

will be an attempt to make it so. If he cannot control his tenant in the use, he can control the occupation by expelling the tenant. The term "suffer" implies assent or acquiescence, and one who suffers a state of affairs to continue when it is in his power to prevent it, produces the same result as though he had consented. *State v. Shanahan*, 54 N. H. 437; *Selleck v. Selleck*, 19 Conn. 501; *Collinsville v. Scanland*, 58 Ill. 221; *Roffey v. Bent*, L. R. 3 Eq. Cas. 759; *Bosley v. Davies*, L. R. 1 Q. B. Div. 84; *Redgate v. Haynes*, L. R. 1 Q. B. Div. 89; *Hipkins v. Birmingham Gas Co.*, 5 H. & N. 75.

As the wilful letting or suffering another to occupy premises, which a person owns or has the control of, for the purpose of being used for the illegal sale of spirituous liquors, is prohibited under a penalty, it follows that the plaintiff whose testate wilfully suffered his premises to be so used by the defendant cannot recover for their use and occupation. *Bartlett v. Vinor*, Carth. 252—*S. C.*, Skin. 322; *Bliss v. Brainard*, 41 N. H. 256, 268, and authorities cited; *Allen v. Deming*, 14 N. H. 133; *Lewis v. Welch*, 14 N. H. 294.

*Judgment for the defendant.*

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

CALIFORNIA WINE COMPANY v. MURRAY.

A defendant arrested on mesne process upon affidavit, under Gen. Laws, c. 225, s. 8, will be discharged from arrest, or his bail will be discharged, on motion at the return term, when it appears that he does not then conceal his property and does not intend to leave the state, although it appears that the alleged cause of arrest existed when the arrest was made.

MOTION to discharge bail. Facts found by the court. The defendant was arrested under the provisions of Gen. Laws, c. 225, s. 8, the affidavit charging "that he conceals his property so that no attachment or levy can be made, and that there is good reason to believe he is about to leave the state to avoid the payment of his debts." When the suit was commenced the defendant was the owner of property subject to attachment sufficient to secure the plaintiffs' debt, and concealed it by giving a bill of sale of it to a third party and representing that he did not own it. After his arrest in this suit he mortgaged this property to another creditor to secure a just debt, which mortgage was duly executed and recorded, the grantee in the bill of sale joining in the mortgage, and at the time when this motion was made and the hearing had he did not conceal his property so that no attachment or levy could be made, though the grantee in the bill of sale has never

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reconveyed the equity of redemption in the property described in it to the defendant. The character of the bill of sale was not disclosed until the hearing on this motion. It is not found that, either at the time of his arrest or at the time of the hearing on the motion to discharge bail, he had any intention of leaving the state to avoid the payment of his debts. On the foregoing facts the court ordered the bail discharged, to which the plaintiffs excepted.

*Copeland & Dodge*, for the plaintiffs.

*Sulloway, Topliff & O'Connor*, for the defendant.

CLARK, J. The defendant having been arrested on mesne process under Gen. Laws, c. 225, s. 8, procured bail, and at the return term of the writ moved that his bail be discharged as provided in section ten of the same chapter, which is as follows: "At the return term of such writ, the defendant may move the court to be discharged, or that his bail or sureties may be discharged; and the court, upon satisfactory evidence that the defendant does not conceal his property and does not intend to leave the state, may order such discharge . . ." The court found that the defendant concealed his property when the arrest was made, by giving a bill of sale to a third party and representing that he did not own it; but having mortgaged it to another creditor to secure a just debt, he did not conceal it when the motion to discharge bail was made and the hearing had, and that he had no intention of leaving the state. The court ordered the bail discharged, and the plaintiffs excepted.

