

dam, and of all the other circumstances, would or might have done as they did, both in permitting the logs to accumulate and in failing to remove them,— you will return a verdict for the Lumber Company. If you find that they did not exercise ordinary care in thus allowing the logs to accumulate, or in failing to remove them, and that they contributed to the washout, your verdict will be for the plaintiffs.”

In the light of these instructions, construed as a whole in the same connected way in which they were given, it is more than morally certain that the jury were not misled by the particular instruction complained of; and if they were not, even though the instruction was erroneous, no ground is presented for reversing their judgment. But this is not all. Fairly construed, the instruction was not erroneous. It is not to be doubted that the jury might, upon all the evidence and arguments before them, properly consider what they would or would not have done had they been placed in the defendants' situation; and such only was the instruction.

The numerous other exceptions appearing in the case, but not insisted upon at the argument, need not be considered.

Exceptions overruled.

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

Grafton, }
June, 1894. }

HURLBUTT v. CURRIER.

Under P. S., c. 201, s. 5, a levy of execution is not dissolved or impaired by subsequent insolvency proceedings.

A judgment creditor will not be prevented from enforcing his lien by knowledge of the debtor's insolvency.

TROVER, for 217 pieces of cloth. Facts agreed. November 25, 1893, Benjamin Greenbank was adjudged insolvent, upon his petition filed November 17, 1893. A warrant issued November 25 to W. B. Richardson, deputy sheriff, as messenger. The defendant was elected and appointed assignee December 26. At the October term, 1893, for the southern judicial district of Grafton county, George H. Goodhue obtained judgment against Greenbank for \$501.05 damages and \$9.93 costs of suit, the date of judgment being October 19. Execution issued October 23, and was placed in the hands of the plaintiff, sheriff of the county, who seized the cloth November 13, placed it in the hands of a

68	94
68	482

68	94
69	179

68	94
74	4

keeper, and was proceeding to advertise and sell it upon execution, when it was taken from the keeper by the messenger, who subsequently delivered it to the defendant as assignee. The defendant subsequently sold it, and holds the proceeds as assets of the estate of the insolvent.

Goodhue, his attorney, and the plaintiff had reasonable cause to believe Greenbank was insolvent at the time the cloth was seized by the plaintiff.

John L. Spring, for the plaintiff.

George W. Murray, for the defendant.

BLODGETT, J. Section 26 of the insolvency statute (P. S., c. 201), which provides that "The proceedings in insolvency shall dissolve all attachments of the debtor's property made within three months before the beginning thereof," applies to attachments on mesne process under which the lien acquired is merely contingent and provisional upon the recovery of judgment by the plaintiff, and does not apply to absolute liens acquired by a seizure or levy on execution as contended by the defendant.

An execution is final process and the end of the law, and the settled doctrine is that a seizure or levy upon it before the commencement of insolvency or bankruptcy proceedings against the debtor under statutes containing provisions like that in c. 26, although not completed until afterwards, is not dissolved or impaired by the proceedings. In such a case, the possession of the sheriff cannot be disturbed by the assignee, who is only entitled to the residue of the property remaining after the execution has been satisfied. *Cushing v. Arnold*, 9 Met. 23, 26; *Andrews v. Southwick*, 13 Met. 535; *Hall v. Hoxie*, 3 Met. 251; *Marshall v. Knox*, 16 Wall. 551; *Savage v. Best*, 3 How. 111; *Mollison v. Eaton*, 16 Minn. 426,—10 Am. Rep. 150; *Fehley v. Barr*, 66 Pa. St. 196; *Thompson v. Moses*, 43 Ga. 383; *Doremus v. Walker*, 8 Ala. 194,—42 Am. Dec. 634; 2 Freem. Judg. (4th ed.) 691; Av. & H. B. L. 56; Bump B'k'cy (10th ed.) 320; Freem. Ex'ons, s. 207.

The conversion of the property in suit by the defendant was unlawful. If the failure of the plaintiff to advertise and sell it as required by P. S., c. 232, s. 2, rendered its subsequent retention by him invalid as against other creditors of the debtor (*Poole v. Symonds*, 1 N. H. 289, 295), the debtor himself had no right, title, or interest in the property which entitled him to its possession at the time of his assignment (*Caldwell v. Eaton*, 5 Mass. 399, 404); and the defendant, by force of the statute and assignment, took nothing more than the debtor had. He stands in his place, having his rights and his only, except in cases of

fraud. *Adams v. Lee*, 64 N. H. 421, 423. There is here no allegation of fraud or illegality of any kind, other than that arising from the fact that the execution creditor, his attorney, and the plaintiff had reasonable cause to believe the debtor was insolvent at the time the levy was made. For the present purpose this is of no consequence. There is nothing in the insolvency statute, either in its language or object, which prevents a creditor from seasonably enforcing his judgment lien against a debtor who is even known to him to be insolvent. It would be absurd to hold that a party may not enforce a valid lien upon property simply because he has knowledge of the owner's insolvency. A legal right not enforceable by its possessor is unknown to the law of this jurisdiction.

The action can be maintained on the agreed facts.

Case discharged.

All concurred.

Grafton, }
June, 1894. }

MITCHELL v. BOSTON & MAINE RAILROAD.

68	96
469	363

68	96
70	83
70	181
70	375
70	376
70	378
70	385
70	387
470	449
70	520
70	525
170	623

68	96
71	248
71	274
71	377

68	96
72	157
72	176
72	292
72	331
72	370
72	450
68	96
74	120
174	251

Evidence of the existence and use of a foot-path across a railroad yard is competent on the question of negligence in the management of a locomotive at that point.

A master is responsible for injuries caused by a negligent failure to inform his servant of dangers incident to the business to which third persons are exposed, which are known to him and unknown to the servant.

When accessible witnesses of a transaction in dispute do not testify, either party may argue that they were not called by his opponent because their testimony would have been unfavorable.

A verdict will not be set aside for the reason that the jury were urged to draw from admitted or established facts an unwarranted inference.

A railroad company is bound to exercise ordinary care to avoid injury to one wrongfully upon its tracks, and is responsible for culpable ignorance of his dangerous situation.

CASE, for injuries caused by negligence. Trial by jury and verdict for the plaintiff. The accident occurred in the defendants' railroad yard in the village of Woodsville. The plaintiff's evidence tended to show that there was on May 21, 1888, and for a long time had been a foot-path across the yard which, with the defendants' knowledge, their servants and people generally were accustomed to use as they had occasion; that on that day