

effective as his signing the formal agreement would have been. *Brown v. Whipple*, 58 N. H. 229; *Webster v. Clark*, 60 N. H. 36; *Rafferty v. Lougee*, 63 N. H. 54; *Barrell v. Joy*, 16 Mass. 221, 223; *Uranm v. Coates*, 109 Mass. 581, 584; *Kingsbury v. Burnside*, 58 Ill. 310; *Ryan v. U. S.*, 136 U. S. 68, 83; *Forster v. Hale*, 3 Ves. 696, 708, 709—*S. C.*, 5 Ves. 308, 315; *Browne St. of Frauds*, ss. 7, 98, 99, 346, 346 b. They prove the plaintiff's "right to redeem" at least one half of the Stark mill property; and as one half is all he claims, it is not necessary to inquire whether, as against Dole, the letters show the plaintiff entitled to more than half. His "right to redeem," established against Dole by the letters, is his right, established by the writing signed by Soule, to have half of the property when he pays half of the advances made by Dole and Soule. Both descriptions of this right mean that the amount to be paid by him is to be ascertained by such an equitable accounting as attends a mortgagor's exercise of his right of redemption. On such an accounting the referee has found a balance due the plaintiff. When he receives that balance and half of the land, the other half of the land will be the profit of those who prevented a foreclosure. The plaintiff's right to specific performance does not depend upon the mutuality of that remedy. *Eckstein v. Downing*, 64 N. H. 248.

Upon the facts found, it cannot be held as matter of law that the suit was not seasonably brought. The plaintiff is entitled to a conveyance from Dole, and from Stuart who became a grantee of some of Soule's heirs with notice of the plaintiff's rights. Soule's administrator was properly joined as a defendant. Whatever may be the several obligations of the defendants to contribute to the payment of the balance due the plaintiff, Soule's administrator and heirs may well be made defendants for the purpose of a decree that will leave no part of the plaintiff's land title open to controversy or doubt. He is not bound to rely upon the evidence relating to Stuart's acquisition of a part or the whole of Soule's title.

Decree for the plaintiff.

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

BURNEY v. HODGDON.

An officer's return of *non est inventus* as to the defendant, is evidence on which an action may be entered without service on the defendant, and continued for notice to him by publication.

In the writ, which is dated May 3, 1889, the defendant is described as "of Milan in the county and state aforesaid." May 6,

66	338
67	197
66	338
70	229

1889, an officer attached real estate and made return concerning the defendant, "not to be found in my precinct." The action was entered at the October term, 1889, and continued for notice, and notice was given by publication. At the April term, 1890, the defendant appeared specially, and pleaded in abatement that on the day of the date of the writ, and all the time between that day and the return day, he was an inhabitant of this state, and during all that time was within this state, and had his usual place of abode in Milan in said county; but no service of the writ was ever made upon him either by delivering to him or leaving at his usual place of abode a copy thereof, or by reading the same to him, or in any other manner prescribed by law. The question of the legality of notice by publication was reserved.

Twitchell & Goss and *J. F. Libby*, for the plaintiff, cited *Thompson v. Carroll*, 36 N. H. 21, and *Buswell v. Babbitt*, 65 N. H. 168, 169.

Ladd & Fletcher, for the defendant.

DOE, C. J. The construction of the statutes, settled by general practice, is, that either of several forms of return, including the one made in this case, is evidence on which an action may be entered and continued for notice. The notice given by publication was legal. A demurrer to the plea in abatement should be sustained.

Case discharged.

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

PARSONS v. LITTLE & a.

66 339
66 620

When, after the foreclosure of a first mortgage, the mortgagor purchased the premises from the mortgagee for a stipulated price, which he afterwards paid, and then, by an agreement between the mortgagor and his wife, a deed was made by the mortgagee directly to her, to go on a debt then due her from her husband of a larger amount than the value of the premises, the wife does not thereby acquire a title which she can set up against a second mortgagee who was not made party to the foreclosure proceedings.

WRIT OF ENTRY, to foreclose a mortgage upon premises in Colebrook. Facts found by a referee. The mortgage was made March 4, 1879, by the defendants, to George Aldrich, the plaintiff's father, to secure a note, signed by J. D. Little, for \$204.10. George