

ience may require. Laws of 1878, c. 118, ss. 4, 5, 6, 10, 11. This proves not only a special legislative intention to preserve to the city the right to lay out, the right to authorize the operating power, to regulate the rate of speed, the mode of using, the grade at which it is to be constructed, and the right to take up the streets through which the railroad may pass, but a general legislative purpose to constitute the mayor and aldermen, as between the railroad and the general public, or abutting owners, the tribunal to decide and direct in these matters whether they arise from express grant or legal implication. The word railroad, as used in section 2, means the railroad described and implied in section 1 in all its parts, and no exception is made in section 2 of the manner of laying out any part of the railroad described or implied in section 1, and a fair construction of the charter requires the mayor and aldermen to lay out the necessary turn-outs.

The turn-out in question, on the facts in the case, may be one that the law would now imply the right to have laid out by the mayor and aldermen; but it has not been done. This is conceded, unless the mayor and aldermen laid it when the main track was laid in August, 1880. What they did then was clearly not a laying out according to the charter, nor was it then understood to be a laying out. It was not then known that a turn-out would be necessary at this point; and the most that can be claimed was an attempt by the mayor and aldermen to delegate the right to locate and construct turn-outs as they might be found necessary, which they could not do. The injunction is made perpetual.

BLODGETT and CARPENTER, JJ., did not sit: the others concurred.

Case discharged.

HILLSBOROUGH.

ALLEN, *Adm'r, Ap't, v. COLBURN, Ex'r.*

Heirs at law, who for twenty-three years neglect to claim personal effects as belonging to the estate of the decedent, may by their laches lose the right to assert such claim.

PROBATE APPEAL. The appellant is administratrix *de bonis non* of Elizabeth Marshall, who died intestate in 1862. The appellee is executor of the will of Almon D. Marshall, who was the husband of Elizabeth, and died testate September 15, 1885. Almon was appointed administrator of his wife's estate in February, 1863, and returned an inventory showing personal estate to the amount of \$905.51. The records of the probate court show no further

action by him as administrator. The appellant was appointed administratrix of Elizabeth in 1886. The defendant rendered an account of Almon's administration on his wife's estate, in which he charged him with the amount of the inventory, \$905.51, and interest, \$342.28,—in all, \$1,247.79,—and credited him funeral charges, commission at $2\frac{1}{2}$ per cent., and expenses of administration, amounting in all to \$180.34, leaving a balance of \$1,067.35, which he claimed as belonging to Almon D. as heir to the estate of his wife. This claim was allowed by the probate court.

A portion of the estate left by Elizabeth consisted of a deposit in the Nashua Savings Bank of \$821.92. Of this sum, \$500, deposited October 1, 1860, was a gift from her husband of that date.

No movement was made by the heirs at law of Mrs. Marshall for the settlement of the administration on her estate by her husband, nor was any claim made for the distribution of assets in his hands until after his death.

W. W. Bailey, for the appellant.

E. S. & H. A. Cutter, for the appellee.

ALLEN, J. At common law, the right and title of the wife's personal estate was in the husband by virtue of the marriage. By the act of 1846 (Laws of 1846, c. 327) the wife became entitled to hold and enjoy in her own right property of which she was seized and possessed before marriage, and which by ante-nuptial contract it was agreed should be so held, and any property conveyed, devised, or bequeathed to her, to be so held free from the interference of her husband. And on the death of the wife intestate, by section 7 of the same act, all personal property so held by her vested in the husband.

The ancestress, Elizabeth Marshall, died intestate in 1862, and her estate must be distributed according to the laws of distribution then in force, unless the claimants, by some act or omission of their own, have waived the right to their shares. By the married woman's act of 1860, the wife was entitled to hold to her own use, free from the control of her husband, all property given, conveyed, bequeathed to, or inherited by her, if not occasioned by the payment or pledge of the husband's property. But this act did not, by retrospective operation, include property received and held by the wife before its enactment, and the title to that part of the property in question, so received by Mrs. Marshall, on her dying intestate vested at once in the husband, and her next of kin have no claim to it. *Atherton v. McQuesten*, 46 N. H. 205; *Sanborn v. Batchelder*, 51 N. H. 426, 431.

Whether the common-law right of the husband in the property left by his deceased wife was repealed by the act of 1860, and for that reason the \$500 with its accumulations, received by Mrs. Marshall after that statute was in force, should have been distrib-

uted to her next of kin, need not here be considered. Upon her death in 1862, her husband was appointed administrator and took possession of her property; and during all the time since, to his death in 1885, a period of twenty-three years, the plaintiff and other heirs of the decedent, in full view of the estate and with knowledge of all facts affecting their interest, including the possession, use, and control of the property by the husband as his own, have made no claim to it nor any part of it until after his death. To allow their claim now, after such laches, would be unjust to the representatives of the deceased husband, and inequitable in the highest degree. *Hatch v. Kelly*, 63 N. H. 29.

Decree of probate court affirmed.

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

FESSENDEN v. TAFT & a.

A mortgage made in part to secure a fixed sum of money agreed to be paid by the mortgagee on the happening of a definite contingency, is not within the statute prohibiting mortgages to secure future advances.

The *lex loci rei sitæ* determines the validity of mortgages of real estate.

The *lex loci contractus* determines the validity of promissory notes.

The law of Massachusetts allows the parties to contract for any rate of interest, and the provision of the statute of that state "that no greater rate of interest than six per centum per annum shall be recovered in any action except where the agreement to pay such greater rate of interest is in writing," does not render invalid executed oral agreements for a higher rate than six per cent.

When A pays money for land the deed of which is taken in the name of B, the payment, in order to give rise to a resulting trust in B's favor, must be made at the time of the purchase.

BILL IN EQUITY, to foreclose a mortgage of land in New Hampshire, given to secure a promissory note for \$4,000, made in Massachusetts by George Taft, and payable to the plaintiff, both Taft and the plaintiff being at the time residents of Massachusetts. Facts found by a referee. The consideration for the note was in part a prior indebtedness of \$2,200 from said Taft to the plaintiff, and it was agreed that the balance of \$1,800 should be retained by the plaintiff until the release of an attachment upon the premises made in a suit brought by one Roberts against said Taft. Afterwards, said Roberts having prevailed in the suit, the plaintiff paid him the \$1,800, and the attachment was dissolved.

In pursuance of a verbal agreement between said Taft and the plaintiff, interest was reckoned and paid on the note at various