

press terms of the grant, the north way extends to the easterly line (protracted northerly) of the east way. The only apparent purpose of this extension beyond the hotel was to make the two passways coterminous and continuous. So far as appears, the defendants can make no beneficial use of the part of the north passway about twelve feet square, expressly granted and situated east of the east line of the premises conveyed, unless it is in some manner connected with and made passable to and from the east passway. Under the express grant of this part of the way the defendants took by implication whatever rights were reasonably necessary to enable them to enjoy it beneficially. *Leonard v. Leonard*, 7 Allen 277, 283. The law conclusively presumes it to be the intention of the parties that the grantee shall enjoy beneficially the subject of the grant. Upon this presumption is founded the doctrine that "the grant of a principal thing carries all things necessary to the use and enjoyment of the thing granted which the grantor had power to convey." *Tourtellot v. Phelps*, 4 Gray 370, 378.

The defendants are entitled to a reasonably convenient connection of the passways, to be made in such a manner as to subject the plaintiffs to no unnecessary inconvenience. In respect to the method of making the connection, the question is similar to that which arises in the case of a grant of an undefined way, as, for example, the right to pass and repass across the grantor's farm. If the parties cannot agree, equity determines the location of the way. *Gardner v. Webster*, 64 N. H. 520, 522, 523. In the present case the plaintiffs do not claim that the ways can be made continuous in a manner less injurious or more satisfactory to them than that adopted by the defendants.

Bill dismissed.

All concurred.

Merrimack, }
June, 1894. }

RICHARDSON v. BAKER.

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If an equity of redemption be sold by an assignee in insolvency, subject to the debtor's homestead right, and the purchaser pays a mortgage in which the homestead right was released, the insolvent is not entitled to a homestead without redeeming from the mortgage, although the purchaser's deed from the mortgagee stated that its intention was to discharge the mortgage.

BILL IN EQUITY, praying for the set-off of a homestead. Facts agreed. January 26, 1892, the plaintiff owned the premises in

which he claims a homestead, subject to two mortgages to Hazelton, in which he released his homestead right. On that day he made an assignment in insolvency. June 15, 1893, his assignee sold and subsequently conveyed the plaintiff's equity of redemption, subject to his homestead right, if any, to the defendant, who on the same day took and has ever since held possession. July 8, 1892, Hazelton took possession of the premises under a writ issued in foreclosure proceedings, and retained the exclusive possession until June 15, 1893. After June 15 and before July 8, 1893, the defendant paid the amount due on the mortgages to Hazelton, who thereupon conveyed his interest in the premises to the defendant by a deed containing a clause as follows: "Said land is the same previously owned and occupied by James M. Richardson for a homestead, and the intention of this conveyance is to discharge two certain mortgages made by said James M. Richardson to me, the said Eleazor Baker having bought the equity of redemption in said land at a sale by the assignee of said Richardson, who is now an insolvent debtor." The plaintiff makes no offer to redeem. The court ruled that he is not entitled to a homestead without redeeming from the mortgages, and the plaintiff excepted.

Leach & Stevens, for the plaintiff. The plaintiff should pay no portion of the mortgages to acquire his homestead because they have been discharged. The deed from the mortgagee to the defendant, made after the latter's purchase of the equity, distinctly declares that "the intention of this conveyance is to discharge two certain mortgages," being the ones in question. The language is clear and unambiguous. The defendant accepted the deed and recorded it, and makes no pretence he did not understand its meaning. Unless the court shall construe the intention of the parties to have been directly opposite from what they said it was in the deed, there are no mortgages in force to redeem.

Equity requires that the mortgages should be treated as merged in the equity of redemption, if not discharged. The defendant knew before he bid, the amount of the mortgage debt and the claim for homestead, and he agreed to pay, over and above these claims, the substantial sum of \$275. There can be no reasonable doubt but that he would have paid at least \$500 if the sale had been for the entire interest above the mortgages without any claim for homestead. This purchase should be construed as an agreement or acknowledgment on his part that the property was worth a substantial sum above the mortgages and homestead. Neither can there be doubt that, if the plaintiff should pay the mortgages, the defendant would at sometime redeem them, and hold them on the balance of the premises.

after the homestead is assigned, as suggested in *Fellows v. Dow*, 58 N. H. 21. The plaintiff may be unable to raise the money to redeem them, and it would be inequitable to require him to do so when the purpose of the defendant to annoy and delay is so apparent. In *Fellows v. Dow* it does not appear whether the equity sold for a substantial sum above the mortgage or not, and it does appear the plaintiff had the means at hand to secure his homestead without inconvenience.

