

[Sullivan, June, 1886.]

LADD v. BARTON.

64 613
Case 1
71 148

ASSUMPSIT, for \$100, money had and received. Facts found by the court.

G. R. Brown, for the plaintiff.

H. W. Parker and *L. W. Barton*, for the defendant.

DOE, C. J. The defendant obtained a pension for the plaintiff, and received \$10 from the government and \$100 from the plaintiff. Both parties understood that it would be unlawful for the defendant to receive for his services in a pension case a greater sum than \$10 (U. S. Rev. St., ss. 4785, 4786, 5485; Act of June 20, 1878), and that the sum of \$100, though paid voluntarily, without demand or undue influence, was paid and received as compensation for the defendant's services in the plaintiff's case. The amount of the fee is fixed for the protection of the pensioner, as the rate of interest is fixed by the usury law for the protection of the borrower; and the parties were not in equal fault. *State v. Rand*, 51 N. H. 361. The right of the pensioners to recover in such cases as this is necessary for the protection the statute was intended to give them.

Judgment for the plaintiff

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

[Merrimack, December, 1886.]

GAGE v. BARNES.

CASE, for diverting the water of Pond brook from the plaintiff's mill, against the provisions of a deed from the defendant to the plaintiff. Report of a referee for the plaintiff.

Albin & Martin, for the plaintiff.

C. P. Sanborn, for the defendant.

BINGHAM, J. The claim of the defendant is, that his deed only gave the right to erect and maintain a dam and penstock on his land, and that in other respects the right of upper and lower riparian proprietors was created by it. An examination of the deed does not sustain this claim. The deed conveyed the right to take the entire water from the dam, and carry it over the defendant's

land to the mill-site below, to be there used for mill purposes, except a single use in a certain time, which by reference is fully defined in the reserving clause of the deed. The reference in the exception to the language in the reservation, stating when and to what extent the defendant might use the water excepted, made it a part of the exception; and it has the same effect as if it had been stated in full in the part of the deed describing the right and uses conveyed. Such was the intention of the parties, and the deed conveyed a water-right which the defendant has infringed.

There was no dispute as to the location of the dam described in the deed. The evidence offered, to prove a different location from the one described as having been agreed upon prior to the execution of the deed and not referred to in it, was properly rejected. *Wells v. Company*, 47 N. H. 236.

Judgment for the plaintiff.

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

[Cheshire, December, 1886.]

COUILLARD *v.* SEAVER.

PETITION for a new trial. The defendant demurred; the court sustained the demurrer, and the plaintiff excepted.

H. Blake and *D. H. Woodward*, for the plaintiff.

H. W. Brigham and *Batchelder & Faulkner*, for the defendant.

SMITH, J. The original action of trespass, brought by the plaintiff, was tried by the court, and judgment was rendered for the defendant. The following are the facts stated in the petition: The matter in controversy was a boundary line; before the trial the parties agreed to try the case on their deeds; and for that reason the plaintiff summoned no witnesses. At the trial the defendant introduced evidence of an agreed boundary. The plaintiff, being surprised, and not prepared to meet the defendant's evidence, moved for a continuance. His motion was denied, and the trial was postponed until the afternoon of the next day, when his witnesses testified. His counsel had but a short time for examining his witnesses before calling them to the stand, and is convinced that one of them did not testify as fully as he should have done. By the application of the 50th rule of court, the plaintiff was allowed to introduce rebutting evidence only. These facts do not show that "justice has not been done through accident, mistake, or misfortune, and that a further hearing would be equitable." G. L., c. 234, s. 1. If justice required that counsel should have