

understand it, and we think the evidence is, upon the whole, insufficient to show affirmatively that there was an agreement of minds between the parties that the appeal should not be further prosecuted. That being so, they should be allowed to repay the money to the executor, or pay the same into court; and thereupon the proceeding to test the validity of the will should be permitted to proceed.

*Appellant's motion granted.*

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LORD & A. v. DUNBARTON AND BOW.

A petition, praying that a new highway may be laid out within two towns, may be filed in the office of the clerk of the supreme court, or may be presented to the selectmen of such towns acting jointly. In order to give the court jurisdiction of such petition, it is not necessary that it be first presented to the selectmen of such towns, and that they neglect or refuse to lay out such highway.

*Sanborn & Clark*, for the plaintiffs.

*Mugridge and Marshall & Chase*, for the defendants.

ISAAC W. SMITH, J. This is a petition for a new highway in the two adjoining towns of Dunbarton and Bow. Counsel for Dunbarton moved to dismiss the petition, because no application had ever been made to the selectmen of said towns, or either of them, to lay out said highway, nor had there been a neglect or refusal by them to lay out the same before the presentation of this petition to the court.

The act of 1829 gave the court jurisdiction of laying out a highway in two or more towns in the same county, or in different counties. That gave the court jurisdiction where the road is in two towns; and the provision, as to one of them being in the county in which the petition is presented, relates, not to the description of the case, but to the county in which the petition shall be brought. It describes, not the nature of the case of which the court has jurisdiction, but the *venue* of the petition. It is as if it had read,—the petition shall be brought in one of the counties in which one of the towns is. The act of 1829 was reenacted in substance in the Revised Statutes, ch. 50, sec. 1, and General Statutes, ch. 63, sec. 1.

The act of 1859 gave selectmen of two adjoining towns (as one board) jurisdiction of a petition for a new highway within such towns. This statute was reenacted in Gen. Stats., ch. 61, sec. 17. The argument from inconvenience of two concurrent jurisdictions is not enough to repeal the former law by implication.

If the provisions as to one of the towns being in the county in

which the petition is presented are construed to relate to the *description* of the case, and not to the *venue* of the case, then it follows, that prior to 1859, as well as since, there was and has been no statute conferring upon the court power to lay out a highway in two towns in the same county; and it also follows, that prior to 1859, as well as since, there was, and has been, and still is, no statute conferring upon the court or upon selectmen power to lay out a highway situate in more than two towns in the same county.

A majority of the court are of opinion that

*The exceptions must be overruled.*

FOSTER, J., doubted.

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KIMBALL v. MILFORD.

54	406
67	82

54	406
74	349

If a railroad corporation, situated in another state, pays a specific tax upon all its capital invested or expended, whether represented by capital stock or indebtedness of the corporation, and such taxation is declared to be in lieu of all state, county, township, or other taxes in that state, and it appears that such specific tax was intended to be a fair equivalent for the taxes that would otherwise be laid on such property by the ordinary means of taxation, such property should not again be taxed in this state to the owners of shares of the capital stock of such corporation.

PETITION for abatement of tax, by John Kimball, against the town of Milford. The petitioner resided in said town April 1, 1873, and owned ten shares of the capital stock of the Michigan Central Railroad, a corporation created by the laws of Michigan, and with its railroad wholly located in that state. The selectmen of Milford assessed a tax of \$15.50 on said shares against the petitioner as of that day. The petitioner offers to prove that he in all respects complied with the laws in respect to giving in his invoice of taxable property for that year, duly applied to said selectmen to abate said tax on the ground that the shares were not liable to taxation here, and informed them that they were subject to taxation, and were taxed for that year, in Michigan, under the laws of that state. The selectmen refused to make the abatement, and therefore this petition was filed. A tax was assessed upon said shares against the corporation for said year, and paid, in conformity with the provisions of the charter of said corporation, approved March 28, 1846, and of the compiled laws of Michigan, vol. 1, ch. 22, being ch. 21 of the Revised Statutes of Michigan of 1846, and no tax in any other form was assessed on the shares in that state. Either party may refer to the provisions of the charter, and of the constitu-