

U. S. Rep.]

HENRY BAKER &amp; WIFE V. CITY OF PORTLAND.

[Maine.]

By a codicil to her will, dated the 16th July, 1855, the testatrix appointed John Fazakerley a trustee and executor of her will, along with Robert Neilson; and she thereby authorised her trustees and executors to lay out all or any part of her personal estate (which by her will she had given upon trust for her four grandchildren on attaining twenty-one, in equal shares), and the rents of her real estate, in repairing the dwelling-house and premises where she then lived, and in erecting and making such alterations and additions thereto as might from time to time appear necessary to them for letting the same to advantage.

The testatrix died on the 21st July, 1855, and her will and codicil were, in the following October, duly proved by John Fazakerley alone.

The four grandchildren were all infants at the death of the testatrix.

The dwelling-house and premises referred to in the codicil consisted of a dwelling-house known as Vine Cottage, and three small plots of land adjoining it, and situate in Buscough-street, Ormskirk. At the date of the testatrix's death, Vine Cottage was in a very dilapidated condition; and Fazakerley, not having in his hands sufficient money belonging to the testatrix to put the cottage into a thorough state of repair, borrowed sums amounting in the whole to 1,018*l.* 15*s.* 4*d.*, which he expended upon the repair of the premises, whereby he alleged that he had increased the letting value thereof from 25*l.* to 90*l.* He had since paid off the amount out of the rents.

Ellen Elizabeth Culshaw, who attained twenty-one in September, 1869, having expressed herself dissatisfied with the expenditure of the sum of 1,018*l.* 15*s.* 4*d.* upon the repairs of the premises, Fazakerley instituted the present suit, praying for the administration of the real and personal estate of the testatrix, and for a declaration that the expenditure of the sum in question on the repairs of the premises was proper and for the benefit of the grandchildren, and that he might be allowed the sum of 1,018*l.* 15*s.* 4*d.* and interest as a proper disbursement on account of the real and personal estate of the testatrix, in taking the accounts.

*Jessel, Q. C.*, and *A. E. Miller*, for the plaintiff, contended that he ought to be allowed all sums properly expended by him, with interest at the usual rate.

*Southgate, Q. C.*, and *Bedwell*, for the grandchildren, contended that the plaintiff was not entitled to be allowed interest. There ought to be an inquiry as to the amount properly expended, and the plaintiff ought to pay the costs of the inquiry, as in *Re Churchill* (3 Jur. 719), where Lord Cottenham held that the committee of a lunatic, who had expended money in the repair of his estates without having the previous sanction of the court, must bear the costs of a reference to the Master whether the amount had been properly expended. They also referred to *Bridge v. Brown* (2 Y. & C. C. C. 181).

*Bardwell* for the other trustee.

*Jessel, Q. C.* replied.

Lord ROMILLY said that under the words of the codicil there was no power to raise money by mortgage of the real estate for the purpose of repairing; the trustees were only empowered to

apply for that purpose the rents after they received them, and therefore no interest could be allowed to the plaintiff in respect of the money which he had borrowed for the purpose of repairing the cottage. There must be an inquiry what sum was properly expended by the plaintiff in the repair of the cottage.

## UNITED STATES REPORTS.

### SUPREME JUDICIAL COURT OF MAINE.

HENRY BAKER AND WIFE V. CITY OF PORTLAND.  
HENRY BAKER V. SAME.

The fact that, when a resident of a city was injured by a defective way, which the city was bound to keep in repair, he was driving at a "faster rate than six miles an hour," in violation of a city ordinance, is no bar to his right to recover damages for such injury, if such driving did not in any way contribute to produce it. The fact that the jury failed to agree upon the answer to the question whether the plaintiff was driving at a faster rate than six miles an hour, does not render it reasonably certain that a general verdict for the plaintiff, in such action, is erroneous.

This was an action on the case, for an injury occasioned by a defective highway. The plaintiffs suffered serious damage in person and property on the evening of October 13th, 1868, by reason of the upsetting of the carriage in which they were riding, in consequence of running over certain piles of stones which had been dumped in the roadway on Cumberland street, by persons in the employ of the street commissioner, and left there over night, without guards or lights, to protect or warn the traveller. The buggy and harness were well made and in good order, the horse well broken and kind, though spirited, the street much frequented, and the evening too dark for a man in a carriage to see obstacles of that description on the ground.

H. Baker testified that he was driving not over five miles an hour, when the accident occurred. The defendants offered evidence to show that he was driving at a rate exceeding six miles an hour.

There was a city ordinance prohibiting driving at a faster rate than six miles an hour, under a penalty of not less than \$5 nor more than \$20.

The presiding judge instructed the jury, that if plaintiffs were driving at a faster rate than six miles an hour, when thrown from the carriage, yet if such driving did not in any degree contribute to produce the injuries complained of, would be no bar to their right to recover.

The case now came before this court on exceptions by defendants to this instruction, and also on motion to set aside the verdict (which was for the plaintiffs) as against law and evidence.

*Davis & Drummond* for plaintiffs.

*J. W. Symonds*, City Solicitor, for defendants.

The opinion of the court was delivered by

BARROWS, J.—Counsel for the defendants cite a strong line of cases, in which our own and other courts have held city ordinances of this and like character, as binding on all who have actual or constructive knowledge of their existence, and as having the force of statute law within the limits to which they apply. And also cases in which it appears to have been held with more or less distinctness, that a party