

that there was no evidence that the intestate had such an intention, and the petition was dismissed subject to exception. The plaintiff also excepted to the refusal to grant him an *ex parte* hearing. Transferred from the April term, 1914, of the superior court by *Sawyer, J.*

Horace J. Holden, for the plaintiff.

Thomas F. Johnson and *Drew, Shurtleff, Morris & Oakes*, for the defendant.

PEASLEE, J. This proceeding involves the same property the title to which was in litigation between the same parties in *Day v. Roby, ante*, 144. The administrator of Volney Day's estate now seeks to prevent Mrs. Roby from disposing of the property, upon the ground that it is charged with the payment of Volney's debts. As the plaintiff failed to prove the allegation upon which his claim depended, his petition was rightly dismissed. No brief has been filed in support of the plaintiff's exceptions, and no error has been found in the rulings of the superior court. The claim that it was the plaintiff's right to have the defendant's rights curtailed without opportunity to make objection on her part is not entitled to serious consideration.

Exceptions overruled.

All concurred.

Merrimack, }
Feb. 2, 1915. }

ELLEN S. ABBOTT v. ISABEL F. ABBOTT.

PETITION FOR PARTITION. At the April term, 1914, of the superior court, the plaintiff's motion that the answer to the petition be disallowed was denied by *Branch, J.*, subject to exception.

Joseph S. Matthews (by brief and orally), for the plaintiff.

George V. Hill (by brief and orally), for the defendant.

Per Curiam. It was conceded at the argument that there was no legal objection to a physical partition of the premises. Whether the premises can be so divided is a question of fact for the trial court. Laws 1913, c. 21, s. 3. As there appears to be little, if any, doubt

that in fact such division can be made without great prejudice or inconvenience, ordinary convenience in procedure requires the determination of that question before discussion of the proposition whether upon the facts stated a sale of the whole can be ordered.

Case discharged.

Hillsborough, }
April 6, 1915. }

WILLIAM BASSETT, JR., v. CLARENCE H. DODGE & a.

CASE, for negligently burning the plaintiff's buildings. Trial by jury and verdict for the plaintiff. The defendants' motions for a nonsuit and a directed verdict were denied, and they excepted. Transferred from the May term, 1914, of the superior court on a bill of exceptions allowed by *Pike*, C. J.

The defendants drilled a shallow hole in a stone which was located a few yards from an old mill, loaded it with dynamite, and exploded the charge with a fuse. The force of the explosion threw the fuse upon the roof of the mill, and the fire which resulted was communicated to the plaintiff's property.

Taggart, Burroughs, Wyman & McLane (Mr. Wyman orally), for the plaintiff.

Branch & Branch and Nathaniel E. Martin (Frederick W. Branch orally), for the defendants.

YOUNG, J. The evidence that it is not uncommon for such a blast to throw the fuse as far as this one was thrown, or for the fuse to contain fire, and that it sometimes contains fire enough to ignite inflammable materials, warrants the finding that the defendants ought to have known that if they exploded the blast at the time and in the way they did they might set the mill on fire. Therefore, the question whether they were in fault depends upon whether the ordinary man would have exploded such a blast, in such a place, in such a way, on such a day, without doing anything whatever to protect the plaintiff's buildings; and that was for the jury.

Exceptions overruled.

All concurred.