If, at the return term of the writ the defendant did not conceal his property, and had no intention of leaving the state to avoid the payment of his debts, he was entitled to have his bail discharged; and upon the finding of the court the order discharging the bail was authorized by the statute. Upon this point we adopt the language of *Cushing*, C. J., in *Jacobs v. Stevens*, 57 N. H. 610, 617: "It should be observed that the statute speaks in the present tense. The defendant is to be discharged, not if it is made to appear that he did not at the time the arrest was made conceal his property, and was not then about to leave the state, but it is if it shall be made to appear that he *does* not conceal his property, and *is* not about to leave the state. So, when the execution issues, the affidavit is still in the present tense, and the defendant cannot be taken on execution, unless he is at that time concealing his property, &c. The discharge, then, by the court does not show that he was not liable to arrest at the time he was arrested, but that he is not at the time of his discharge liable to be longer detained." The fact that prior to the General Laws an affidavit was in all cases required on the execution to authorize an arrest

of the defendant, notwithstanding he had been arrested on affidavit on the writ, shows that to justify an arrest, the concealment of property, or the intention to leave the state to avoid payment of the debt, must exist at the time of issuing the execution. *Kidder v. Farrar*, 20 N. H. 320; *James v. Miller*, 21 N. H. 371. A defendant may be liable to arrest on mesne process, and not on the execution issued on the judgment recovered in the same action; and he may be liable to arrest on execution, although not arrested on the writ. Section 12 provides for an arrest pending the suit, as follows: "In any case where no sufficient attachment has been made and there is no sufficient bail, the court or any justice thereof, upon motion and satisfactory evidence that the defendant intends to leave the state, may order a *capias* to issue, on which the defendant may be arrested and held to bail as on an original writ." The purpose of this section is to secure the appearance of the defendant so that he may be taken on execution if the circumstances then existing authorize an arrest. There is no provision for the attachment of property while the action is pending, after the return of the writ. If the plaintiff recovers judgment, he may levy his execution upon any property of the defendant open to attachment, and upon satisfactory evidence that the defendant conceals his property so that no levy can be made, he may arrest the body.

The concealment of his property by the defendant at the commencement of the action authorized his arrest upon the writ; it also rendered him liable to the penalty prescribed by Gen. Laws, c. 275, for fraudulently concealing property; but at the return term of the writ, it appearing to the court upon satisfactory evidence that he did not conceal his property and did not intend to leave the state, the motion to discharge the bail was properly granted.

It is urged, that the object of holding to bail is to hold the defendant until he can be arrested on execution; and that the defendant in this case, having been guilty of concealing his property at the commencement of the suit, could not relieve himself from arrest on the execution by taking the poor-debtor's oath. Whether such concealment would exclude the defendant from taking the poor-debtor's oath we need not now inquire. It is a sufficient answer to this argument that no person can be lawfully arrested, or compelled to make application to take the oath for the relief of poor-debtors, upon an execution founded on a contract, unless it appears that he conceals his property so that no attachment or levy can be made, or that there is good reason to believe he is about to leave the state to avoid the payment of his debts. G. L., c. 225, s. 8. Section 9, providing for an application for a discharge from arrest, applies to arrests made on affidavits on execution, as well as to arrests made on mesne process. "The defendant in such case, when arrested, may require the officer making the

arrest to carry him before two justices, one of whom shall be of the quorum; and such justices, upon considering his affidavit and such evidence as may be laid before them, if they believe he does not so conceal his property and has no intention to leave the state, may make an order for his discharge upon the writ or execution, and he shall be released."

*Exceptions overruled.*

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

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McDONOUGH v. PRESCOTT.

The mere convenience of the parties is not a sufficient explanation of the retention of possession by the vendor to avoid the general rule that a sale of chattels unaccompanied by a change of possession is invalid as to creditors.

REPLEVIN, for a wagon. The defendant justified under an attachment, as the property of Derry & Co. The plaintiff introduced evidence tending to show that Derry & Co. were carriage-makers; that they contracted to build a grocery wagon for him complete, except the lettering on it, for \$165; that he paid them in full before the attachment, and before the wagon was completed; that after it was completed and before it was attached he saw it and accepted it, but not wishing to use it then, and having no place convenient to store it, he requested Derry & Co. to allow it to remain on their premises, to which they consented, and it remained there until it was attached. The plaintiff's name was painted upon it previous to its attachment, and before it was completed, the plaintiff himself contracting with and paying an outside party for the lettering.

On the foregoing facts the court ruled, that, there having been no change of possession, the plaintiff could not recover, and directed a verdict for the defendant, to which the plaintiff excepted.

*C. A. Gallagher*, for the plaintiff.

*Osgood & Prescott*, for the defendant.

CLARK, J. Upon the acceptance of the wagon by the plaintiff, the executory contract terminated in a completed sale, as between the plaintiff and Derry & Co., but there was no change of possession. As a matter of convenience to the plaintiff, the