

to be drawn from the evidence. *Martin v. Funk*, 75 N. Y. 134. In this case the depositor did not constitute herself a trustee. The nominal trust was a testamentary disposition of property, not made according to the statute of wills, and the fund remains a part of the depositor's estate. *Davis v. Ney*, 125 Mass. 590; *Gerrish v. N. B. Inst. for Savings*, 128 Mass. 159; *Taylor v. Bruscup*, 48 Md. 550; *Stone v. Bishop*, 4 Cliff. 593.

*Decree for the heirs of Mary A. Bemington.*

FOSTER and STANLEY, JJ., did not sit: the others concurred.

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SPOFFORD v. SMITH & a.

The filing of a demurrer with the answer on a separate paper does not differ, in legal effect, from insisting on special matter in the answer, as provided by Rule 10.

The validity of a will, duly proved and allowed in the probate court, cannot by a collateral proceeding be attacked on the ground that its execution was fraudulently proved.

BILL IN EQUITY, by the heir of a testator, to cancel the will, alleging that the testator was fraudulently induced to execute it; that upon the petition of Smith, one of the defendants and executor of the will, the plaintiff being a minor, the probate court appointed Currier, the other defendant, his guardian *ad litem*; that Currier was the plaintiff's trustee under the will; that Smith obtained the probate of the will in pretended solemn form, after notice by publication, Currier not attending, and no appeal being taken. The defendants answered, denying the material allegations of the bill, and demurred, assigning that the court had no jurisdiction. The answer and demurrer were filed at the same time on separate papers. Motion to dismiss the demurrer.

*Mugridge, Perkins, and Albin & Norris*, for the plaintiff.

*Greene and Hawthorne*, for the defendants. •

BINGHAM, J. In chancery the defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit therefrom as if he had pleaded the same or demurred to the bill. Rule 10. The answer may be amended by inserting the demurrer in it. The probate of the will raised the issue of fraud alleged in the bill. There is no allegation of insufficiency of notice or other reason why the probate court, in

appointing the guardian and allowing the will, did not have jurisdiction. A decree of the probate court upon matters within its jurisdiction cannot be impeached by a collateral proceeding. *Gordon v. Gordon*, 55 N. H. 399; *Lyme v. Allen*, 51 N. H. 242; *Railroad v. Railroad*, 57 N. H. 200; *Poplin v. Hawke*, 8 N. H. 124. When the answer is withdrawn, or amended by making the demurrer a part of it, the demurrer will be sustained.

*Case discharged.*

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

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SCHOOL-DISTRICT v. MORRILL & a.

An existing school-district, however organized, was legalized by Gen. St., c. 78, s. 3.

A school-district is entitled to its proportion of school-money, except the literary fund, although no school is kept.

Selectmen are liable in an action of debt, under Gen. St., c. 77, s. 6, for neglect to pay over on demand to the prudential committee the proportion of school-money belonging to a district, assessed and assigned for a previous year by a former board of selectmen.

DEBT, against the selectmen of Andover for school-money belonging to the plaintiffs, remaining unpaid, made up of a tax upon the polls and taxable estate in the town, the literary fund and the dog-tax, and assigned to the plaintiffs by a former board of selectmen for the years ending March, 1877, and March, 1878. Plea, *nil debet*. Facts found by a referee. During those years no school was kept, and in the former year there were only one or two scholars in the district. Since the summer of 1878 there have been ten or twelve scholars, and one term of school each year. Thompson, who acted as prudential committee during the years for which the school-money was assigned, lived on a farm in the adjoining town of Salisbury. This farm had been included in the plaintiff district about twenty years, under some arrangement made at some time between the selectmen of Andover and Salisbury, but whether the farm was ever legally annexed did not appear. There had been no change in the boundaries of the district since 1862. It was admitted, for the purpose of this case, that the money was demanded of the defendants by a duly appointed prudential committee before the commencement of the suit.