

*Daniel C. Remich*, for the plaintiffs.

*Defendants, pro se.*

WALKER, J. The plaintiffs' contention, that Mary has a life estate in the land devised to her, with the right to dispose of it by deed whenever she may deem it necessary to do so "for her comfort, maintenance, and support," does not appear to be disputed, and may be a correct statement of the testator's intention. But it is not the province of the court to determine the validity of Mary's title, which is derived not from the executors but from the testator, and with reference to which the executors have no duty to perform. A prospective decision of the question suggested, whether in accordance with, or against, the plaintiffs' claim, would not aid the executors in the performance of a fiduciary duty imposed upon them in their official capacities. They have no such interest in the determination of that question as to require the advice of the court. *Greeley v. Nashua*, 62 N. H. 166; *Gafney v. Kenison*, 64 N. H. 354; *Ellis v. Aldrich*, 70 N. H. 219, 222; *Carr v. St. Paul's Parish*, ante, p. 231.

*Case discharged.*

All concurred.

Coös, }  
April 1, 1902. }

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HARRIS v. SMITH.

The defendant in an action of trover cannot set up the defence of property in a third person without showing some right, title, or interest in himself derived from such person.

The opinion of a witness as to a fair price for hauling wood between given points, founded upon his knowledge of the locality and his experience in similar business, is competent evidence and is to be regarded as a conclusion of fact derived from proper sources.

An exception to instructions is unavailing unless the attention of the court is specifically directed to the particular error claimed.

TROVER, for wood. Trial by jury and verdict for the plaintiff. Transferred from the April term, 1901, of the superior court by *Pike, J.*

The plaintiff's evidence tended to prove the following facts: Prior to December 9, 1898, Tyler Clark and W. H. Merriam owned a woodlot in Stark, in common and undivided. In August,

1898, Merriam conveyed to one McIntire, as security for a debt, all the pulp-wood and fire-wood on the lot, and on October 18 the latter assigned his bill of sale to the plaintiff, at the request of Merriam. On the following day the plaintiff took possession of the wood, gave notice of her title to one Bogan, who was doing the chopping as Merriam's agent and servant, and ordered him to cut no more. November 17, 1898, Merriam gave Bogan a chattel mortgage of the fire-wood on the lot, including that cut after the plaintiff took possession; and on January 26, 1899, the wood was sold under the mortgage, bid off by the defendant, and subsequently drawn away by Bogan. The wood in controversy was cut by Merriam with the knowledge of Clark and without any objection on his part. Merriam conveyed his interest in the lot to Clark, December 9, 1898.

The defendant claimed (1) that the plaintiff had no title to the wood, and (2) that he simply let his team to Bogan, who used it in hauling the wood to market.

Bean, a witness for the plaintiff, who had been in the grocery business in Groveton for several years, knew the distance from the woodlot to the village and the character of the road, and had bought wood and kept horses, was asked, subject to the defendant's exception, his opinion as to what was a fair price for hauling the wood to the village.

The court instructed the jury, in substance, that if they believed the plaintiff's evidence tending to show how the wood originally owned by Clark and Merriam passed by sale from Merriam to the plaintiff, then Merriam had the right to make the sale and the plaintiff's title to the wood was valid. To this instruction the defendant excepted.

*Drew, Jordan & Buckley*, for the plaintiff.

*Sullivan & Cleveland* and *Chamberlin & Rich*, for the defendant.

BLODGETT, C. J. The plaintiff's purchase from Merriam under circumstances strongly tending to show an estoppel, if not authorization and ratification, on the part of Clark, conferred upon her title to the wood in controversy; for even if Clark did not part with his interest in it by the sale to the plaintiff, the defendant shows no right or title to the wood derived from Clark. "In an action of trover, the defendant cannot set up the defence of property in a third person without showing some right, title, or interest in himself derived from such person." *Harrington v. Tremblay*, 61 N. H. 413.

Bean's opinion of what was a fair price for hauling the wood was competent. The inquiry was not one calling for expert testimony in a matter of science, art, or skill, but one seeking information from the witness in relation to a subject as to which he had the means of information, and upon which knowledge may be attained by common observation and experience. *Currier v. Railroad*, 34 N. H. 498, 508; *Nutter v. Railroad*, 60 N. H. 483, 485; *Wells v. Eastman*, 61 N. H. 507, 508. An opinion under such circumstances is to be regarded as essentially a conclusion of fact derived from proper sources. *Leach v. Bancroft*, 61 N. H. 411, 413.

No error is discovered in the instructions of the court to the jury so far as they appear in the reserved case; and if, as is now claimed, the instructions assume the existence of facts of which there was no evidence, the defendant's general exception is unavailing. "In such a case there must be a specification of error, so that the attention of the court may be called to it and the error corrected before the jury retire, or the verdict will not be disturbed." *Emery v. Railroad*, 67 N. H. 434, 435, and authorities there cited; *Wheeler v. Railway*, 70 N. H. 607, 615.

*Exceptions overruled.*

All concurred.

Co's, }  
April 1, 1902. }

REYNOLDS, *Adm'x*, v. BURGESS SULPHITE FIBRE CO.

The plaintiff in an action for personal injuries may maintain a bill of discovery to compel the production of fragments of broken machinery in the possession of the defendant as owner, for the purpose of making an inspection of them as a material element in the proper preparation for a trial of the suit at law.

Such relief cannot be denied for the reasons that the discovery and inspection sought would constitute an infringement of the defendant's right of property, that an examination of the fragments is desired for the purpose of enabling witnesses to testify as experts, and that the action at law is brought to recover damages for a personal tort; nor do the statutes removing the disability of parties as witnesses, authorizing the taking of depositions before trial, and empowering the court to order a view, furnish such full, complete, and adequate means of obtaining information concerning the property in the defendant's possession as to oust the court of its equitable jurisdiction to entertain a bill of discovery for the accomplishment of that purpose.