

be pleaded with a *que estate*." *Waters v. Lilley*, 4 Pick. 145, 148; *Gateward's Case*, 6 Co. 60; *Grimstead v. Marlowe*, 4 T. R. 717, 718; Wash. Eas. 10.

Whether a party can prescribe for a several fishery in the estate of another without alleging some estate of freehold to which it is appendant, was left undecided in *McFarlin v. Essex Company*, 10 Cush. 304, and is immaterial in this case, for the facts agreed and the facts which the defendant offers to prove do not show a prescriptive right of fishery in the stream on the land leased to the plaintiff. An adverse right to an easement cannot grow out of a mere permissive enjoyment for any length of time. There was no assertion by the defendant that his entry upon the leased land was under a claim of right, and his occasional acts in entering and fishing were such as have been so generally regarded as permissive that it must have been understood by the parties that the defendant entered under a license. They were not of such exclusive and notorious character as to afford notice of a claim of right. Any right which his father or others acquired, if they could acquire or have acquired any, being a mere personal right not appendant to an estate, a right *in gross*, is not assignable nor inheritable, and cannot avail the defendant. Wash. Eas. 8.

The plaintiff's lease is valid against his lessor, although unrecorded (P. S., c. 137, s. 4), and, upon being recorded, is admissible in proof of his title. But irrespective of the lease, his possessory title is sufficient to enable him to maintain this suit in the absence of any better title in the defendant.

The stocking of streams with young trout, raised at the expense of the state, by the fish commissioner, does not operate as a license to the public for fishing in waters not public, nor in unnavigable streams on private lands. The "public" benefited by the placing of young trout in the stream in question are the land-owners on their respective lands on the stream, from its source to its mouth, its tributaries, and the stream into which it flows.

The fish taken by the defendant being *feræ naturæ*, the plaintiff can recover for the trespass only.

*Judgment for the plaintiff for one dollar.*

All concurred.

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NEBONNE v. CONCORD RAILROAD.

In a suit against a railroad to recover damages for an injury alleged to have been received through negligence in the management of one of its trains, evidence of a statement made two months later by the conductor of the train is not competent as an admission against the defendants.

67	531
70	135
70	275
70	317

CASE, for injuries received by the plaintiff, in being run over and having his foot crushed by a car of the defendants. Trial by jury. The plaintiff, subject to exception, introduced evidence of a conversation between himself and one Wheeler, who was the conductor of the train by which the injury was caused. This conversation was held about two months after the accident, and tended to show negligence in respect to the starting of the train. Wheeler was a witness for the defendants, and testified that he had no recollection of such a conversation.

*Albin & Martin*, for the plaintiff.

*Streeter, Walker & Chase*, for the defendants.

BLODGETT, J. The alleged statement of the conductor of the defendants' railway train as to the way in which the plaintiff was injured, made some two months after the injury, was incompetent, and should have been rejected. The accident had long since become a completed fact, and the statement was only the narration by an agent of a past occurrence, and not a part of the *res gestæ*. Doubtless the declarations and admissions of a party, whenever made, may be given in evidence against him, and "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*" (Sto. Ag., s. 134; *Thompson v. Androscoggin, etc., Co.*, 58 N. H. 108, 111); "but an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. 1 Tay. Ev., s. 526. The reason is, that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*." *Union Packet Company v. Clough*, 20 Wall. 528, 540; *American Life Ins. Co. v. Mahone*, 21 Wall. 152, 157; *Vicksburg & Meridian Railroad Co. v. O'Brien*, 119 U. S. 99, 103-106; 58 Am. Rep. 562, note, 565-568; 95 Am. Dec., note, 73-75. More concisely stated, the declaration or admission of an agent binds his principal only when it is made "in regard to a transaction then depending *et dum fervet opus*." 1 Gr. Ev., s. 113.

The defendants, by calling the conductor and interrogating him relative to his statements as testified to by the plaintiff's witnesses, did not waive their objection to the testimony or make it competent. The general principle invoked by the plaintiff, that "when testimony is incompetent, or not admissible when received, if by the introduction of subsequent testimony it is made competent, the objection is removed," is inapplicable to the facts appearing in this case. The plaintiff introduced no subsequent testimony

as to the statement, and the defendants neither admitted nor proved it by any subsequent act or evidence: on the contrary, they denied that the conductor made the statement, and his testimony on that point tended only to support the denial. In view of these facts, the claim that a party who vainly objects to the admission of incompetent and highly prejudicial testimony, offered by his adversary, waives his objection and makes the testimony competent if he contradicts it, is a proposition without support in the law of evidence, and hardly requires extrinsic refutation.

*Verdict set aside.*

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

PICKERING v. MOORE.

67	533
168	465
67	533
69	412
67	533
70	146
67	533
72	431

Manure made on a farm from fodder not produced thereon is not a part of the realty.

The intermixture of one's property with another's of the same kind, quality, and value, without the other's consent, but with no wrongful intent, does not change the ownership.

A tenant in common of goods of the same kind, quality, and value, so as to be divisible by tale, measure, or weight, has a right to take his share, and his co-tenant who prevents it is guilty of a conversion.

TROVER, for manure. Facts found by the court. March 31, 1883, the defendant leased his farm for the term of three years to the plaintiff, who covenanted to carry on the place in a "husband-like manner," and to consume and convert into manure, to be used or left upon the premises, all hay and fodder raised thereon. The plaintiff occupied the farm and performed all his covenants contained in the lease, without any new or further contract, until May 30, 1892. During the last year of his occupancy he fed out upon the farm a large quantity of fodder not produced on the place. He put twenty-five cords of the manure made from this fodder, and manure of the same quality and value made from fodder raised on the place, together, in a heap, where they were so intermixed that they could not be distinguished. The defendant prevented him from taking away the twenty-five cords.

*Leach & Stevens*, for the plaintiff.

*Albin & Martin*, for the defendant.

CARPENTER, J. The plaintiff held the farm after the expiration of three years, as tenant from year to year, upon the terms