

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.

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,

s. 32; *Osgood v. Blake*, 21 N. H. 550; *Knowlton v. Tilton*, 38 N. H. 263; *Ricker v. Blanchard*, 45 N. H. 39.

The sale by Mitchell of his interest only in the steers was no wrong to the plaintiff, and did not terminate the bailment. The defendant by his purchase became entitled to hold them in the same manner as Mitchell held them. *Bailey v. Colby*, 34 N. H. 29; *McFarland v. Farmer*, 42 N. H. 391, 392.

Exceptions overruled.

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

ROWELL v. ROWELL.

The court has not authority to order an allowance for the support of the wife during the pendency of a libel for divorce against her by the husband.

LIBEL FOR DIVORCE. Motion for the libellee for an allowance to be paid by the libellant for her support during the pendency of the libel.

Bingham, Aldrich & Remick (with whom were *Ladd & Fletcher*), for the libellee. Prior to the Revolution, divorces were granted by the legislature as they are sometimes granted by parliament in England. And alimony, or an allowance, *pendente lite*, was a common-law right. 2 Bish. Mar. & Div., s. 400; *Parsons v. Parsons*, 9 N. H. 317; 1 Bl. Com. 441; *Cooke v. Cooke*, 2 Phill. Ecc. R. 40. The power to order relief of this character was certainly exercised by the ecclesiastical courts, and perhaps by parliament. The constitution in 1783 provided that "all causes of marriage, divorce, and alimony * * * shall be heard and tried by the superior court, until the legislature shall by law make other provision." Similar provisions were adopted in all or nearly all the other states. It would seem that some of the states treated this as a mere transfer of jurisdiction, and exercised the power existing at the common law, while in other jurisdictions the provision of the constitution and acts of the legislature were treated as the source of power, and authority was not exercised beyond the express terms of the legislative acts. It will be observed, upon an examination of the cases where the right is denied, that the denial is upon technical grounds, and that the justness and soundness of the principle are conceded; and the result in every state has been an enlargement of authority by act of the legislature.

In Georgia it was held, in a luminous opinion, that the power to