

v. *Morey*, 1 N. H. 347; *Shepherd v. Temple*, 3 N. H. 455; *Tillotson v. Grapes*, 4 N. H. 444; *Leach v. Tilton*, 40 N. H. 473; *Paget v. Wilkinson*, note to 2 East 449, cited 41 N. H. 102; *Canaan v. Derush*, 47 N. H. 212; *Bascom v. Manning*, 52 N. H. 132; *Blodgett v. The Berlin Mills Co.*, 52 N. H. 215.

*Albin*, for the plaintiff. This is the case of an attempt to vary or contradict the terms of a written agreement or contract. The contract made between the parties states just what the agreement was with reference to the machine in question. Instead of providing that it should not be an infringement of the "patented machine owned by one Corey," it did provide that the defendants were to take their chances as to its being patentable at all. The case finds that "in connection with the two last machines [one of which was the machine in dispute] were included all drawings and patterns and models of all kinds, with the right to a patent therefor if the same or any part of them were patentable," thereby implying upon the face of the contract itself a doubt as to whether either of the machines was patentable.

CLARK, J. It was an incumbrance on the right to use the machine, constituting a defect in the title, if it was an infringement of Corey's patent. In the sale of chattels, there is ordinarily an implied warranty of title. The evidence offered by the defendants was competent as tending to show a defective title, and a breach of such implied warranty. It was also competent as tending to show an express warranty. The clause in the bill of sale relating to the patentable character of the machine, expressed a contract in relation to the right to obtain a patent, and not in relation to the right to use the machine; and the evidence did not contradict or vary the terms of the written contract. *Hersom v. Henderson*, 21 N. H. 224.

*Case discharged.*

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

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COCHRAN, *Adm'r*, v. LANGMAID.

When the adverse party is an executor or administrator, the surviving party will not ordinarily be allowed to testify to matters to which the deceased could testify if alive.

ASSUMPSIT, to recover certain notes. Plea, the general issue, with a set-off. Facts found by a referee. The defendant offered his own testimony. The plaintiff, who is an administrator, did not

elect to testify, and, it not appearing that injustice would be done without the testimony of the defendant, he was not allowed to testify, and the defendant excepted. All the matters to which he proposed to testify related to transactions occurring in the lifetime of the deceased, and it did not appear that the deceased could not testify to the same matters, if alive.

*John Y. Mugridge*, for the defendant.

*Sanborn & Clark, Haselton, and Copeland*, for the plaintiff.

CLARK, J. A party may be allowed to testify, although his adversary is an executor or administrator, when it clearly appears to the court that injustice may be done without his testimony. G. L., c. 228, s. 17. But the injustice must appear from other evidence than the testimony of the party himself. *Harvey v. Hilliard*, 47 N. H. 551; *Fosgate v. Thompson*, 54 N. H. 455. In determining whether a party should be admitted to testify when the adverse party is an executor or administrator, in ordinary cases the safe guide and decisive test are found in the inquiry whether the deceased, if alive, could testify to the same matters. *Chandler v. Davis*, 47 N. H. 462; *Hoit v. Russell*, 56 N. H. 559. And it is said to be a proper exercise of discretion to allow the living party to testify to relevant facts of which the deceased could have had no knowledge,—as, to matters arising after the death of the deceased, or to facts not known to the deceased but known to a third person who might be a witness. *Brown v. Brown*, 48 N. H. 90; *Chandler v. Davis, supra*. An application of these tests to the present case does not show that there was error in the ruling of the referee excluding the testimony of the defendant.

*Exceptions overruled.*

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

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TENNEY v. KNOWLTON & a.

When an unauthorized extension of the time of payment is relied on in defence of an action against the sureties on a promissory note, the burden of proof is on the plaintiff throughout the trial to satisfy the jury that such note is a valid and subsisting obligation.

ASSUMPSIT, on a joint and several note, payable on demand, and signed by the defendants and another. Plea, the general issue, with a brief statement that the defendants were sureties, and that the