

was the non-payment of the premium to that extent, and the non-forfeiture law applies.

The extension of the policy by this law must be from the date of forfeiture for non-payment, September 20, 1869, and the extension will fall short of or extend beyond the death of the assured, according as the part of the notes representing the last half of the year's premium is or is not deducted from the net value of the policy at the time of forfeiture in determining the net single premium for the extension of the policy.

The indebtedness to be deducted was represented by the unpaid notes. The premiums were payable yearly in advance, and no premiums were to be returned by reason of forfeiture during the year, for the whole of which the premium might have been paid. The value of the policy depended on the premiums paid, and, though the insurance might be lost by forfeiture for non-payment, the value of the policy was diminished by an amount equal to the sum of the notes unpaid.

In *Goodwin v. Mass. Life Ins. Co.*, 73 N. Y. 480, it was decided that the policy was forfeited by the failure to pay when due the last half of a year's premium, payable at the middle of the year, but that the unpaid part of the premium should not be treated as indebtedness to be deducted in determining the net value of the policy as a premium for extension. No note had been given for the unpaid part of the premium.

In *Pitt v. Berkshire Mutual Life Ins. Co.*, 100 Mass. 500, the note for the unpaid part of the annual premium was payable in three instalments. The policy being forfeited for non-payment of the first instalments when due, the amount of the whole note, including the two instalments not due, was deducted in determining the net value of the policy. This case is affirmed in *Bigelow v. State Mutual Life Assurance Assoc.*, 123 Mass. 113.

The construction given by the Massachusetts court to the non-forfeiture law enacted in that state is adopted. The policy was not in force at the death of the assured, and on the referee's report there must be

Judgment for the defendants.

STANLEY, BINGHAM, SMITH, and CLARK, JJ., did not sit: the others concurred.

DEARBORN v. SAWYER.

The release of an attachment is a good consideration for a promise.

Notice to a guarantor is unnecessary when the principal debtor is insolvent; also when the undertaking is absolute.

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Evidence from a servant of a corporation of facts as to its business, communicated to him by another servant of the corporation, is, in a suit between third parties, hearsay, and inadmissible.

ASSUMPSIT, upon the promise of the defendant to indemnify the plaintiff against loss from the release of an attachment. Facts found by a referee.

October 7, 1876, the plaintiff having a claim against one Emerson, attached by trustee process his wages in the hands of the Concord Railroad. Emerson was then employed on the line of the M. & N. W. R. R., which was operated by the Concord Railroad. October 16, 1876, Sawyer wrote to the plaintiff representing that Emerson was in danger of losing his place through a rule of the road relating to trustee suits; that he had a large family dependent upon him for support; and added, "If you will sign the enclosed release [of the attachment], I will be responsible to you that you shall not lose anything by such release." The plaintiff executed the release as requested, and Sawyer, in consideration thereof, wrote across the face of his letter, and signed and delivered to the plaintiff, this agreement: "Received herein described release, and become responsible." October 21, 1876, Emerson filed a petition in bankruptcy, and subsequently obtained his discharge.

W., cashier of the C. R. R., testified that the amount of wages due Emerson at the date of the service of the trustee process was \$58.46; that his time was kept by another employé of the road; that a statement of the time so kept was returned by the time-keeper to W., who made up the pay-roll from the information so furnished; and that he had no other knowledge of the amount due to Emerson. To this evidence the defendant excepted.

The witness was permitted to state, so far as he had personal knowledge, by whom and in what manner the M. & N. W. R. R. was operated, and stated, among other things, that the help on that road were paid by him as cashier of the C. R. R., and with the money of that road. To this evidence the defendant also excepted.

The referee found that the attachment of Emerson's wages was not shown to be and was not such a valid and legal attachment that the release of the same by the plaintiff would support a consideration for Sawyer's promise to become responsible to the plaintiff for Emerson's debt; that Sawyer's guaranty was without consideration; and that no demand or notice was ever made by the plaintiff upon the defendant for the payment of the sum claimed, before suit was brought.

Both parties moved for judgment.

Osgood and *W. Little*, for the plaintiff.

Mugridge, for the defendant.

