

such as shall suit their case as it now stands, and in opposition to the application which the law itself makes. They cannot apply the payment to an item of the account not legally payable. The remainder of the plaintiffs' account is paid and discharged by the money credited, and therefore they cannot recover anything in this action.

The traffic in spirituous liquors is condemned by the policy which has caused the enactment of a statute for its suppression in this state; and as its sale is restricted by stringent limitations, so is its purchase, so far as a purchase of such a commodity may in any sense be regarded as the subject of municipal regulation.

An individual may buy liquor, and not thereby commit an offence against the law; but a town is not thus protected. The law does not undertake to regulate the conduct of an individual, except so far as it strives to protect him and his family against the consequences of his intemperance, by treating the excessive indulgence of his intemperate habits as a crime, or at least an offence against the good order of society; but, in the case of a town, the law has undertaken to *regulate* the traffic,—that is, the purchase, as well as the sale, of spirituous liquor. Gen. Stats., ch. 99, sec. 6. It must be sold with great caution. In theory, it is to be sold only for such purposes as contemplate the use of a pure article; and it should only be *purchased for sale* by an agent such as the town may deem discreet and trustworthy. Therefore it is provided by the law—Gen. Stats., ch. 99, sec. 6—that no innkeeper, or keeper of a place of public entertainment, shall be a town agent. And although the selectmen may be as judicious as any person they might appoint, still, as they are constituted the *appointing power*, it would seem quite ridiculous to say they might appoint themselves to the office of town agent.

The proposition needs only to be stated to exhibit its absurdity.

Selectmen are entrusted with the power of controlling, for the interests of the inhabitants of a town, the traffic in spirituous liquors, and if they themselves undertake this traffic, to whom shall they be responsible? The object of the statute was to create an agent who should be under control, and not irresponsible.

I agree with my brethren that there must be

*Judgment for the defendants.*

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STATE v. ROLLINS.

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A complaint for making a brawl or tumult is sufficient, if the offence be described in the words of the statute.

Such complaint will not be held bad for duplicity, because it contains in the same count a charge of another misdemeanor which is insufficiently described; but such imperfect allegation may be rejected as surplusage.

APPEAL from a justice of the peace. The complaint charged that the defendants, on, etc., at, etc., "in a certain public place, to wit, in a certain school-house in which a singing-school was then and there being held, did make a great brawl and tumult, and stamped their feet on the floor, hissed, used loud and saucy language, and were guilty of rude, indecent, and disorderly conduct. The defendants moved to quash the complaint, which motion was overruled, *pro forma*, and the defendants excepted.

*Solicitor, E. Fletcher, and Whidden, for the state.*

*Crawford, for the defendants.*

LADD, J. This complaint is doubtless very inartificially and loosely drawn, but I am inclined to think it must nevertheless be sustained, as to the charge of making a brawl and tumult. It is settled that a complaint charging the making of a brawl and tumult, in the words of the statute, without any further specification of the facts relied on as constituting the offence, is sufficient. *State v. Perkins*, 42 N. H. 464. This complaint distinctly alleges that the defendants did make a great brawl and tumult, which is well enough, unless it is vitiated by what follows. The next sentence contains what appears to be an independent charge of certain specific acts,—that is, stamping, hissing, using loud language, etc. But this is not connected, either with what precedes or follows, in such way that it can be said to constitute a specification of any offence which the defendants are called upon to answer. Then comes another general charge, that they were guilty of rude, indecent, and disorderly conduct. Rude, indecent, and disorderly conduct is a separate and independent offence, under the same section of the statute. But that offence is not sufficiently charged in the complaint—*State v. Peirce*, 43 N. H. 273; so that the complaint is not, after all, open to the objection of duplicity. *Com. v. Tuck*, 20 Pick. 356; *State v. Palmer*, 35 Me. 9. Besides, the fault of duplicity, if it is ever to be regarded as anything more than one of mere form—1 Bish. Cr. Prac., sec. 196—is certainly nothing more, in cases of misdemeanor in this state—*State v. Marvin*, 35 N. H. 22—and might be remedied by amendment under Gen. Stats., ch. 242, sec. 13. It follows, that all of this complaint, after the words "did make a great brawl and tumult," may be rejected as surplusage, and then the complaint may be sustained as setting out a sufficient description of that offence.

