tection of domestic creditors. It was to their advantage that their debtors should remain within the limits of the State. And it was intended to protect them from the inconvenience and loss to which they would be exposed by the absence of their debtors and consequent immunity of the latter from process and judgment. The permanent removal of the debtor would only aggravate the evil and hazard to the creditor. But whether the removal be permanent or temporary, the return of the debtor is within the range of possibilities and in the contemplation of the law, and when that event does take place, the creditor can claim the advantage intended by the section in suspending the operation of the statute. Whether any modification should be made of this provision under certain circumstances, as, for instance, where the party leaves property subject to attachment, is left to the wisdom of the Legislature. There is no exception in the words of the law, and we are not authorized to admit of any not provided for or intended by the legislative authority; consequently there was no error in refusing the charge as asked by the defendant.

Nor is there any error in refusing the second charge.

The proposition, as presented, has no direct application to the facts of the case. The deceased removed from the State before the note became due, and the statute did not commence to run during his lifetime. There is no proof of any kind as to the time of his death. If we look to the facts of the case for presumptions as to that period, we may infer that administration was taken out within a reasonable time, a year or two years, for instance, after his death; and consequently, if even the statute did then commence to run, yet the bar would not have been completed prior to the commencement of the action. Without considering whether the charge, as a legal proposition, be correct or otherwise, we are of opinion that there was no error in refusing to give it under the facts of this case.

Judgment affirmed.

Note 95.—Teal *v.* Ayres, *post*, 588; Henderson *v.* Ayres, 23 T., 96.

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[542] Foster v. McAdams.

One justice of the peace cannot, by consent of parties, be substituted for another in the trial of a case in a precinct to which the former does not belong.

Where the parties having a suit pending before Justice Davis, in precinct No. 7, agreed that Justice Mason, of precinct No. 3, should sit with Justice Davis at the trial, and that the decision of Justice Mason should be final, and the case was tried in that way; Justice Davis entering up the judgment as the judgment of Justice Mason, and signing his own name thereto. Justice Davis declining to express an opinion, but making no entry to that effect: *Held*, That the judgment was void. (Note 96.)

See this case upon the subject of an award in a justice's court.

Error from Walker. Injunction against an execution issued by a justice of the peace. It appeared that the parties had a suit pending before Davis in the 7th precinct; that they agreed that Mason, justice in precinct No. 3, should sit with Davis in the trial of the case, and that the decision of Mason should be final; that the judgment was entered up by Davis, signing his own name thereto, as the judgment of Mason, and declining to give an opinion of his own, but making no entry to that effect. The injunction was dissolved, and the plaintiff obtained a writ of error.

Wiley & Baker, for plaintiff in error. I. The act of 1848, (Hart. Dig., p. 520,) to "organize justice's courts and define their jurisdiction," provides for an election "by the qualified electors of each justice's precinct, semi-annually, "two justices," &c. There is no provision in the law for a justice hearing and determining cases out of his own precinct. Their civil jurisdiction is confined to their precincts respectively, except in certain cases. (Hart Dig., p. 527, art. 1717.) And hence it follows that one justice has no right to sit upon a case in

another's precinct. (2 Root R., 357; 1 Id., 202.) And for the purpose of remedying this hiatus the Legislature, at [543] the last session, passed an act, which see in acts of 1852, p. 140, sec. 2. Their criminal jurisdiction is co-extensive with the county. (Hart. Dig., p. 523, art. 1703.)

II. The justice's record and the justice (Mason) who rendered the judgment in this case both show that the judgment was that of Mason and not of Davis; hence it was void. Consent could not give jurisdiction where, otherwise, there was none. (Wynns & Lawrence *v.* Underwood, 1 Tex. R., 48.)

III. It was not an arbitration under the statute, for the proceedings show that the parties did not intend to follow the statute for the submitting of matters of arbitrament and award. (Owens *v.* Withee, 3 Tex. R., 161.) And if it was a submission at common law, then the award is only matter for the foundation of an action, and cannot be enforced by execution. (1 Chitty Pl., m. p., 103; 8 Cow. R., 235; 7 Id., 522; 2 Saund. R., 62.)

Yoakum & Campbell, for defendant in error. The judgment entered up by Judge Davis in this case is good as his judgment or as an award.

1st. As his judgment. He was not bound to adopt it if it did not coincide with his view. But we have reason to believe it did coincide with his opinion, because he stated that the evidence was different from that of the former trial; also, the fact that he was not called on to prove that it was not his judgment is evidence that it was; and again, as he entered it upon his docket and signed his name to it as a judgment, the presumption is in favor of its being such.

