

secured by mortgage on the premises described in the writ. After the delivery and record of the mortgage, the defendant signed it without witnesses or seal. David Wilson died April 5, 1872. The plaintiff is a son of David Wilson, and received the note in question at its face value on account of his distributive share, upon the settlement of his father's estate. The plaintiff was requested by the defendant and her husband, James Whitfield, to take the note and allow them to pay in instalments, and was told by the defendant that if he would do so he should have his whole pay and lose nothing; and he was induced by this request and promise to take the note. Whitfield died August 3, 1878, and the premises described in the mortgage were set off to the defendant and her minor children in the settlement of Whitfield's estate as their family homestead.

*J. W. Fellows*, for the plaintiff.

*Burnham & Brown*, for the defendant.

CLARK, J. The defendant did not release her homestead by signing her husband's mortgage, without witnesses or seal, after it was delivered and recorded. Under the act of 1851 no release or waiver of the homestead exemption was valid, "unless made by deed executed by the husband and wife, with all the formalities required by law for the conveyance of real estate." The defendant has a life estate in the premises set off to her as a homestead, as against the plaintiff's mortgage. *Dickinson v. McLane*, 57 N. H. 31; *Lake v. Page*, 63 N. H. 318. The mortgage note was not signed by the defendant. It was neither her debt nor a contract respecting her property, and being a married woman she could not bind herself by a promise to pay it, either by way of contract or estoppel. *Farmington National Bank v. Bussell*, 60 N. H. 189.

*Case discharged.*

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

66	316
68	324
66	316
69	620

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HEALEY v. HUTCHINSON.

The valuation put upon personal property attached, in a receipt given therefor to the officer making the attachment, is conclusive against the receptor.

A receptor is not holden for property taken by a paramount title after the receipt.

TROVER, for certain articles of personal property taken by the plaintiff, sheriff of the county, on a writ against one McGregor,

and receipted for by the defendant, in the usual form, at a valuation of \$150. The actual value of all the property was in fact only \$35. A portion of the property, of the value of \$23.50, was afterwards, and before the demand upon the receptor, taken by one Young on a mortgage which existed in his favor at the time of the attachment. All the property mentioned in the receipt was duly demanded by the plaintiff before the commencement of the suit. The question, what amount of damages the plaintiff should recover, was reserved for the opinion of the court.

*Sulloway & Topliff*, for the plaintiff.

*Wm. Little and Burnham & Brown*, for the defendant.

CLARK, J. By the contract of bailment the defendant promised to deliver the property, valued at \$150, to the plaintiff on demand. The object of inserting a valuation in the receipt being to fix the extent of the receptor's liability, it is held to be conclusive as an agreed valuation, and the measure of damages in case of a breach of the contract. *Drown v. Smith*, 3 N. H. 299; *Remick v. Atkinson*, 11 N. H. 256; *Scott v. Whittemore*, 27 N. H. 309; *Cross v. Brown*, 41 N. H. 283; *Wakefield v. Stedman*, 12 Pick. 562. By failing to deliver the property when demanded, the defendant's liability became fixed at \$150, unless he shows a sufficient excuse for not delivering it. It is a defence to an action on a receipt that the plaintiff has no claim to the goods, and that they have gone into the possession of the owner. *Webster v. Harper*, 7 N. H. 594; *Spear v. Hill*, 52 N. H. 323; *Stone v. Sleeper*, 59 N. H. 205. If part of the goods have been surrendered to a paramount title, it is a defence *pro tanto*. *Haynes v. Tenney*, 45 N. H. 183.

A portion of the goods receipted for was subject to a mortgage at the time of the attachment, and was taken from the possession of the defendant by the mortgagee before the demand. This was a sufficient excuse for not delivering those goods. The question is raised as to the damages for not delivering the balance. There would be no difficulty in determining this question if the goods remaining were worth \$150 (*Spear v. Hill*, 52 N. H. 323), or if the agreed valuation had been the actual value of the property, or a separate valuation had been put upon each article. But it appears that the actual value of the whole property embraced in the receipt, and valued at \$150, was only \$35. The value of the goods taken upon the mortgage was \$23.50, and the plaintiff contends that this sum should be deducted from the valuation stated in the receipt, and that he should have judgment for \$126.50 with interest from the date of the demand. The defendant insists that he is chargeable only for the actual value of the balance of the goods not taken on the mortgage.

The valuation stated in the receipt being conclusive upon the defendant, he cannot show, for any purpose, that the actual value of the goods receipted for was less than the amount fixed by the receipt, and the evidence upon which the value was found to be \$35 was inadmissible. As the value of the whole must be taken to be \$150, the amount for which the defendant is chargeable is found by deducting from that sum the value of the goods taken on the mortgage. The plaintiff is entitled to judgment for \$126.50 with interest from the time of the demand.

This rule works no injustice to the receiptor. When property attached and receipted for is allowed to go back into the possession of the debtor, the receipt is understood to be security to the extent of the valuation stated in it. The receiptor is responsible for the return of the property when demanded, or its agreed valuation. The delivery of the property in good condition when called for discharges the receiptor's liability. If it is taken by a superior title, he is not chargeable for it. If a part is taken by a paramount title, the receiptor is discharged upon delivery of the balance. If, without excuse, he fails to return the property when called for, he is chargeable for its value as stated in the receipt.

*Judgment for the plaintiff accordingly.*

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

FELCH, *Adm'r*, v. CONCORD RAILROAD.

FELCH v. SAME.

A railroad company is bound to exercise ordinary care to avoid injury by its trains to one wrongfully upon its track.

That the party injured could have been seen on the track by the engineer at a distance within which the train might have been stopped, is evidence upon the question whether the defendants exercised ordinary care.

That he attempted to escape as soon as he knew his danger, that the train made but little noise and was an extra, that extra trains were uncommon upon the road and were usually run at a very slow speed, that he knew of a similar use of the track by others, and that he had no reason to expect a train at the time, are facts upon which the plaintiff is entitled to the judgment of a jury upon the question of the exercise of ordinary care by the person injured.

CASE, for injuries from negligence. Two actions were tried together, one by the plaintiff as administrator, for injuries resulting in the death of his minor son, Willis Felch, and one by the plain-

66	318
67	450
68	117
68	208
66	318
69	289
69	363
69	649

66	318
70	129
70	218
70	358
70	450
70	520
70	525

66	318
71	82

66	318
72	331
72	524

66	318
74	434