

diate control; that which he was accustomed to treat and call his own. This is the natural and obvious meaning of the operative words in his will, their ordinary and popular signification; and he clearly uses them in that sense, and his intention, gathered from the whole will, must govern in its construction. *Blake v. Bunbury*, 1 Ves., Jr., 194, n. 4; 1 Red. Wills, p. 432, pl. 16, 17; p. 436, pl. 24; p. 438, pl. 2, et seq.

DOE, C. J. The interpretation of a will is the ascertainment of the testator's intention; and the question of intention is ordinarily determined as a question of fact by the natural weight of competent evidence. *Rice v. Society*, 56 N. H. 191, 197, 198, 203; *Brown v. Bartlett*, 58 N. H. 511. In this case there is no statute that defeats the testator's intention; and a legal rule, having that effect, cannot be invented by the court, and cannot be enforced unless shown to have been duly enacted by a body authorized to make law. There is a balance in the trustee's hands, which has been held and used, according to the order of the will, during the life of the testator's widow; but the will does not direct how it shall be disposed of after her death. We think the will proves the fact that the testator intended no legal or equitable title of this balance should vest in any other person than the trustee and widow during her life. The balance goes to Lucy A. Lancaster, who was the testator's next of kin at the decease of the widow.

*Decree accordingly.*

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

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OSGOOD v. JONES.

The court decline to act as judges of the election of a county treasurer before ascertaining and declaring the result of the returns.

MOTION, for a recount of the votes cast for treasurer of this county at the last election, and for a trial of the question whether the plaintiff or the defendant was elected. The motion was made by the plaintiff at this term, before the result of the town-clerks' returns was declared.

*Chandler and Mugridge*, for the plaintiff.

*Chase & Streeter*, for the defendant.

DOE, C. J. The votes cast in a town-meeting are counted and publicly declared by the moderator. G. L., c. 31, s. 9. And as he can count and declare only the votes of his own town, the result of the moderators' counts of the votes cast for county officers in all the towns of a county is necessarily found by some tribunal from some evidence of the moderators' official declarations. The statute makes it the duty of the court to ascertain this result from the town-clerks' returns. G. L., c. 24, ss. 3, 4, 5. This statute requires us to find and declare, not who are elected, but who appear by the returns to be elected. It imposes the ordinary duty of a canvassing board, and not the duty of judges of the election. By this and other statutory provisions, both duties are assigned to the same persons; but the law does not require the latter duty to be performed before the former. And, without examining the question of our power to grant the plaintiff's motion at this time, we deem it inexpedient to make the investigation asked by him before the declaration of the result of the returns. At some time after that declaration the plaintiff will have an adequate remedy for any error that can be corrected, in a proceeding requiring the performance of the duty of judges of the election. Until the returns are combined and declared, we decline to go beyond the duty of a canvassing board.

*Motion denied.*

All concurred.

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NELSON, *Ex'x*, v. HALL & Wife.

In a suit in equity brought to foreclose a mortgage of land given to secure the purchase-money, the fact that, without the fault of either party, but through a material mistake of the defendants as to the location of a boundary line, the plaintiff conveyed less land to the defendants than the latter agreed to buy, is not a defence of a partial failure of consideration, but may be a ground of relief in equity.

If the defendants, on a bill brought by themselves, would be entitled to such relief, it may be given upon proper proceedings in the equity suit for foreclosure.

In such a case, upon a reconveyance and restoration of the plaintiff to his former position, after the commencement of the suit, and in a reasonable time after the land was conveyed to the defendants, justice may be done by a decree based on the state of things existing at the time of the decree.

BILL IN EQUITY, to foreclose a mortgage of a farm. Facts found by a referee. August 6, 1877, about a week before his