

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.

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ROCKINGHAM, AUGUST, 1877.\*

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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.

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\* 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.

DOE, C. J. If the amount secured by the attachment could not exceed \$2,000, the levy might be sustained to that amount. *Avery v. Bowman*, 40 N. H. 453; *C. P. Institution v. Stone*, 52 N. H. 365, 368; *Hobbs v. Hobbs*, *ante*, p. 81. The defendants might be required to deposit \$110 with the clerk for the plaintiff, or to convey to the plaintiff a proportional part of the land; or, without a conveyance, the levy could be upheld as establishing a good title to a proportional part. If a conveyance were made, it might contain a stipulation that the expense of a partition should be borne by the defendants. They might be required to obtain partition at their own expense. The plaintiff might be allowed his election of land or money to the amount of \$110. In various ways the plaintiff could be indemnified, and justice done without invalidating the whole levy. When the defendants complied with all the conditions imposed upon them, judgment could be rendered on the verdict. The question, whether an officer is authorized to attach property to an amount greater than that named in the writ, in this case is not, and in other cases is not likely to be, of great practical importance.

*Motion denied.*

FOSTER and STANLEY, JJ., did not sit.

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SANDERSON v. PEABODY.

Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered, which is excluded in the action in which that judgment is offered in evidence.

By "the matter in issue" is to be understood that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings.

When the precise matter in issue in a former trial is not apparent from the declaration and pleadings, extraneous evidence may be produced to show upon what grounds the verdict and judgment proceeded. The applicability of the plea of former judgment depends, therefore, upon the identity, not of the form, but of the cause of action or matter of defence in issue.

ASSUMPSIT, to recover \$12,348.42, alleged to be the unpaid balance of an original debt for double that amount, contracted in April, 1864. The defendant claimed that the whole original debt had been discharged by a fifty per cent. composition between the defendant's firm and its creditors, paid and received in full satisfaction. The plaintiff

58	116
67	321
68	543
68	548