

form, has existed in this state for a longer period than is covered by our reported cases. We are unable to find an instance in which the court has intimated such a construction as the defendant claims. A mortgage vests the seizin of the estate in the mortgagee, and he may at any time enter upon the mortgageor, and take and retain possession of the premises for the purpose of receiving the rents and profits until the condition is performed. *Brown v. Cram*, 1 N. H. 169; *Hartshorn v. Hubbard*, 2 N. H. 453; *Hunt v. Stiles*, 10 N. H. 466; *Dearborn v. Dearborn*, 9 N. H., 117; *Ellison v. Daniels*, 11 N. H. 274; *Smith v. Moore*, 11 N. H. 55, 61; *Chellis v. Stearns*, 22 N. H. 312. In an action brought to foreclose a mortgage, the judgment must be conditional. But in this case, the mortgagee, being entitled to the possession of the premises in order that he may take the rents and profits, can maintain his action. *Hobart v. Sanborn*, 13 N. H. 226.

*Case discharged.*

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

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WHITCHER v. McCONNELL.

Part payment of a note on Sunday, and an indorsement of it on the same day, are not evidence of a new promise to remove the bar of the statute of limitations.

A payment upon a note owned by two persons, each having a several interest in it, of the amount owned by one, will not operate as a renewal of the note in favor of the other.

ASSUMPSIT, on a note dated March 20, 1867, payable to Mercy Whitcher, or order, and by her indorsed to the plaintiff. Plea, the statute of limitations, and replication, a new promise. The payee had given the note to the defendant's wife, excepting \$36, which it was understood the defendant was to pay to her within six years of the suit. On Sunday the defendant gave to the payee his note for \$44.64, being \$36 and interest from the date of the gift, and on the same day indorsed on the note in suit \$36. Subsequently, the \$44.64 note was paid to Mercy Whitcher, and she indorsed the note held by the defendant's wife to the plaintiff. The referee found for the defendant; and the question is upon the competency of the evidence upon the question of a new promise.

*Foster*, with whom were *Bingham, Mitchell & Batchellor*, for the defendant.

*Carpenter*, for the plaintiff.

ALLEN, J. The transaction by which the defendant gave a note of \$44.64 to Mercy Whitcher, and indorsed \$36 on the note in suit, was upon Sunday, and, being illegal, was not evidence from which a new promise could be inferred. *Clapp v. Hale*, 112 Mass. 368. The subsequent payments were voluntary payments to Mercy Whitcher, intended to be on her note of \$44.64, and not on the note in suit. Nothing was paid on the plaintiff's note. The fact that the \$44.64 note was void does not contradict the fact that the defendant paid and intended to pay that note, and is no evidence that he paid or intended to pay some other note, which at the time he did not see nor have in mind; nor was there any transaction between him and the holder in regard to the payment of the other note. The fact that the defendant paid a note which he was not obliged to pay, cannot be made to work a payment of another note, nor operate to renew it.

*Judgment for the defendant.*

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

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DAVIS v. WEBSTER AND HUCKINS.

A debtor refusing, on request, to elect whether he will retain a horse or pair of oxen as a team exempt from attachment, cannot afterwards complain because the oxen, and not the horse, were attached and sold.

A debtor whose cows are all taken on attachment has no ground of action for a wrongful taking and conversion of exempted property, if at the time of the attachment he informed the sheriff making it that he had other cows, and the sheriff afterwards, on learning he had taken the last cow, returned one, which the debtor received.

An officer is not liable in damages for an excessive attachment, unless in making the attachment he acts without ordinary care, and so conducts as to warrant the conclusion that he intended a wrong from the first.

TROVER, for a pair of oxen and a cow. Plea, the general issue, with a brief statement that Webster, a deputy sheriff, attached and sold the oxen and cow on a writ against the plaintiff, and Huckins acted as Webster's servant. The plaintiff claims the oxen and cow as exempt from attachment, and because the attachment was excessive.

The referee found that Huckins was Webster's assistant at his request. Webster was a deputy sheriff, and, having a writ against the plaintiff, who was a farmer, went to the latter's barn to attach personal property. The plaintiff was requested to elect whether