

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16, chapter 202 of the General Laws, relating to a husband's rights in the real estate of his deceased wife, is not repealed by chapter 37 of the acts of 1879.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

CARPENTER, J. "The husband of any person deceased, holding property in her own right, shall be entitled to his estate by the curtesy in all lands and tenements owned by her, when he would be entitled to hold as tenant by the curtesy at common law." G. L., c. 202, s. 14.

"The husband of any person deceased, testate or intestate, leaving any child by him, or the issue of any child by him, surviving her, by waiving the provisions of the will, if any, in his favor, and releasing his estate by the curtesy, shall be entitled, in fee, to one third part of all her real estate remaining after the payment of debts and expenses of administration; if she shall not leave surviving her any child by him, or the issue of any child by him, and he has no estate by the curtesy, he shall be entitled during life to one third part of all the real estate of which she died seized; but if she shall not leave surviving her any child, or the issue of any child, he shall be entitled, in fee, to one half of all her real estate remaining after payment of debts and expenses of administration." G. L., c. 202, s. 16. Section 15 provides that the husband shall be entitled to a portion of his deceased wife's personal property. Upon his wife's decease, Lewis Linscott took in fee one half the land in question under the last clause of section 16, unless it is repealed by the act of July 18, 1879, which provides that "the husband of any person deceased, in case she dies intestate, or if she dies testate and no provision is made for him in her will, shall not be entitled to her estate by the curtesy in any lands and tenement owned by said deceased, nor to any portion of her personal property remaining after the payment of her debts, if he shall have willingly abandoned and absented himself from the deceased, or wilfully neglected to support and maintain her, or shall not have been heard from, in consequence of his own neglect, for the term of three years next preceding her death." Laws of 1879, c. 37. The act relates solely to the husband's estate by the curtesy, and to his rights in the personal property of his deceased wife. It is not necessary to consider what effect, if any, it may have upon the first and second clauses of section 16. The plaintiff claims under the last clause, by which the husband is entitled to one half of all his deceased wife's real estate, after payment of debts and expenses of administration. This right is not affected by the enactment depriving him of his estate by the curtesy. Whether in addition to one half of the real estate in fee the husband might in the absence of the act of 1879 be entitled to his estate by the curtesy, is a question which does not arise. The legislature may have seen satisfactory reasons for taking away from the deserting husband his estate by the curtesy, and rights to personal property, without at the same time depriving him of the rights conferred by section 16 in the realty of his deceased wife. However this may be, the language of the act is explicit. The legislative will as expressed cannot be disregarded. *Weeks v.*

*Waldron*, 64 N. H. 150. The words "by the curtesy" cannot be stricken out and "any" substituted for "her," as the defendant in substance contends, making the act read "the husband . . . shall not be entitled to any estate in any lands," etc. To do so would be not construing but making the statute.

*Judgment for the plaintiff.*

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

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OSSIPEE v. CARROLL COUNTY.

A settlement acquired by a woman through marriage is not lost by a divorce in favor of her husband.

CLAIM for aid furnished Berthana Wallace, a pauper. Facts agreed.

In 1858 Berthana Wallace, then seventeen years of age, was married to Samuel Wallace, who was then nineteen years of age. Each had a settlement in Ossipee at the time of their marriage. In 1880 they were divorced, upon a libel filed by the husband. Their settlement remained in Ossipee up to the time of the divorce, and the settlement of Samuel W. remained in Ossipee up to the time of his death, September, 1888. Mrs. Wallace acquired no new settlement after the divorce, and it has remained in Ossipee to the present time, unless it was lost by the divorce.

*The Selectmen*, for the plaintiffs.

*The County Commissioners*, for the defendants.

BINGHAM, J. The settlement of the husband became that of the wife from the date of the marriage to that of the divorce. G. L., c. 81, s. 1, cl. 1. The statute especially gave her the settlement of her husband, and by implication she lost the one she acquired prior to her marriage. *Madbury, ex parte*, 17 N. H. 569. Mrs. Wallace had the settlement of her husband in Ossipee when the decree of divorce was granted. If he had died instead of obtaining the divorce, she would have retained the settlement acquired through the marriage till she gained a new one. G. L., c. 81, s. 7. This section provides that "every settlement shall continue until a new settlement is gained in this state." *Peterborough v. Lancaster*, 14 N. H. 382, 392; *Landaff v. Atkinson*, 8 N. H. 532, 535. Mrs. Wallace has not gained a new settlement, and the statute gives her the one she acquired by the marriage.

*Case discharged.*

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