

former bill was for an earlier default and not for those relied upon here. In such a case the doctrine that a second suit must abate has no application.

*Exceptions overruled.*

All concurred.

Strafford, }  
June 28, 1912. }

STATE *v.* WALSH.

INDICTMENT, for rape. The defendant excepted to a denial of his motion to quash the indictment on the ground that a witness who testified before the grand jury was incompetent. Transferred from the February term, 1912, of the superior court by *Plummer, J.*

*George T. Hughes*, solicitor, for the state.

*Arthur L. Foote* and *Walter W. Scott*, for the defendant.

YOUNG, J. It is not customary for the court to quash an indictment merely because it may have been produced by the testimony of an incompetent witness. *Commonwealth v. Woodward*, 157 Mass. 516; *State v. Fassett*, 16 Conn. 457; 17 Am. & Eng. Enc. Law 1283, note 7; 20 Cyc. 1347, note 18.

*Exception overruled.*

All concurred.

Coos, }  
Dec. 3, 1912. }

MACKEY, *Adm'r.*, *v.* GRAND TRUNK RAILWAY CO.

CASE, for negligence causing the death of Margaret Duggan, the plaintiff's intestate. Trial by jury at the December term, 1911, of the superior court. At the close of the plaintiff's evidence and subject to his exception, the court (*Mitchell, J.*) withdrew the case from the jury and made certain rulings to which exception was also taken.

*Matthew J. Ryan* and *Herbert I. Goss* (*Mr. Goss* orally), for the plaintiff.

*Drew, Shurtleff & Morris* and *Rich & Marble* (*Mr. Marble* and *Eri C. Oakes* orally), for the defendants.

PARSONS, C. J. Upon the only ground of liability asserted—the defendants' fault in not avoiding the injury after discovery of the danger—the case cannot be distinguished from *Cavanaugh v. Railroad, ante*, 68. In view of the suggestion of additional evidence upon the question of damages, there is now no occasion to consider the plaintiff's exception to the ruling thereon, which was not argued. The plaintiff was entitled to go to the jury.

*Exception sustained.*

All concurred.

Hillsborough, }  
Jan. 7, 1913. }

BARTLETT *v.* MANSFIELD.

DEBT, against a selectman, to recover the penalty imposed by section 16, chapter 57, Public Statutes. Trial by jury and verdict for the defendant. Transferred from the January term, 1912, of the superior court by *Mitchell, J.*, on exceptions taken by the plaintiff. On the ground that the private action for a penalty was abolished by chapter 31, Laws 1899, judgment was ordered for the defendant without considering the exceptions. *State v. McConnell*, 70 N. H. 158, 161; *Noyes v. Edgerly*, 71 N. H. 500, 503, 505.

*David W. Perkins*, for the plaintiff.

*Wason & Moran*, for the defendant.

Merrimack, }  
Feb. 4, 1913. }

YOUNG *v.* AMERICAN EXPRESS Co.

CASE, for negligence. Transferred from the April term, 1912, of the superior court by *Mitchell, J.*