

And it is equally improbable that he intended the number of trustees should not be reduced if, by reason of changed conditions in the estate, the number became excessive, so that it was impossible to effectuate his primary purpose without a reduction.

Another contention made by the petitioners is, that the order of the court deprives Hiram of the opportunity of passing upon the question whether he has complied with the condition imposed as to sobriety and good conduct, upon which the second and third instalments of the gift of \$30,000 are predicated, and is in violation of the intention of the testator that he should be permitted to pass upon this question with the other trustees. We do not think the will provides that he should have the right to pass upon his own qualifications with the other trustees; and as we understand the law, he would not be entitled to pass upon questions in which he is directly interested as a beneficiary and involving an exercise of discretion, but that such questions should be passed upon by the other trustees alone. *Rogers v. Rogers*, 111 N. Y. 228, 234, 237; *Woodward v. James*, 115 N. Y. 346, 357.

Exception overruled.

All concurred.

Strafford, }
Oct. 3, 1905. }

TISDALE *§ a.* v. JOHN H. PRAY SONS CO. *§ a.*

A mortgage of personalty, in which the affidavit required by statute is not signed and sworn to by both the mortgagee and the mortgagor, is not entitled to registration; and the unauthorized record of such an instrument does not charge a subsequent attaching creditor with notice of the lien sought to be secured thereby.

BILL IN EQUITY, praying for the cancellation of certain attachments made by the defendants upon personal property mortgaged by the plaintiffs Emma E. and John W. Hobart to the plaintiff Tisdale. Trial at the September term, 1904, of the superior court before *Stone, J.*, who dismissed the bill subject to the plaintiffs' exception.

The Hobarts, who reside in Brookline, Massachusetts, owned certain personal property situated in Rollinsford, and on March 20, 1903, executed the mortgage in question, which purported to secure a note for \$1,600. At the time of signing the note and mortgage nothing was due from the mortgagors to the mortgagee,

but on March 24 a loan of \$1,600 was made. The mortgagors, but not the mortgagee, took and subscribed to the following oath: "We, John W. Hobart and Emma E. Hobart, hereby certify that the foregoing mortgage is given in good faith, for a *bona fide* consideration, and is not intended or given to evade the claims of creditors." The mortgage was recorded in the town of Rollinsford on March 26, 1903. The defendants attached the mortgaged property on September 28, 1903, on writs brought against the Hobarts, without knowledge of the existence of the note or mortgage.

Charles S. Hill and *Vere Goldthwaite* (both of Massachusetts), for the plaintiffs.

Arthur G. Whittemore and *John S. H. Frink*, for the defendants.

BINGHAM, J. The affidavit contained in the mortgage, if otherwise sufficient, was not signed and sworn to by the mortgagee. The statute requires that the mortgagee as well as the mortgagor shall take and subscribe to the oath. P. S., c. 140, s. 6. This must be done to entitle a mortgage of personal property to registration. The unauthorized registration of such an instrument is not constructive notice of its existence. *Lovell v. Osgood*, 60 N. H. 71. The defendants' attachments having been made while the mortgaged property was in the possession of the mortgagors, and without knowledge, actual or constructive, of the existence of the mortgage, must prevail.

Exception overruled.

All concurred.

Merrimack, }
Oct. 3, 1905. }

WENTWORTH v. PITTSFIELD.

Steps which furnish a means of descent from a sidewalk to the adjacent roadway and are not provided with a railing for the support of pedestrians do not constitute a "dangerous embankment and defective railing" within the meaning of section 1, chapter 59, Laws 1893.

CASE, for injuries from a defective highway. Trial by jury. A nonsuit was ordered at the close of the plaintiff's evidence, subject