

ROBERTSON v. KETTELL.

For some purposes of state law, an action of debt for a penalty, under Gen. Laws, c. 147, s. 13, is a suit of a civil nature; and the defendant, having taken the proper steps to remove it to the circuit court of the United States, under the act of March 3, 1875, it was held inexpedient to put the parties to the expense of a trial before a federal decision of the federal question of removal.

DEBT, for a penalty, under Gen. Laws, c. 147, s. 13. The defendant, a citizen of Massachusetts, took the proper steps to remove the case to the circuit court of the United States, under the act of March 3, 1875; and the question arose whether the case is a suit of a civil nature within the meaning of that act.

Bingham & Mitchell, for the plaintiff.

C. P. Sanborn, W. L. Foster, and J. H. Benton, Jr., for the defendant.

DOE, C. J. As a stockholder, the plaintiff was entitled to copies of corporate records. Gen. Laws, c. 147, ss. 10-13. The plaintiff of record is the plaintiff in interest. If the defendant prevails on the merits, he will have a judgment for costs. The action of debt, provided as a remedy for a violation of the plaintiff's private right, is civil in form; and in some sense, and for some purposes, its substance is regarded as civil by the law of this state. *Dow v. Norris*, 4 N. H. 16, 19, 20; *Bellows, J.*, in *Rich v. Flanders*, 39 N. H. 304, 388; *State v. Kinne*, 39 N. H. 129; *State v. M. & L. R. R.*, 52 N. H. 528; *State v. G. T. Railway*, 58 N. H. 198; *Castles v. Welch*, 63 N. H. 369; *Wiley v. Yale*, 1 Met. 553, 554; *Roberge v. Burnham*, 124 Mass. 277; 3 Bl. Com. 2, 161; *Sedgwick*, Const. Stat. 333-336. "An action of debt to recover a penalty is a civil cause." *Woart v. Winnick*, 3 N. H. 473, 481. One of the material differences between this action and an indictment prosecuted wholly in behalf of the public is stated in *Lewis v. Foster*, Smith (N. H.) 420, 421, 422, 426. But an action may be civil within the meaning of one law, and criminal within the meaning of another. Whether this is a suit of a civil nature within the meaning of the federal statute of March 3, 1875, is a question on which it is not necessary for us to form an opinion. If the federal court hold the suit to be removable, a verdict and judgment, obtained by the plaintiff in the state court, would be fruitless. *C. & O. R. Co. v. White*, 111 U. S. 134. The practical question is, not whether we think the case is removable, but what will probably be the opinion of the federal court on that subject.

The utility of a judgment for the plaintiff here is so doubtful that it is not expedient to put the parties to the expense of a trial before the federal question is decided by the federal court.

Case discharged.

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

STATE v. FAGAN.

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In a prosecution for a second offence, the defendant's conviction of a previous offence is equally conclusive whether his plea, in the previous case, was guilty, not guilty, or *nolo contendere*.

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INDICTMENT, under Gen. Laws, c. 109, s. 15, for keeping lager beer for sale, as a "subsequent offence." The defendant excepted to the admission of the record showing a judgment rendered against him on an indictment for a like offence to which he had pleaded *nolo contendere*. The question whether the statute of limitations is applicable to evidence of the previous offence, was raised in this case, and disposed of by the judgment in *State v. Adams*, decided this term in this county.

H. Robinson, for the defendant. A subsequent offence necessarily implies a conviction for a former offence, and a plea of guilty by a defendant is a conviction by confession. Bishop Stat. Cr., s. 348. But a plea of *nolo contendere* is not a confession of guilt. Its literal and true meaning is, "I do not wish to contend," and it is not an admission of the truth of the charge in any proper sense, notwithstanding by statute (Gen. Laws, c. 109, s. 20) it subjects the defendant to the court's power of final judgment and sentence, but is not to be used as an admission elsewhere. Heard Crim. Pl. (students' series) 263. A man may be conscious of innocence, and at the same time be conscious that circumstances exist which he may be unable to explain, which render a defence useless, and so whilst protesting his innocence he may properly decline to contend with the state. The plea is allowed by way of compromise between the state and the defendant, and is for the purposes of the particular case only, and cannot be used to bind the defendant in other proceedings. Its legal effect is, that the non-contending defendant submits to the mercy and the judgment of the court; but that effect is limited to the particular case in which the plea is entered, and the defendant is not thereby estopped in any subsequent proceeding (like the present indictment) to say that he