

benefit might legally be paid. As he failed to do so, the rights of the parties are fixed at his death and his children under the contract are entitled to the fund because of his failure to make other legal designation.

*Knights of Honor v. Watson*, 64 N. H. 517, upon which the designated beneficiaries rely, cuts both ways. There it was held that as none of the other defendants could receive a sum designated to be paid to a particular beneficiary, they could not raise the question of her title. Here the designated beneficiaries can have no interest in the fund, not merely because of the constitution or by-laws of the insurer, but because the policy of the state declared by the legislature incapacitates them from having any. Having no interest in the fund, they are not in a position to question its final disposition. The logic of the decree in the *Watson* case, giving the fund to Mrs. Lamprey because no other defendant was entitled to it, is not now involved.

If in this case none of the defendants were found entitled to the fund, the proper decree would seem to be one returning it to the plaintiffs for such voluntary disposition as the law would permit and their inclinations advise. But no such question arises.

*Exception overruled: decree for the children of E. L. Tinkham.*

PLUMMER, J., did not sit: the others concurred.

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Hillsborough, }  
Dec. 4, 1923. }

ALEC J. YOUNG v. JOHN BURNETT.

A signer of a joint promissory note is entitled to contribution from his co-signer though at the time of payment the holder's action against the co-signer had become barred by limitation.

ASSUMPSIT, to recover contribution of a co-signer of three promissory notes for the amount paid by the plaintiff to discharge his liability thereon. The notes were outlawed in this state as between the defendant and the holder when the payment was made by the plaintiff, but enforceable against the plaintiff.

Trial by the court, *Kivel*, C. J., who found for the plaintiff subject to the defendant's exception, and allowed this bill of exceptions.

*Henry A. Cutter*, for the plaintiff.

*Doyle & Doyle*, for the defendant.

PARSONS, C. J. The plaintiff's right of action accrued against the defendant when he paid the notes. He therefore can maintain this action, the payment being made within six years from the date of the writ, even if the holder of the notes could not here maintain a suit thereon against the defendant. *Whipple v. Stevens*, 19 N. H. 150; *Boardman v. Paige*, 11 N. H. 431; *Peaslee v. Breed*, 10 N. H. 489.

*Exceptions overruled.*

All concurred.

Hillsborough, }  
Dec. 4, 1923. }

BENJAMIN L. TERRELL *v.* JOHN BARTON PAYNE, *Agent*.

Under U. S. Comp. Stat., 1906, s. 8651, the duty of a carrier to provide "properly equipped pens" for live stock, when unloaded in transit, may be performed by maintaining such pens on the carrier's own land, or by hiring such pens on the land of another; and the carrier has a lien for the feed, water and care, regardless of the location of the pens or who may own them.

Upon a general exception that a carrier was entitled to no lien whatever for the care of live stock in transit, when taken off the train and removed to the land of another, the court will not consider whether the charge was erroneous in not properly defining the extent of the lien.

Where the evidence has not been transferred, an exception to the court's refusal to give an instruction will be overruled, if the refusal would have been proper under any possible circumstances.

CASE, for loss on a carload of horses shipped from Montpelier, Vermont, to Concord, New Hampshire. Trial by jury and verdict for the plaintiff.

The horses arrived in Concord on a very cold night in February, and the time having arrived when they should be unloaded for food and rest (U. S. Comp. Stat., 1906, ss. 8651, 8652), they were put into open pens without any protection from the weather and caught cold.

Transferred by *Allen, J.*, on the defendant's exception to the charge as given and to the court's refusal to charge. The facts relevant to the exceptions are stated in the opinion.