

the set-off of the land upon an execution in his favor against the husband; and the defendant claims that the conveyance to the plaintiff was voluntary and in fraud of her husband's creditors. The jury were instructed that the plaintiff had a homestead right in the land of the value of \$500, and if they should find the value of the land not to be greater than that sum, the question of fraud in the conveyance would be immaterial, and need not be considered, and the plaintiff could recover. The defendant moved to set the verdict aside, and for a new trial, on the ground of error in the instructions.

*J. C. Caverly* (with whom was *T. J. Smith*), for the defendant.

*Copeland & Edgerly*, for the plaintiff.

ALLEN, J. The plaintiff cannot recover in this action on any claim of a homestead right in the land, the homestead not having been assigned; nor in this proceeding could the jury rightfully determine the value of the land. *Tidd v. Quinn*, 52 N. H. 341, 343.

If the plaintiff can recover at all, it must be by virtue of her title derived from her husband's conveyance in fee simple; and if that conveyance was in fraud of his creditors, her title fails without regard to the value of the land, and notwithstanding her homestead right. If the conveyance was not fraudulent, the plaintiff's right of recovery would be clear. If fraudulent, though the question would then arise, whether, in spite of that fact, she would be entitled to a homestead on appropriate proceedings to assign and set it out, she could not recover in this action. The question of fraud in the conveyance was material upon the trial, and the instructions upon the subject were erroneous. The verdict is set aside, and a

*New trial granted.*

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

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STATE v. CLOUTMAN.

Money drawn as a prize in a lottery may be the subject of embezzlement.

INDICTMENT, for the embezzlement of \$1,000, the property of S., who held a ticket in the Kentucky State Lottery, which drew a prize of \$1,000 payable in New York, and employed the defendant to collect the money, giving him the ticket and a written order for that purpose. He went to New York, collected the money, and,

though requested, has never paid nor accounted for it to S. The defendant claimed that the state showed no title in S. to the money, and moved for a verdict on that ground. Motion denied, and the defendant excepted. Verdict, guilty.

*G. E. Cochrane* and *S. M. Wheeler*, for the defendant.

*W. R. Burleigh*, solicitor, for the state.

CLARK, J. Illegality in the acquisition of property does not render it incapable of being the subject of embezzlement or larceny. Goods stolen from a thief who has stolen them from the owner, may be charged in the indictment as the goods either of the thief or of the true owner. 2 Bish. Cr. Law, s. 801. Under this indictment it was sufficient proof of the ownership of the money which the defendant is charged with having embezzled, that it came into the possession of the defendant lawfully, as the agent of S., and that it was the property of S. when the defendant received it. It was immaterial how the title of S. was acquired. *Com. v. Rourke*, 10 Cush. 397; *Com. v. Coffee*, 9 Gray 139; *Galligan v. Fannan*, 7 Allen 255; *Booraem v. Crane*, 103 Mass. 522.

*Exceptions overruled.*

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

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#### HALL v. SMITH.

Those entitled in remainder to a legacy given to the testator's wife for life, upon her waiver of the provisions of the will, take immediately.

The entire legacy given to a class is taken by the individuals of the class who survive the testator.

A legacy to pay the funeral expenses of a testator's wife will lapse upon her waiver of the provisions of the will; so will a legacy to pay the funeral expenses of one who dies in the testator's lifetime.

A will and codicil are to be construed together as one instrument.

When the assets are insufficient to satisfy all the bequests, the deficiency must be borne ratably by the legacies which are not specific.

BILL IN EQUITY, for instructions to an executor. *W. H. Smith*, deceased, by his will, gave,—

*Third.* To his executor, in trust, \$4,000, the income to be paid to his wife for life, then to his three sons, Charles W., Winthrop, and Albert W., for their lives and the life of the survivor, then the \$4,000 to his legal heirs then living.

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