CUSHING, C. J. By looking at the precedents of complaints for assault and battery in Bell's Justice, page 361, it will be seen that the general charge is made in the first instance, and then followed by an enumeration of the particulars of the assault and battery connected together by the conjunction "and." This form of pleading, in indictments for this description of misdemeanor, is commented upon and approved in *State v. Perkins*, 42 N. H. 464. In the complaint under

consideration, every specific act mentioned after the word "tumult" is one which might be one of the acts going to make up a tumult or a brawl; so that, according to the case of *State v. Perkins*, the whole may be considered as a description of the particular brawl or tumult. Considered in this way the complaint seems to be well enough, and there is no danger that anything could be proved under it which would not be embraced in the words "brawl" or "tumult."

As the statute does not confine the offence of a brawl or tumult to a public place, the allegation that the offence was committed in a public place is clearly surplusage, and may be disregarded.

With these views, it appears to me that the complaint is well enough, and according to established precedents.

SMITH, J. The respondents' motion to quash this complaint is grounded on the idea that two of the six different offences enumerated in Gen. Stats, ch. 252, sec. 1, are joined in the same count in this complaint, namely, with making a brawl and tumult, which is one offence, and being guilty of rude, indecent, and disorderly conduct, which is another offence. The charge against the respondents of being "guilty of rude, indecent, and disorderly conduct" is defective in that there is no description of the acts which it is claimed constituted such conduct, and no conviction or sentence could be had upon such a charge. *State v. Peirce*, 43 N. H. 273.

A complaint charging one with "making a brawl and tumult" would be good. *State v. Perkins*, 42 N. H. 464. In that and like cases, the charge may be in general terms to avoid prolixity, and because the words themselves imply the nature of the offence with which the respondent is charged.

If this complaint had charged that the respondents, "on, etc., at, etc., to wit, in a certain school-house in which a singing-school was then and there being held, did make a great brawl and tumult," it must have been held good, although it is not necessary to allege that the offence was committed in a public place; and so if it had added, by way of description of the offence, "by stamping their feet on the floor, hissing, and using loud and saucy language," although unnecessary, the complaint would still be held good. If the complaint had charged the respondents with being "guilty of rude, indecent, and disorderly conduct," it must, under the authority of *State v. Peirce*, be held bad; but if it had added, by way of description, "by stamping their feet on the floor, hissing, and by using loud and saucy language," the offence would have been sufficiently described.

But the allegation in this complaint, that the respondents "stamped their feet on the floor, hissed, and used loud and saucy language," is not, according to the laws of legal or grammatical construction, descriptive either of the charge of making a brawl and tumult, or of being guilty of rude, indecent, and disorderly conduct. It precedes the latter charge, and is not connected with it by any such words that it can be said they are used to describe the latter offence.

For these reasons I am of the opinion that but one offence is legally set out in the complaint, to wit, that of making a brawl and tumult, and that the remainder of the count may be rejected as surplusage. *Commonwealth v. Tuck*, 20 Pick. 356.

*Motion to quash denied.*

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HALL v. CONGDON.

On the trial of an issue in substance whether certain land was conveyed to the defendant upon an express trust, parol evidence to prove the trust is inadmissible.

In such case, parol evidence of facts not alleged in the bill, from which a resulting trust would arise, is inadmissible.

IN EQUITY. The bill alleged that a certain tract of land had been conveyed to the defendant, Congdon, by the town of Pittsburg, on certain express trusts specifically set out in the bill, and the answers fully denied the trusts, and issues were framed for the jury. Trial before LADD, J., November term, 1873.

Upon the first issue, which was in substance whether the land was conveyed to Congdon upon the trust set up in the bill, the plaintiff offered to prove the allegations of the bill by parol evidence. The court ruled that such evidence could not be received for that purpose, and the plaintiff excepted. For the purpose of raising the questions of law involved in the case, the plaintiff's counsel then stated that they had no written evidence of the trust, and offered in general terms to prove by parol that the whole of the purchase-money for the land was furnished by the plaintiff, for the purpose and upon the parol agreements and understandings alleged in the bill. The court excluded the evidence, and the plaintiff excepted. It being conceded that these rulings, if sustained, must dispose of the case in favor of the defendants, the issues were taken from the jury by consent of counsel on both sides, and the question reserved for consideration by the whole court.

*Fletcher & Heywood, H. Bingham, and Burns & Heywood*, for the plaintiff.

*Ray & Drew, G. A. Bingham, and J. Benton*, for the defendants.

\* CUSHING, C. J. The allegation material to the question raised in this case is as follows: "On February 26, 1861, said Congdon took a conveyance of said lands of said town of Pittsburg, \* \* which conveyance the plaintiff procured to be made, and five hundred dollars of

\*LADD, J., did not sit.