

Hillsborough, }
 June, 1898. }

RICHARDSON v. BAILEY.

The rights of the parties in property attached are to be determined by the state of the title at the time of the attachment, and are not affected by the fact that the defendant may have subsequently acquired title.

An officer cannot maintain an action upon a receipt for property attached unless he is liable to the debtor or some third person.

TROVER. Facts agreed. March 3, 1896, Samantha L. Abbott died, leaving a will in which her husband, Peltiah T. Abbott, was named as executor and residuary legatee. April 21, 1896, Peltiah was appointed executor and gave bond to pay debts and legacies. A part of Samantha's estate consisted of two horses, which were attached April 16, 1896, by the plaintiff, as deputy sheriff, in a suit against Peltiah. The defendant became receptor, and, upon a demand by Peltiah, as executor, delivered the horses to him. In the fall of 1896 a commissioner was appointed to examine and allow claims against Samantha's estate, which was thereafter settled in the insolvent course and was apparently insolvent in fact.

Osgood & Osgood and David A. Taggart, for the plaintiff.

George W. Prescott and John B. Cavanaugh, for the defendant.

PEASLEE, J. The rights of the parties in the property attached are to be determined by the state of the title at the time the attachment was made. Drake Att., s. 245. They are not affected by the fact that the defendant may have subsequently acquired title. *Crocker v. Pierce*, 31 Me. 177. It is suggested that, as the property was in the custody of the receptor and the officer intended to hold it under the attachment against Peltiah, it may be treated as attached as of the date when the executor's bond was filed. However this might be, if the officer then had power to make an attachment, the rule could not apply when the title was acquired after the officer's right to act had terminated. The bond was filed Tuesday, April 21, 1896. The last day of service for the May term, 1896, was Monday, April 20 (P. S., c. 219, s. 1; Laws 1893, c. 9), and so this contention cannot avail the plaintiff.

The title to the personal estate vested in the person named as executor in the will, as trustee, even before the will was probated. *Shirley v. Healds*, 34 N. H. 407, 411. By the filing of

the bond to pay debts and legacies, the title passed to him as an individual. *Batchelder v. Russell*, 10 N. H. 39; *Tappan v. Tappan*, 30 N. H. 50, 68; *Mercer v. Pike*, 58 N. H. 286.

Peltiah made the demand, and the property was delivered to him, as executor. But if he should now attempt, as an individual, to recover its value from the officer upon the ground that the property should not have been delivered to the executor, the title being in the individual, the fact that he represented that the title was in the executor would operate as an estoppel. For this reason the officer is not liable to the owner; and as the debtor had no attachable interest in the property, the officer is not accountable to the creditor. All liability of the officer being thus at an end, he cannot maintain this action against the receptor. *Whittridge v. Maxam*, 68 N. H. 323; *Scott v. Whittemore*, 27 N. H. 309, 321.

What the effect of the settlement of the estate in the insolvent course might be upon the liability of the receptor, is a question not considered. See *Moody v. Davis*, 67 N. H. 300.

In accordance with the terms of the agreed case, the plaintiff may have a trial upon the question of Peltiah's title to the horses apart from that derived under the will.

Case discharged.

All concurred.

Sullivan, }
June, 1898. }

ELLIS v. BLUE MOUNTAIN FOREST ASSOCIATION.

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A way of necessity is founded on an implied grant, and cannot exist unless there has been a former unity of ownership of the two estates.

If the proprietors of a game preserve enclose within its limits land of another upon which they suffer their wild and dangerous animals to run at large, the wrong is one for which an action at law does not furnish an adequate remedy, and which may be restrained by injunction.

WRIT OF ENTRY, to recover a tract of land in Croydon, with a second count of a BILL IN EQUITY, for additional relief in relation thereto. Facts found by the court.

The plaintiff in his count in equity alleges that he has title to, and ought to be in peaceable possession of, the premises described in his first count, which are enclosed and surrounded on all sides by lands of the defendants and occupied by them, the lands so occupied being known as Corbin park; and that the