

clares upon several causes of action in the declaration, in different counts, and that the plaintiff is entitled to recover a certain amount of debt or damages in the whole action generally, as in this case, or upon the particular part, where the confession is to a part only, and that he does not need to be more specific. We see no reason for requiring it in this case, any more than in a case of a tender, or paying money into court under the common rule.

But it is also claimed, that, because the plaintiff in this case recovered more upon his specification than the amount confessed, he is entitled to costs since the confession. Now the statute not only authorizes defendant to confess a certain amount of plaintiff's claim, but also *to plead to the residue*. If he is successful on that plea to the residue, and defeats the plaintiff from recovering that residue, why should he not be entitled to his costs on that issue? If the defendant had pleaded to the whole of plaintiff's claim and been successful thereon he would have recovered full costs. But he has confessed a part which gives the plaintiff costs up to that time, and joins issue as to the residue, and if he succeeds on that issue and shows that after his off-set is allowed, or so much thereof as is just, he did not really owe the plaintiff so much as he had confessed, why should he not recover his costs from the confession as much as though he had confessed a part and pleaded the general issue as to the residue and been successful on that issue? We think the statute is susceptible of but one construction. Plaintiff must recover more than is confessed, as the final balance, or amount due him after trying the issue that is raised by the plea to the residue of plaintiff's claim which is not confessed. The recovery referred to is the final balance for which the verdict is returned. If that is no larger than the amount confessed, defendant recovers costs from the time of the confession, if it is larger the plaintiff recovers full costs.

*Exceptions overruled.*

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JAMES B. SUMNER *v.* WM. H. CRAWFORD.

A witness's testimony on cross-examination, that he did or did not make a certain statement as to a matter not material to the issue, cannot be contradicted, unless it has a bearing upon his feelings toward one of the parties.

Where perishable property was taken or attached by an officer on a writ, Nov. 28, 1859, and was afterwards duly examined under the statute, and advertised for sale on the 9th of December, and to be sold on the 13th of the same month,—*held* that the officer had kept the goods four days at least from the time of the attachment; the *taking* or *seizure* or *attachment* being reckoned from Nov. 28, and not from the date of the certificate of the examiners.

TROVER for two harnesses, two horses and the halters. It appeared that D. H. & J. B. Sumner & Co., having a just claim against one

Smith Barnett, brought a suit against him, and attached said property; that examiners were appointed at the request of plaintiffs, who made their certificate, and the officer proceeded to sell said property on the writ, at which sale this plaintiff was the purchaser of all said property, and took possession of the same; that while said property was in the possession of an agent of said plaintiff, one Burdette Barnett, a son of Smith Barnett, took said property away and put it into the hands of this defendant, who undertook to keep it for him, and when demanded by the plaintiff refused to deliver it to him. Defendant claimed that the property belonged to Burdette Barnett at the time it was attached, and the question submitted to the jury was, whether the alleged sale of his property by Smith Barnett to his son Burdette a few days before it was attached was valid or void as to creditors. The jury returned a verdict for the plaintiff, finding that the sale was void. Smith Barnett, after he had stated the terms of the sale to his son, was asked on cross-examination, if this property at the time of the alleged sale did not constitute all the attachable property he owned; which he denied and said that he at the same time owned a double wagon, which he did not sell. Plaintiff called a witness who stated that at the time in question he owned said wagon, and that said Smith Barnett never owned it. To this evidence defendant objected, but the court admitted it, defendant excepting. The court also ruled, that, upon the evidence in the officer's return of the sale of this property on the writ, the sale was legal, and the defendant excepted on the ground that the officer did not keep the property a sufficient length of time after the return of the examiners' certificate, before the sale. It appeared from the officer's return, that he attached this property on the writ against Smith Barnett, Nov. 28th, 1859, and kept the same until the day of sale. It did not appear on what day the plaintiffs in that suit made their request in writing to the officer to have examiners appointed, but it appeared that they were sworn, examined the property, and made their certificate on the 9th of December, 1859, in which they certified that all said property was liable to perish, waste and be greatly reduced in value by keeping. The officer advertised the property on said 9th day of December, to be sold on the 13th of the same month, and the sale was adjourned from the 13th to the 20th of the same December, when the property was sold.

Defendant moves to set aside the verdict for the reasons above stated.

*Williams*, for plaintiff.

*Ramsay* and *Ray*, for defendant.

NESMITH, J. As to the first exception made by defendant's counsel, it may be properly admitted, that, if the evidence tending to contradict Smith Barnett as to what he said on cross-examination about his title in the double wagon were material, it would then be proper to contradict it, otherwise the verdict should not be on this account disturbed. *Seavy v. Dearborn*, 19 N. H. 355.

