

tunities for hearing, their prejudices for or against the parties, the lapse of time since the conversation occurred, and a variety of other circumstances. Emphasis thrown upon the wrong word might convey a meaning different from that originally intended. Often the manner in which a remark is made, and the conduct and appearance of the party, may have much to do in producing the understanding that was received, much of which it is difficult and sometimes impossible for a witness to describe.

It was a vital question whether the defendant understood or had a right to understand, from what was said and done, that the request for a certificate was waived or withdrawn. He might have received his understanding in part from the conduct of the officer, and in part from what was said between them and from the way it was said. To confine the witness to a mere narration of the language used, if he were able to recall it, might give the jury an imperfect and erroneous idea of the actual understanding of the parties. The request for a certificate might be waived expressly, or by a mutual understanding that it was waived. If the defendant might reasonably understand, from all that was said by Holt and from his conduct, that he had obtained all the information he desired or which a certificate would give him, he might and probably would conclude that Holt waived his request for a certificate; and Holt, by suffering him to receive and act upon such an understanding, would be estopped to assert the contrary. It was a question of mutual understanding. Such evidence has been so commonly received that the question of its admissibility can hardly be said to be an open one.

Case discharged.

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

STEARNS & a. v. HINSDALE & a.

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Under c. 67, Gen. Laws, authorizing towns in this state situate on Connecticut river to contract with contiguous towns in Vermont as to the construction and maintenance of highways across that river, the authority to contract is vested in such towns exclusively, and is to be exercised or not at their option

A report of county commissioners, refusing to lay out a highway across that river, will not be recommitted by the court because at the hearing evidence of a proposal made by a contiguous town in Vermont to defray a portion of the expense of building and maintaining the proposed highway was rejected.

PETITION, for a new highway in Hinsdale over the bridge crossing the Connecticut river to Brattleborough, Vt. The petition was sent to the county commissioners. Before the hearing the town of Chesterfield was made a party defendant. The commissioners made report that the cost of making the proposed highway would be excessively burdensome to the defendants, and that the public exigency did not justify the imposition upon them of so great a burden. At the hearing the petitioners offered to show that Brattleborough proposed by its selectmen to bind itself to pay a part of the cost of building the highway, and to contribute towards the expense of supporting it, and also offered in evidence a record of the action of that town relating thereto; but the commissioners excluded the evidence on the ground that they could not legally consider such offer, and the plaintiffs excepted. The commissioners filed with their report a supplementary statement that the highway ought to be laid out provided Brattleborough could be legally bound to pay its just proportion of the expense of building and maintaining it.

On the return of the report to the court "the petitioners moved that it be recommitted, with instructions (1) that the town of Brattleborough, by a legal vote, can, through its selectmen, offer to the town of Hinsdale a legal obligation to perform what it has offered, which the commissioners may consider; (2) that a good and sufficient obligation of the town of Brattleborough for the benefit of the town of Hinsdale would be a sufficient act under the law to warrant the commissioners in considering the offer; (3) that Hinsdale cannot resist the prayer of the petitioners by refusing to accept a proper and sufficient obligation tendered by Brattleborough, if the commissioners should be of the opinion that Hinsdale should accept it and the road be laid; and (4) that the court give to the commissioners such instructions as the case warrants."

D. H. Woodward, for the plaintiffs.

Lane & Dole and Batchelder & Faulkner, for the defendants.

BLODGETT, J. By ss. 11 and 12, c. 67, Gen. Laws, any town in this state, situate on Connecticut river, is empowered at any legal meeting to authorize the selectmen thereof to unite with the selectmen or other proper officer of any contiguous town in Vermont, and contract with them for the purchase of any real estate, or the privilege, easement, or franchise of any bridge or ferry corporation, if in their opinion the public good requires a public highway to be laid out over said property, and also to contract and agree as to the proportion of expense to be borne by each town in such purchase, and in the construction and maintenance of a highway over said river, including also the proportion which each town

shall contribute towards the payment of damages to third persons in the use of such highway, subject, however, to the approval of such towns.

The effect of these provisions is to apply an essentially different principle in the case of proposed highways between this state and Vermont than obtains in the case of highways generally, which can legally be established only when required by the public convenience and necessity and through the exercise of the right of eminent domain, whereas in highways across the Connecticut river the public welfare is not made a controlling consideration, but the question of convenience and necessity is made the subject-matter of contract to be agreed upon by the parties; and neither directly nor by implication is any power of revision conferred upon the county commissioners or the court. On the contrary, the towns to be connected have full power to act as they may think best, and are made the sole judges of what their interests require; and therefore, while in highway hearings commissioners have exclusive jurisdiction as to the admission and rejection of evidence (G. L., c. 69, s. 8), they have no power to compel the defendants to enter into a contract tendered by Brattleborough in respect to the proposed highway. The authority to make such contract is vested absolutely in the defendants, and they cannot be divested of it except by the legislature. And as the commissioners could legally lay out the highway only on the ground that it was required for the public accommodation, bearing in mind the burden thereby to be imposed on the defendants, no error of law is discovered in their conclusion that the public exigency does not require the imposition of so great a burden upon them.

All the motions are denied (see *Freeman v. Plainfield*, 52 N. H. 146, 147), and the defendants are entitled to

Judgment on the report.

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

SULLIVAN.

KELLY v. DUFF & *ux.*

One who pays the amount of a mortgage debt to the mortgagee, claiming a right to redeem by virtue of his supposed legal title derived from a levy of an execution on the land in his favor, may thereby become the equitable assignee of the mortgage.

WRIT OF ENTRY. Plea, *nil disseizin*. Facts found by the court. March 18, 1878, the plaintiff began a levy on the home-