

case, and that two of them (who were sick) were discharged from all further service. When the officer executed this order, one of the jurors proposed that another vote be taken on the case. Another vote was taken, and the result showing a change of two votes, the jury concluded to remain and try to agree, which they did, and finally agreed, and returned a verdict for the defendants. The plaintiff moved for a new trial. The court found the facts to be, that the jury did not separate or depart from their room, or from the charge of the officer, and that the fairness and justice of the trial were not affected by anything that happened after the order of discharge was given. The case is to be so amended as to reserve the evidence upon which these facts were found, if the court, at the law term, will consider it.

*Aldrich, Shurtleff, and Ray, Drew & Jordan*, for the plaintiff.

*Dudley, Ladd, and Bingham*, for the defendants.

STANLEY, J. There is no cause for a new trial. *Nims v. Bigelow*, 44 N. H. 376, 380-382; *The King v. Woolf*, 1 Bennett & Heard Ld. Cr. Cases (2d ed.) 496. The case should not be so amended as to bring the evidence to the law term. The facts on which a motion for a new trial is based should be settled at the trial term.

*Judgment on the verdict.*

BINGHAM, J., did not sit.

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BEALS v. HILL.

A defendant is not estopped to set up an assignment of property as a defence of payment, by reason of his having obtained a continuance of the action at a former term, upon his affidavit that he was advised by counsel and believed that his claim for the assignment probably could not be allowed as a set-off, and that, for reasons stated, judgment should not be rendered against him before he had an opportunity, in a pending suit on his claim, to obtain a judgment which might be set off against the plaintiff's judgment.

ASSUMPSIT, on notes. The plaintiff objects to the admission of evidence tending to show that the notes had been paid by the assignment of a patent right. At a former term, the defendant had obtained a continuance upon his affidavit that he was advised by his counsel and believed that his claim for the assignment probably could not be allowed as a set-off, and that, for reasons stated, judgment

should not be rendered against him before he had an opportunity, in a pending suit on his claim against the plaintiff, to obtain a judgment which might be set off against the plaintiff's judgment in this suit. The defence offered had never been adjudicated. The plaintiff contends that the defendant is estopped to set up the assignment as a defence of payment. The evidence of payment being rejected, and a verdict ordered for the plaintiff for the amount of the notes, the defendant moves for a new trial.

*Burns & Heywood*, for the plaintiff.

*Ray, Drew & Jordan*, for the defendant.

BINGHAM, J. The court rejected evidence tending to show that the notes were paid. This was a meritorious defence, and it should not have been rejected except for good cause. The reason assigned for rejecting it was, that the defendant made the affidavit described in the case. It is apparent that the defendant was misinformed as to his legal rights at the time he made affidavit. He then believed that he would be unable to avail himself of this defence in the trial of this action. He afterwards learned that he could, and offered to do so. The court rejected it, on the ground that he was estopped. The merits have never been tried. So long as the merits of a case remain untried, the court will relieve a party, who, under misapprehension, or a want of proper knowledge of his case, has in good faith filed pleadings or made agreements that operate to defeat a full presentation of his rights. *Wells v. Iron Co.*, 48 N. H. 491, 524-526; S. C., 50 N. H. 85, 89.

The defendant does not appear to have been guilty of fraud or bad faith, and we do not think that the case made was such as estopped the defendant from showing his defence.

*Verdict set aside.*

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BEDELL & a., *Ap'ts*, v. BAILEY, *Ap'ee*.

The acts of a judge of probate, in the settlement of an estate in which he is interested as an executor, are void.

APPEAL, from the decision of the commissioner, disallowing a claim of the appellants, as executors of Lombard, against one Hall, of whose estate the appellee is administrator. The appellant, Bedell, was judge of probate for the county of Coös. The appellee pleaded that Bedell appointed the commissioner, approved and accepted the report,