

subsequently, at the time of his expulsion the deceased was not so drunk as to be bereft of intelligence; his physical faculties were not so impaired that he was unable to walk. There was no reason to suppose he was not able to care for himself. He was not put off "at night in the woods, far from houses, upon the brink of a precipice, or upon a high railroad bridge." The time was shortly after sunset, and the place was near dwellings, and upon a public highway which is not claimed to have been otherwise than suitable for the travel upon it. There was no evidence tending to show that the place was a dangerous one, or that the deceased was put in circumstances of danger greater than those that attend every person in his condition whose business or pleasure takes him over that part of the highway. In short, there was no legitimate connection between the expulsion and the deceased's death except as he himself connected it by reason of his intoxication; and for this, as between him and the defendants, he alone was responsible.

The denial of the motion for a nonsuit was proper. Whether negligence had been shown by the defendants in the running of their car upon the deceased, and whether there had been due care on his part to avoid it, were questions of fact upon which there was evidence competent to be submitted to the jury, and upon which they might find for the plaintiff. When this is so, a nonsuit will not be granted. *Page v. Parker*, 43 N. H. 363; *National Bank of Newbury v. Bank*, 62 N. H. 703. The instructions given upon these questions were correct (*Nashua Iron and Steel Co. v. Railroad*, 62 N. H. 159, 164, 166), but if it were otherwise, the defendants' general exception would be unavailing. *Reynolds v. Railroad*, 43 N. H. 580, 588; *Paine v. Railway*, 58 N. H. 611; *Haines v. Republic Ins. Co.*, 59 N. H. 199.

For failure to give the instructions requested by the defendants as to the third count, the exceptions are sustained.

*Verdict set aside.*

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

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MORSE & a. v. PEARL & Trs.

An action upon a judgment is maintainable, although an execution upon the judgment has been issued and not yet returned.

If an attachment of property which cannot be taken on execution is made in such an action, the maintenance of the action is not affected by the existence of visible property which could have been taken on execution.

DEBT, on a judgment. Facts found by the court. At the time the action was brought, an execution had been issued on the judgment but not returned. The officer subsequently made a

return of a levy in part satisfaction. This process was foreign attachment, and the trustees appear by their disclosures to be chargeable. If it is material whether the defendant had visible property subject to be taken on execution, the parties have leave to introduce evidence upon that question hereafter. The defendants moved to dismiss on the ground that the action was prematurely brought, and was an abuse of the process of this court. The motion was denied, and the defendants excepted.

*Samuel S. Parker*, for the plaintiffs.

*Felker & Pearl*, for the defendants.

BLODGETT, J. The action was not prematurely brought. A judgment creditor has a common-law right to sue upon his judgment as soon as it is rendered, and this right is neither barred nor suspended by the issuing of an execution. *Hale v. Angel*, 20 Johns. 342; *Smith v. Mumford*, 9 Conn. 26; *Ives v. Finch*, 28 Conn. 112; *Clark v. Goodwin*, 14 Mass. 237; *Headley v. Roby*, 6 Ohio 521; *Albin v. People*, 46 Ill. 372; *Stewart v. Peterson*, 63 Pa. St. 230; *Ames v. Hoy*, 12 Cal. 11; *Kingsland v. Forrest*, 18 Ala. 519; *Freem. Judg.*, s. 432. Nor is it otherwise under our statutes. "Actions of debt upon judgments . . . may be brought within twenty years after the cause of action accrued, and not afterwards." Pub. Sts., c. 217, s. 4. And even if an execution has been issued and not returned, an action may be maintained upon a judgment, in the absence of plea or proof of satisfaction. *Linton v. Hurley*, 114 Mass. 76; *Wilson v. Hatfield*, 121 Mass. 551.

The suing out of the plaintiffs' writ was not an abuse of the process of this court. It gave the plaintiffs a new remedy, of which they could not avail themselves by their execution; and there can be no reason why a judgment creditor who discovers property of his debtor which may be secured by foreign attachment, and which cannot be touched by execution, may not properly avail himself of that remedy. Indeed, this is so even where the doctrine prevails that an action on a judgment cannot be maintained while the judgment is enforceable by execution. *Shooter v. McDuffie*, 5 Rich. 61, 66—21 Am. Dec. 479, note.

It is not material to show whether the defendant had visible property that could have been seized and applied on the execution. It was the right of the plaintiffs to determine what legal process would be most for their advantage for the better recovery of their debt (*Clark v. Goodwin*, *supra*), and the fact that the one adopted by them proved to be efficacious affords the defendants no reasonable cause for complaint.

*Exception overruled.*

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