

estate is not exposed to a liability of being consumed by executions issued in suits of which they were not entitled to notice, brought upon executor's contracts in the making of which they were not entitled to be consulted. The suits may have been caused by the fault of the executor. On various grounds, the propriety of the estate being charged with the expense of defending the suits, including the plaintiff's fees, may be contested. It is a probate question. It may include questions of the executor's performance of his fiduciary duty, which he could not raise in a suit brought against him on his personal liability by this plaintiff, but which the beneficiaries can raise in the probate court. It may include questions which would be raised by them in the settlement of his account, and which would not be raised by him in this suit. The estate was no more bound by the administrator's promise than by the executor's employment of the plaintiff, and a nonsuit should have been ordered.

Verdict set aside.

CLARK, J., did not sit.

MERRILL v. CLAREMONT.

Where the horses of a traveller, being frightened by an overturn of their load caused by a defect in the highway, escape from him, run ninety rods, and collide with another traveller, the injury of the latter may be a natural and probable consequence of the defect, for which the town is liable.

CASE, for damage happening by reason of a defect in a highway. It was alleged in the declaration that the highway was sloping, rounding, uneven, encumbered by a snow-drift, and unsafe; that one B. was travelling in the highway, driving two horses that were drawing a sled loaded with bark; and that, by reason of the defect, the sled was overturned, the horses were frightened, escaped, and ran without guidance against the plaintiff, who was travelling in the highway. The distance from the place where the sled was overturned to the place of the collision with the plaintiff was ninety rods. The question whether the action can be maintained was reserved.

Barton, for the plaintiff, cited *Underhill v. Manchester*, 45 N. H. 214, 216; *Cate v. Cate*, 50 N. H. 144; *Ricker v. Freeman*, 50 N. H. 420; *State v. M. & L. R. R.*, 52 N. H. 528, 552; *Stark v. Lancaster*, 57 N. H. 88, 91, 93; *McIntire v. Plaisted*, 57 N. H. 606, 608; *Gilman v. Noyes*, 57 N. H. 627; *Tuttle v. Farmington*, 58 N. H. 13; *Kelsey v. Glover*, 15 Vt. 708; *Vandenburgh v. Truax*, 4 Denio 464; *Dickson v. McCoy*, 39 N. Y. 400; *Clark v. Chambers*, L. R. 3 Q. B. D. 327; *McDonald v. Snelling*, 14 Allen 290.

58	468
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Colby, Parker, and Baker, for the defendant, cited *Marble v. Worcester*, 4 Gray 395; *Bosch v. B. & M. R. R.*, 44 Iowa 402; *Rockford v. Tripp*, 83 Ill. 247.

DOE, C. J. Evidence is stated in the case upon which we think it may be properly found that the plaintiff's injury was the natural and probable consequence of the defendant's neglect of duty.

Case discharged.

ALLEN and CLARK, JJ., did not sit.

TASKER v. THE KENTON INS. Co.

A condition in a policy of insurance, that no recovery shall be had unless suit is brought within a given time, is valid.

The Gen. St., c. 157, ss. 6 and 7, are for the benefit of the assured, and may be waived by an express agreement in the policy.

ASSUMPSIT, on a policy of insurance. Plea, the general issue. The action was not commenced within twelve months next after the loss occurred. The policy contained the following clause: "It is furthermore hereby expressly provided and mutually agreed, that no suit or action against the company for the recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding." No waiver of this clause or sufficient excuse was shown why the action was not seasonably commenced. The court, subject to the defendants' exception, denied a motion for a nonsuit. Verdict for the plaintiff. Motion for a new trial.

Parker and Wait, for the plaintiff.

Holt, for the defendants.

BINGHAM, J. The clause in the policy, stipulating that no action shall be sustainable thereon unless commenced within twelve months next after the loss occurs, is in form and effect a condition precedent, and unless it is complied with, there can be no recovery at common law. *Patrick v. Ins. Co.*, 43 N. H. 621, 624; *Gooden v. Ins. Co.*, 20