

fendant, the court or justice before whom the action is tried shall cause a certificate thereof to be made on the back of the execution issued in the action, and the defendant shall not be discharged on giving bond as provided in the preceding chapter." "The court . . . before whom the action is tried," within the meaning of this section, is the court which takes jurisdiction of the cause and in which judgment is rendered and execution issued,—not the individual by whom or before whom the facts may be ascertained. *Cooley v. Eastman*, 57 N. H. 503; *Samson v. Young*, 50 N. H. 62; *Nelson v. Ladd*, 47 N. H. 343. As the superior court had jurisdiction, rendered judgment, and issued execution, that court is the court before whom the action was tried. That court has jurisdiction, therefore, to determine whether the certificate is required by the facts and to make it when warranted thereby. The personality of the justice presiding when the question is presented is immaterial. The order is to be made, not by the judge, but by the court; and the certificate, if ordered, should be made and signed by the clerk by order of the court. *Cooley v. Eastman*, *supra*, 504.

There can be but one execution in force at any time. The statute relates to the release of the defendant from arrest upon execution. The execution upon which the defendant is lawfully arrested and held is "the execution issued in the action." If the certificate has been made upon the back thereof, the exception of the statute applies.

Case discharged.

All concurred:

Hillsborough, }
Dec. 6, 1910. }

COLLINS v. PEARSON.

A writ of *mandamus* is not issued if an order requiring the defendant to comply with the prayer of the petition would be wholly nugatory.

PETITION for *mandamus*. Trial by the court. Facts found, and case transferred from the May term, 1910, of the superior court, by *Wallace*, C. J.

Stephen L. Hallinan, for the plaintiff.

Edwin G. Eastman, attorney-general, for the defendant.

BINGHAM, J. In the petition filed in this proceeding, the plaintiff requested that a writ of *mandamus* be issued against the defendant compelling him to print the plaintiff's name on the official ballots to be used at the primary election to be held September 6, 1910, as a candidate for the republican nomination for senator in the twentieth senatorial district. In the superior court the petition was dismissed, and the plaintiff excepted.

Since the proceeding was instituted the primary election of September 6 and the general election of November 8, 1910, have been held. An order made at this time requiring the defendant to comply with the prayer of the petitioner would be wholly nugatory, and the issuance of the writ an idle and useless ceremony. Under such circumstances the court will not grant a *mandamus*, even though the plaintiff would otherwise be entitled. *Mitchell v. Boardman*, 79 Me. 469; *Spiritual etc. Society v. Randolph*, 58 Vt. 192; 26 Cyc. 156. There is, therefore, no occasion for considering whether the plaintiff, upon the facts alleged in the petition, would be legally entitled to have his name placed on the ballot. The order is, exception overruled.

Petition dismissed.

All concurred.

Hillsborough, }
Dec. 6, 1910. }

LOVELL v. BOSTON & MAINE RAILROAD.

A contract which the parties thereto are forbidden to make by the *lex loci contractus* is invalid and cannot be enforced in this jurisdiction.

A shipper of freight is not estopped to set up the invalidity of a Sunday contract of carriage because transportation was completed at a time when the agreement might have been legally made, nor by his acceptance of the goods at their destination when it appears that no other course was open to him.

If goods shipped under an invalid contract limiting the carrier's liability are injured in transit to an amount exceeding the reduction in rates made as a consideration for the special agreement, the owner is not required to tender the difference in charges before repudiating the contract and suing for the full amount of his loss.

CASE, for injuring the plaintiff's mare while transporting her from Bellows Falls, Vermont, to Nashua, via Ayer Junction, Massachusetts. Trial by jury. Transferred from the May term, 1910, of the superior court by *Chamberlin, J.*

On Sunday, July 26, 1908, the plaintiff delivered the mare to the