

granted or reserved without limit of use, may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted. See, also, *Johnson v. Kinnicutt*, 2 Cush. 153; *Holt v. Sargent*, 15 Gray 97, 102; *Sargent v. Hubbard*, 102 Mass. 380. But if, when a way is expressly granted in a deed, with no limit as to its use, it is presumed or found that a general way was intended, it may be difficult to explain why, when it is found to exist by implication, it should on the same evidence be held to be a limited or special way. In both cases its existence is a matter of intention proved by different evidentiary facts, and its extent, or the extent of its use, is also a matter of intention, but is founded on the same evidence. Having the same evidence in its support in both cases, the fact of intention must be the same in both.

As there is no evidence in this case showing that when the way was reserved the parties intended to limit its use by the uses then made of the rear lot, the refusal of the court to rule that the defendants were entitled to use the way for the accomplishment of all lawful purposes to which their land was adapted was error.

Verdict set aside.

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

PICKERING v. FRINK.

On a trial by jury of a cause which has been heard by an auditor, the defendant cannot deprive the plaintiff of the benefit of the auditor's report as evidence by confessing a part of the plaintiff's claim.

An unqualified admission of a debt which the party is liable and willing to pay has the force and effect of a new promise, and if made within six years removes the bar of the statute of limitations in assumpsit, and it is immaterial whether the new promise is made before or after the right of action is barred by the statute.

ASSUMPSIT, to recover some two hundred items of account, and also four promissory notes, dated, respectively, October 1, 1869, March 11, 1870, March 11, 1872, and January 3, 1873. Writ dated June 23, 1879. The defendant pleaded the general issue, with set-off, as to the account, and payment and statute of limitations as to the notes. The cause was sent to an auditor, who reported a balance of \$234.11 due the plaintiff on the account, and \$1,666.97 on the notes. Upon the filing of the report, the defendant elected to go to the jury, but before the trial was commenced

paid into court the said balance of \$234.11. The report of the auditor was offered in evidence by the plaintiff, and thereupon the defendant objected that only that part relating to the account could be read to the jury; but the court permitted the whole report to be read, and the defendant excepted. After part of the plaintiff's case had been put in, he accepted the confession, and received the \$234.11 in full of all matters of account; but the auditor's report was not withdrawn from the jury, and they were told that they might consider it as evidence as to the notes. The defendant requested the court "to instruct the jury that the plaintiff must show a promise to renew, or to pay the notes after they had become outlawed, or barred by the statute." The jury, on the contrary, were instructed that a promise made within six years next before the commencement of the plaintiff's suit would take the case out of the operation of the statute; and that to constitute such new promise there must be an express promise, or an acknowledgment expressed in such words and attended by such circumstances as to give to it the meaning, and therefore the force and effect, of a new promise. It must be an acknowledgment containing a direct and unqualified admission of a previous subsisting debt, which the party is liable and willing to pay;—to which the defendant excepted. The jury returned a verdict for the plaintiff, which the defendant moved to set aside. Motion denied, and bill of exceptions filed.

C. Page, for the plaintiff.

John Hatch and *J. W. Emery*, for the defendant.

CLARK, J. The objection that a case is not a proper one to be heard by an auditor should be made before the reference to the auditor, or it will be regarded as waived. *Perkins v. Scott*, 57 N. H. 55; *Boyd v. Webster*, 58 N. H. 336. The conceded fact that an investigation of accounts was required as to a portion of the case shows that the action was properly committed to an auditor, and it was his duty to hear, determine, and report upon the whole case. When an action is referred to an auditor, his authority is not limited to an examination of accounts and vouchers merely, but he may consider all matters involved in the issues submitted to him so far as may be necessary to a determination of the indebtedness between the parties. *Moulton v. Parker*, 35 N. H. 92; *Holmes v. Hunt*, 122 Mass. 505. As it does not appear that the report contained matters not proper to be reported, it was rightfully received in evidence on the trial before the jury. It is made evidence by statute, and the defendant could not deprive the plaintiff of the benefit of it by confessing a portion of his claim. *Fulford v. Converse*, 54 N. H. 543; *Doyle v. Doyle*, 56 N. H. 567; *Perkins v. Scott*, 57 N. H. 55.

An unqualified admission of a debt which the party is liable and willing to pay, has the force and effect of a new promise (*Holt v. Gage*, 60 N. H. 536), and if made within six years removes the bar of the statute of limitations in assumpsit, and it is immaterial whether the new promise is made before or after the right of action is barred by the statute. The new promise takes the case out of the operation of the statute, and it runs anew from that time. The decisions, in cases of partial payment of a debt within six years, are decisive of the question raised in this case, for the reason that it is only as evidence of a new promise that a part payment operates to remove the bar of the statute. *Whipple v. Stevens*, 22 N. H. 219; *Wheeler v. Robinson*, 50 N. H. 303; *Brown v. Latham*, 58 N. H. 30.

Exceptions overruled.

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

EASTERN RAILROAD IN N. H. v. PORTSMOUTH & a.

A railroad is not liable to contribute to the expense of maintaining gates at highway crossings upon the track of another railroad in which it has no right or interest except a right acquired under the statute to use the track at a fixed compensation.

PETITION, for the examination of the Vaughan Street railroad crossing in Portsmouth, under Gen. Laws, c. 161, s. 5.

J. S. H. Frink, for the plaintiffs.

W. R. Foster, for the city of Portsmouth.

W. Hackett & W. H. Hackett, for the Concord & Portsmouth Railroad.

J. W. Fellows, for the Concord Railroad.

CARPENTER, J. The plaintiffs have three tracks at the crossing; the Concord Railroad have none. Under the act of June 25, 1859 (Laws 1859, c. 2284), the Concord & Portsmouth Railroad acquired "the right with their cars and engines to enter upon and use" a portion of the plaintiffs' tracks, including the tracks at the point in question, subject to the provisions of the acts of July 10, 1855, and July 12, 1856 (Laws 1855, c. 1666, Laws 1856, c. 1847), under which the compensation to be paid by the Concord & Portsmouth Railroad to the plaintiffs for the use of that part of