

McDERMOTT v. HAYES, *Adm'r.*

After verdict for an administrator, in a suit against him for a distributive share which he paid the plaintiff before distribution was decreed, the decree may be so modified by the probate court as to show the previous payment of the plaintiff's share, and judgment may then be rendered on the verdict without a new trial.

DEBT, for the plaintiff's distributive share of an estate. Subject to exception, the defendant proved that before the decree of distribution was made he paid the plaintiff more than her decreed share, and took her receipt in full. The payment was not charged in his account on which the decree was made, and was not recited in the decree. Verdict for the defendant.

Wm. Little, for the plaintiff.

The probate court is a court of record for all purposes. G. L., c. 189, s. 1. Its judgments are conclusive, and cannot be impeached collaterally except for fraud. *Tebbetts v. Tilton*, 24 N. H. 120; *Kimball v. Fisk*, 39 N. H. 110; *Morrison* Dig. 214, ss. 59, 60. Its decrees bind parties and privies like any other judgments. *Ham v. Ayers*, 22 N. H. 423; *Morgan v. Dodge*, 44 N. H. 257. The judgment of a court of competent jurisdiction, until reversed or set aside, is conclusive upon parties and privies. The decree of distribution upon which this suit is founded is a judgment of the probate court. It was rendered in full knowledge of the defendant. He had it made up. He knew all the facts in the case. It is conclusive upon him that the money was in his hands at the time the decree was rendered, and that he owed it to the plaintiff. The defendant says that he paid the plaintiff before the decree; but the decree is conclusive that he did not. One might as well, in a suit upon a judgment on a note, be permitted to prove that he had paid the note before the judgment, the judgment still remaining in full force. Here there is no set-off filed, if indeed there could be any in such an action. *Thorpe v. Wegefarth*, 56 Penn. St. 82; *Waite* Ac. and Def. 526.

Sulloway, Topliff, & O'Connor, for the defendant, cited *Faulkner v. Chandler*, 11 Ala. 725; *Spencer v. Vigneaux*, 20 Cal. 442; *Thayer v. Mowry*, 36 Me. 287; *Hollenbeck v. Stanberry*, 38 Iowa 327; *Shouse v. Newton*, 12 Ark. 367.

DOE, C. J. The defendant may apply to the probate court forthwith for a modification of the decree on due notice. *Warner Bank v. Clement*, 58 N. H. 533; *Ayer v. Messer*, 59 N. H. 279, 280. When the decree shows payment of the plaintiff's share, judgment

will be rendered on the verdict. *Boulo v. Valcour*, 58 N. H. 347; *Morrill v. Hovey*, 59 N. H. 107; *Boudreau v. Eastman*, 59 N. H. 467.

Case discharged.

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

MANCHESTER v. QUIMBY.

A city license granted to a party to place an obstruction in a street does not amount to a waiver of the latter's liability to the city, under Gen. Stats., c. 70, s. 7.

In such case, if the defendant placed an obstruction in the street which caused damage to another, and the city has been compelled to pay for the same, his liability to the city necessarily follows.

CASE. Facts agreed. This is an action to recover damages, paid by the plaintiffs, upon a judgment recovered by Charles H. Varney against the city of Manchester for injuries sustained by said Varney by reason of an incumbrance upon a public highway. The incumbrance was lumber placed in the highway by the defendant, who was seasonably notified in writing of said suit, and requested to defend it. Varney recovered judgment for damages and costs, \$3,224.99, which was paid by the city, as alleged in the writ.

Upon application of Quimby to the mayor and aldermen, a license was granted to him, May 12, 1876, "to encumber a portion of the corner of Hanover and Elm streets, opposite his building on said corner, while making repairs upon said premises, complying with the ordinances of said city relative to the same, and also complying with the following conditions, upon which this license is granted:

"First. He is at no time to encumber more than one third the width of either of said streets.

"Second. He is to take proper care that all portions of said streets so occupied shall be as free from obstruction as may be.

"Third. He shall keep and maintain lights through the night, that all obstructions may be well and readily seen.

"Fourth. The above-named licensed person shall be accountable for all damage that may occur on account of any obstructions of the aforesaid streets made or allowed by him under this license, the city in no case assuming any responsibility or liability by reason of granting said license.

"Fifth. This license is granted upon the further condition that no shade-trees shall be cut down or otherwise injured by said licensee, or on account of the aforesaid incumbrance."