill dismissed, and the plaintiffs excepted.

Josiah Hobbs and *John C. L. Wood*, for the plaintiffs.

James A. Edgerly and *John B. Nash*, for the defendants.

YOUNG, J. The question the plaintiffs have discussed is not in the case, for this is an action to collect a note. Want of consideration is a defence to such an action when it is brought by the original payee of the note or his personal representatives (*Murray v. Whitecomb*, 58 N. H. 50), and may be shown by parol evidence. *Bigelow v. Bigelow*, 93 Me. 439. No question of law is raised by the other exception.

Exceptions overruled.

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

Merrimack, }
June, 1900. }

CONCORD LAND AND WATER POWER CO. v. CLOUGH.

PETITION, under the flowage act, for the assessment of damages to the defendant's land.

The plaintiffs excepted to the following statement in the argument for Clough: "My brother Sargent made an excuse. He said

70	627
	Case 2
70	887
70	627
71	274
70	627
	Case 2
72	450

that if you dug down there when you were up there, you could have seen what was under the surface. I didn't think of that. He did, it seems. . . . If I had thought of that, I should have had it done."

Streeter, Walker & Hollis and Sargent & Niles, for the plaintiffs.

Martin & Howe, for the defendant.

PEASLEE, J. The plaintiffs' comment on the defendant's failure to show the nature of the soil by inspection was an argument concerning the failure to produce available evidence, and was unobjectionable (*Mitchell v. Railroad*, 68 N. H. 96, 116); while the defendant's unsworn statement of the reason why such evidence was not produced vitiates the verdict. *Bullard v. Railroad*, 64 N. H. 27.

Verdict set aside.

CHASE and PIKE, JJ., did not sit: the others concurred.

Hillsborough, }
June, 1900. }

STATE (REYNOLDS, *Compl't*) v. MCKENNA.

COMPLAINT, for bastardy. At a former term of court the defendant was found chargeable and ordered to pay a certain sum. A *capias* execution for the sum was issued, upon which the defendant was arrested; and, having given a bond for the purpose, he subsequently took the poor debtor's oath, the plaintiff objecting. At the May term, which was since the oath was taken, the action was brought forward, and the plaintiff's motion that the defendant be committed until he paid the sum ordered was denied *pro forma*, subject to exception.

PEASLEE, J., having been of counsel, did not sit; and the other members of the court being equally divided on the question, the motion failed of being granted.

Andrews & Andrews, for the plaintiff.

Drury & Hurd, for the defendant.