

The defendants could not be legally notified to answer to the action, as ruled at the trial term. *Jones v. Smith*, 3 N. H. 108; *Kendrick v. Kimball*, 33 N. H. 484; *Nelson v. Swett*, 4 N. H. 256; *Arnold v. Tourtellot*, 13 Pick. 172.

Action dismissed.

STANLEY, J., did not sit.

HOLT & a. v. DOWNS & a.

When a writ, signed and issued by the clerk of one county, is made returnable and entered in another county, the change of the name of the county in the margin, from the former to the latter, at the time the declaration is inserted, is not a cause for quashing the writ.

MOTION, to quash a writ signed and issued by the clerk of Merrimack, and made returnable and entered in Hillsborough. The ground of the motion was, that when the blank was filled, "Merrimack" in the margin was erased, and "Hillsborough" inserted.

E. M. Smith, for the defendants.

Albin, for the plaintiffs.

DOE, C. J. If the alteration is a defect, it is one of form only. *Reynolds v. Damrell*, 19 N. H. 394; *Berry v. Osborn*, 28 N. H. 279.

Motion denied.

BINGHAM, J., did not sit.

KENNISTON v. HANNAFORD.

DAVIS v. HANNAFORD.

Upon a plea of *nul disseisin* to a writ of entry, the tenant cannot set up an easement in the demanded premises; but he will not be estopped by such plea, and judgment thereon, from asserting his rights whenever he shall be disturbed in their enjoyment.

WRITS OF ENTRY. Plea, *nul disseisin*. A referee, to whom the

causes were committed, found for the plaintiffs, severally, "subject to the easement of the defendant to have and maintain the timbers in said wall, as now inserted," &c. The defendant having elected a trial by jury, the plaintiffs moved that the report be recommitted for the purpose of having that portion thereof relating to the easement stricken out. The court, *pro forma*, denied the motion, and the plaintiffs excepted.

S. N. Bell and *Briggs & Huse*, for the defendant, contended that the title of the plaintiffs being subject to the easement, a finding by the referee, which should not recognize and define the easement, would give an unqualified possession to the plaintiffs. Such possession could not be given without interfering with the defendant's rights—citing *Rogers v. Sinsheimer*, 50 N. Y. 646.

C. R. Morrison, for the plaintiffs.

FOSTER, J. It is no objection to a recovery in a real action, that the tenant has an easement in the demanded premises. The right of the demandants to the fee and of the tenant to an easement therein, are rights independent of each other, and may well subsist together, when vested in different persons. A recovery by the demandants will not affect nor disturb the easement of the tenant. If he shall be interrupted in its enjoyment, he may still assert his rights by appropriate proceedings in law or equity. *Hancock v. Wentworth*, 5 Met. 446; *Morgan v. Moore*, 3 Gray 319; *Alden v. Murdock*, 13 Mass. 256; *Miller v. Miller*, 4 Pick. 244; *Tyler v. Hammond*, 11 Pick. 193; *Trask v. Wheeler*, 7 Allen 109; *Blake v. Clark*, 6 Greenl. 436; *Thompson v. Prop. of Androscoggin Bridge*, 5 Greenl. 62, 65; *Bradbury v. Cony*, 59 Me. 499; *Brondage v. Warner*, 2 Hill (N. Y.) 145; *Blake v. Ham*, 53 Me. 430.

But as the demandants, in a writ of entry, cannot deprive the tenant of his easement, so neither can the extent of the incumbrance imposed thereby be ascertained or defined in any proceeding in which the quality and extent of such claim is not brought in issue. See *Stearns on Real Actions* 202, 207; *Jackson on Real Actions* 91; *Gale on Easements* (4th Eng. ed.) 614; *Whidden v. Proctor*, 17 N. H. 90; *Melcher v. Flanders*, 40 N. H. 155, and cases cited; *Wiggin v. Smith*, 54 N. H. 213. Like extraneous matter in an auditor's report, the superfluous findings may be rejected. *Bartlett v. Trefethen*, 14 N. H. 427; *Stevens v. Thompson*, 17 N. H. 103; *Green v. Pickering*, 28 N. H. 360.

The substance and point of the defendant's plea here is, that he is tenant of the freehold and not of a less estate. But, as we have seen, although he fails to support his plea, he is not estopped thereby, nor by any judgment against him, upon these pleadings, from asserting his claim to an easement in the land.

The case of *Rogers v. Sinsheimer*, cited by the defendant, is based

upon a provision of statute (2 N. Y. Rev. St. 307, s. 30), that, in ejectment, the nature and extent of the plaintiff's interest must be specified in the verdict.

Case discharged.

STANLEY, J., did not sit.

BROWN v. LATHAM.

A payment of part of a debt does not take the remainder out of the operation of the statute of limitations, unless it is made under such circumstances that a promise to pay the remainder may be reasonably inferred from it.

Where goods and chattels were placed in the hands of the payee of a promissory note, by the maker, at the date of the note, under an agreement to apply the proceeds thereon, such application, without notice to and assent by the debtor, will not constitute a payment from which a new promise may be inferred.

ASSUMPSIT, on a note made by the defendant in September, 1862, payable to the plaintiff, on demand, with interest. Suit brought in August, 1875. There is a plea of the statute of limitations, and a replication of a new promise within six years. The plaintiff's evidence tended to show, that when the defendant gave the note he placed in the plaintiff's hands certain notes, accounts, and chattels, as collateral security, and authorized him to collect the notes and accounts, and sell the chattels, and apply the proceeds upon the note; that the plaintiff collected some of the notes and accounts, and sold some of the chattels, within six years of the date of the writ, and endorsed the proceeds on the note, in part payment thereof, in 1870, and that he exercised reasonable diligence in collecting the notes and accounts.

The defendant moved for a nonsuit, which the court denied, and the defendant excepted.

G. Y. Sawyer and Sawyer, Jr., for the defendant.

The true ground upon which a new promise by a debtor, or, rather, his acts and declarations furnishing evidence of a new promise, are held to take the case out of the statute of limitations, is, that he thereby waives the statute bar. *Titus v. Ash*, 24 N. H. 319, and cases cited on page 330. The acts or declarations must tend to show the assent of his mind to the waiver within the six years; and this

58	30
89	184

58	30
74	273