

or affected by the trespass, either of breaking and entering or of carrying away. This damage may, no doubt, be recovered in some form of action, but not in this.

The instructions, in regard to the reasonable time within which the timber should have been removed, were correct, and also the instructions in relation to the timber cut before the expiration of such reasonable time, but not removed till afterwards. As to the timber cut and removed after the expiration of such reasonable time, the instructions should have been that the measure of damages would be the actual damage occasioned by such entry as above explained; and if the market value of such timber had increased after the expiration of such reasonable time, the plaintiff would be entitled to recover in this action for the increased value of such increased growth, but not for the increased growth itself, because that would be paid for in the increased measure of the timber at the agreed price per thousand,—not, in this action, for the damage to her land by its being occupied by the trees after the expiration of such reasonable time, though the latter might be recovered in some other form of action.

At first it seemed somewhat doubtful about recovering the increased value of the increased growth in this action, but upon further consideration we are satisfied that this increased value was simply the gain which the plaintiff had been enabled to realize from his wrongfully using the plaintiff's land to afford nourishment to his trees, and that the plaintiff should have had a lien upon the timber till such extra charge was paid, and that the defendants, by taking away this increased value of the increased growth, without right, would be liable for the same in this form of action.

If a *remititur* of the nine dollars be entered, the plaintiff may have judgment for the one dollar damages done to the land by the entry, and the eight dollars and thirty-three cents the increased value of the increased growth of the timber. In that way there may be

Judgment on the verdict.

FOSGATE v. THOMPSON.

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Where the plaintiff is an executor, the defendant will not be admitted as a witness to matters which he claims were not within the knowledge of the testator without other proof that injustice will otherwise be done.

ASSUMPSIT, by Sarah W. Fosgate, executrix of Lockhart Fosgate, to recover the sum of seventy-five dollars which the plaintiff alleges was found due from the defendant to the plaintiff's testate, upon a settlement of their accounts November 13, 1869. The defendant offered himself as a witness to testify to matters which he claimed were not within the knowledge of the plaintiff's testate, and about which he, if living, could

not for that reason testify. But the court refused to permit him to testify, the executrix not having testified; to which ruling the defendant excepted.

Wheeler & Faulkner and *Forbes*, for the plaintiff.

Albee, for the defendant.

LADD, J. In *Harvey v. Hilliard*, 47 N. H. 551, the plaintiff was an executor. The defendant offered himself as a witness, and not only *claimed* that injustice would be done were he excluded, but furnished to the court his own affidavit showing such to be the case, provided the affidavit were believed. The court declined to consider the affidavit, and excluded the witness, and this ruling was sustained. In the present case, the defendant offered himself as a witness to matters which he claimed were not within the knowledge of the testator. This, at the outside, was no more than a claim that injustice would be done were he excluded. So far as the case shows this claim was not supported by any evidence whatever. The case, therefore, comes far within the doctrine of *Harvey v. Hilliard*, and the exception

Must be overruled.

STATE v. CLARK.

Bigamy—Indictment—Marriage in fact.

An indictment upon Gen. Stats., ch. 256, sec. 5, alleged that the defendant being a married man, and having a lawful wife alive, did, &c., cohabit with one C. M. J., single woman, &c. *Held*, sufficient after verdict.

On the trial of such an indictment, the testimony of persons who were present and witnessed the former marriage ceremony is admissible to show the fact of such marriage.

On the question of handwriting, the jury may compare the writing in dispute with one admitted to be genuine.

Where the instructions to the jury were such that in any view they must have found the fact of one valid subsisting marriage at the time of the unlawful cohabitation charged, it is no ground of exception that the jury were erroneously told that there was evidence from which they might find that the first of two former marriages had been cancelled by a divorce.

INDICTMENT, charging that the respondent, on the first day of April, A. D. 1871, at Keene, in the county of Cheshire aforesaid, with force