

town paying money "under the provisions of the twelfth section," may recover the same, in an action on the case, of the rioters. The meaning of s. 15 is, that in an action on the case there is a remedy for a town that pays money to the owner, when, by s. 12, it is liable to indemnify. Its remedy depends upon its discharging its liability by payment, and not upon the form of the action by which its liability is enforced.

Notwithstanding the unnecessary averment in relation to the accruing of the action, and demand and refusal, the declaration is in case.

*Demurrer overruled.*

ALLEN, J., did not sit.

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KNAPP v. COX.

In an action against a sheriff for a false return of an attachment, a declaration alleging that the return was false, in this, that the sheriff made no attachment, but also alleging facts which show that the return was true, is bad on demurrer.

CASE, against a sheriff for a false return made by K., one of his deputies. The declaration charged that, in an action brought against the plaintiff by W., the deputy made return on the writ that he attached certain hay and wood, and left an attested copy of the writ and of his return of attachment thereon at the dwelling-house of the town-clerk; that the suit was entered in court, and is still pending; that since the date of said attachment, said hay and wood have been in the custody of K., as such deputy, and the plaintiff, by reason of such pretended attachment, has been deprived of all control and power to dispose of the same; and that the return is false in this, that K. did not attach said property. The defendant demurred. K. never had any actual possession or control of the property.

*Shirley*, for the defendant. The declaration contradicts itself, and shows no cause of action. It alleges that the return is false because no attachment was made, and that the deputy did everything necessary to make an attachment.

*Putnam*, for the plaintiff. The declaration does not allege that the deputy did everything necessary to make an attachment; and the case shows that he made no attachment because he took no actual possession or control of the property. *Scott v. M. Print Works*, 44 N. H. 507. The declaration alleges, and the case shows, that the return is false. And the return, though false, is conclusive between the

parties and their privies, and by it this plaintiff is deprived of all right to control and power to dispose of the property, as he would be by a valid attachment (*Brown v. Davis*, 9 N. H. 56; *Angier v. Ash*, 26 N. H. 105; *Messer v. Bailey*, 31 N. H. 9; *Treadwell v. Brown*, 43 N. H. 290, 292; *Cooper v. Newman*, 45 N. H. 339; *Morse v. Smith*, 47 N. H. 474), and he is necessarily injured by the falsity of the return. He cannot sell the property, nor use it, nor prevent its going to waste.

FOSTER, J. The plaintiff contends that the return is false, in this, that the defendant did not take that possession or control of the property without which there could be no attachment. But the averment of the declaration, that since the date of the attachment the hay and wood have been in the custody of the defendant as a deputy sheriff, must be understood to mean that the defendant took the necessary possession. The attachment is afterwards called a "pretended attachment;" but the declaration is not made good by the inconsistency of averment and epithet.

*Demurrer sustained.*

STANLEY, J., did not sit.

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SPILLER v. CASS.

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In assumpsit for the use and occupation of land verbally agreed to be conveyed to the defendant, who entered upon and occupied the land, but failed to pay according to the agreement, the plaintiff cannot recover until he has restored any benefits he has received from the contract.'

ASSUMPSIT, for use and occupation of land. Facts found by a referee.

The plaintiff verbally made a bargain with the defendant to sell him his farm, in the spring of 1875, for \$800 and the payment of the taxes for that year. Two hundred dollars was to be paid by the next July, when a deed was to be given. The defendant took possession of the farm but did not make the payment as agreed, and the following March the plaintiff sold it for a larger price, and the defendant moved from the premises. While in possession the defendant paid the taxes and made permanent improvements on the land, such as a tenant for a year would not make. The taxes and improvements were of equal value to the plaintiff's claim for use and occupation. Both parties claimed judgment.

*Wilson*, for the plaintiff.

*Fling*, for the defendant.