

native was to remain at the same rate, or not to remain at all, and he finally remains and works, the inference is irresistible that, whatever he may have said, he finally concluded to remain and work upon the terms offered him ; and he certainly could recover nothing more.

In the case before us, the furnishing the water to the defendant, or the cutting off his supply, was a matter entirely in the hands and power of the plaintiffs, just as much as the performing of the service was entirely at the discretion of B, in the case supposed. After the plaintiff company had failed to make the contract which they desired to make, there were only two things they could properly do : one was, to shut off the water that ran to the defendant's premises ; the other was, to let him have the water upon his terms, and according to his offer. The result shows which alternative the plaintiffs adopted. Their " acts speak plainer than their words." There must be

*Judgment for the defendant.*

DOE, J. Whether the inference, that might be drawn from the plaintiffs' allowing the water to go, that they understood the price was \$10, would be a conclusion of fact not reported by the referee ; whether the inference might be drawn, from the defendant's allowing the water to come, and using it, that he understood the price was \$12, (*Fogg v. Portsmouth Athenaeum*, 44 N. H. 115) ; and whether the report should be recommitted for the referee to draw the right inference of fact from the acts of both parties, or, failing to find a price, fixed by a mutual understanding, actually existing in the minds of the parties, or existing in contemplation of law by force of an estoppel, to find what the water was worth, and what the plaintiffs reasonably deserved to have, *quære*.

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#### FORIST v. ANDROSCOGGIN R. I. Co.

Prior to the statute of 1872, chapter 48, a remedy by action on the case for an injury to real estate did not survive in favor of an administrator. To sustain an action on the case by an administrator for an injury to real estate after the death of his intestate, the facts on which his right to sue depends must be stated in the declaration.

CASE, by M. C. Forist against the Androscoggin River Improvement Company. The plaintiff sues as administrator of the estate of Richard Perkins : in a plea of the case for that the said Richard Perkins, in his lifetime, and ever since May 1, A. D. 1860, was lawfully seized and possessed of a tract of meadow land in said Dummer, containing thirty acres, situate on the west side of the Androscoggin river, and being a part of lot No. 229 of the lots in said Dummer, all of which the said defendants were well knowing ; but the said defendants, minding and

contriving to injure the said Perkins in his lifetime, and his said estate since his decease, and deprive him and his heirs and assigns of the benefit of said meadow land, hath, ever since the said May 1, A. D. 1860, maintained and kept up and continued a mill-dam in Erroll, in said county of Coös, across the Androscoggin river, and by means thereof caused the water of said river to overflow and drown the meadow land aforesaid ever since said May 1, A. D. 1860, whereby the grass and other crops belonging to the said Perkins, in his lifetime, and to his heirs and assigns since his decease, growing in his and their meadow aforesaid, within the time aforesaid, and of the value of three hundred dollars, have been made worse, damnified, and destroyed, and his and their meadow land aforesaid is become spongy, rotten, and impassable; and the said Perkins has also, during the time aforesaid, in his lifetime, and the said administrator in his said capacity for said heirs and assigns, since his decease, thereby been prevented from clearing the said meadow and putting in crops.

To this declaration the defendants filed a general demurrer, which the court sustained. The plaintiff excepted.

Case reserved.

*A. S. Twitchell*, with whom were *Ray & Drew* and *G. A. Bingham*, for the plaintiff.

*Fletcher & Heywood*, and *Burns & Heywood*, for the defendants.

BELLOWS, C. J. The remedy for the injury to the land does not, at common law, survive to the administrator. 1 Saund. 217, note a; 1 Bouv. Law Dict. 64, 65, and cases cited; *Holmes v. Moore*, 5 Pick. 257; *Vittum v. Gilman*, 48 N. H. 416.

The rules of the common law have been changed by statute, both in England and in this State, but not so as to reach a case like this.

By the statute of 4 Edw. 3, ch. 7, *de bonis asportatis in vita testatoris*, a remedy was given to executors by action of trespass for injuries to the goods of the testator in his lifetime; and, by an equitable construction of that statute, it was held applicable to injuries to personal estate other than trespasses; but it was held not to extend to injuries to the person or to real estate. See the cases above cited.

The statute of 3 and 4 W. 4, ch. 4, sec. 2, gave a remedy to executors for injuries done in the lifetime of the testator to his real estate; but, of course, this statute is not in force here.

Our own statute, which saves actions of trespass to real estate, together with real actions and actions of ejectment, does not extend to this case. Gen. Stats., ch. 207, sec. 11.

There seems to be no good reason for this distinction, but the legislature have seen fit to save actions of trover and trespass by name, and there is nothing that indicates the use of the term trespass to denote any injury to real estate other than what is a trespass in form. Until, then, the legislature have used terms which fairly comprehend injuries

which are the subjects of actions on the case, the courts cannot construe the enactment so as to hold that this cause of action survives.

The administrator also sues for injuries to the intestate's real estate, caused by a continuance of the same mill-dam, and relies upon Gen. Stats., ch. 179, sec. 19; but he fails to allege any title to the land in the administrator, or any right to sue; on the contrary, he alleges the injury to be to the heirs and assigns of the deceased. It is very clear, we think, that it should appear in the declaration that the plaintiff, as such administrator, has a right to sue, as he would have if the intestate died seized and the estate was insolvent, and the administration not closed. But nothing of this kind is alleged; and, for aught that appears, the property has descended to the heirs, and they alone can sue. The statute of 1872, chapter 48, does not apply to pending suits, and cannot save this case.

*Demurrer sustained.*

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### COREY v. SUMNER.

The same magistrate to whom complaint for bastardy is made should issue the warrant upon said complaint.

When the complaint was made before a justice of the peace in Vermont, and the warrant was issued by a justice in New Hampshire, the proceeding was held irregular.

Such defect will not be waived by the respondent by waiving the complaint and warrant and giving bond for appearance at court, if he had no knowledge of the defect, and made his objection as soon as it came to his knowledge.

This is a proceeding under the bastardy act, in the name of the State, by Maria W. Corey against James B. Sumner, Jr. The respondent was arrested under a warrant issued by a justice of the peace in this county upon a complaint made and sworn to in Vermont, before a justice of the peace of that State. The respondent was taken before a Coös county justice of the peace, and there, without hearing the complaint read, and without knowledge that it was so made in Vermont, he waived the reading of the complaint, and the examination, and gave bond for his appearance at the supreme judicial court. The proceeding was entered at the April term, 1871,\* and the respondent season-

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\* The Gen. Stats., ch. 76, sec. 4, which took effect January 1, 1868, substituted a recognizance for the bond required by former statutes.