

821; *Gates v. Lounsbury*, 20 Johns. 427; *Gyre v. Culver*, 47 Barb. 592.

Ladd & Fletcher, for the plaintiff.

BINGHAM, J. If one wrongfully takes the chattel of another from his possession, the latter may retake it, using no more force than is necessary for that purpose. *State v. Elliot*, 11 N. H. 540; *Sterling v. Warden*, 51 N. H. 217, 240—*S. C.*, 52 N. H. 197, 203; *Blades v. Higgs*, 10 C. B., N. S., 713; *Mills v. Wooters*, 59 Ill. 234.

Verdict set aside.

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

KENT & a. v. BROWN.

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Whether a furnace and cistern, with pipes and other attachments, are furnished for erecting, altering, or repairing a house, so that a lien attaches to secure their price, is a mixed question of law and fact, and its decision by a referee will not ordinarily be disturbed, unless it appears that he has misapplied the law.

ASSUMPSIT, for a furnace, cistern, and attachment sold to the defendant. The plaintiffs claim a lien for their price, under Gen. St., c. 125, s. 11. Facts found by a referee. The court overruled the objection that they were not furnished for erecting, altering, or repairing a house.

Benton & Hutchins, for the defendant.

Ladd & Fletcher, for the plaintiffs.

BINGHAM, J. The furnace was enclosed in brick and mortar, with a smoke-pipe passing to the chimney, and hot air-pipes passing to the several apartments, and was designed as a permanent method of warming the house. The cistern and pipes bringing the water to and carrying it from the house, were designed to provide it permanently with water. They would pass by a conveyance of the house. *Tuttle v. Robinson*, 33 N. H. 119; *Wadleigh v. Janvrin*, 41 N. H. 503, 514, and cases cited. Whether they were furnished for erecting, altering, or repairing the house is a mixed question of law and fact, and its decision by a referee will not ordinarily be disturbed, unless it appears that he mistook or misap-

plied the law. *Cummings v. Centre Harbor*, 57 N. H. 17. The referee finds that the articles were used as the parties intended at the time of the sale, and that they have become a part of the house, so that the statutory lien attaches. In this we discover no error.

Judgment on the report.

DOE, C. J., did not sit: the others concurred.

MCINTIRE v. EVANS.

When a chattel is purchased by one of two persons, the buyer holds the title against those claiming under the other, although the vendor supposed he was selling to the latter.

REPLEVIN, for four oxen. The plaintiff claimed that he purchased the oxen of one Rogers, and let one Callahan take them. The defendant claimed that he bought them of Callahan. Subject to the plaintiff's exception, the court instructed the jury that if Rogers understood he was selling to Callahan, the plaintiff could not recover.

Ray, Drew & Jordan, for the plaintiff.

Twitchell & Evans and *Ladd & Fletcher*, for the defendant.

BINGHAM, J. If the plaintiff acquired a title from Rogers, he can recover, even though Rogers did not know he was the purchaser. If Callahan purchased the oxen as agent, the title vested in the plaintiff, although Callahan did not disclose his agency, and Rogers supposed he bought them for himself.

Verdict set aside.

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

DODGE v. CARROLL.

Motive may be shown, when material.

Admission of testimony not rebutting is within the discretion of the judge at the trial term, which will not be revised unless specially reserved.

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