

SMITH, J. We have no occasion to inquire whether the town of Lebanon, prosecuting this suit in the name of the state, can legally except to the rulings of the referee, for we are of opinion that the evidence excepted to was competent. The sufficiency of the application to the court in 1837 was a matter for the court then to consider. The regularity of those proceedings, after the lapse of forty years, is not open to examination. The same is true of the commissioner's report in 1837, and of the acceptance thereof establishing the rates of toll; also, of the return made by the corporation in 1842. The question tried before the referee was, whether equity and good conscience required the forfeiture of the defendants' charter; and, as bearing on this question, evidence of the receipts, expenses, and cost of the bridge since the last return made in 1842, and evidence as to the way the bridge had been managed, how far it had accommodated the public wants, how far it was necessary to meet the future wants of the public, and how much the proprietors had received and expended, was pertinent, and properly received. In this view, the fact that the statements presented by the defendants to the referee did not contain all the information required by their charter presented no legal reason for their exclusion.

Although the corporation has been guilty of gross neglect in not making the returns required by its charter, yet the facts laid before us do not, we think, furnish sufficient reasons why a forfeiture of the charter should be decreed upon the first application therefor. What might be the result in case of a second application we are not called upon to decide. The statements of receipts and expenses laid before the referee show the necessity of a revision of the tariff of tolls; and the matter being now before the court, a referee will be appointed to hear and report what revision is necessary in order that the receipts may not exceed the limit fixed by the charter.

The neglect of the corporation to hold its annual meetings does not operate to dissolve the corporation. Provision is made by Gen. St., c. 133, ss. 15, 16, whereby the organization may be continued.

Case discharged.

STANLEY, ALLEN, and CLARK, JJ., did not sit.

COÖS.

TYLER v. FLANDERS and YOUNG.

Where there are two selectmen there is a legal board.

TROVER, for a horse. (Reported in 57 N. H. 618.) The conversion complained of was the sale of the plaintiff's horse by a collector of

taxes, on a tax warrant issued by the defendants and one Hibbard, who was a defendant until his death, which occurred before the last trial had at the February Term, 1877. The present defendants were selectmen *de facto* and *de jure*, and Hibbard was a selectman *de facto*. The defendants and Hibbard acted jointly as a board of selectmen in assessing taxes, appointing the collector, and issuing the warrant. The plaintiff contends that Hibbard, by reason of alienage, was not a selectman *de jure*. The only question of fact was, whether Hibbard's father was born in the United States or in Canada; and the jury found he was born in Canada. The defendants moved for judgment, notwithstanding the verdict.

Dudley, and *Ray*, *Drew & Jordan*, for the defendants.

Aldrich and *Ladd*, for the plaintiff. Where any one, having seized the goods of another, attempts to justify the seizure as a public officer, he must show a title to the office strictly legal. *Brewster v. Hyde*, 7 N. H. 206; *Blake v. Startevant*, 12 N. H. 567; *U. S. v. Morris*, 2 Brock. 96; *Fetterman v. Hopkins*, 5 Watts 539; *Schlenckler v. Risley*, 3 Scam. 483; *Cummings v. Clarke*, 15 Vt. 653; *McGregor v. Balch*, 14 Vt. 435; *Colburn v. Ellis*, 5 Mass. 427; *Bearce v. Fassett*, 34 Me. 575; *Allen v. Archer*, 49 Me. 351; *Blackwell on Tax Titles* 95, 96.

Hibbard, being an alien, was disqualified, and his election was void. 2 Kent Com. 54; *Albany v. Derby*, 30 Vt. 718; *Lyndon v. Danville*, 28 Vt. 809; 1 Dillon Mun. Corp., s. 135; *Spear v. Robinson*, 29 Me. 531, 541; 38 Me. 547.

The statute provides that three or more selectmen shall be chosen, and that a majority may act. Gen. St., c. 37, s. 2. Two selectmen do not constitute a board. Until there is a board, there can be no majority. *Williamsburg v. Lord*, 51 Me. 599; *Sanfason v. Martin*, 55 Me. 110; *Mitchell v. Holderness*, 34 N. H. 213; *Palmer v. Conway*, 22 N. H. 144, 148, 149; *Petition of Nashua*, 12 N. H. 425, 428; *Pike v. Hanson*, 9 N. H. 491; *Schenck v. Peay*, 1 Woolw. 175, 187; 1 Binn. 481; 9 B. & C. 648; Co. Lit. 181, b; *Blackwell on Tax Titles* 111; *Cooley on Taxation* 550, 552.

The provisions for filling vacancies, and allowing the major part of those who remain in office to warn meetings in case of the death or removal of any of the selectmen, show that the board consists of not less than three. Gen. St., c. 39, s. 1; c. 35, s. 8.

DOB, C. J. The purchaser of the horse acquired a good title. *Smith v. Messer*, 17 N. H. 420, 429. The collector is not liable for taking and selling the horse. *Roberts v. Holmes*, 54 N. H. 560. As between the plaintiff and the town, the plaintiff's tax was legally assessed and legally collected. The town can keep the money. Hibbard being a selectman *de facto*, his official title cannot be questioned, in suits between such third persons as the plaintiff and the purchaser, the plaintiff and

the collector, the plaintiff and the town. And the question is, not whether Hibbard was liable, but whether the present defendants, acting discreetly and in good faith, each having an official title that is not disputed, are liable, with no protection or indemnity (*Wadsworth v. Henniker*, 35 N. H. 189), for all the taxes collected on the warrant, by reason of the unknown alienage of a third person, their associate selectman *de facto*. The act of Feb. 8, 1791 (*ss.*, 3, 6, 11, 22), requires the election of three or more selectmen at the annual meeting; authorizes the town to fill vacancies at any meeting; empowers the major part of the selectmen remaining in office to call a town-meeting for the purpose of filling vacancies, when, by reason of death or removal of selectmen, the major part of the number originally chosen do not remain in office; and makes the major part of the selectmen competent to act in all cases. The construction of this act and subsequent acts on the same subject, settled by usage, is, that when there are two selectmen there is a legal board. If the established practical construction is theoretically wrong, the case is one of a class in which it is proper to act upon the maxim that common opinion and common practice may be accepted as conclusive evidence of what the law is. Hibbard's alienage is an irrelevant fact. The verdict was on an immaterial question. Whether there is any other ground of defence, we need not inquire.

Judgment for the defendants.

BINGHAM and ALLEN, JJ., did not sit.

CROSS v. CROSS.

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An agreement between husband and wife, having for its object a dissolution of the marriage contract, is contrary to sound public policy; and a note and mortgage, executed in pursuance of such an agreement, are illegal and void.

WRIT OF ENTRY, on a mortgage. Facts agreed. In 1862, the plaintiff being the wife of the defendant, he made to her a voluntary conveyance of the land. In 1875, each being about to sue for a divorce, they made this compromise: She should convey the land to him; he should give notes of a certain amount to M., for the benefit of the plaintiff, and the mortgage to secure the notes; she should file a libel for divorce for a certain cause; he should accept service of process, and make no defence; if a divorce was decreed, she should have the custody of one of their three children, and he of the other two; he should send to the court, as witnesses for her, the two children who were to remain with him; and he should not attempt to obtain a divorce for a certain cause. This agreement was executed;