

CARROLL.

HOBBS v. HOBBS.

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In assumpsit for money had and received by the defendant as the price of the plaintiff's land, which the defendant, by warranty deed, sold without authority, the objection that the plaintiff may not be estopped to recover the land from the purchaser, to whom the defendant will remain liable, may be obviated by the plaintiff's giving the defendant a deed of the land before taking judgment.

ASSUMPSIT, for money had and received by the defendant as the price of the plaintiff's land, which the defendant, by warranty deed, sold without authority. The plaintiff demanded the money of the defendant before suit. The facts were found by the circuit court.

Copeland, for the plaintiff.

T. J. Smith, for the defendant.

DOE, C. J. If the defendant, without authority, had sold the plaintiff's personal property and received the price, the plaintiff could ordinarily waive the tort, ratify the unauthorized sale, and recover the money of the defendant in this form of action; and, so far as his rights depend upon the general principles of agency, waiver, and ratification, he may confirm the unauthorized sale of his real estate. The defendant objects that nothing passed by his deed, and that the plaintiff may recover the land of the purchaser, who will have a remedy against the defendant on his warranty. If this objection is supported by any distinction between real and personal estate, it might have been obviated by a conveyance of the land from the plaintiff to the defendant before suit. And it may be obviated in the same way at any time before judgment. *Thurston v. Blanchard*, 22 Pick. 18; *Manning v. Albee*, 11 Allen 520, 523; *Nichols v. Pinner*, 18 N. Y. 311; Kerr on Fraud 328, note (Am. ed., 1872); *Concord Bank v. Gregg*, 14 N. H. 331; *Abbott v. Tenney*, 18 N. H. 109; *Reddington v. Henry*, 48 N. H. 273; *C. P. Institution v. Stone*, 52 N. H. 365.

If, notwithstanding such a conveyance to the defendant, he would be liable to his grantee for nominal damages for breach of warranty, there seems to be no reason why he should not be left exposed to that unsubstantial danger.

If the defendant would have complied with the plaintiff's demand had it been accompanied by a tender of a deed,—if the suit would have been avoided by such a tender,—justice can be done in the mat-

ter of costs. Judgment for the costs of the suit may be rendered against the party whose fault was the cause of the suit.

Upon a deed being tendered to the defendant, or deposited with the clerk for him, there will be

Judgment for the plaintiff.

HILL v. EQUITABLE M. F. INSURANCE CO.

When a house is insured upon condition that, if it is vacated by the owner or occupant, previous notice shall be given to the insurer of "the particulars of such vacation or removal," the condition is not complied with by a notice that the household goods will not be removed, when, in fact, they are substantially all carried away.

ASSUMPSIT, on a policy insuring a house upon condition that, if the house is vacated by the owner or occupant, notice thereof shall be given to the secretary of the company prior thereto, stating the particulars of such vacation or removal, and the length of time the house is to remain unoccupied. Facts found by a referee. The plaintiff, having taken the policy with full knowledge of the condition, called, with her husband, upon an agent of the company, and informed him that her son and his family, who occupied the house, were about to leave it for three or four weeks. The agent said, "I suppose they are not going to move their things away." The plaintiff's husband said, "No; they are only going on a visit." The plaintiff's son and his family left the house, intending to return in three or four weeks, and carried away substantially all their household property. At the end of three weeks the empty house was burned.

I. A. Eastman and W. T. Norris, for the plaintiff.

Mugridge, for the defendants.

DOE, C. J. The contract required notice of the particulars of the intended removal. The notice given was, not that substantially all the household goods would be removed, but that no such removal would take place. If such goods are not excessively insured, their presence in the house generally has a tendency to prevent the burning of the house by their owner. The danger of his burning his goods, the difficulty of removing them after he sets the fire, and the evidence furnished by his preparatory removal of them before the fire, afford a protection of a substantial character against fraudulent incendiarism, which insurers may well avail themselves of. The house containing the goods of the absent family is more likely to be cared for, and less