

the extent of their legality, notwithstanding the agreement under which the writs were served was illegal because of its conflict with public policy. If the sums so collected by the defendant amount to more than legal fees, the excess belongs to the parties who paid the same and not to the plaintiff. It is only the legal fees that equitably belong to him. He could not take more without incurring the penalty before mentioned. The law will not aid him in doing that.

It is manifest that the rulings of the referee in regard to the special agreement were not in accordance with these views; and for this reason, as well as for the other reasons above stated, the judgment must be set aside and there must be a new trial.

*Case discharged.*

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

Merrimack, }  
Dec. 3, 1901. }

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72 320

PERRY v. HARDY.

In an action of trespass *quare clausum*, a verdict cannot be directed for the plaintiff when there is evidence from which it might reasonably be found that the defendant's ancestor in title was induced to enter into an agreement as to the location of the disputed divisional line by fraudulent representations on the part of the plaintiff, by whom such agreement is set up.

TRESPASS *quare clausum*. Trial by jury and verdict for the defendant. Transferred from the superior court by *Peaslee, J.*

The issue was whether the line claimed to by the plaintiff had been agreed upon by himself and the defendant's ancestor in title. Upon this point the plaintiff and two other persons, who were present when the line was run, testified that there was such an agreement. The defendant's grantor, Dow, testified that he had the line run, agreed upon a division of the fence, and paid damages for cutting over the line in order to avoid a lawsuit, to settle with the plaintiff, and to keep out of trouble. The plaintiff testified that there was no dispute as to the location of the line, that Dow cut over the line, and that he asked to have it run and the damages settled.

None of the deeds describe the line by bounds. For many years the lots lay in common; and the evidence was conflicting as to whether the old fence was still plainly visible, and as to the loca-

tion of the original line. It was a disputed question whether the stakes and stones at the termini of the line, as claimed by the plaintiff and run by the surveyor, were the true bounds. There was evidence that Dow was ignorant of the location of the boundaries, and that the plaintiff, who had been familiar with the premises for many years, pointed out certain objects as the true bounds.

The plaintiff's motion that a verdict be directed for him upon the issue tried was denied, subject to his exception.

*Albin & Shurtleff*, for the plaintiff.

*Martin & Howe* and *Walter S. Peaslee*, for the defendant.

CHASE, J. In the brief filed in behalf of the plaintiff counsel say: "From the line of argument before the jury, it is anticipated that the defendant may claim the agreement [as to the line] was void on account of fraud on the part of the plaintiff." They proceed to cite authorities bearing on the question of fraud, and to argue the point; the defendant's counsel do the same. It is inferred from these facts that the issue of fraud was submitted to the jury. If, as the plaintiff alleges, the evidence as to an agreement was wholly in his favor, still the motion to direct a verdict for him should not be granted if there was evidence from which impartial and reasonable men might fairly find that Dow was induced to make the agreement by the plaintiff's fraud.

If the plaintiff pointed out to Dow, as true boundaries in the line, objects that were not such in fact, and he knew that they were not, or did not know that they were, true boundaries, and, the matter not being equally within the knowledge of Dow, he was misled and induced to agree to the line thereby, the misrepresentations (being with reference to matters that were material to the agreement) would constitute fraud, of which Dow and those having his estate could avail themselves and avoid the agreement. *Hoitt v. Holcomb*, 23 N. H. 535, 552; *S. C.*, 32 N. H. 185; *Gage v. Gage*, 29 N. H. 533, 543; *Jones v. Emery*, 40 N. H. 348; *Springfield v. Drake*, 58 N. H. 19; *Farmington Nat'l Bank v. Buzzell*, 61 N. H. 618; *Stewart v. Stearns*, 63 N. H. 99. The evidence tended to show that the plaintiff pointed out objects as the boundaries. Whether he knew they were not the true boundaries, or did not know they were the true ones, is not material, since his representation in either contingency would be an element of fraud. There was evidence that Dow was ignorant of the location of the boundaries. The evidence was conflicting as to whether the old fence was still plainly visible, and as to the location of the original line. If Dow was ignorant of the location of

the line, and evidences of it upon the ground had been obliterated, it would not be an unreasonable inference that he was not in fault for not knowing or discovering that the plaintiff's representations were false. Dow ran the line, agreed to a division of the fence, built his portion of it, and settled with the plaintiff for the alleged trespass. Apparently, he did all the things that are relied upon by the plaintiff to prove the agreement, believing the plaintiff's representations were true. There was evidence before the jury from which impartial and reasonable men might fairly find that the plaintiff fraudulently made false representations regarding the line, and that Dow was induced thereby to enter into the agreement which the plaintiff sets up. The plaintiff's motion was properly denied. *Paphro D. Pike Co. v. Baty*, 69 N. H. 453, 458; *State v. Harrington*, 69 N. H. 496; *O'Hare v. Company*, ante, p. 104.

*Exception overruled.*

All concurred.

Hillsborough, }  
Dec. 3, 1901. }

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71	153
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MANCHESTER *ſ a. v.* FURNALD *ſ a.*

The assessors of a city are by statute made a constitutional tribunal to determine the value of property therein for purposes of taxation.

An undervaluation of certain estates by assessors, in the fair exercise of their judgment, is not correctible upon a petition for *mandamus* brought against them by the city to compel the appraisal of such property at its true and full value.

A taxpayer who is aggrieved by an overvaluation of his estate resulting from an undervaluation of other property, and who has neglected to avail himself of the adequate remedy provided by a petition for abatement, cannot maintain a petition for *mandamus* to compel a reappraisal.

A proceeding to compel the correction of error in the valuation of taxable property by assessors is not seasonably commenced if brought more than nine months after knowledge of the appraisal could have been obtained by reasonable diligence.

PETITION for *mandamus*, by the city of Manchester and George A. Wagner, a taxpayer, against David O. Fernald and nine others, assessors of the city. Transferred from the May term, 1901, of the superior court by *Wallace*, C. J.