

716; *Sumner v. Blaklee, supra*. The testator's careful use of language in the disposition of his household goods and other chattels, probably of much less value than the money, bank share, and notes, is strong evidence that he would not have left his intention as to this portion of his estate (of the value of more than \$5,000) to be inferred from such terms as "every other article of personal property in and about said homestead, or wherever found." No satisfactory reason appears why he should mention books, minerals, shells, and curiosities, which would pass under the general description used, and omit to mention the bank share, money, and notes.

The construction contended for by the residuary legatees is strengthened by the fact that legacies to the amount of \$1,700 are payable during the life of Mrs. Benton. If the construction contended for by her is correct, there is no estate undisposed of by the will from which those legacies, or the debts, expenses of administration, or funeral charges, can be paid during her life. Our conclusion is, that she does not take the bank share, money, or notes, under the third or fourth clauses of the will. This part of the estate goes to the residuary legatees upon the final settlement of the estate, after the death of Mrs. Benton, subject to the payment of the specific legacies, debts, &c. Under the third clause she takes only the household furniture, piano, books, minerals, shells, curiosities, and other chattels not otherwise disposed of by the will. She should join with her co-executor in returning an inventory of all the estate, except what she takes under the third clause.

Case discharged.

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

WEBSTER & a. v. BRIDGEWATER AND NEW HAMPTON.

It is ordinarily the right of petitioners for a highway, before a hearing of the petition, to withdraw upon payment of costs, and the petition may be amended by striking their names therefrom.

MOTION, by N. H. Weeks, and one hundred and eighty others, petitioners for a new highway in Bridgewater and New Hampton, for leave to withdraw, and to amend the petition by striking out their names on the payment of costs. The other petitioners, seventy-three in number, oppose the motion. After the filing and reference of the petition, the towns of Bridgewater and New Hampton made application to the commissioners for an apportionment of the

expense of any highway that might be established, upon Plymouth, Ashland, and Bristol. The petitioners making this motion nearly all reside in the three last named towns. There has been no hearing before the commissioners. The court allowed the motion, and the seventy-three petitioners who opposed it excepted.

Pike & Parsons and *Aldrich & Remick*, for the seventy-three petitioners who oppose the motion.

Fling & Chase, for the defendants.

Burleigh & Adams, for Plymouth and Ashland.

BLODGETT, J. The granting of the motion was not erroneous. The rule in this state is, that a plaintiff, before opening his case to the jury, may become nonsuit as a matter of right (*Farr v. Cate*, 58 N. H. 367); and the rule also applies to any other tribunal which is equivalent to a jury. *Fulford v. Converse*, 54 N. H. 543, 544. Such being its extent, it cannot be fairly held that the rule does not include highway petitions to the court, in which the petitioners stand in the light of joint plaintiffs (*Parker, J.*, in *Burnham v. Steele*, 8 N. H. 184), and the commissioners fill the ordinary place of the jury. And in principle, also, there is nothing to distinguish a petition for a highway from other petitions, or actions, in which several unite in a common object, for there is no legal ground for the position that the relation of highway petitioners to each other is different from that of co-plaintiffs generally.

In this view, it was the right of the dissatisfied majority of the petitioners, unless estopped by some act or agreement beyond what appears, to become nonsuit at any term of the court after the entry of the petition and before the commencement of its hearing by the commissioners, and thereby bar its further prosecution; and therefore it is not a meritorious cause of complaint by the minority that the majority were permitted to withdraw without affecting the petition, and on the payment of costs.

Whether the amendment was authorized by s. 17, c. 226, Gen. Laws, allowing the name of a plaintiff or a defendant to be struck out before the evidence is closed or the case submitted, on paying his costs to that time, is immaterial. Justice required that the majority of the petitioners should not longer be compelled to share the burden and expense of the litigation against their will; and this, of itself, was amply sufficient to authorize the amendment. *Stebbins v. Ins. Co.*, 59 N. H. 143.

Exceptions overruled.

ALLEN and BINGHAM, JJ., did not sit: the others concurred.