SMITH, J. The defendant did not undertake to pay the debt of Emerson to Dearborn, but promised that the plaintiff should not lose anything by releasing his attachment. If there were no funds attached in the hands of the Concord Railroad, then the plaintiff lost nothing by the release, for there were no funds to be released. The question then is, whether the Concord Railroad was indebted to Emerson, that is, whether Emerson was in the employ of the C. R. R. or of the M. & N. W. R. R. The referee finds that the defendant's guaranty was without consideration. By this we understand him to mean that there were no funds attached, because the legal effect of the defendant's undertaking was that he would pay whatever sum the plaintiff should release from attachment; and if there were any funds attached, the release would support a consideration to the amount of such funds. *Wallace v. Holmes*, 2 N. H. 111; *Hackett v. Pickering*, 5 N. H. 19; *Haynes v. Thom*, 28 N. H. 386; *Robinson v. Gilman*, 43 H. H. 485, 492. The referee has not found, in terms, that Emerson was in the employ of the M. & N. W. R. R. But his finding, that there was no legal or valid attachment of Emerson's wages, can be put upon no other ground than a finding that he was in the service of that road. The principal question litigated before the referee was, whether Emerson was in the service of the Concord or the North Weare road. The defendant contended that he was employed by the latter road, and the referee's finding that he was so employed is in conflict with the facts he has reported; for it is found that the North Weare road is operated by the Concord, and that the help are paid by the cashier of the Concord road and with its money. Upon this branch of the case the evidence of the cashier, W., was limited to what he personally knew, and there could be no exception to its admissibility.

But the testimony of W. as to the amount due Emerson at the time of the attachment was not derived from his personal knowledge, but from information furnished by a co-servant of the railroad, and, being only hearsay, was inadmissible. In a suit by or against the corporation, the evidence might be admissible on behalf of the other party as an admission coming from its authorized agent. But in a suit between third parties the evidence is hearsay.

Whether the undertaking of the defendant was an absolute, unqualified contract to indemnify, or a collateral undertaking, we need not inquire, for the necessity of demand and notice was obviated by the insolvency of Emerson. *Beebe v. Dudley*, 26 N. H. 249; *Batchelder v. Wendell*, 36 N. H. 204; *March v. Putney*, 56 N. H. 34.

There must be a rehearing upon the question of damages, that is, whether the Concord Railroad owed Emerson, and if so, how much, at the time of the attachment. If it shall be proved that

the road was indebted to him, the plaintiff will be entitled to judgment for the sum so found.

Case discharged.

BINGHAM, J., did not sit: the others concurred.

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REDDING v. DODGE.

Amendments are not allowed when injustice will be done thereby.

TRESPASS, for the forcible taking and carrying away of the plaintiff's cattle. Facts found by a referee.

The defendant was, at the time of the taking complained of, and since has been, sheriff of Merrimack county, and one Kenrick was his deputy. Kenrick was also deputy of the sheriff of Belknap county. Kenrick, at S. in Belknap county, attached the plaintiff's cattle upon a writ against one D., returnable in Merrimack county, which is the taking complained of. On the same day Kenrick drove the cattle to F. in Merrimack county, and five days later sold the same, as a deputy of the defendant, upon the certificate of examiners, and made return of his doings upon the writ. The declaration charges the defendant with the forcible taking and carrying away of the plaintiff's cattle in S. in the county of Belknap. The plaintiff moved to amend by alleging the taking, &c., to have been done in F. in the county of Merrimack.

Rolfe, for the plaintiff.

E. B. S. Sanborn, Shirley, and Mugridge, for the defendant.

SMITH, J. Kenrick was not acting as the deputy of the defendant when he attached and removed the plaintiff's cattle. If he acted illegally in removing property into Merrimack county which he might lawfully attach in Belknap county, and selling the same upon the certificate of examiners in Merrimack county,—a point upon which we express no opinion,—yet we think it would be inequitable to enable the plaintiff by the proposed amendment to harass the defendant with this suit. Upon the facts reported, justice does not require the allowance of the proposed amendment. *Wendell v. Mugridge*, 19 N. H. 109; *Baker v. Davis*, 22 N. H. 27.

Case discharged.

BINGHAM, J., did not sit: the others concurred.

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