

There is no evidence in this case to show that the testator used the words in the residuary clause, "to have and to hold the same to her, the said Angeline G. Morrill, her heirs and assigns forever," for any purpose except to describe the extent of the interest which he intended to give to his wife, and as words of limitation merely. While the fact that the testator gave a legacy of one hundred dollars only to his sister, taken in connection with the residuary clause giving the residue of his estate to his wife, indicated that he intended his sister and her heirs should have no greater portion of his estate than one hundred dollars in case his wife should survive him and take under the residuary clause, it does not indicate any such purpose in the event of his wife's dying before him and the lapse of the residuary bequest. Such a purpose cannot be imputed to him, nor such a meaning given to his will, in the absence of any competent evidence to show that such was his intention. The testamentary gift to Angeline G. Morrill under the third clause of the will lapsed by reason of her death before that of the testator. As to the property which she would have taken had she survived her husband, he died intestate; and that portion of his estate goes to his heirs-at-law.

Case discharged.

All concurred.

Hillsborough, }
June, 1899. }

CUTLER v. CONCORD & MONTREAL RAILROAD.

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The exclusion of evidence tending to prove only a fact that was conceded at the trial is not error.

A verdict will not be set aside for the exclusion of evidence unless it appears that the evidence was material.

CASE, for negligence. Verdict for the defendants. The plaintiff's evidence tended to show that while intoxicated he was injured by the failure of the defendants' servants properly to care for his safety after accepting him as a passenger, with knowledge of his condition.

Besides other evidence tending to establish the fact of intoxication, the plaintiff offered to prove the purchase of beer by him shortly before the accident, at a restaurant in the defendants' passenger station at Manchester kept by one Twombly under lease from the defendants. The plaintiff claimed that the fact that intoxicants were there sold imposed additional duties upon

the defendants in the care of intoxicated persons who became so in whole or in part from such sales. The evidence was admitted for the purpose of showing the plaintiff's condition, but was excluded for the purposes set forth, and also for the reason that it was too remote, and the plaintiff excepted. There was no question that the defendants' servants were fully informed of the plaintiff's condition.

David W. Perkins, Taggart & Bingham, and James F. Briggs, for the plaintiff.

Oliver E. Branch and William H. Sawyer, for the defendants.

PARSONS, J. The finding of the court, that the excluded evidence had no legitimate bearing in the case for the purposes for which the plaintiff claimed to use it because of remoteness, presents no question of law. *Pritchard v. Austin, ante, p. 367,* and cases cited. Evidence that intoxicants were sold the plaintiff in the defendants' passenger station had some tendency to prove that the plaintiff was intoxicated, and that the defendants' servants knew or ought to have known of such intoxication. Upon these questions it was material and competent. Upon the first question the evidence was admitted and the plaintiff had the benefit of it. No question was made that the defendants' servants were fully informed of the plaintiff's condition. Further evidence upon a point that is conclusively established or admitted is superfluous and immaterial. A verdict will not be set aside for the exclusion of evidence to a point already conclusively proved. *Litchfield v. Londonderry, 39 N. H. 247, 254.* The plaintiff was not prejudiced by the exclusion of evidence tending merely to establish a point the truth of which was conceded.

The exception to the exclusion of this evidence has been argued upon the ground that the plaintiff was thereby prevented from showing that the defendants maintained a nuisance in the station and were guilty of an indictable offence therein. Assuming this to have been the effect of the ruling, the verdict cannot be disturbed, for it does not appear that the fact of the defendants' alleged violation of law was material upon any issue in the case. *Putnam v. Osgood, 52 N. H. 148, 153.* If the evidence tended to establish that the plaintiff's condition was caused in part by the defendants' violation of law, and would have been competent if the cause of the plaintiff's intoxication had been in issue, its exclusion was not error, because the case presented no such question. The plaintiff did not claim the defendants were liable because their unlawful acts enabled him to secure the means of his intoxication, but put his case upon

the ground that, knowing his intoxication, they did not properly care for him as a passenger. This was the issue tried, and upon this issue the cause of the plaintiff's condition was immaterial. Neither does it appear to have been claimed that lack of responsibility on the part of the defendants for the plaintiff's condition was an answer to his case. However unfounded in law either or both of these propositions may be, it is sufficient for this case that they were not presented at the trial, and evidence as to the fact either way was immaterial and properly excluded.

Exception overruled.

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

Hillsborough, }
June, 1899. }

MOOAR, *Adm'x*, v. MOOAR.

An offer to give a note for a certain sum in settlement of an existing debt is not evidence of a new promise to pay more than the amount of the note. The finding of the court at the trial term, that one of the issues in a case involved the examination of long and complicated accounts and ought not to be submitted to the jury, and the submission of certain other issues in the case to the jury, are not rulings of law open to exception.

ASSUMPSIT, to recover the amount due on four notes given by the defendant John Mooar to the plaintiff's intestate. Plea, the general issue, with a brief statement of the statute of limitations. The plaintiff's evidence tended to show that, after the death of the payee of the notes, she sent the notes to one Jacob Mooar to compute the amount due upon them. Jacob found due on the notes \$163. Subsequently the plaintiff employed counsel, who, by his computation, found \$3,400 to be due. There was evidence tending to show an express promise by the defendant to pay what was due on the notes. There was no evidence of an express promise by the defendant to pay any definite sum, except that John, upon learning of the result of Jacob's computation, wrote a note for \$163, payable to the plaintiff; that this fact was communicated to the plaintiff; and that the defendant was willing to adjust the controversy on this basis. The defendant denied the express promise, but admitted the facts as to the \$163 note.

After the charge to the jury was given, the defendant requested the court to instruct the jury that an offer to make a

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