

PIKE, J. The only question raised by the amended case is whether or not the plaintiff's contract with the railroad is such as to enable him to maintain this bill against the defendants, who, claiming to be common carriers, without legislative authority or without agreement with the railroad and against its protests, subject its property and grounds at Manchester to the purposes of carrying on their private business of soliciting and carrying baggage from the station over the streets and highways of the city of Manchester. This question was decided in the former case (*Hedding v. Gallagher*, 69 N. H. 650), and is not now open for consideration.

Demurrer sustained.

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

Hillsborough, }
June, 1900. }

WHITE & a. v. DAKIN.

PROBATE APPEAL, from a decree dismissing the plaintiffs' petition to vacate a decree granting Dakin a discharge in insolvency. Dakin died after the appeal was taken, and his administrator defends.

The plaintiffs' evidence tended to show that the bond to secure the performance of a composition agreement was executed by the debtor and one of his creditors, and that thereafter, and before the discharge was granted, he made a mortgage to this and three other creditors to secure the payment of a sum in excess of the amount needed to pay the percentage agreed upon. The plaintiffs also offered to show by a creditor, who was not a party of record, transactions between the witness and Dakin. The administrator did not elect to testify, and the evidence was excluded, subject to exception.

At the close of the plaintiffs' evidence the appeal was dismissed, subject to exception.

Osgood & Osgood, for the plaintiffs.

Burnham, Brown & Warren and *Allan M. Wilson*, for the defendant.

PEASLEE, J. There was no evidence to justify a finding of fraud. Such a conclusion would have been mere conjecture. *Deschenes v. Railroad*, 69 N. H. 285, 288, *et seq.*

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The testimony of the creditor was properly excluded. Although not a party of record, he was directly interested in the result of the appeal. *Foster v. Ela*, 69 N. H. 460.

Exceptions overruled.

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

Hillsborough, }
June, 1900. }

JELLISON v. JELLISON.

LIBEL FOR DIVORCE, charging habitual drunkenness. It was found that the charge was not proven, that the libelant had deserted the libelee without cause, and that justice required that an order be made that the libelant contribute to the support of his family. Upon the libelee's motion it was so ordered, subject to exception.

Henry B. Atherton, for the plaintiff.

Doyle & Lucier, for the defendant.

PEASLEE, J. The question of whether justice required the granting of the motion is not one of law. As justice required that the order be made, and the court had power to make it (P. S., c. 176, s. 4), it is immaterial whether the application was called a petition or a motion. The parties were already in court, the libelant was given an opportunity to be heard, and if a further hearing is needed it can be had upon application.

Exception overruled.

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