and notice of a sale given according to law, payment and discharge of the mortgage by the debtor will not defeat a subsequent sale by the officer pursuant to the notice. *Capen* v. *Doty*, 13 Allen, 262. It is therefore argued that the second levy was properly made on the right to redeem on April 12, 1880, and that the fact that the tenant did subsequently redeem cannot defeat the demandant's right, although the tenant was in possession, in consequence of such redemption, when the suit was actually brought. But whether a redemption by an execution debtor after the second levy would have operated to increase the value of the estate levied upon in favor of the creditor or not, it is sufficient here to say that the tenant was not the execution debtor. Whether he was entitled to redeem at all had been disputed, and, as against the demandant, it had been decided that he was so entitled. It is not for the demandant to say that, by redeeming, the tenant has merely increased the value of the estate subject to the demandant's second levy. He has a right as against the demandant, if the latter asserts a title to the property, to the sum which he advanced for its redemption.

For these reasons, a majority of the court are of opinion that the entry should be, *Exceptions overruled.*

ALBERT WHITE *vs.* EDWIN C. MORSE.

Middlesex. Jan. 19. — March 2, 1885. FIELD, DEVENS, & COLBURN, JJ., absent.

A trial justice is not liable to a civil action for having rendered a judgment for costs in violation of the provisions of the Pub. Sts. c. 183, § 88; nor for having issued execution on the judgment when it was not appealed from nor reversed.

TORT for acts done by the defendant as a trial justice. Trial in the Superior Court, without a jury, before *Rockwell*, J., who rendered a judgment for the defendant; and the plaintiff appealed to this court. The facts appear in the opinion.

N. D. Pratt, for the plaintiff.

P. H. Cooney, for the defendant.

MORTON, C. J. The principle that judicial officers, whether of superior or inferior courts, are not liable to civil actions for errors of judgment upon matters within their jurisdiction, is too well established to require any citation of authorities.

In the case before us, it appears that one Shattuck, in November, 1883, sued out a trustee writ against the present plaintiff, returnable before the defendant, who is a trial justice. The writ was duly served, and the defendant, as trial justice, had jurisdiction of the parties to the suit and of the subject matter. After due hearing, he rendered judgment for the plaintiff in that action for ten dollars, damages, and eleven dollars and ninety-eight cents, costs of suit, and the trustee was duly charged. No appeal having been claimed, the trial justice issued an execution for the amount of the judgment. The execution was paid by the trustee from funds in his hands belonging to the present plaintiff, who thereupon brought this action to recover of the trial justice the amount paid as costs upon said execution, upon the ground that, under the Pub. Sts. *c.* 183, § 88,* he had no right to render judgment or to issue execution for costs.

The action cannot be maintained. The question whether, in the case pending before him, the plaintiff was entitled to costs, was a judicial question, which the trial justice was required to adjudicate. His decision of this question was strictly within his jurisdiction.

It is true that, if a justice of the peace exceeds his jurisdiction, he is liable to a private action for any wrongful act done outside of his jurisdiction to the injury of another. *Piper* v. *Pearson*, 2 Gray, 120. *Clarke* v. *May*, 2 Gray, 410. *Sullivan* v. *Jones*, 2 Gray, 570. In this case, in rendering a judgment for costs, the defendant was not acting outside or in excess of his jurisdiction; his error was an error of judgment in deciding a question of law which he was obliged to decide, and which was within the scope and limits of his jurisdiction. For such error he

* This section is as follows: "In any action brought under the trustee process, in which the damages assessed do not exceed in amount the sum of ten dollars, exclusive of all costs which have accrued in any former action, the plaintiff shall recover no costs; but this section shall not apply to any action brought upon a cause of action which existed on the first day of July in the year eighteen hundred and eighty-one."

is not liable to the plaintiff, whose proper remedy was by an appeal.

The plaintiff contends that the defendant, if not liable for rendering an erroneous judgment, is liable for the issuing of the execution, which is merely a ministerial act. If a justice of the peace illegally issues an execution, it has been held that he is liable to an action by a party injured thereby. *Sullivan* v. *Jones*, *ubi supra*. But the case at bar is different. The judgment rendered by the defendant as a trial justice, not being appealed from or in any way reversed, was a valid and binding judgment between the parties. The judgment creditor had the right to demand, and it was the duty of the defendant to issue, a proper execution to enforce the judgment. In so doing he was not guilty of any wrongful or illegal ministerial act, which would render him liable to an action by the judgment debtor.

Judgment for the defendant.

SAMUEL E. SEWALL, executor, *vs.* LIZZIE G. ROBBINS & others.

Middlesex. Jan. 26. — March 3, 1885. DEVENS, W. ALLEN, & COLBURN, JJ., absent.

An objection to the admission of a will to probate, that it is revoked by a subsequent will, cannot be taken until the subsequent will is put in evidence; and such will cannot be put in evidence until it is admitted to probate.

A deposition in an appeal from the probate of a will is not admissible in an appeal from the probate of another will, although the parties are the same, and the two wills are executed by the same person.

A witness testified, on cross-examination, that he should not want to swear to the number of days he attended court at a former trial. His certificate of attendance was then shown him, and, for the purpose of testing his memory, he was asked whether, having looked at the certificate, he could recall the number of days he attended. He answered that he could not. He was then asked how many days he had been paid for before this hearing, and answered, "Two, I think." *Held*, that there was no ground of exception to these questions.

On the trial of an appeal from a decree of a Probate Court admitting a will to probate, evidence of what an attesting witness to the will, who had since died, had said in derogation of the testator's capacity to make the will, is inadmissible.

On the issue whether A. was of sound and disposing mind on May 13, it appeared that, in a previous case between the same parties, the jury had found that A. was not of sound and disposing mind on June 7 of the same year. *Held*, that,