Such testimony will be immaterial, unless it has a bearing upon the witness's state of feeling towards one or both of the parties. Here it is not shown that the cross-examination of the witness had any relation to the state of feeling towards either party, so as to render it competent. It is of no importance, as bearing upon this issue, whether Smith Barnett owned the double wagon, as its title was not now in controversy between these parties, and no question is legitimately before the court on this point. For these reasons this exception is overruled. *Dewey v. Williams*, 43 N. H. 386.

The defendant says the plaintiff cannot maintain this action, because he proved no title to the property sued for. This question is made to depend upon the legality of the proceedings of the officer, who attached and sold the property. The sale was made on the writ, after the property had been duly examined, and found, under the certificate of the examiners, liable to perish.

The goods in question were attached Nov. 28, 1859. The date of the certificate of the examiners was Dec. 9, 1859, and, on the same day, the officer advertised the property to be sold on Dec. 13, 1859. On this last day, the sale was postponed to Dec. 20, 1859, at which time the property was sold at public auction, and the plaintiff bought it. The defendant alleges the defect to be, that the officer did not keep the property four days at least. When these *four* days commenced presents the material enquiry. Sections 19 and 22 of chap. 195 of the Comp. Laws, page 471, substantially authorize perishable property, when appraised in due form to be sold, in the same manner as such sales are made on execution, unless a different mode is agreed on. Section 3d of chap. 207, of Comp. Laws, provides that goods and chattels taken on execution shall be safely kept by the officer at the expense of the debtor four days at least, and shall be advertised for sale, &c., forty-eight hours before the expiration of said four days, and sold at public auction to the highest bidder. The word *taken* as used in this section, plainly signifies the same as the words *received, apprehended, seized, attached*—*Webster's Dict.* The first of the four days evidently refers to the day when the goods were *seized, attached, taken*, on execution, and not to a subsequent time when they were *examined, appraised, or advertised and sold.*

The object of the statute, in requiring that the goods should be kept four days from their *taking*, was to enable the debtor to redeem the goods by paying the debt, or otherwise satisfying the execution. The old law of 1791, sec. 4, which was in force up to the time of the revision of our statutes, and is practically in force now, provides that the goods *taken* to satisfy an execution shall be safely kept by the officer for the space of four days *next* after they are so *taken*, and, if within that time the owner shall not redeem the same by otherwise satisfying the execution, such goods and chattels shall be sold, &c. Here, then, the officer has obeyed the benevolent intent of the statute, by giving to the debtor much more than the four days from the time of the taking (Nov. 28th,) in which he was to redeem his goods by satisfying the debt against him, or by furnishing a receipt, or his bond under the

statute. We cannot see that the defendant can properly complain that his principal had the lenity allowed by the officer, and we think this exception should also be overruled, and that there should be

*Judgment on the verdict.*

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F. D. ELLIS v. H. LULL & E. W. LULL.

Depositions, taken too late to be used on a trial before the jury, may still be used on a trial before an auditor, under a strict construction of the 20th rule of court.

Where two or more persons are subject to a joint duty or obligation upon notice, and where other special notice is not made necessary by statute or by contract, a notice addressed to *all* and served on *one* is notice to all. It will be sufficient if any *one* of the parties residing within the distance required by the statute be *notified*; a *legal* notice on him binding all the other parties jointly liable.

Generally, the shortest route of public travel to a given point is regarded as the just and legal route, both in making service of legal notices, and in giving compensation therefor.

At the hearing before the auditor, who was appointed October Term, 1859, the plaintiff offered depositions taken at Boston, on the 23d and 24th day of April, 1863, to be used at the April term of said court to have been holden on the 28th of said April. There having been no appearance at the caption by defendants, they objected to the admissibility of said depositions under the 20th rule of court. The depositions were in fact taken to be used before the auditor. The notice of taking was served on H. Lull only, on the 11th day of said April, who lived in Columbia, 28 miles from Lancaster, the place of audit, and the other defendant, in the same town, 10 miles more remote from Lancaster and Boston, and it is agreed for the purpose of this case, that by no possible route to Boston could the time of notice be sufficient if reckoned to the most distant defendant's residence, but was sufficient if H. Lull had been sole defendant, and computing by the short route.

It is further agreed that the notice gave sufficient time to H. Lull by the short route to Boston, by Lancaster, Franconia Notch and Plymouth, but by the ordinary railroad route the time was too short.

*Ray*, for plaintiff.

*Burns & Fletcher*, for defendants.

NESMITH, J. UNDER the 20th rule of court, the depositions taken in this case could not be used in the trial of the action before the jury. Under that rule, they would be regarded as having been taken out of time. But the case finds that they were to be used before an auditor. We do not understand that the prohibition of this rule extends to depo-