

farm and took possession of it, and his payment by conveyance of land was more than payment in money. If he had made valuable improvements on the Welch farm, he would have been entitled to a decree for specific performance; and his conveyance of his farm to Welch was not less effective as part performance than valuable improvements made by him on the Welch farm would have been. His conveyance of his own farm is within the reason of the rule in regard to valuable improvements made by a vendee upon land of a vendor, entitling the former to a specific performance. *Tilton v. Tilton*, 9 N. H. 385, 391; *Glass v. Hulbert*, 102 Mass. 24, 43; *Purcell v. Miner*, 4 Wall. 513, 519, 521. And it is not necessary to consider whether possession and cash payment would entitle Lamprey to specific performance. Being entitled to a conveyance of the Welch farm, Bell's attachment was valid. When Bell released the attachment on the Brewster farm, he had no notice of the plaintiff's mortgage on the Welch farm. The mortgage being subsequent to the attachment, he had no occasion to inquire as to the title. He was not put on inquiry in regard to it, and the record of the mortgage was not constructive notice to him. Having an attachment of both farms, and no notice of the mortgage upon one, his release of the other from attachment could not be taken advantage of by the mortgagee for his benefit, nor be made a ground for his relief in equity. The doctrine of *Brown v. Simons*, 44 N. H. 475, that a release by a prior encumbrancer of a portion of the encumbered land to the owner, who has conveyed another portion to a third person, operates as a release, *pro tanto*, of the land of the latter, is expressly on the ground that the prior encumbrancer, at the time of the release, had notice of the conveyance. The defendant Doton had no notice, actual or constructive, of the mortgage on the Welch farm, and could not be affected by it, for it did not include the Brewster farm, which he had purchased of Lamprey.

Bill dismissed.

STANLEY, J., did not sit.

GORDON v. THE BOSTON & MAINE RAILROAD.

On the question whether the noise of escaping steam from a locomotive was likely to frighten horses, evidence that other horses were frightened by it is admissible.

Railroad corporations are bound to exercise reasonable care and diligence in the management and operation of their locomotives in the vicinity of highways, having due regard to the rights and safety of travellers thereon. When proper instructions are given to the jury, it is no ground of exception that they are not given in the form requested.

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CASE, for injuries caused by the fright of the plaintiff's horse through the negligent management of the defendants' locomotive engine.

The defendants' track, a short distance from their depot, in the village of Exeter, crosses a public highway at grade. At the time of the injury complained of, the plaintiff was driving along the highway, no moving train or engine being in sight, and when within about twenty feet of the crossing, steam was allowed suddenly to escape from a locomotive standing upon a side track about two rods from the highway where the plaintiff was riding. The sharp, shrill noise of the escaping steam frightened the plaintiff's horse, and upon a repetition of it the horse became unmanageable, overturning the carriage, and seriously injuring the plaintiff.

At the trial, it was a question whether the noise was one calculated to frighten horses; and, subject to exception, the plaintiff was allowed to prove its effects upon other horses passing there under like circumstances.

Also, subject to exception, the plaintiff was allowed to prove that the superintendent of the railroad had been notified, some two years before the accident, that the public travel was endangered by the management of their locomotive in the way it was managed at the time of the accident, and that he promised to have the matter attended to at once, but made no change.

The defendants' evidence tended to show that at the time of the accident they were using their locomotive in conducting the business of the railroad upon their own land, outside the limits of the highway. The plaintiff's counsel referred to Gen. St., c. 148, s. 8, in commenting upon what would be due care in the management of a locomotive engine.

The defendants' counsel requested the court to instruct the jury that the defendants were not liable for any injury from the fright of the plaintiff's horse in consequence of the ordinary, or necessary, or reasonable use of their locomotive upon their own land not in the highway; that the defendants had the right to use their locomotive on their own land in the transaction of their ordinary business, and were not responsible for the consequences of such use to persons travelling upon the highway; and that the statute relating to injuries by steam does not apply to cases like this.

