

their railroad was fixed at five cents for every ton of merchandise transported over it. The Concord Railroad have succeeded to all the rights of the Concord & Portsmouth Railroad. The court held that the Concord Railroad were not liable to contribute to the expense of gates at the crossing, and the plaintiffs excepted.

“Any town . . . may by vote require the proprietors of any railroad to secure the crossing of any highway by said railroad, by a bridge, or a pass under said way, or by gates on both sides of said railroad.” Gen. Laws, c. 171, s. 3.

The Concord Railroad are neither the owners nor the lessees of the railroad tracks in question. They are under no obligation, and have no power, to maintain them. Their right to use them is a statutory easement. They are not “proprietors” of the railroad at the crossing, as that term is defined by the statute, Gen. Laws, c. 159, s. 1. The obligation of the plaintiffs to build bridges over, make passes under, or to maintain gates at highway crossings, is a matter proper to be considered in fixing the compensation for the use of their track. If the present compensation will be insufficient in case the plaintiffs are required to maintain gates at this crossing, it may, upon proper proceedings under the statute, be increased. G. L., c. 164; *Railroad v. Railroad*, 47 N. H. 108.

Exceptions overruled.

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

STRAFFORD.

COCHECO AQUEDUCT ASSOCIATION v. BOSTON & MAINE R. R.

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The form of action may be changed by amendment when justice requires it to be done; and the question of justice, so far as it is a question of fact, is determined at the trial term.

ASSUMPSIT, reported 59 N. H. 312. The plaintiffs moved to amend the declaration by adding a count in case.

Marston & Eastman (with whom was *S. M. Wheeler*), for the plaintiffs. If the whole wrong had been a violation of a contract within the statute of frauds, the statute would be a defence in any form of action. *Vasse v. Smith*, 6 Cranch 226. But here was another wrong. 1 Ch. Pl. 135; *Govett v. Radnidge*, 3 East 62; *Coggs v. Bernard*, 2 Ld. Ray. 909.

A. R. Hatch and *J. Hatch*, for the defendants. It is said that equity will enforce certain verbal contracts, notwithstanding the statute. But “the fraud against which equity will relieve is not

the mere moral wrong of repudiating a contract actually entered into," but not in writing. *Browne St. Frauds*, ss. 437, 439; 2 *Sto. Eq. Jur.*, ss. 768, 757; *Montacute v. Maxwell*, 1 P. Wms. 618; *Whitchurch v. Bevis*, 2 *Brown Ch.* 567, 569 n.

G. C. Yeaton, for the defendants. The plaintiffs, by varying the form of their action, cannot alter the intrinsic nature of the case. *Add. Torts* 726; *Ross v. Terry*, 63 N. Y. 614; *Nestel v. Lightstone*, 77 N. Y. 96; *Sparman v. Keim*, 83 N. Y. 245; *Wright v. Geer*, 6 Vt. 151; *Vaill v. Strong*, 10 Vt. 457; *Mann v. Birchard*, 40 Vt. 326; *McDermott v. M. Co.*, 38 N. J. Law 53; *Martin v. Hand*, 11 R. I. 306; *Ill. C. R. R. v. Phelps*, 4 *Bradw.* 238; *Und. Torts* 102.

DOE, C. J. The amendment may be allowed if justice requires it (*Merrill v. Perkins*, 59 N. H. 343, *Elsner v. Hughes*, 60 N. H. 469); and the question of justice, so far as it is a question of fact, is determinable at the trial term. *Garvin v. Legery*, 61 N. H. 153. It does not appear that an amendment will be useful. Whatever the form of action, the question will arise at a new trial whether there is evidence of any other wrong than a breach of contract on which no action can be maintained.

Case discharged.

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

SHERRY v. ROCHESTER.

In a notice given by a traveller to a town of an injury caused by a defective highway, the day of the injury is a sufficient description of the time, in the absence of evidence that a specification of the hour was necessary.

CASE, for injuries received by a traveller on a highway. Verdict for the plaintiff. In the notice given to the town (*G. L.*, c. 75, s. 7), the plaintiff stated that the injuries were received February 20, 1881. The defendants excepted to the ruling that the time was sufficiently stated.

Worcester & Gafney, for the defendants.

Copeland & Edgerly, for the plaintiff.

DOE, C. J. It is not found as a fact that a more specific statement of the time was necessary, and no error of law appears. *Donnelly v. Fall River*, 132 *Mass.* 299.

Judgment on the verdict.

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