

RUSSELL v. BABBITT, *in rev.*

Evidence of an agreement made by the parties in the trial of a cause not limited to that trial nor to the purposes of that case is competent in an action of review of the same case.

In an action of review by the defendant, the amount in controversy does not exceed the amount of the judgment in the original action.

ACTION OF REVIEW, by the defendant, to recover \$57.55, being the amount of the judgment against him in the original action. The plaintiff in that action sued for \$107. At the trial the parties agreed that if the plaintiff could recover anything it would be \$57.55. To show that the amount in controversy in this action of review is less than \$100, the defendant offered to prove that agreement, and moved to refer the action against the plaintiff's objection.

Barton, for the plaintiff.

Shirley & Carr, for the defendant.

ALLEN, J. The case does not show that the agreement was intended by the parties to be limited to the original action, and evidence of the agreement is competent in this action of review upon the question of the amount in controversy. *Page v. Brewster*, 58 N. H. 126.

The defendant's right of review was a right to bring a new action to recover what he alleges has been wrongfully taken from him by the judgment in the original suit. *Page v. Brewster*, and cases cited. The amount in controversy, therefore, cannot exceed the amount of that judgment, which being less than \$100, the action may be referred without the consent of the parties.

Case discharged.

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

BETSEY PERKINS v. MILAN H. PERKINS & a.

The mortgagee of land, with the mortgage conditioned for the support of himself and his wife during their joint lives and the life of the survivor, is a trustee for that purpose, and on his death and condition of the mortgage broken the court will appoint a trustee to appropriate the land for the purposes of the trust.

BILL IN EQUITY, for the possession of land. Joseph Perkins, husband of the plaintiff, conveyed land to Abram, his son, and at the same time Abram reconveyed the premises to Joseph in mortgage, conditioned that the mortgagor and his heirs should support Joseph and his wife during their lives and the life of the survivor. Joseph died, the plaintiff surviving. Abram fulfilled the conditions until his death, he leaving heirs, some of whom supported the plaintiff until their death. The defendants, the only surviving heirs of Abram, have not performed the conditions of the mortgage. Decree for the plaintiff. The defendants excepted.

Barton, for the plaintiff.

Wait, for the defendants.

ALLEN, J. The mortgagee, Joseph Perkins, holding a security for his own benefit and the benefit of his wife, was a trustee of the fund constituting the security for the purposes declared, namely, his own support for life and the support of his wife.

For the complete execution of the trust, the court in a bill in equity will see that a trustee is not wanting. The mortgagee having died, and the fund not having been appropriated for the purpose declared, a trustee is appointed, and he is to be made a party in this bill. The trustee is empowered to appropriate the income of the land and so much of the principal as may be necessary for the support of the plaintiff, and to this end may make public or private sale of the land.

Case discharged.

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

WAKEFIELD v. NEWPORT.

If a flag-staff, not the property of a town, and which it is not the duty of a town to remove, falls through the negligence of its officers or employes while engaged in its removal, a person injured thereby cannot maintain an action against the town to recover damages for the injury.

CASE. The declaration alleges that the plaintiff, while riding along a public highway in the village of Newport, was injured by the falling of a flag-staff, which the defendants, by their selectmen, agents, and employes, were taking down; that they conducted so negligently and carelessly that the flag-staff suddenly fell across the highway, striking the carriage in which she was riding. The defendant demurred.