

was not for money paid by the plaintiff for locations made by himself, but for costs incurred by the plaintiff in ejectment in making his locations, and in otherwise prosecuting his suit for which a judgment had been rendered jointly against the present plaintiff and defendant. The plaintiff in ejectment might perhaps have insisted, at the trial, upon the agreement with the present defendant, and might not have made other locations than those contained on the old plots, but this he did not chuse to do. He went on to make entire new plots, for the expense of which he recovered his judgment, and the present defendant is liable for his moiety to the present plaintiff, unless he can show himself entitled to other credits than those contended for by reason of the new plots. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

1810.

Norwood
vs
Norwood

The case was argued before CHASE, Ch. J. BUCHANAN, GANTT, and EARLE, J. by

Winder, for the Appellant, (who cited 2 *Com. on Contr.* 151.) and by

Key, for the Appellee.

THE COURT concurred with the court below in the opinion given in the bill of exceptions.

BUCHANAN, J. In this case I differ in opinion with the rest of the court. [He here stated the facts.]

The question is, whether the plaintiff can, in an action for money paid, &c. recover from *S. Norwood* one half of so much of the costs adjudged against them in the action of ejectment as might have been saved under the agreement.

The action of *assumpsit* is an equitable action, and in order to support it the law will often raise an implied promise according to the circumstances of the case. But there must always be either an express or implied undertaking. In this case there is neither, on the contrary all the equity is with the appellant. The costs of making out new plots, so far as they contain the same locations which were made on the old ones, and of the attendance of witnesses whose depositions had before been taken, were incurred by the plaintiff in the ejectment, in consequence of *E. Norwood's* refusal to accede to the agreement. But it is said, that the judgment in the action of ejectment was joint, and