

by reason of the injury no mistake is committed. It is the damages which result from acting upon false representations as if they were true, and not the expense of detecting their falsity, which a plaintiff is entitled to recover.

*Demurrer sustained.*

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

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PEASLEE v. DUDLEY.

Where the facts appearing on the trial of an action of trover showed that the plaintiff was entitled to recover for the same cause in an action of assumpsit, the court declined to consider the question whether trover could be maintained, but gave the plaintiff leave to amend by joining a count in assumpsit, and thereupon ordered judgment.

TROVER, for six tons of straw-board. Facts found by the court. July 18, 1881, the plaintiff, at the request of the defendant, receipted to an officer for six tons of straw-board which had been attached on a writ against the defendant. He did not see the straw-board; and there was no agreement that he should have a lien on it as security for signing the receipt. Judgment having been recovered in the suit, an execution was taken out and placed in the hands of the same officer for collection. The officer seasonably demanded of the plaintiff the property mentioned in the receipt; and the plaintiff, being unable to deliver it because the defendant had converted it to his own use, paid the officer the amount of the execution. Some time after the receipt was given, the officer went to the defendant's storehouse, and finding that part of the straw-board had been removed, called with the plaintiff upon the defendant's foreman, and told him that no more of it must be sent away. The plaintiff had no title or possession except as above. Both parties moved for judgment. If the plaintiff is entitled to judgment, it should be for \$139.36 and interest from August 24, 1882.

*G. W. Murray*, for the plaintiff.

*Barnard & Barnard*, for the defendant.

CARPENTER, J. The question presented is of no practical importance. Time spent in considering it would be wasted. If upon examination it should be found that the action in its present form cannot be maintained, the plaintiff would be permitted to amend by filing a count in assumpsit. The facts upon which the rights

of the parties depend having been fully tried and determined, there is no occasion for a further trial. The plaintiff may amend by adding a count for money paid (*McDuffee v. Railroad*, 52 N. H. 459, *Buckminster v. Wright*, 59 N. H. 153, and *Merrill v. Perkins*, 59 N. H. 343), and thereupon there will be

*Judgment for the plaintiff.*

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

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NUTTING v. NUTTING.

Where by the terms of a conditional sale of oxen the vendee was to keep them without cost to the vendor, and return them in two years if not paid for, the vendor cannot maintain replevin for the cattle against a purchaser of the vendee's interest before the expiration of the two years.

REPLEVIN, for a yoke of oxen. Facts found by the court. May 5, 1881, the plaintiff, being the owner of the cattle, delivered them to one Mitchell upon an agreement that they should remain the plaintiff's property until Mitchell paid him \$50 and interest annually, Mitchell to keep them without cost to the plaintiff, and return them to him in two years from date "if he does not pay the above amount." April 29, 1883, Mitchell sold his interest in the cattle to the defendant. May 3, 1883, the defendant took them into his possession, agreeing to pay the plaintiff what was due him from Mitchell. May 5, 1883, the plaintiff demanded the cattle of the defendant, who refused to give them up, but offered an account he held against the plaintiff and \$23 in money in payment of what was due on them, which offer the plaintiff refused, and on the same day commenced this suit and took the cattle on the writ. The court held that the action was prematurely brought, and ordered judgment for the defendant. The plaintiff excepted.

*J. L. Wilson*, for the plaintiff.

*Fling & Chase*, for the defendant.

CARPENTER, J. By the terms of the contract it was at Mitchell's election to pay the plaintiff \$50 and interest at any time within two years from the 5th day of May, 1881, or to return the steers at the end of that period. Although the property in the steers remained in the plaintiff, Mitchell was entitled to their custody until the expiration of the 5th day of May, 1883. G. L., c. 1,