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Gordon v. Rundlett.

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The second and eighth exceptions being sustained, there must be a new trial.

*Verdict set aside.*

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GORDON v. RUNDLETT & a.

An agreement in this form: "March 28, 1846—Due to S. G. \$10,000, to be paid as wanted for her support; if no part is wanted, it is not to be paid, S. S." is not a promissory note, nor evidence of a debt. The holder of it is not liable to be taxed for money at interest.

The list of taxes committed to a collector must be signed by the selectmen.

TRESPASS. The declaration alleges, that the defendants, at Stratham, on the 9th of January, 1850, assaulted, beat and imprisoned the plaintiff, until she paid \$100.

The plea is the general issue, with a brief statement that the defendants were selectmen and assessors of the town of Epping for the year 1847; that the plaintiff then resided there, and was liable to be taxed; that they legally assessed against her a tax amounting to \$68 $\frac{14}{100}$ , and gave their warrant to J. P. Tilton, collector of taxes for Epping, in due form, who collected the tax, &c.

The defendants admit that the plaintiff was arrested, as alleged in the declaration, on their warrant, and was compelled to pay a tax and costs amounting to \$78,30.

It appears by the records of the town of Epping, that the defendants were selectmen of that town in 1847, and that there were no assessors of taxes that year. In April, 1847, Mr. Rundlett, one of the defendants, called at the house of the plaintiff, in Epping, and told her that he wanted an account of her taxable property. She replied that she had \$170 money at interest, and no more. He asked her if that

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was all the taxable property she had, and she said it was; and in answer to his inquiry she further said, that she had a large note, but that was not taxable, and she offered to show it to him. He said it was no matter. The plaintiff held at that time a note against one Gordon for \$170, and she had no other property taxable in Epping, unless the agreement or note, of which the following is a copy, and which is the same referred to in her answer to Mr. Rundlett, was taxable:

“ Stratham, March 28th, 1846.

Due to Sophia Gordon, widow, ten thousand dollars, to be paid as wanted for her support. If no part is wanted, it is not to be paid.

STEPHEN SCAMMON.”

The agreement above recited was given under the following circumstances: Scammon married the only daughter of J. S. Gordon, late of Epping. Said Gordon, in the spring of 1845, and shortly before his decease, told Scammon he would give him a deed of all his property, if Scammon would give a note to his wife, the plaintiff, for \$10,000, which should lie on interest at a certain rate per annum. Scammon made the note and delivered it to Mrs. Gordon, but J. S. Gordon died without making the deed. Mrs. Gordon, however, conveyed to Maria R. Scammon, wife of said Stephen Scammon, her rights in the estate of her late husband, by deed, dated January 18th, 1848.

Mrs. Gordon continued to hold the note till March, 1846, when Scammon insisted she should give it up, and told her he would sell the property at auction and pay it, if she did not. She gave up the note, and Scammon gave her in place of it the agreement above recited.

The defendants assessed the plaintiff in the taxes in Epping that year, as follows:

“ 1847. Sophia Gordon, money on hand, at interest, and

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on deposit, \$10,170. State, county, town and school tax, \$68,14; highway tax, \$16,27."

They committed the list of taxes to their collector, to whom the plaintiff voluntarily paid \$1,34, and by whom she was arrested, imprisoned in the county jail, and compelled to pay the balance of the tax, with costs.

The warrant by which the taxes were committed to the collector, was in due form; and it referred to the foregoing list of taxes as a correct list of the assessment on the ratable polls and estate of the inhabitants of Epping; but the list was not signed, or otherwise certified by the selectmen.

Upon the foregoing facts it is agreed that the court may render such judgment as they think just.

*Hatch*, for the plaintiff.

*McMurphy* and *Marston*, for the defendant.

BELL, J. In the case of *Scammon v. Scammon & a.*, at the present term, it was held that the writing called a note has none of the qualities of a promissory note. It is an admission of a special agreement to pay Mrs. Gordon such sum as should be wanted for her support, to the amount of \$10,000. It is not evidence of any debt to any amount, since if no part of the money is wanted for her support, no part of it is to be paid. It is merely contingent, whether anything will be payable. The instrument is a very informal agreement to pay for the support of Mrs. Gordon, if she should need it, to the amount of \$10,000. It furnished no pretext for a tax on \$10,000, or any other amount of money at interest. The tax was, consequently, illegal, and the arrest of the plaintiff under it cannot be justified.

By the case of *Chase v. Sparhawk*, 2 Foster's Rep. 134, it was decided that by the language of the statutes the list

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 Bassett v. Salisbury Manf. Co.
 

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of taxes committed to the collector must be signed by the selectmen, and for this cause, also, the justification fails.

*Judgment for the plaintiff for \$78,30, and interest.*

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28	438
68	3

28	438
70	379

28	438
71	31

### BASSETT v. SALISBURY MANUFACTURING COMPANY.

A declaration alleged that the defendants by a dam caused the waters of a stream to overflow the plaintiff's land. *Held*, that an amendment by adding "and the waters falling upon and running into said land" (before "to overflow,") did not change the cause of action.

An amendment ordered at one term of the court cannot be objected to at a succeeding term. Any exception to such order must be insisted on at the same term, or it is waived.

An exception to the testimony of a witness, as to the contents of a lost deed, cannot be taken at a subsequent stage of a cause, because it then appears that the deed was recorded.

An office copy of such deed may be given in evidence, though parol evidence has been previously given of its contents.

A witness, who proves an entry on the land in controversy, made by a party claiming under a deed, may be cross examined as to the title of such party, because the amount of the damages to be recovered, may depend on the nature of his interest.

In an action for flowing land, possession under a claim of title, is *prima facie* evidence of title in fee, and entitles a party to recover for any damages done to the land.

In such cases the plaintiff is ordinarily entitled to recover some damages, if it appears that his right has been infringed; especially where a repetition of the wrong might in time ripen into an easement or incumbrance on the land.

But if it is shown that the plaintiff's interest is of so limited a character that the supposed wrong, however injurious to the owner or reversioner, could not injure the plaintiff or his estate, he is not entitled to recover.

The presiding justice of the court of common pleas may, on application of the jury, in the absence of the parties and during the recess of the court, repeat or explain in writing his charge relating to the law applicable to the case.