

the same court, and it has the power to transfer from one docket to the other any petition or proceeding erroneously entered. *Spaulding's Appeal*, 33 N. H. 479.

Exception overruled.

SAWYER and BINGHAM, JJ., did not sit.

CRAWFORD & a. v. FORRISTALL.

A subsequent vendee of a chattel, with possession, and without notice of a prior sale, has a good title as against a prior vendee with no possession.

TROVER, for a wagon. The defendant, March 12, 1873, bought the wagon of his brother James for \$60, the wagon being two and a half miles away, in an open shed, on a farm formerly owned by the defendant's father. The defendant did not see it that day. Subsequently, on the same day, James offered it to the plaintiffs for \$70, to be endorsed on their note against him; and on the morning of the 13th they rode to where it was, concluded to take it on the terms offered, drew it into the road, but, finding it difficult to draw it home, drew it back, and left it with one Smith to keep and to send to them. The next day the defendant took the wagon and converted it to his own use. The jury found, specially, the value of the wagon to be \$46.66; that the plaintiffs bought and accepted it of James Forristall, March 13, 1873, and received possession of it the same day; that the defendant bought and accepted it March 12, 1873, but did not receive possession of it on that day. Both parties claimed judgment on this verdict.

Aldrich & Shurtleff and Ladd, for the plaintiffs.

Dudley and Ray, Drew & Jordan, for the defendant.

ALLEN, J. The general rule is, that delivery of possession is necessary to the conveyance of a title to personal chattels, as against every one except the vendor; and a subsequent purchaser, with no notice of a prior sale, receiving possession, has a better title than one who has before purchased the same thing with no delivery of possession. 1 Pars. Con. 529; *Ricker v. Cross*, 5 N. H. 570; *Shumway v. Rutter*, 7 Pick. 56; *Jewett v. Warren*, 12 Mass. 300; *Lanfear v. Sumner*, 17 Mass. 110. The purchase of the wagon by the defendant, in this case, unaccompanied by possession, gave him no title against the subsequent purchase by the plaintiffs, who received possession. Admitting the good faith of the parties, and that they stand on equal grounds as to notice of each other's rights, the defendant neglected the very obvious duty of taking possession of the property; and the

plaintiffs, finding it in the control of the vendor, should not be made to suffer for the defendant's neglect. None of the circumstances, which the law makes an exception to the rule requiring delivery of possession, exist in this case. The property was not bulky nor immovable. It was not at such a distance from the place of the trade that the defendant could not, by ordinary diligence, have asserted his title and taken possession before the plaintiffs. Under such circumstances the plaintiffs' title is the better one.

Judgment for the plaintiffs.

DOE, C. J., and BINGHAM, J., did not sit.

ROCKINGHAM, AUGUST, 1877.*

MOORE v. KIDDER & a.

The levy of an execution for an amount which, by reason of accident or mistake, is excessive, is not necessarily in all cases wholly void.

WRIT OF ENTRY. (Reported in 55 N. H. 488.) The plaintiff claimed under a deed from one Downing. The defendants claimed under the levy of an execution issued upon a judgment recovered by them against Downing in a suit in equity, in which the land was attached after the deed from Downing was delivered, and before it was recorded. By the writ in that suit, the officer was commanded to attach property to the amount of \$2,000. The attachment was general,—of all the real estate of Downing in the town. The land levied upon was appraised at \$2,110, = 2,053.32, the amount of the judgment, + \$56.68, the costs of the levy. At the trial of this case (Jan. term, 1876) the plaintiff contended that the lien acquired by the attachment could not exceed \$2,000. The court, *pro forma*, ordered a verdict for the defendants. At the August (adjourned) term, 1876, it was decided (in accordance with *Searle v. Preston*, 33 Me. 214) that the attachment was not limited to \$2,000, and that the levy was valid; and judgment was ordered on the verdict. The plaintiff moved for a rehearing.

Hatch and Wood, for the plaintiff.

C. R. Morrison and Small, for the defendants.

* CLARK, J., sat in none of the cases decided at the August Adjourned Term, 1877, and SMITH, J., in none except those in which he delivered the opinions.—RE-PORTER.