The court declined to charge as requested, and instructed the jury that the defendants, in the management of their engines and machinery, were bound to exercise, towards persons rightfully attempting to cross their track at a highway crossing, the care, skill, and diligence that men of ordinary skill, prudence, and diligence would use under the circumstances, having due regard to the rights of the defendants and the rights of those attempting to pass; that in the management of the more dangerous elements, like fire and steam, the same rule applied as in matters less dangerous; but the acts that might constitute ordinary care in the management of elements of little or no dan-

ger, might be gross carelessness in the management of fire and steam. Whether the defendants had exercised ordinary skill, prudence, and diligence, under the circumstances in this case, was for the jury to determine upon the evidence. The defendants excepted to the charge, and to the refusal to charge as requested. Verdict for the plaintiff.

Hatch, for the defendants.

Marston, for the plaintiff.

CLARK, J. On the question whether the noise of escaping steam from the defendants' locomotive was likely to frighten horses, the evidence that other horses passing along the highway had been frightened by it was admissible. *Darling v. Westmoreland*, 52 N. H. 401. So, also, was the evidence that the superintendent of the railroad had been notified some two years before the accident that the public travel was endangered by the management of the defendants' engine at that place. This evidence tended to show that the defendants knew that other horses had been frightened by their locomotives, as managed by their servants at that place. The defendants' exceptions to the evidence must be overruled.

The defendants' request for instructions, that they were not responsible for the consequences of the use of their locomotive in their ordinary business upon their own land, was properly refused. This request assumed that the defendants had the right to use their locomotives on their own land, in their ordinary business, as they pleased, without regard to the rights or safety of travellers in the highway; and, if given, would have excluded from the consideration of the jury the question of care, or negligence, in the management of such locomotives. In *Knight v. Goodyear Rubber Co.*, 38 Conn. 438, where the plaintiff's horse was frightened by the blowing of a steam whistle on the defendants' factory, situated near the highway, the defendants were held liable, although it appeared that the whistle was blown in the ordinary way, and for the ordinary purpose of designating the hour of noon.

We see no error in the instructions to the jury. Although they were not told in express terms that the statute relating to injuries by steam did not apply to this case, the charge was such that they must have understood that it did not apply. The damages accruing to person or property by fire or steam, for which the proprietors of a railroad are made liable by statute, are such damages as may be insured against,—damages caused directly by fire or steam in the burning or destruction of property; and in cases under the statute no question of negligence arises, railroads being held liable as insurers in such cases. *Rowell v. Railroad*, 57 N. H. 132.

In this case, the jury were instructed that the liability of the defendants depended upon whether they had exercised proper care and prudence in the management of their locomotive at the time of the

accident; and that whether the defendants had exercised ordinary care, prudence, and diligence, under the circumstances disclosed in this case, was a question of fact for the jury to determine upon the evidence. Under these instructions, the jury must have understood that the material question for them to determine was the question of negligence. Jurors are presumed to be men of at least ordinary capacity and common intelligence, and we think the instructions upon this point could not have been misunderstood. It is not a sufficient objection that the charge was not given in the particular words of the request. *Cooper v. Railway*, 49 N. H. 209; *Wendell v. Moulton*, 26 N. H. 41; *March v. Railroad*, 19 N. H. 372; *Clark v. Wood*, 34 N. H. 447; *Tucker v. Peaslee*, 36 N. H. 167; *Walcott v. Keith*, 22 N. H. 196.

Judgment on the verdict.

BINGHAM, J., did not sit.

STATE v. BECKMAN.

A stake and stones, set up by a committee appointed by the probate court to make partition of land between tenants in common, do not constitute a boundary of lands within the proviso of Gen. St., c. 260, s. 1, until the report of the committee is accepted and judgment rendered thereon.

COMPLAINT, for the removal of a boundary. The defendant removed a stake and stones placed by a committee appointed by the probate court to make partition of land owned in common by the defendant and W. B. The removal of the stake and stones was before the return and acceptance of the committee's report.

Towle, for the complainant.

Marston & Eastman, for the respondent.

CLARK, J. Gen. St., c. 263, s. 1, upon which this complaint is founded, provides,—“If any person shall wilfully and maliciously remove or alter any boundary of lands, or deface, alter, or remove any mark upon any tree or other monument made for the purpose of designating any point, course, or line in the boundary of any lot or tract of land, or dividing line between towns, such person shall be fined * * *” We think the fair construction of this statute is, that it applies to boundaries, marks, and monuments between adjoining land-owners only, and such as are intended to mark the lines between different owners. The stake and stones, which the respondent is