

Fling & Chase, for the defendants.

Barnard & Barnard and *K. E. Dearborn*, for the plaintiff.

ALLEN, J. There was no evidence of an open, visible change of possession of the property; and in a sale of chattels, retention of possession by the vendor, unless satisfactorily explained, is conclusive evidence of a secret trust and of fraud which defeats the sale as against the vendor's creditors. *Lang v. Stockwell*, 55 N. H. 561; *Cutting v. Jackson*, 56 N. H. 253; *Plaisted v. Holmes*, 58 N. H. 294; *Sumner v. Dalton*, 58 N. H. 295; *Parker v. Marvell*, 60 N. H. 30. In the evidence offered to explain the want of a change of possession, and excluded as affording no satisfactory explanation, there was nothing tending to show such a publicity in the sale as would naturally give it notoriety. *Cutting v. Jackson*, *supra*, 255. The exceptions are overruled, and there is

Judgment on the verdict.

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

WELLS v. EASTMAN.

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The opinion of a witness on the question of negligence in setting fire to brush in a time of high wind, founded upon his knowledge of the situation of the land and brush and his observation of the wind, and upon the same question in the management of the fire founded upon the acts and omissions of the defendant at the time, is competent evidence.

CASE, for negligence in setting fire to brush on the defendant's land in a time of high wind blowing towards the plaintiff's land, and so carelessly managing the fire that it escaped to the plaintiff's land and burned his property. On trial before a referee, subject to the defendant's exception, the following inquiries made of different witnesses were excluded:

"What, if anything, did you see, about the time this fire was set, in respect to the wind, situation of the land, brush, or its condition, which rendered it improper to set the fire that day?"

"What, if anything, did the defendant and his men omit to do to keep the fire from the plaintiff's land?"

The defendant moved to set aside the referee's report made in favor of the plaintiff.

Philip Carpenter, for the defendant.

G. F. Putnam, for the plaintiff.

ALLEN, J. The question of the defendant's negligence was one to be determined from all the circumstances of the case, including the defendant's conduct and the situation of the objects in connection with which the negligence is alleged. One question was, the suitability of the time selected for setting fire to the brush. And in determining this, the velocity and direction of the wind, the relative situation of the land of both parties, the quantity, condition, and situation of the brush, and its distance from the plaintiff's land, were material facts. The opinion of a witness who had observed these facts, upon the question of suitability of time in setting the fire, might be more useful and valuable than a description of the facts would be to one who had not observed them, and was admissible in evidence. *Barnes v. Heath*, 58 N. H. 196. So, too, upon the question of the defendant's want of reasonable care in the management of the fire, the opinion of a witness derived from observation of his conduct, acts, and omissions, at the time, is competent.

Exceptions sustained.

BLODGETT and CARPENTER, JJ., did not sit: the others concurred.

CLIFFORD v. TYMAN.

When two persons are travelling in the same direction upon a highway, with their respective carriages, neither is compelled to travel behind the other, and neither has the exclusive right to precede the other. "The law of the road" requiring travellers who meet to turn to the right does not apply in such a case. The rear traveller may pass to the front when he can do so in safety, by turning to the right or left, using ordinary care and prudence to do no damage to the other.

If a traveller under such circumstances is damaged by the attempt of the other to pass to the front, and through the fault of the other, he may recover therefor if his own fault did not contribute to the injury.

TRESPASS, for injuries to the plaintiff's horse and wagon. Facts found by a referee.

The defendant was riding on a highway, in Bristol, in a wagon drawn by a gentle horse of ordinary speed, which she was driving slowly. The plaintiff's wife, riding in a wagon drawn by a faster horse, drove up behind her. They travelled in this way until they came to a place in the highway where there were two tracks for carriages. The defendant took the left hand track. The plaintiff's wife was desirous of getting ahead of the defendant, and, without requesting the privilege of passing, she undertook to drive