

Bennett
vs.
Davis.

The present case comes within the last clause of the rule above laid down, and the three last items are not evidence of a promise to pay the preceding items.

J. P. Hale, for the plaintiff.

N. Eastman and *J. Smith*, for the defendant.

JOSEPH CHESLEY, JUN. *versus* EBENEZER SMITH.

A farmer, or renter of a turnpike gate, may maintain assumpsit for tolls in his own name, against one who has, by mistake, been permitted to pass a gate as a person exempted from toll.

The authority given to turnpike corporations, to stop and detain travellers until the tolls are paid, is a cumulative remedy.

THIS was an action of assumpsit, for certain tolls alleged to be due from the defendant to the plaintiff, as farmer and renter of tolls, at a certain gate of the *New-Hampshire Turnpike* in *Durham*. The cause was tried here, February term, 1816, on the general issue, when it appeared in evidence that the corporation had been duly organized; that the gate was, by a vote of the corporation, rented to the plaintiff for a year; and that the defendant had travelled the road and passed the gate sundry times during the term, without having paid any thing, and without having promised to pay any thing for the privilege: it having been supposed, by both parties; that the defendant was exempted from toll, although he was not in fact exempted. It appeared, also, that the act of incorporation gave authority to the corporation to stop and detain travellers until the tolls were paid.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the court upon the above facts.

Ichabod Bartlett, for the plaintiff.

J. Smith, for the defendant.

The opinion of the court was delivered by

WOODBURY, J.* This case presents some difficulties, but the court, after such examination as they have been able to give it, are inclined to render judgment on the verdict.

* The Chief Justice, having been of counsel, did not sit in this cause.

It is objected that the contract, between the corporation and the plaintiff, was void by the statute of frauds, because not in writing; and that, therefore, as no interest in the gate passed to the plaintiff, if any action can be maintained at all, it must be in the name of the corporation. But it seems to us, that the plaintiff having gone into possession of the toll-house and gate, under a vote of the corporation, authorizing him to take possession and receive the tolls to his own use, is to be considered as tenant of the toll-house and gate, at least at the will of the corporation, and that he is as such entitled to collect and recover the tolls in the same manner as the corporation might have done. 1 *D. & E.* 616, *Seward vs. Baker.* 10 *East* 104, *Peacock vs. Harris.* A mere tenant at will, may, with propriety, be considered in relation to a stranger, as the owner of a gate. In this view of the case, no question upon the statute of frauds can arise, and this objection cannot prevail.

It is also contended, that as the act of incorporation prescribes only one method of collecting toll, *viz.* : by stopping the traveller until he makes payment, the corporation could exercise no rights but those explicitly conferred, and that a designation being made, of one remedy alone, it is equivalent to an exclusion of all others.

We are aware that cases exist where a rule of this kind has been adopted, but they will be found on examination to depend on principles not analogous to those that ought to govern the present case. Penalties imposed for particular offences must be sued for in the mode prescribed by statute, in those cases only where the offence is merely *malum prohibitum*, or the punishment is made less than that inflicted by the common law, or where a restrictive clause is expressly introduced, (2 *Burr.* 799, *The King vs. Robinson.*) When a new right, too, is conferred on an individual by a statute, which at the same time provides a remedy, or when, for some public consideration, as to prevent a multiplicity of suits, a new remedy is given for an old right, such remedy

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alone is to be pursued. 5 *Mass. R.* 514, *Smith vs. Drew.* 3 *Mass. R.* 307, *Gedney vs. Tewksbury.* 5 *Johns.* 175, *Alney vs. Harris.* But where new remedies are given by statute to individuals, in order to enable them more effectually or more conveniently and expeditiously to enforce their rights, these provisions being intended for the benefit of the grantees, are, unless expressly excluding other remedies, to be construed favorably, and considered cumulative rather than restrictive. 10 *Johns.* 389, *The Farmer's Turnpike vs. Coventry.*

In the present case, the power to detain the traveller until payment of the toll is manifestly conferred for the benefit of the corporation, that it may collect its dues promptly and without the risk of credit, or the expense of an action. Those remedies therefore which the common law would furnish, if the act of incorporation provided none, (*Com. D. Tolls, E.*) could never have been intended to be taken away. The construction contended for would not benefit travellers, for they often prefer credit to punctual payment. And instead of being useful to the corporation, it would leave them wholly remediless in a class of cases embracing the present one, and all cases where travellers, by fraud or force, should pass through the gate without paying toll. Nor is such construction necessary, to effect the only public purpose which can be imagined in its favor—the prevention of suits; for no corporation, unless from necessity, would resort to an action at common law, for toll, when there was a summary remedy so much more speedy, safe and convenient. We are, therefore, of opinion that this objection cannot prevail. One other objection against a recovery in this action, was suggested from the circumstance of the defendant's having, by the consent of the plaintiff, passed the gate without paying toll. This would deserve much consideration, had it not appeared that the consent was given under a mistake as to the fact of the defendant's exemption. Both parties erroneously supposed that the defendant was exempted from toll. But the princi-

ple is clear and the authorities decisive, that a person waiving his rights under such a misapprehension as to facts, is not thereby to be estopped or injured. *Evans' Essays* 23, 29. 1 *D. & E.* 712, *Goodall & al. vs. Dolly.* 1 *Bos. & Puller* 326, *Williams vs. Bartholomew.* 3 *Mass. R.* 74, *Union Bank vs. Bank of the United States.* 9 *Mass. R.* 408, *Garland vs. The Salem Bank.*

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Judgment on the verdict.

ZEBINA EASTMAN *versus* THE COOS BANK.

Depositions taken in the common form are admissible, though the opposite party be a corporation. All customary acts of the agents of a corporation are binding. The plaintiff in an action is liable to the sheriff for the service of the writ. The latter may recover for storage of property taken on mesne process, and interest may be taxed on money paid and expended for that purpose, but he cannot recover an extra charge for making the return on the writ.

THIS was an action of assumpsit. The declaration contained two counts, one for two hundred fifty three dollars seventy nine cents, money paid, laid out and expended: the other, on an account annexed, amounting to the same sum. The items in the account were for the service of two writs by the plaintiff, as a deputy sheriff, in favor of the defendant, storage of a large quantity of property attached, and for making a schedule of said property in the return on said writs. The cause was tried here at the last term on the general issue, when the plaintiff proved the service of the writs, and offered the deposition of one *Stimpson*, taken in common form, notice of the time and place of caption having been given to the president of the corporation, to shew the storage of the property and payment for it at the usual rate by the plaintiff. This deposition was objected to by the defendants, but admitted by the court. *J. H. Crane, Esq.*, who was called as a witness, testified, that the cashier of the *Coos Bank* deliver-

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86	488
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69	191