

*Daniel J. Daley and Herbert I. Goss, for the plaintiffs.*

*Rich & Marble and Edmund Sullivan, for the defendant.*

WALKER, J. This is a bill in equity for the specific performance of an agreement to mortgage real estate. The court dismissed the bill and transferred the question whether there was error of law in so doing. The title to the land in question is in the defendant's wife, who is not a party to this proceeding. Before she acquired her title the land was attached upon this bill in equity as the property of the defendant, who then had a record title. So far as appears from the case, his wife took her title subject to the attachment and is entitled to preserve it by satisfying the plaintiff's claim for damages by the defendant's alleged breach of his contract. Upon the present state of facts, a decree for specific performance would not be equitable.

*Case discharged.*

All concurred.

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Hillsborough, }  
Oct. 5, 1909. }

TARBELL & a., Trustees, v. LEARY & a.

PETITION, for advice as to the execution of the will of Luther A. Tarbell. Transferred from the January term, 1909, of the superior court by Wallace, C. J.

The testator executed his will September 7, 1892, and died September 24, 1893. The first clause of the will bequeathed the sum of \$3,000 to trustees, who were directed, "at the end of five years after my decease and every five years thereafter during the term of this trust," to pay over the accumulations, and at the end of fifteen years after the testator's decease to pay over the principal sum and accumulations, "in equal shares unto my grandchildren then living." The third clause directed that at the end of twenty years after the testator's decease the testators should pay the residue of the estate "unto my children and my grandchildren then living in equal shares."

At the date of the will the testator had nine grandchildren. Between the date of the will and the testator's death another grandchild was born. At the expiration of five years from the testator's death there were eleven grandchildren alive, and one had been born and died in that period. During the second period of five

years three more grandchildren were born. The trustees desire to be instructed as to what grandchildren are entitled to share in the trust funds.

*George B. French*, for the plaintiffs.

*George A. Bales*, for the defendants.

YOUNG, J. The trustees are advised as to the trust fund of \$3,000, that the first division of the income is to be made to Mr. Tarbell's grandchildren living September 24, 1898, the second division to those living September 24, 1903, and those living September 24, 1908, are to share in the final distribution of the fund. The other trust fund is to be divided equally among Mr. Tarbell's children and grandchildren who may be living September 24, 1913.

*Case discharged.*

All concurred.

Merrimack, }  
Dec. 7, 1909. }

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CRAIG v. WILKINS.

CASE, for personal injuries. Trial by jury and verdict for the plaintiff. The defendant's motion that a verdict be directed in his favor, on the ground that it conclusively appeared that the plaintiff assumed the risk of his injury, was denied subject to exception. Transferred from the April term, 1909, of the superior court by *Stone, J.*

*Martin & Howe*, for the plaintiff.

*Streeter & Hollis*, for the defendant.

YOUNG, J. Notwithstanding it could be found that the plaintiff ought to have known of the slippery condition of the floor on which he fell, it cannot be said that the evidence is so conclusive that all fair-minded men must come to that conclusion. Therefore the question whether the plaintiff ought to have known of this condition of the floor and appreciated the risk incident thereto was properly submitted to the jury.

*Exception overruled.*

All concurred.