

was ever necessary to flow the defendant's land, or whether it was ever flowed, before the plaintiff erected his dam in 1910. In the absence of any finding of the extent of the alleged easement, determined either by the height of the original dam, or by the actual flowage caused by the usual operation of the old mill, or by the reasonable necessities of its operation in 1819, or by other competent evidence, it is impossible to hold that the plaintiff has established his right to flow the defendant's land by means of his modern dam. If he has that right, he has not proved it. His right, if any, is not unlimited, and he has not shown that he has not exceeded his right.

If, as seems probable from the reserved case, the court cannot find what the easement was that was reserved in the deed of 1819, judgment should be rendered for the defendant. Until that fact is found, it is not useful to consider the question of abandonment.

Case discharged.

The others concurred.

MEMORANDUM.

Mr. Justice BINGHAM resigned his office on the ninth day of June, 1913, the resignation taking effect on the eleventh day of June, 1913.

Strafford, }
June 27, 1913. }

DWIGHT HALL, *Adm'r*, v. CAROLINE M. HARVEY & a.

Where a will empowers the executor named therein to distribute the residue of the estate among educational, benevolent, and charitable institutions "as he shall in his absolute discretion think fit," and in terms constitutes him the sole judge as to what institutions shall be benefited and the amounts they shall receive, the trust reposed in him is personal; and in the event of the decease of the designated trustee during the lifetime of the testatrix, the legacy to him lapses and the proceeds thereof must be administered as intestate estate.

BILL IN EQUITY, for instructions as to the execution of a will. Transferred without a ruling from the February term, 1913, of the superior court by *Plummer, J.*

Dwight Hall, administrator, *pro se.*

WALKER, J. This is a bill in equity for instructions. The plaintiff is the administrator with the will annexed of the estate of Caroline M. Martin, who died September 5, 1910, testate. George W. Benn, nominated as executor in the will, died August 31, 1910. By the last clause of the will, the testatrix gave "all the rest, residue, and remainder of my estate, real, personal, and mixed, to George W. Benn of Dover, N. H., as he shall in his absolute discretion think fit, to give to and bestow upon Protestant benevolent, educational, and religious institutions; and it is my direction and meaning that the said George W. Benn shall be the sole judge as to what institutions shall be benefited hereby and in what amounts they shall be benefited."

The question presented relates to the disposition of the residue in view of Benn's decease. It is clear that the testatrix intended to leave to the absolute determination of Benn the selection of the particular institutions of the kinds mentioned that were to be benefited by her bequest. No other method of selection is suggested in the will. It was a personal trust which she desired to repose in her designated trustee. It was not her intention, so far as the will shows it, that the discretion reposed in Benn should be exercised by some one else appointed by the court as his successor. The result is that the legacy in trust to him lapses, and the proceeds thereof must be disposed of as intestate estate. The administrator is so advised.

Case discharged.

All concurred.