

and the full price at which it was sold, which much exceeded that mentioned in the bill of sale, was carried to the credit of Moffatt, and all the charges upon the timber until the moment it was sold were placed at the debit side of his account, thus showing that the object of the second bill of sale, as well as of the first, was to improve the security of Symes & Co.

The action of the plaintiffs was contested by the defendant Moffatt, and the timber seized was claimed by Symes & Co. on the ground that it was in their possession at the time of the seizure, and that it belonged to them under the agreement for advances and the two bills of sale. The pleadings, as well upon the original demand as upon the intervention of Symes & Co., are exceedingly voluminous, and raise a number of questions that need not be discussed. I, therefore, shall limit myself to the consideration of those points upon the decision of which our judgment must depend. And, in the first place, with reference to the demand of the plaintiff, it is necessary to determine what, according to the declaration, is the cause of action sued upon. The defendant contends that he is sued upon the agreement of the 13th July, 1855; that, according to that agreement, one-fourth only of the debt was due when the action was brought; that that fourth had been paid by two payments, one of £1,500, and the other of £800; and, therefore, that the action must be dismissed. The plaintiffs, on the other hand, contended, in the course of the argument before us, that the action was brought to recover the debt due by William Moffatt & Co., for the whole of which the defendant was liable, irrespective of the agreement, and that the agreement was referred to merely as establishing the amount due by the defendant as a member of the firm of Moffatt & Co. Here it may be well to observe that the question as to whether the defendant was sued under the agreement or not, was one of great interest to him. If sued as a partner in the firm of Moffatt & Co., he had a right to claim indemnity, for one-half of the debt, from his partner John Egan, one of the plaintiffs, whereas, under the agreement, he had assumed the whole of the debt himself; and, therefore, if he was liable under the

agreement, he could *not* make a claim against Egan.

Now, on reference to the declaration, we find that, in the first count, it formally recites the agreement, and that count most assuredly is based upon the agreement. The second count is for goods, wares, and merchandize sold, &c. But the goods and merchandize really sold were not sold to the defendant; they were sold to a firm of which he was a member, and the declaration does not allege any dealings with a firm. The third count is "for a balance which the defendant admitted to be due and promised to pay to the said plaintiff, on the plaintiffs' account rendered on the said last mentioned day to the defendant, as and for divers lumber transactions." Now the agreement certainly does admit a balance, and contains a promise to pay, but it is a promise to pay in four instalments, and that is what the defendant contends for.

That the first count is founded on the agreement is too plain to be disputed; and the defendant could not, by one and the same action, be sued as sole debtor under the agreement, and as joint debtor of the same debt, irrespective of the agreement. Any doubt, however, as to whether the defendant was or was not sued under the agreement, is removed by the factum of the appellants in the Superior Court, in which they say: "The declaration was founded upon the agreement filed by the plaintiffs, dated July 13th, 1855."

Assuming, then, as I think is the case, that the action was brought under the agreement, this brings us to the second of the pretensions of the defendant which I propose to consider, namely, that, under the agreement, there was but one instalment due, and that by two payments, the one by a note of £1,500, and the other by a note of £800, the whole of the first instalment was discharged. As to the note for £1,500, it is admitted it was paid by the defendant to the plaintiffs; that they transferred it to a third party, to whom £1,000, and no more, was paid on account of it. But as the plaintiffs paid the note of £1,500 to a third party, and have not produced it in this cause, they cannot, for the present, nor until they do produce it, sue for the debt on account of which it was given. Then as to the note for £800, the