

prayer in the bill for a reformation of the contract. By opening a saloon was intended not merely the entering upon the saloon business, but the continuing of the business after it had commenced. The object of the parties was, to prevent any loss of custom to the plaintiffs from the competition of the defendant in the same business; and their contract set forth the special manner in which competition was not to be instituted by the defendant. Neither of the obligors (the defendant and Allen) was to engage in the business "for themselves or either of them." "Or for any other person" is a restriction that would naturally have been added if it had been intended. The contract in restraint of trade did not forbid the defendant to engage in the business as agent or servant of any other person than Allen. *Eastern Express Co. v. Meserve*, 60 N. H. 198.

Several minor exceptions were raised by the plaintiffs at the hearing. They relate principally to the admission or exclusion of testimony, and have all been carefully considered. The principles involved are so well settled that we do not think any of them require discussion or special mention.

Bill dismissed.

All concurred.

WEEKS v. SLY.

61	89
66	80

If a tenant refuses to leave at the expiration of the time fixed in a notice to quit, the lessor may peaceably remove the tenant's goods, doing no unnecessary damage.

Service of a notice to quit may be shown by the evidence of any one having knowledge of the fact.

TRESPASS *qu. cl. et de bonis asportatis*. Plea, the general issue, with a brief statement that the goods mentioned were unlawfully incumbering the defendant's premises, wherefore he removed them, doing no unnecessary damage. Facts found by a referee. The plaintiff entered into the occupation of a part of a house belonging to the defendant, September 16, 1878, and remained in its occupation till October 11, 1879, when the rent being due and in arrear, the defendant served upon him notice to quit the premises on the 21st day of October, 1879. The plaintiff did not quit, but remained in possession until November 8, 1879, when the defendant removed the property specified in the writ from the premises, and placed it in the door-yard, doing no unnecessary damage. The property remained in the door-yard about three weeks, when it was removed by the plaintiff. In the meantime it was considerably damaged by the weather.

The plaintiff objected before the referee that the only way in which service of notice could be shown was by copy of the notice with the (return) thereon of the person serving the same. The referee held that any evidence showing that a notice in writing was given to the tenant was sufficient and competent; and the plaintiff excepted. The referee found the defendant not guilty.

The court ordered judgment on the report for the defendant, and the plaintiff excepted.

S. B. Page, for the plaintiff.

G. F. Putnam, for the defendant.

SMITH, J. The plaintiff's occupancy was a tenancy at will, no different contract being shown. *G. L., c. 250, s. 5*. The rent was due and in arrear October 11, 1879, and no point is made that it was not demanded before service of the notice. Seven days' notice was therefore sufficient to terminate the tenancy, and after the time fixed in the notice the plaintiff was a trespasser. His goods were *damage feasant*, and the defendant had a right to enter and remove them to a convenient distance, without breach of the peace, doing them no unnecessary damage. *Whitney v. Swett*, 22 N. H. 10, 13. A tenant who holds over after the determination of his tenancy, being a trespasser, or at most a mere tenant at sufferance, cannot maintain trespass *qu. cl.* against his landlord who enters and dispossesses him. After the determination of his tenancy, he has no legal right of possession on which to found his action. This will be apparent from an examination of the pleadings, when the landlord pleads *liberum tenementum*. The tenant must then reply a tenancy under the defendant, or traverse the plea, neither of which can he do, or state a title superior to the defendant's. Nor can he reply *de injuria* alone, except when the defence set up is matter of excuse instead of justification. *Sterling v. Warden*, 51 N. H. 217, 232, and cases cited; *State v. Morgan*, 59 N. H. 322, 325;—see, also, *Hyatt v. Wood*, 4 Johns. 150, 159; *McDougall v. Sticher*, 1 Johns. 44; *Sampson v. Henry*, 13 Pick. 36; *Meador v. Stone*, 7 Met. 147; *Taylor L. & T.*, s. 532; *Taunton v. Costar*, 7 T. R. 431; *Miner v. Stevens*, 1 Cush. 485; *Pratt v. Farrar*, 10 Allen 521.

The statute provides that the lessor may terminate the tenancy by giving to the tenant a notice in writing. The notice is not a process issuing out of court directed to an officer and to be served by him. Service may be made by any one whom the lessor may authorize, and may be shown by any one who has knowledge of the fact. 2 Gr. Ev., s. 322. The evidence of the person making the service, given in court in a suit between the parties, with an opportunity to the tenant for cross-examination, is competent evidence to prove the fact of service. Whether an *ex parte* affidavit

on a copy of the notice would be competent evidence, we have no occasion to inquire. It might appear, if the affiant were produced in court and cross-examined, that the service was defective.

Exceptions overruled.

All concurred.

WHITCHER v. DEXTER.

61	91
68	423
68	563
61	91
72	109

A negotiable security taken as collateral to an antecedent debt, is no satisfaction of such debt unless it be paid, or unless it appear that the creditor has so improperly conducted in respect of it that the debtor has been injured thereby.

The court will not decide questions of fact at the law term.

ASSUMPSIT, upon the common counts, and also upon a count alleging that the defendant drew an order in the plaintiff's favor upon one Rutherford, which Rutherford refused to accept, whereupon the defendant promised to pay the plaintiff the amount thereof. Facts found by a referee.

March 1, 1871, the defendant, being indebted to the plaintiff, gave him a negotiable order on Rutherford, who at that time was solvent, and owing the defendant enough to pay the order. Rutherford continued solvent until 1874, when he became insolvent. The plaintiff did not accept the order in payment of the defendant's account, but he expected that Rutherford would pay it, and also, if he did, to give the defendant credit for it, and to balance the account. The plaintiff and Rutherford had extensive dealings. Rutherford knew the plaintiff had the order, and expected to pay it. He was, however, owing the plaintiff considerable sums all the time, and, in the different accountings which were had between them, the order was never settled. The plaintiff did not mention to the defendant that Rutherford had not paid the order until about two years after it was given, when he informed him it was not paid, and asked the defendant to pay his account. The plaintiff at the hearing did not claim to recover upon the order.

The referee referred the question of the plaintiff's liability in connection with the order to the court, and found for the plaintiff or for the defendant as the court might determine. At the trial term, judgment was ordered for the plaintiff, and the defendant excepted. After the case was reserved, the report was recommitted to the referee to find whether the plaintiff was guilty of negligence, and, if so, whether the defendant was thereby injured; and thereupon he filed an additional report as follows: "I find that the plaintiff was negligent and careless in not collecting the order of Rutherford, as all