

or by the instrument under which the question arises. Cook Stock and Stockholders, s. 558; Per. Tr., s. 556; *Foote, app't*, 22 Pick. 299; *Granger v. Bassett*, 98 Mass. 462; *Dexter v. Phillips*, 121 Mass. 178. Annuities intended for the daily support of the beneficiary, as in the case of a child, or the separate maintenance of a married woman, or an annuity given to a widow in lieu of dower, and interest money accruing from day to day, are not within the rule. The difficulty of making an apportionment of dividends is one reason for the rule. It would be impracticable in many cases, and perhaps impossible in some instances, to determine the amount of net earnings at a given time with any degree of accuracy, and hence the earnings and acquisitions are treated as mere incidents to the capital stock, and undistinguishable and inseparable from it till set apart by the declaration of a dividend, when they become income as distinguished from capital. The undeclared dividends upon the stocks of the Burns estate accruing previous to the death of Joseph Madigan, go to the remaindermen as a part of the *corpus* of the estate.

*Case discharged.*

CARPENTER, J., did not sit: DOE, C. J., absent: the others concurred.

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STATE v. PALMER & a.

When none of the physical facts bearing upon the question of domicile are in dispute, the mental fact of intention is the sole issue for the jury to determine.

INDICTMENT of the defendants, as supervisors of the town of Barrington, for refusing to place upon the check-list in March last the name of Dr. John S. Daniels.

Dr. Daniels is thirty-seven years old and unmarried. He was born in Barrington, graduated at a medical college in 1875, and practised his profession in Barrington until May, 1884. Since his father's death in 1883 he has owned the homestead place, subject to a life estate in his mother. Except when at school or attending lectures he always lived on the homestead with his father until his death, and afterwards with his mother until May, 1884, when he opened an office in Rochester, where he has ever since practised. He has boarded at a hotel in Rochester, and, unless prevented by the weather or by illness, has generally spent Saturday nights and Sundays at the homestead with his mother, who has done his washing and mending. He has always been taxed and paid taxes in Barrington, and has voted there at every election until March last.

The foregoing facts were not in controversy, and the court instructed the jury that "the sole question is, What was Dr. Daniels's intention? Did he or not intend to abandon his previous home in Barrington and make his home in Rochester?" Dr. Daniels testified that he never intended to abandon his home in Barrington, or to acquire a home in Rochester; and the court told the jury that if they believed his testimony his legal domicil was in Barrington. To both these instructions the defendants excepted.

*J. G. Hall* and *J. S. H. Frink*, for the defendants.

*J. Kivel*, solicitor, for the state.

BLODGETT, J. The facts involved in the question of domicil were either physical or mental. None of the physical facts bearing upon the question being in controversy, the mental fact of intention was necessarily the sole issue for the jury to determine; and if they should believe Dr. Daniels's testimony, that he never intended to abandon his home in Barrington, or to acquire a home in Rochester, his legal domicil would of course be in Barrington, and entitle him to vote there.

The instructions complained of were legally correct.

*Exceptions overruled.*

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

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MARTIN v. SWANTON.

The last clause of section 16, chapter 202 of the General Laws, relating to a husband's rights in the real estate of his deceased wife, is not repealed by chapter 37 of the acts of 1879.

PETITION FOR PARTITION. Lewis A. Linscott and Gertrude Linscott married in 1870. No child was born to them. Mrs. Linscott died intestate in 1885, seized in fee of the land of which partition is sought. She left surviving her no child, nor the issue of any child. Mr. Linscott died in 1887. Before 1877, and for more than three years prior to the death of his wife, Mr. Linscott willingly abandoned and absented himself from her, failed to support and maintain her, and was not heard from by her in consequence of his own neglect. The plaintiff is the heir at law of Mr. Linscott. The defendant has the title of the heirs at law of Mrs. Linscott.

*W. S. Pierce*, for the plaintiff.

*F. B. Osgood*, for the defendant.