

limited to property held by virtue of the act itself, and so by its own terms it can have no application to property held by virtue of the later act, even though the general tenor and scope of the two may be similar. The former became of no effect, and so was practically repealed when the latter took away the subject-matter upon which it was to operate.

The conclusion is, that, so far as regards the property which came to Abigail Woodman by the will of her father, its distribution upon her death is not to be controlled by section 7 of the act of 1846, but goes to her next of kin according to the general law regulating the distribution of the estates of intestates.

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SANBORN v. ROBINSON.

54	239
67	440
68	485

A mortgage of real estate, witnessed by only one witness, is sufficient to convey the title as between the parties, and all others who had actual notice of the existence of such mortgage.

WRIT OF ENTRY by Thomas Sanborn against James H. B. Robinson (and George W. Osgood admitted as defendant). The parties agreed upon the following statement :

October 11, 1870, Jonathan B. Kelley owned the demanded premises. Upon that day he mortgaged the premises to Josiah R. Dearborn, to secure a note of even date for six hundred dollars. This mortgage, at the time of its execution, was attested by only one witness. It was acknowledged October 11, and recorded October 15, the record as then made showing only one witness. October 13, 1870, Kelley sold to Robinson and took a mortgage back the same day to secure a note of five hundred dollars. At the close of the description in this mortgage are the following words in parenthesis :

of six hundred dollars  
(said premises are subject to a former. )

This mortgage (Robinson to Kelley) was recorded October 21, 1870. November 1, 1870, Kelley sold and transferred the mortgage note to George W. Osgood, and delivered the mortgage to him. Osgood claims that he took the mortgage, not knowing of the prior mortgage. It is not alleged he had other notice, except what the mortgage-deed (Robinson to Kelley) gave him. Subsequently to the original record of the first mortgage, Thomas Sanborn took that mortgage, the deed when taken by him having on it the names of two witnesses. The signature of the second witness was recorded September 27, 1872.

The court ruled, *pro forma*, that the plaintiff could recover. The defendant, Osgood, excepted.

The parties agreed that all questions arising on the foregoing statement, whether of law or fact, be reserved.

*Murray*, for the plaintiff.

*Stone*, for the defendant.

SARGENT, C. J. I. We think the mortgage-deed of October 11, 1870, from Kelley to Dearborn, is sufficient to convey the title between the parties, and as to all others who had notice of it.

II. We think Osgood is chargeable with notice. At the close of the description of the land in the mortgage-deed of October 13, 1870, from Robinson to Kelley, is the following in parenthesis :

( of six hundred dollars  
said premises are subject to a former. )

The above can only mean that said premises are subject to a former [mortgage] of six hundred dollars. This is sufficient to charge Osgood with notice of the mortgage of Kelley to Dearborn of six hundred dollars. *Brown v. Eastman*, 16 N. H. 592; *Rogers v. Jones*, 8 N. H. 268; *Story's Equity*, secs. 399, 400; *Sugden on Vendors*, chaps. 16 and 17, 9th ed., and cases there referred to; *Cuyler v. Bradt*, 2 Caines Cas. in Err. 326; *Taylor v. Stibbertt*, 2 Ves. Jr. 440; *Hall v. Smith*, 14 Ves. Jr. 426; *Hastings v. Cutler*, 24 N. H. 481; *Kingsley v. Holbrook*, 45 N. H. 320; *Gooding v. Riley*, 50 N. H. 402.

The defendants stood upon the general issue, which admits their possession with claim of freehold; but the plaintiffs show the better title and the prior seizin.

*Judgment for the plaintiffs.*

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STATE v. TEBBETTS.

When a witness is summoned to attend a court and testify in any specified case, or to testify before the grand jury at any term of the court by having a proper subpoena read to him, and his legal fees for travel and attendance paid or tendered to him by a proper officer or by a private individual, it is the duty of the witness to attend such court and testify according to the command of the summons.

When a subpoena is sent out under the endorsement of the attorney-general or the county solicitor, and the same is properly served upon the witness, it is his duty to attend court and testify according to the command of the summons, without having any fees paid or tendered.

Such endorsement of the subpoena by the prosecuting officer of the state is a sufficient guaranty that his fees will be paid by the county.

When a witness has been summoned in either of the modes stated above, and fails to attend according to the command of the summons, and the facts of such service are properly returned to the court, the court will order a *capias* to issue against such witness to answer for his default.

This was a motion for a *capias* to issue against George H. Tebbetts.