

show a private right of way in order to maintain his actions. If the fence which obstructed the plaintiff's driveway and excluded him from the well was built by the defendants in the public highway, it was such an obstruction as constituted a nuisance, and inasmuch as the injury caused by it to the plaintiff was special and peculiar to him, and not such as was common to all persons using the highway, the plaintiff can maintain a private action for damages and for the abatement of the nuisance. *Brown v. Watson*, 47 Me. 161; *Brayton v. Fall River*, 113 Mass. 218.

The testimony of E. H. Smith, "that he asked permission of Chandler to take water from the well and did not ask permission of any one on the Morrison property;" of S. E. Marston, "that Chandler told him the well and driveway belonged to the place, and that his grandfather dug the well and owned it;" of D. G. York, "that Marston told him in 1876, when he bought the place of him, that he owned the well;" and of James H. Plaisted, "that Nathaniel Chandler told him, when getting water from the well, that his grandfather dug the well for the benefit of his blacksmith-shop and dwelling-house,"—was competent as tending to show the character of the use of the well by the plaintiff's grantors, and that it was such as to give notice that it was under a claim of right. *Bell v. Woodward*, 46 N. H. 315, 335. The testimony of S. B. Chandler, who had lived on the plaintiff's premises seventeen years prior to 1845, "that so far as he knew, the persons living on the Chandler place always claimed the right to the full, free, and uninterrupted use and enjoyment of the well," and that "there was always an open driveway, free and uninterrupted to the public," was not matter of opinion but a statement of material facts, and therefore it was competent. *Leach v. Bancroft*, 61 N. H. 411.

The objection to the maintenance of the bill in equity is obviated by the finding of the court in the action at law. The plaintiff's right being established in the action at law against all the defendants, a proper case is presented for the interference of a court of equity by injunction, for the protection of the plaintiff in the enjoyment of his rights.

*Exceptions overruled.*

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

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CARROLL.

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STATE v. TOWLE.

In an indictment upon a statute prohibiting the commission of "any act whereby any tree . . . shall be injured," an averment that the defendant did "girdle" a growing tree does not allege an injury with sufficient certainty.

INDICTMENT, charging that the defendant, "on the twenty-second day of August, 1881, at Effingham, in the county of Carroll aforesaid, with force and arms, did wilfully, maliciously, and unnecessarily girdle six elm trees then and there standing and growing for ornament and shade on the side of the street, near to the dwelling-house of Joseph L. Drake, situate in said Effingham, and there-afterwards, to wit, on the seventh day of December, 1881, did wilfully and maliciously cut down and destroy the trees aforesaid, contrary," etc.

The defendant moved to quash, because the indictment charges two offences, and on other grounds. On the plaintiffs' motion, the indictment was amended by striking out the charge of an offence committed in December.

*W. J. Copeland*, for the defendant.

*J. B. Nash*, solicitor, for the state.

DOE, C. J. "If any person shall wilfully, maliciously, wantonly, or unnecessarily commit any act whereby any tree placed or growing for ornament or use in any yard, street, square, or other place, . . . shall be injured, . . . he shall be punished." G. L., c. 281, s. 3. This provision is not violated unless a tree is injured. If the elms were dead when they were cut down in December, they might not have been injured by the mere cutting. There are cases in which the removal of a small quantity of bark from living fruit trees is regarded by some as good husbandry; and it is neither a matter of law, nor a matter of fact of which judicial notice can be taken, that the slightest possible girdling is injurious to elms in every condition and under all circumstances. A ring of their bark is often scraped off in a process of protecting them against the canker-worm. In ordinary speech, various degrees of abrasion are called girdling; and on the question of the sufficiency of the depth necessary to make an incision injurious. It is easy to use the language of the statute in drawing an indictment, and it is not easy to find a legal ground on which it can be held that a charge of girdling alleges an injury with the certainty required in criminal pleading. However probable it may be that girdled trees are damaged, it is better to adhere to the statutory description of the offence than to rely upon a degree of probability open to a possible doubt. Other objections, raised by the defendant's motion, need not be considered.

*Indictment quashed.*

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