If equity requires the plaintiff to pay anything on the mortgages to secure his homestead, it should only be in case the appraisers appointed to make the set-off find the value of the equity above the mortgage to be less than \$500; and then only for his proportion of the deficiency, if he was unwilling to accept a homestead of a value equal to the equity. *Norris v. Morrison*, 45 N. H. 490, 501. If the appraisers should find the value of the equity to be \$400, and the plaintiff preferred to accept a homestead of that value instead of contributing to the mortgage, he should have that privilege.

The sale by the assignee should be construed as under P. S., c. 138, ss. 9, 10, as if made by a sheriff, and the defendant's bid as an offer to pay \$275 and the mortgages, and allow the plaintiff his homestead, or pay him \$500 with which to secure another. *Hall v. Johnson*, 64 N. H. 481.

The plaintiff ought not to be considered in fault for not offering to redeem mortgages, when the defendant had given him notice by the record of said deed that they were discharged, and had never suggested any contrary claim. If any such offer becomes necessary, the plaintiff will ask consent to amend his petition.

Almon F. Burbank and Harry G. Sargent, for the defendant.

CARPENTER, J. As against Hazelton or one claiming under him, a homestead cannot be assigned to the plaintiff until he or some one in his behalf has satisfied the mortgage debts. *Fellows v. Dow*, 58 N. H. 21; *Pollard v. Noyes*, 60 N. H. 184. There is no evidence tending to show that the defendant intended his payment of the mortgage debts should enure to the plaintiff's benefit. The plaintiff is not a party to the deed or to the transaction which it completed. The language of the deed has no relation to him or to his rights. Construed, as it must be, in view of the situation of the parties and the nature of the transaction, it shows a purpose to discharge the mortgages so far, and only so far, as they were an incumbrance on the defendant's title to the land. The plaintiff stands in no better position than he would if Hazelton had executed, and the defendant had accepted and put on record, a formal discharge of the mortgages.

Heath v. West, 26 N. H. 191; *Wilson v. Kimball*, 27 N. H. 300; *Stantons v. Thompson*, 49 N. H. 272; *Bell v. Woodward*, 34 N. H. 90; *Hammond v. Barker*, 61 N. H. 53.

Exception overruled.

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

Merrimack, }
June, 1894. }

STATE (*ex rel. Thorndike & a.*) v. COLLINS & a.

A petition under P. S., c. 205, s. 5, may be amended by substituting a legal voter for a petitioner who is not a legal voter.

PETITION, by twenty-one persons alleged to be legal voters in Concord, for the abatement of a liquor nuisance in that city. Two of the petitioners were not such voters. The petition was amended by substituting two voters for them, subject to the defendants' exception.

William H. Sawyer and *Burleigh & Adams*, for the state.

Albin & Martin and *Bingham & Mitchell*, for the defendants.

CHASE, J. The statute required the petition to be signed by not less than twenty legal voters of Concord. P. S., c. 205, s. 5. It purported to be so signed, and was therefore sufficient upon its face; but it turned out that only nineteen of the signers possessed the requisite qualification. Was the defect amendable? There is nothing in the nature of this action (*State v. Saunders*, 66 N. H. 39; *Rancour's Petition*, 66 N. H. 172) that excludes it from the operation of the general rule, authorizing the court to allow amendments to be made in civil actions by adding new parties or substituting new ones for original parties, if justice requires the change to be made. P. S., c. 222, ss. 7, 8, 11; *State v. Batcheller*, 66 N. H. 145; *Annis v. Gleason*, 56 N. H. 16; *Judge of Probate v. Jackson*, 58 N. H. 458; *Boudreau v. Eastman*, 59 N. H. 467; *Buckminster v. Wright*, 59 N. H. 153; *Hazen v. Quimby*, 61 N. H. 76; *Willoughby v. Holderness*, 62 N. H. 661; *Fitch v. Nute*, 62 N. H. 700; *Owen v. Weston*, 63 N. H. 599, 603, 604; *Smith v. Hadley*, 64 N. H. 97. The requirement that there shall be twenty petitioners who are legal voters in the town

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