

the silence of a party does not create an estoppel where the other party is fully acquainted with the facts. *Odlin v. Gove*, 41 N. H. 465; Big. Est. (2d ed.) 467; 1 Sto. Eq. Jur. (12 ed.) s. 386; 6 Wait Act. & Def. 707, and cases cited.

Judgment will therefore be entered for the plaintiff, or for the defendants, as the trial judge may find upon the question of reasonable use.

*Case discharged.*

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

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STRAFFORD.

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MATHES v. DOVER NATIONAL BANK.

An officer's return of a levy of an execution on a right to redeem mortgaged land may be amended to show the fact that the equity on which the levy was made included a creditor's right to contest the validity of a second mortgage.

DOE, C. J. The plaintiff, holding a second mortgage which is fraudulent and void as against the mortgagor's creditors, petitions to redeem from the first mortgage, which is held by the defendants. Upon an execution against the mortgagor, an equity of redemption has been sold to the defendants, who set up the invalidity of the plaintiff's mortgage. The plaintiff replies that the officer's return of the levy shows that the equity sold to the defendants was the mortgagor's right to redeem the land from both mortgages, and that under such a levy the defendants cannot deny the validity of the plaintiff's mortgage. The property on which the creditor intended to levy, and which the defendants bought and paid for, included the creditor's right to contest the fraudulent mortgage, and the officer's return is erroneous if it disproves a levy on that right. The first mortgage being valid, the levy was properly made on an equity. The creditor had a legal right to a sale that would enable the purchaser to resist the fraudulent mortgage. The facts found by the court at the trial show that such a sale was made, and all question as to the construction and effect of the officer's return will be properly avoided by an order for such an amendment of it as will leave the defendants' right of contestation in no doubt.

*Case discharged.*

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

*C. H. Smith*, for the plaintiff.

*J. G. Hall*, for the defendants.