

trix intend to impose an obligation on her husband to carry her wish and desire as to her father's maintenance into effect, or, having expressed her wish and desire, did she intend to leave it to him to comply with them or not at his discretion? From the nature of the case, no certain answer can be given; but upon the established rule of testamentary construction in this state, as well as in accordance with the general rule where like words have been used by testators (44 Am. Dec., note, 372-379), and with a plain moral duty on the part of the defendant, we are of opinion that the clause of the will which is the subject of the present controversy does not leave the maintenance of the plaintiff to the discretion of the defendant, to be afforded or withheld at his pleasure, but that the devise to him was made on the trust that he should furnish such maintenance during the plaintiff's life, should he need and require it, which the bill charges and the demurrer admits.

"The wish of a testator, like the request of a sovereign, is equivalent to a command" (1 Hill Tr. 73; 1 Per. Tr., s. 121, note); and especially should it be so held in a case like the present, where it would seem that even the slightest wish of a deceased wife as to the care of her aged, infirm, and dependent father ought of itself to be sufficiently binding on the defendant's conscience.

The question whether the maintenance of the plaintiff shall be in the defendant's family or elsewhere will be determined at the trial term.

Demurrer overruled.

All concurred.

Cheshire, }
Dec., 1894. }

GURNSEY & a., *Ap'ts*, v. KEENE.

The question of procedure upon an appeal from a decision of the mayor and aldermen in a highway proceeding is one of fact, to be determined at the trial term.

APPEAL, from the decision of the mayor and aldermen awarding the plaintiffs no damages for land taken for a highway. The defendants in their answer aver that the plaintiffs' land over which the new highway is laid is within the limits of an existing

highway by prescription, and move that the issue on this averment be tried before sending the petition to the commissioners.

Batchelder & Faulkner, for the plaintiffs.

John T. Abbott, for the defendants.

CARPENTER, J. "If no sufficient objection is made, all petitions relating to highways shall be referred to the county commissioners." P. S., c. 68, s. 5. If, upon a trial of the issue raised by the answer, it should be found that the new highway is laid over an old one, the finding would be a sufficient objection to sending the petition to the commissioners. The plaintiffs would be entitled to no damages (*Pierce v. Somersworth*, 10 N. H. 369), and their petition would be dismissed. If it should be found that there was no existing highway where the new one is laid, the petition must be referred to the commissioners. On the return of their report the plaintiffs would be entitled to, and in order to obtain their rights might be obliged to have, another trial. P. S., c. 68, s. 10. They might thus be subjected to the expense and delay of two trials where one would suffice. What method of procedure in the trial of the several issues presented will be most convenient, expeditious, and least expensive to the parties, is a question of fact to be determined at the trial term. *Owen v. Weston*, 63 N. H. 599.

Case discharged.

All concurred.

Cheshire, }
Dec., 1894. }

STATE v. HITCHCOCK.

Upon the trial of an indictment against a person claiming to be a registered pharmacist for illegally keeping spirituous liquor for sale, the offer in evidence of hand-bills used in advertising certain medicines was properly rejected, in the absence of evidence or the offer of any evidence that liquor was used in compounding them.

INDICTMENT, for illegally keeping spirituous liquor for sale. Trial by jury. Verdict of guilty. The defendant introduced evidence tending to show that he was a registered pharmacist at the time and place it was alleged the offence was committed. He also offered in evidence five hand-bills of different kinds, as samples of those distributed by him for the purpose of advertis-