

PENACOOK SAVINGS BANK v. HUBBARD.

Money paid on a check by the drawee to a messenger of the payee under a mistake (the drawee erroneously supposing he had funds of the drawer), and paid by the messenger, without fault on his part, to the payee, cannot be recovered from the messenger by the drawee.

ASSUMPSIT, for the amount of two checks paid by the plaintiffs to the defendant. The checks were drawn by M., on the plaintiffs, in favor of W. & S., who sent them to the plaintiffs by the defendant. The plaintiffs paid their amount to the defendant, who paid it to W. & S. The specification was for money paid by accident and mistake. The mistake was in the plaintiffs' clerk erroneously supposing that the plaintiffs had funds of M., when, in fact, M.'s account was overdrawn. On a formal ruling, by which the defendant would be liable without fault on his part, a verdict was taken by consent for the plaintiffs, subject to the opinion of the court.

Sargent & Chase and *Butler*, for the plaintiffs.

Rand and *Albin*, for the defendant.

FOSTER, J. By the plaintiffs' delivery of the money to the defendant for the payee, the defendant was as fully authorized by the plaintiffs to carry it to the payee as if he had been the plaintiffs' messenger. Without fault on his part, he is not liable for doing what the plaintiffs authorized him to do. There is no legal reason for transferring from the plaintiffs to the defendant the consequences of the plaintiffs' error. Story on Agency, s. 300; *Holland v. Russell*, 1 B. & S. 424; 4 B. & S. 14; *Shand v. Grant*, 15 C. B. (N. S.) 324; *Sadler v. Evans*, 4 Burr. 1984; *Edden v. Read*, 3 Camp. 339; *Bamford v. Shuttleworth*, 11 A. & E. 926; *Cox v. Prentice*, 3 M. & S. 344; *Buller v. Harrison*, Cowp. 565; *Tugman v. Hopkins*, 4 M. & G. 389, 401; *Penhallow v. Doane's Adm'rs*, 3 Dall. 54, 87, 105, 114, 118; *Elliott v. Swartwout*, 10 Pet. 137, 153-158; *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104.

Verdict set aside.

STANLEY, J., did not sit.

HAYNES v. ORDWAY.

In an action brought by a surgeon against his patient for service in a surgical case, the defence of malpractice is barred by a judgment on the merits rendered for the surgeon in a suit brought against him by the patient for malpractice in the same service.

ASSUMPSIT, by a surgeon for professional service performed by him for the defendant. In a former suit brought by this defendant against the surgeon for malpractice in the same service, judgment had been rendered on the merits for the surgeon. The question whether the defence of malpractice can be set up by the defendant in this action was reserved.

Albin, for the plaintiff.

Sanborn & Clark, for the defendant.

ALLEN, J. The former judgment in the suit for malpractice was on the merits, and is conclusive as to all matters then in issue between these parties. *King v. Chase*, 15 N. H. 9. The question of malpractice having been thus determined in favor of this plaintiff, it is not open to the defendant to try the same question again in this suit, and he is estopped from setting up in defence what was determined against him by the former judgment. *Edwards v. Stewart*, 15 Barb. 67; *Stevens v. Miller*, 13 Gray 283; Bigelow on Estoppels 45.

Judgment for the plaintiff.

STANLEY and FOSTER, JJ., did not sit.

BARNEY v. KENISTON.

A debtor, claiming and obtaining the exemption of a horse from attachment, under Laws of 1871, c. 30, is estopped from afterwards claiming the exemption of oxen attached at the same time, though the horse was not his property.

TRESPASS, *de bonis*, to recover the value of a yoke of oxen taken and sold by the defendant on mesne process against the plaintiff. A horse, attached on the same process, was claimed by the debtor to be exempt from attachment, under Laws of 1871, c. 30, and was released by the officer. There was evidence that another person owned the horse at the time of the attachment. Afterwards, before the oxen were sold, the debtor claimed them as exempt from attachment.

The defendant excepted to the instructions of the court to the jury, that if the plaintiff did not own the horse, he would not be precluded from claiming the oxen, although he had before claimed the horse as exempt. Verdict for the plaintiff; motion of the defendant for a new trial.

Flanders, for the plaintiff.