

303, it is held that reputation, such as recitals in ancient records and grants, is competent evidence of the laying out of ancient highways. The record was a public declaration that a highway had been laid out in the place described; and after the lapse of more than one hundred years the presumption is that it was legally laid out. This record, in connection with the other records produced and the evidence that the road as laid out was used more or less extensively as a public highway until 1876, was evidence sufficient to sustain a finding that the highway was legally laid out. *State v. Morse*, 50 N. H. 9; *Thompson v. Major*, 58 N. H. 242; *Plummer v. Ossipee*, 59 N. H. 55; *State v. Vale Mills*, 63 N. H. 4. The facts found in the case also tend to show a legal highway, with gates at the King street entrance, by twenty years' public use.

Exceptions overruled.

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

STONE v. TOWNE & a.

87	113
71	489

When no apportionment is made or authorized by a school-district in the distribution of the salary among the members of the board of education, it is to be divided equally, without reference to the amount of service or the manner of its performance, and the board have no authority to change it if objection be made.

ASSUMPSIT. Money had and received, for \$83.33, one third part of the salary of the board of education of the school-district composed of the whole town of Franklin, for the year ending March, 1890. The facts appear in the opinion.

Frank N. Parsons and *Sanborn & Hardy*, for the plaintiff.

Edward G. Leach and *Barnard & Barnard*, for the defendants.

CLARK, J. The sum of \$250 has been drawn from the treasury of the district on the order of the defendants, as compensation for the services of the board of education. It was the understanding of the voters that the members of the board should receive that sum for their services, and the district makes no objection or claim to the money so paid. Of this sum the defendants have received \$100 each, and the plaintiff \$50. The defendants claim that they are entitled to a larger share of the salary than the plaintiff because the plaintiff did not perform his share of the work of the board. The plaintiff claims one third of the salary of the board,

and brings this action to recover of the defendants \$33.33 as the balance of his salary, they having drawn the same from the treasury and claiming the right to retain it. The question is as to the authority of the defendants to apportion the salary.

The right of the members of the board of education to compensation rests upon the action of the district. It is not implied or determined from the amount or character of the services rendered. "There is no such implied obligation on the part of municipal corporations, and no such relation between them and officers which they are required by law to elect, as will oblige them to make compensation to such officers, unless the right to it is expressly given by law, ordinance, or by contract. Officers of a municipal corporation are deemed to have accepted their office with knowledge of and with reference to the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied assumption on the part of the corporation with respect to the services of its officers. In the absence of express contract, these regulate the right of recovery and the amount." Dill. Mun. Corp. (2d ed.) s. 169.

It does not appear that any apportionment or discrimination was made or authorized by the district in the distribution of the salary among the members of the board of education; and in the absence of such provision it is to be divided equally. It appears that it was so divided the previous year, the plaintiff and the defendants constituting the board at that time. The acceptance of the office by the defendants upon their reelection was evidence of their willingness to perform the duties upon the same terms as the previous year, and they were each entitled to claim and receive from the district one third of the salary appropriated for the board, and no more. *Rindge v. Lamb*, 58 N. H. 278.

It appears from the case that the plaintiff was "duly elected, qualified, and served" as a member of the board of education for the year 1889-'90. He is therefore entitled to the salary of a member of the board, being one third of \$250. It is immaterial whether the services actually rendered by him were worth more, or less, than the salary. The salary was not conditional upon the amount of service or the manner of its performance. If the services were of greater value, or performed with superior fidelity, he can recover no more than the compensation provided. If they were of slight value, and if the duties of the office were imperfectly performed, the right to the salary is not impaired or defeated, the law having provided for the punishment of wilful neglect of duty otherwise than by depriving the plaintiff of his salary, or by transferring a part of it to the defendants. "If any public officer wilfully neglects any duty of his office, and no penalty is prescribed by statute for such neglect, he shall forfeit

a sum not exceeding thirty dollars." Gen. Laws, c. 262, s. 13. Mere neglect of official duty does not create a vacancy in the office. *Giles v. School District*, 31 N. H. 304.

The defendants do not show any legal authority to apportion the salary. They rest their claim upon the ground that having performed more service than the plaintiff they are equitably entitled to more compensation; but as the right to compensation rests entirely upon legal grounds, this claim cannot be sustained, and the defendants' offer to show that the apportionment made by them was an equitable one was properly denied.

Judgment for the plaintiff.

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

DURKEE v. MOSES & a.

COSHLAND & a. v. SAME.

BOEHM v. MCINTIRE.

67	115
167	589
168	37
168	602

General Laws, c. 109, s. 18, making penal the solicitation or taking of orders in this state for the delivery of liquors in another state, with knowledge or reasonable cause to believe they are to be brought within this state and sold here in violation of law, is a regulation of commerce among the states without the permission of congress, and must, in accordance with the judgment of the federal supreme court, be declared void.

The price of liquors sold and delivered in another state, where such sale is lawful, upon orders obtained in this state in violation of such statute, may be recovered in this state.

Dunbar v. Locke, 62 N. H. 442, and *Jones v. Surprise*, 64 N. H. 243, overruled.

ASSUMPSIT, for intoxicating liquors sold and delivered. Facts agreed. The plaintiffs are wholesale liquor dealers in Boston and New York, and the defendants are retail dealers in this state. A part of the liquors, for which recovery is sought in the first suit, was ordered by the defendants in Boston and delivered there, the plaintiffs knowing that the liquors were to be sold at retail in violation of the laws of this state; and in the third suit, a part was ordered by the defendants, by a letter addressed to the plaintiffs in New York and delivered there, with the same knowledge as to the sale thereof. The balance of the liquors for which these suits were brought was delivered to common carriers in Boston and New York, to be transported to the defendants in this state under orders given by the defendants to the plaintiffs' agents while in

67	115
71	351
71	352
71	353