

As Worthen has not resigned, he is now the acting mayor by virtue of his office as chairman of the board of aldermen. In case he should die or resign, it would be the duty of the aldermen to elect another of their members chairman, and he as chairman would be the acting mayor during the vacancy in the office of mayor. Until January, 1895, that is, during the remainder of the present official term, the duties of mayor will be performed by an alderman chosen chairman by the board of aldermen.

Information granted.

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

Cheshire, }
June, 1894. }

DAVIS v. WHITNEY & a.

The reasonable use of one's property is not an actionable nuisance, although injurious to another.

CASE, for maintaining a private nuisance. Facts found by a referee. The defendants owned and operated a shoddy mill, situated eighty-six feet from the plaintiff's dwelling-house, and equipped with machinery indispensable to the business and similar to that used in other shoddy mills. When the wind was in the right direction, lint, dust, and smoke, the latter of a sickening odor, were driven toward the plaintiff's house, obliging her to close the doors and windows on that side. On two or three occasions she had to absent herself from the house for several weeks, because chronic diseases from which she suffered were made worse by the objectionable materials and odors. The defendants have not intended to injure her, and have tried to construct their plant so that she would not be annoyed. The use they made of their premises was found to be reasonable. The plaintiff's damages were assessed at \$300. Both parties moved for judgment on the report.

Don H. Woodward and *Charles H. Hersey*, for the plaintiff.

Batchelder & Faulkner, for the defendants.

SMITH, J. The referee has found that the use made by the defendants of their premises was reasonable. According to the decisions in this state, the defendants are entitled to judgment.

68	66
68	187

68	66
74	307

Bassett v. Salisbury Co., 43 N. H. 569; *Hayes v. Waldron*, 44 N. H. 580; *Sweet v. Cutts*, 50 N. H. 439; *Eaton v. Railroad*, 51 N. H. 504, 533; *Brown v. Collins*, 53 N. H. 442; *Haley v. Colcord*, 59 N. H. 7; *Green v. Gilbert*, 60 N. H. 144; *Rindge v. Sargent*, 64 N. H. 294.

Judgment for the defendants.

All concurred.

Cheshire, }
June, 1894. }

WHITCOMB v. CUMMINGS.

An action of covenant by a lessor against an assignee of the term will not operate to release a lessee who promised to stand behind the lessor in such suit, and at whose request it was brought, nor does it limit the lessor to an action on the collateral promise.

DEBT and COVENANT, by lessor against lessee, for rent reserved in a lease under seal. Facts found by a referee. The lease was for a term of five years from April 1, 1873, and contained no stipulation against an assignment or under-letting. The defendant assigned the lease to John W. Starkey, August 8, 1874, by a writing under seal, signed by both him and Starkey, in which the latter agreed to pay the rent, perform the defendant's covenants, and indemnify the defendant against them. Starkey's agent subsequently offered to pay the rent to the plaintiff, who declined to receive it, stating that he recognized no one but the defendant as party to the lease. The defendant then requested the plaintiff to receive rent from Starkey's agent, saying that he would continue liable on the lease. The plaintiff thereupon received rents from the agent, and gave receipts therefor in which he acknowledged receipt of the money for the defendant. All subsequent payments of rent were made by the agent, except a payment of \$101 made by the defendant April 17, 1877. After the expiration of the term, the plaintiff frequently requested the defendant to pay the balance due. The defendant did not deny his liability, but urged the plaintiff to collect it of the heirs of Starkey, and applied to Starkey's widow to pay it to the plaintiff. In 1884, at the request of the defendant, the plaintiff brought an action of covenant against the devisees under Starkey's will for the balance due, the defendant promising to stand behind the plaintiff in the suit. In that action (reported in 63 N. H. 607) there was judgment for the defendants.