2d. It was a good common-law award. The parties had agreed upon the arbitrator. He accepted the position, sat upon it, gave a decision; the parties were there; his award was entered up as the judgment of the court.

Our arbitration law does not apply to cases in court, but only to cases not commenced. Its whole form of proceeding contemplates a new case. Here is a case in court, a reference is had as at common law, no particular form is required, [544] substantial justice has been done. The claim is small, yet the plaintiff is running up a heavy bill of costs to avoid the just penalty of a trespass on his neighbor's property.

LIPSCOMB, J. The question presented in this case is, can a justice of the peace go out of his own precinct and try and decide a civil suit?

The justices of the peace are elected for a particular precinct by the qualified voters of such precinct, (see arts. 201, 202, 225, Hart. Dig.,) and it would seem to follow, as a matter of course, in the absence of any express authority of law to the contrary, that their jurisdiction is restricted and confined to the particular precinct for which and in which they had been elected by the qualified voters thereof. They can no more go out of their own precinct and try a civil suit than they could go out of their county and perform such judicial functions. And the question of jurisdiction is not to be waived, nor can it be given where it does not exist, even by consent of the parties. (Wynns & Lawrence *v.* Underwood, 1 Tex. R., 48.) In general a party is protected from a suit only in the precinct of his residence. To this there are some exceptions, such as if there be no justice of the peace in the precinct of the defendant's residence, or if it be within an incorporated town or city. In the first exception he can be sued before the justice of the next adjoining precinct, and in the latter he can be sued before any justice of the peace within the corporation. In neither of these exceptions is it believed that the justice could go out of his own precinct to hold his court. He can bring the parties before him, but he cannot go out of his precinct to try the case.

The record shows that the supposed judgment in this case was rendered and signed by Justice Mason out of his own precinct and in the precinct of Justice Davis, and the judgment was entered on the docket of the said Justice Davis not as his judgment but as the judgment of Mason. There was some evidence that the parties had verbally consented to the substitution [545] of Mason in

the place of Davis; but this consent, we have said, could not give jurisdiction to the substituted justice any more than if he was not in commission at all. (See the case above cited.)

The appellant filed his petition, and prayed an injunction against an execution issued upon this void judgment. The injunction was granted by the district judge, but on a hearing of the case the court dissolved the injunction and dismissed the petition. In the petition the circumstances under which the pretended judgment was obtained are fully stated, and he alleges that he is threatened with an execution upon this void judgment against his property. Perhaps this was the only appropriate and ample remedy that he could have resorted to. We believe that the injunction ought to have been perpetuated, and the appellant relieved from the expense and trouble of further defense against the judgment, on the ground that it was a void judgment, for want of jurisdiction in the justice rendering it.

The judgment of the District Court is therefore reversed; and this court will render such judgment as the District Court ought to have given, perpetuating the injunction.

Reversed and reformed.

NOTE 96.—Horan *v.* Wahrenberger, *ante*, 313.

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[546] HOGUE, EX'OR, v. SIMS AND ANOTHER.

Unless the heirs comply with the conditions imposed by the latter part of the 110th section of the probate law, (Hart. Dig., art. 1219,) the provision in the will, made in pursuance of the former part of the same section, taking the estate out of the Probate Court, becomes inoperative, and the estate must be settled under the direction of the chief justice, as in other cases, where the will contains no such direction, that is, if there be any creditors; for if there be no creditors, the heirs can adjust their respective rights without the control of the chief justice. (Note 97.)

A provision in the will and the assent of the heirs are both necessary to take the administration of the estate out of the Probate Court; after the heirs have assented by giving bond, as provided by the statute, the creditor may sue upon the bond, or he may sue the person in possession of the estate, but not before; and the petition shall allege the giving of bond, &c., although the suit be not brought upon the bond. (Note 98.)

Appeal from Walker. This suit was brought by the appellees against appellant, on a note of hand executed by the testator. The District Court gave a judgment for the plaintiffs.

It is not material to refer to the whole petition. It will be sufficient to notice such parts thereof as will show the grounds of the demurrer, which was overruled in the District Court. It alleged the death of the testator, the probate of the will, and the qualification of two of the executors named in the will; that the will contained a provision that the Probate Court should have no other control over the estate of the testator than to take probate of his will and receive an inventory of his estate, which the petitioner averred had been done; that the claim sued on had been duly authenticated and presented to the executors, and allowed by them, and had been approved by the chief justice of the county. It averred refusal and failure to pay in the testator's lifetime, and that the executors had not paid the same since his death; prayed process and judgment. The defendant filed a demurrer to the plaintiffs' petition, and assigned as special exceptions, that the plaintiffs had failed to set forth or allege in their petition that [547] a complaint in writing had been