

of legislative power, and should not be unnecessarily compelled to decide it at their peril. If it were the intention of the law-making power, in passing a tax act or an exemption act, to submit the judicial question of its constitutionality to every board of assessors for preliminary decision, and to require each board to suspend the operation of the act in their municipality when they did not concur with the legislature on that question, it is probable that such a design would be clearly expressed. And in the absence of satisfactory evidence of a legislative intention that assessors should decide, at their peril, the judicial question of the legality of a vote of a town purporting to authorize taxation or tax exemption, such an intention cannot be established on an unreasonable conjecture. Assessors are not liable for making an assessment in pursuance of an unconstitutional act of the legislature, or an illegal vote of the town; and the validity of such acts and votes in this case is immaterial.

Bad faith is not alleged in the declaration, nor found by the referee. The question of assessors' liability upon allegations and proof of fraud or malice, and special damage, we are not now called upon to consider. Many questions of law and fact, decided in tax appeals, are previously decided by assessors. Appeals are generally taken for the purpose of obtaining a decision by the appellate tribunal of questions decided (many of them necessarily decided) by assessors. Some of these questions are first determined by the legislature. That any of them, being judicial questions when reviewed by court, referee, or jury, on appeal, are not judicial when decided by assessors before appeal; that assessors, deciding them, do not act in a judicial capacity, and are subject to a rule of liability for damages that is not applicable to jurors, referees, and other judges, resolving judicial questions, and legislators passing upon legislative questions; that the liability of a tribunal determining the existence and amount of a tax debt or other debt depends upon the circumstance that the warrant, execution, or other process of collection is issued by that tribunal and not by some other officer; that the assessment of the railroad tax heretofore by the court has been a judicial act, and its assessment hereafter by the board of equalization will not be a judicial act,—are propositions of which we express no opinion.

Judgment for the defendants.

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

PURINTON v. LADD.

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Chapter 55, Laws of 1872, is a revision of and substitute for all the previous statutes prohibiting the catching of trout, and as no way is provided for the recovery of the penalty fixed by it, such recovery may be had under Gen. St., c. 248, s. 1.

Chapter 70, Laws of 1874, does not repeal c. 55, Laws of 1872, but is in aid of its provisions.

A declaration for the recovery of a penalty, of ten dollars each, for the catching of twenty trout on the same day from the same brook, is not bad for duplicity.

DEBT, to recover a penalty of two hundred dollars for catching, with a hook, twenty trout, April 20, 1877. The defendant demurred, because (1) such penalty cannot be recovered in an action of debt; (2) prosecutions for the violation of the law for the preservation of trout should be by complaint by the fish-wardens before a justice of the peace; (3) the declaration is bad for duplicity, in that it embraces more than one offence, and is for the recovery of more than one penalty.

Edes & Newton, for the defendant.

Burke and Brown, for the plaintiff.

STANLEY, J. "All penalties and forfeitures of money may be recovered by action of debt, * * * unless otherwise provided." Gen. St., c. 248, s. 1. The penalty sought to be recovered in this suit is fixed by c. 55, Laws of 1872. That statute is not in addition to or in amendment of any preceding statute. It establishes the time within which it is unlawful to catch trout, and fixes a penalty of ten dollars for each trout caught in violation of its provisions. It is silent as to the method of recovering the penalty for its violation. It, in terms, repeals all acts inconsistent with it. It is a revision of all former statutes on the same subject-matter, and was evidently designed as a substitute for them, though no words to that effect were used. It declared the rule to be followed, and as it is the most recent and authoritative expression of the legislative will, it must prevail—*Leighton v. Walker*, 9 N. H. 59; *Wakefield v. Phelps*, 37 N. H. 295; *State v. Otis*, 42 N. H. 71; *State v. Wilson*, 43 N. H. 415;—and since no way is provided in that act for the recovery of the penalty, the provisions of c. 248, s. 1, apply, and the recovery must be had under that statute.

Assuming this position to be correct, the defendant claims that c. 55, Laws of 1872, is repealed by c. 70, Laws of 1874. There is no repeal in express terms. Repeals by implication are not favored. In order to such repeal there must be such a positive repugnancy as shows that the legislature intend a repeal. In this case no such repugnancy appears. The provisions of c. 70, Laws of 1874, are not inconsistent with the provisions of c. 55, Laws of 1872, or the provisions of Gen. St., c. 248, s. 1. While the act of 1874 provides for the appointment of fish-wardens and defines their duties, it does not prohibit others from assisting in the enforcement of the law. It does not confer upon the fish-wardens the sole and exclusive duty of enforcing the laws for the preservation of trout. It merely defines their duty and the means they shall employ in doing it. The remedy is cumulative.

The objection of duplicity is based on the fact that the plaintiff seeks to recover twenty sums of ten dollars each for taking twenty trout. The declaration charges the taking of twenty trout on one day from the same stream. The object of pleading is the production of a single issue on the same subject-matter, and the rule against duplicity tends to this result. Chit. Pl. 225. This declaration charges a single offence, the subject-matter of which is the catching of trout in violation of law. It is not, therefore, open to the charge of duplicity.

Demurrer overruled.

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

HOLTON & a. v. OLCOTT, *Ex'r.*

A person aggrieved by a decision of a judge of probate, who failed to appeal therefrom within sixty days from the time it was made because he did not know that it had been made, may be allowed an appeal on the ground of mistake, accident, or misfortune, if injustice is done by the decision.

In such a case, if the person made no special arrangement to be notified within the sixty days, this alone is not legal negligence, such as, in law, makes him guilty of unreasonable neglect.

Injustice is done, within the meaning of Gen. St., c. 188, s. 7, when it appears that there are important questions at issue, which the petitioner, in good faith, desires and intends to try, and some evidence is offered tending to sustain the reasons of the appeal.

PETITION, under Gen. St., c. 188, s. 7, for leave to appeal from a decision of the judge of probate, allowing the final account of the defendant. Facts found by a referee. The petitioners are heirs at law of the testator. The account was allowed in this county, September, 1875. The executor gave the usual notices of the presentation of his account, which came to the knowledge of the petitioner, Charles D. Holton, and he was represented at the hearing by counsel.

Sophia W. Greene, the other petitioner, lived in the state of Maine, and had no notice, in fact, of the settlement, or of the decree within sixty days from the time it was made. She made no special arrangements to be informed.

The referee's report did not find, in terms, that injustice had or had not been done by the decision of the judge of probate, but stated facts that showed there were no important questions of law or fact at issue which the petitioners, in good faith, intended to try.

Parlcer, for the plaintiff.

Cushing, for the defendant.

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