

RAND v. RAND.

A judgment refusing a divorce on the ground of extreme cruelty, is no bar to a subsequent suit by the same party for a divorce on the ground of abandonment arising from the libellant's abandonment of the libellee, compelled by the same acts of cruelty relied on in the former suit.

LIBEL FOR DIVORCE, for abandonment and refusal to cohabit for three years. For proof, the libellant relied on the fact of her own abandonment of the libellee caused by his acts of extreme cruelty. In answer to this, the libellee offered the record of a judgment denying a divorce on a former libel for the same extreme cruelty. The question was reserved whether that judgment is a bar to a divorce in this suit.

Gould and Mugridge, for the plaintiff.

Albin & Streeter and C. P. Sanborn, for the defendant.

ALLEN, J. The abandonment alleged arose from the plaintiff's abandonment of her husband, caused by his acts of cruelty. To make out this charge of constructive abandonment, the plaintiff must show that the defendant intended that his wife should abandon him, and committed the acts complained of for the purpose of compelling a separation. Bishop Mar. & Div. 515; *James v. James*, 58 N. H. 266. Any conduct of the defendant intended to drive the plaintiff away and keep her away being good cause for her going away and staying away, is, in legal effect, his abandonment of her, whether he expels her from his house and keeps her out by direct physical violence, or by treatment indirectly as effective as assault and battery.

The issue determined by the former proceeding was that of extreme cruelty. The court cannot say, as matter of law, that cruel acts of the husband which would justify his wife in leaving him would always be such extreme cruelty as would entitle her to a divorce on that ground. The refusal of a divorce in the former suit was not an adjudication of the cause alleged in this case, and the former judgment does not estop the plaintiff from using the evidence offered by her in support of the allegations in this case.

Case discharged.

FOSTER, J., did not sit: the others concurred.

NOYES AND WIFE v. HEMPHILL.

In a deed of lot A, a reservation of the right to draw water from a well on that lot for the family occupying lot B, gives the occupant of lot B the

right to draw water for the ordinary purposes of a family, but not for the additional use of a bakery.

Husband and wife cannot recover joint damages for the infringement of such a right when it does not appear that their right is joint.

CASE, for polluting the water of the defendant's well, the right to draw water from which is alleged to have been appurtenant to a dwelling-house of which the plaintiffs were seized. Facts found by a referee, who awarded the plaintiffs joint damages. A former owner of lots A and B conveyed A to the defendant, reserving the right to draw water by means of a pipe from the well on A for the family occupying B, and afterwards conveyed B to the plaintiff, Mrs. Noyes. At the time the well was polluted, the plaintiffs were drawing water from it for family use on B, and also for a bakery carried on by Mr. Noyes.

Albin & Streeter and S. G. Lane, for the plaintiffs.

Gould and Mugridge, for the defendant.

SMITH, J. The extent of the easement in the defendant's premises is defined in the reservation in the deed from his grantor. The reasonable interpretation of the language of the reservation is, that the occupant for the time being of the plaintiffs' premises can draw water from the defendant's well only for the ordinary purposes of a family. The use of an easement is to be confined strictly to the purposes for which it was granted. *French v. Marstin*, 24 N. H. 440, 451; Washb. on Easements 186. The plaintiffs have no right to draw water from the defendant's well for the use of a bakery.

Any one in possession of premises to which an easement belongs may have an action for the disturbance of the enjoyment of the same. Washb. on Easements 570; *Foley v. Wyeth*, 2 Allen 135. A tenant may have his action for the disturbance, and if it be an injury to the inheritance, an action will be in favor of a reversioner. *Hastings v. Livermore*, 7 Gray 194. But the tenant and reversioner cannot be joined, for they have no joint cause of action. The plaintiffs allege a joint seizin, but the evidence shows the wife alone seized. She might sue alone if she has been injured in her inheritance; and her husband might sue alone if he was occupying the premises as the tenant of his wife, and has been injured in his occupancy; or if they were joint occupants of the premises, and have been injured in their joint occupancy, they may jointly recover. It does not appear whether the husband occupies the dwelling as tenant of his wife under some lease or agreement to pay her rent therefor, or whether she is sole occupant as well as owner, having actual possession and control, and he a mere servant or guest, or whether they are joint occupants. The character of his possession is a question of fact to be determined upon evidence. *Albin v. Lord*, 39 N. H. 196, 205. Marriage is not such an institu-

tion that it prevents a joint recovery, if the occupancy of the wife's land is joint by herself and husband. She can lease her real estate to him—*Albin v. Lord*, 39 N. H. 196, 205—and they are competent to occupy it jointly upon an express or implied agreement, as two men may jointly occupy a farm, or two women jointly occupy a dwelling, or an unmarried man and woman may occupy a store as copartners in trade.

The report may be recommitted for a further hearing upon the character of the plaintiffs' occupation, or for striking out one of the plaintiffs if their occupation is not joint.

Case discharged.

FOSTER, J., did not sit: the others concurred.

MORRISON v. MANCHESTER.

Mortgaged property may be taxed to the mortgagor in possession.

APPEAL, from the refusal of the tax assessors of Manchester to abate a part of a tax assessed by them to the plaintiff for his real estate, which is subject to mortgages given by him to a savings-bank as security for loans made to him by the bank. The amount of the mortgages is \$10,000. In the assessment, the property is appraised at \$10,500. The plaintiff claims that he is taxable for the equity of redemption only, and that there should be an abatement of the tax except so much as, on a division of the assessment, should be laid upon the equity. The question was reserved, whether the mortgagor is taxable for the value of the mortgaged property, or only for the value of his equity of redemption.

C. R. Morrison, for the plaintiff.

I. In New Hampshire the mortgagor is not sole owner of the land. The interest of the mortgagee in the land is as truly an interest in real estate as that of the mortgagor, and is often a greater interest. It is an abuse of language, and an "affront to common-sense," to say that the mortgagor is the real owner of the land. It takes both the mortgagor and the mortgagee to own the land. Gen. St., c. 121, s. 4—c. 257, s. 6; *Lund v. Lund*, 1 N. H. 41; *Brown v. Cram*, 1 N. H. 169; *Runlet v. Otis*, 2 N. H. 167; *Tift v. Walker*, 10 N. H. 150; *New London v. Sutton*, 2 N. H. 401; *Pembroke v. Allenstown*, 21 N. H. 115; *Hobart v. Sanborn*, 13 N. H. 226; *Tripe v. Marcy*, 39 N. H. 439, 444; *Chellis v. Stearns*, 22 N. H. 312; *Furbush v. Goodwin*, 29 N. H. 321, 332; 1 East 288; Jones on Mortgages, ss. 11—20; Bouv. Law Dic., "Property."

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