

tiff was in the exercise of reasonable care at the time of the injury. There was evidence that the defendants' train was running at an unlawful rate of speed, and this fact might affect the question of the plaintiff's care. It may have been reasonable for the plaintiff to act upon the belief that the defendants were aware of the speed law, and would obey it. *State v. Boston & Maine Railroad*, 58 N. H. 408, 410. The fact that the plaintiff did not stop and look for the approaching train before attempting to go over the track at a street crossing, is not, as matter of law, conclusive of the plaintiff's want of care contributing to the injury. *State v. Manchester & Lawrence Railroad*, 52 N. H. 528. The plaintiff's belief in the defendants' knowledge and presumed obedience of the speed law may have been a sufficient excuse for his want of vigilance in not observing the approaching train; and whether or not it was a sufficient excuse is a question of fact, which was properly submitted to the jury. *Warren v. Fitchburg Railroad*, 8 Allen 227; *Gaynor v. Old Colony Railway Co.*, 100 Mass. 214; *Wheelock v. Boston & Albany Railroad*, 105 Mass. 206. There was no error in the admission of evidence of the distance from Dover to Alton Bay and intermediate stations, and of the running time between. The time taken to run over the whole road or any given part of it would have some tendency to show the velocity of the train at any given point between stations, and the evidence was admissible for that purpose. Whether evidence of the speed at which the defendants' trains were run at the same place at other times was admissible, was a question of fact depending upon remoteness of time and place, to be decided at the trial. The judgment of the court admitting the evidence disclosed no error. The usual rate of speed may have had some weight on the question of the rate at the time and place of the accident. *State v. Manchester & Lawrence Railroad*, 52 N. H. 528, 549, 550; *State v. Boston & Maine Railroad*, 58 N. H. 410, 412. The estimate of the rate of speed of the train by witnesses living near, and who were in the habit of observing the passage of trains, was competent on the subject.

*Judgment on the verdict.*

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

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GOODWIN v. HORNE.

In an action upon a promissory note, given for the right to make and sell a patent spring-bed, under a plea that the note was obtained by fraud, it is competent for the defendant to show that the payee, as an inducement to the giving of the note, falsely and fraudulently promised to buy of the defendant, at a profit to him, a large number of spring-beds, and return the note in payment.

On the question of the honesty and good faith of a defence, it is competent for the plaintiff to show that the defendant, after the suit was brought, conveyed his real estate to prevent the satisfaction of any judgment which the plaintiff might obtain upon the suit; but, against objection, such conveyance cannot be shown by secondary evidence.

ASSUMPSIT, by the indorsee of two promissory notes, signed by the defendant, and indorsed by the payee to the plaintiff before maturity. Plea, the general issue, and a brief statement that the notes were without consideration, and were procured by the fraud of the payee, of which the plaintiff had knowledge. The notes were given for the right to make and sell a patent spring-bed in the states of Maine and New Hampshire. Subject to the plaintiff's exception, the defendant was allowed to testify that among other fraudulent representations made by the payee to induce him to give the notes were these:—that the payee and one Beadle would require a large number of beds for their Southern trade, of the kind covered by the patent sold to the defendant; that they would want five hundred at least, and probably many more, and would buy them of the defendant at a price above the cost of manufacture which would give him fifty cents profit on each bed; that the payee would retain and hold the notes, and use them toward paying for the beds agreed to be purchased of the defendant; that no beds were in fact ordered by the payee, or by Beadle. On cross-examination of the defendant, the plaintiff's counsel asked him whether since this suit was brought he had not made a conveyance of certain real estate to prevent the satisfaction of any judgment the plaintiff might recover against him in this action. The question, having been objected to as immaterial, and as calling for secondary evidence of the alleged conveyance, was excluded, and the plaintiff excepted. Verdict for the defendant, which the plaintiff moves to set aside.

*Copeland & Edgerly*, for the plaintiff.

*Wells & Burleigh*, for the defendant.

ALLEN, J. The rule that parol evidence is inadmissible to vary the terms of a written contract, does not exclude evidence of a want of consideration, illegality, or fraud, when a defence is made on any one of these grounds. Although the agreement of the payee to buy five hundred beds at a profit to the defendant, and in payment of the notes, was no part of the consideration, it was an inducement to the sale of the invention for which the notes were given. Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable, or can be made the ground of defence. *Long v. Woodman*, 58 Me. 49; *Murray v. Beckwith*, 48 Ill. 391; *Loupe v.*

*Wood*, 51 Cal. 586; *Jorden v. Money*, 5 H. L. Cas. 185; *Cool. Torts* 486. But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defence. Such are cases of concealed insolvency, and purchases of goods with no intention to pay for them. *Bradley v. Obear*, 10 N. H. 477. If the payee had no intention to buy the spring-beds, and used the promise for the purpose of inducing the defendant to buy the invention and give the notes, and the defendant, relying upon the promise, gave them, it was evidence of fraud. The evidence objected to contained only a part of the representations made at the time, and claimed to be fraudulent. With other representations and acts of the payee, the evidence was relevant to the question of his intention to defraud the defendant, and induce him to give notes for a worthless patent. All the negotiations between the parties at the time of the sale, and when the notes were given, were material upon the question of fraud in the payee.

The offer of the plaintiff to show that since the suit was brought the defendant conveyed his real estate to prevent the satisfaction of any judgment which the plaintiff might recover, was an offer to show the conveyance of land by parol evidence, and objection was made upon this ground. Competent evidence of such a conveyance was material upon the question of the honesty and good faith of the defence. *Gutterson v. Morse*, 58 N. H. 165. But the evidence offered was secondary in its character, and this was a sufficient ground for its exclusion.

*Judgment on the verdict.*

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

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TIBBETTS & a. v. SHAPLEIGH.

An unsatisfied judgment against one joint promissor is no bar to a subsequent suit against the remaining co-promissors, who at the time of the recovery of the judgment were without the jurisdiction, so that no service could be made upon them.

Bringing a suit upon claims which were in issue, and embraced in a judgment in a former action between the parties, is a waiver of the estoppel of the judgment, and the plaintiff cannot insist upon it as a bar to the defendant's set-off.

If a party pleads a fact which he might be estopped to plead, and the other party takes issue on the fact instead of relying on the estoppel, and the truth of the fact is found, judgment may be rendered accordingly, without regard to the estoppel.