and speaking through Justice CLIFFORD, said: "Admiralty jurisdiction was conferred upon the Government of the United States by the constitution, and in cases of *tort* is wholly unaffected by the considerations suggested in the proposition."

This is the latest judgment of the Supreme Court, and unless it can be shown that jurisdiction in matters of contract is not as "wholly unaffected by the considerations" referred to, as jurisdiction in matters of *tort*, it seems to be my duty, being fully satisfied that this court has jurisdiction under the constitution and the law over the contract of the respondents, to award to the libellants that justice to which the proofs clearly entitle them, without turning them out of this and requiring them to resort to another court. I do not think this can be shown, and therefore

Affirm the decree of the District Court.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW HAMPSHIRE.[1]

ADMINISTRATOR.

Right to Administration.—Where two persons are of the same relationship to the deceased, and one resides in this state and the other does not, ordinarily the one resident here is entitled to administration, as of right; but if he makes a claim against the estate which is contested by the heirs, it is proper, within the discretion of the court, to appoint the one residing out of the state: *Pickering* v. *Pendexter*, Sup. Court N. H.

ASSUMPSIT.

Assignment of Claim for Services.—Where A. had hired his son to B. for a given time and at a fixed price, and before the time had expired he gave an order on B. to pay to C. the amount then due or which might become due thereafter for his son's wages, which order was accepted by B., *Held*, that after said term of service had expired and the contract had been fully performed by A., C. might maintain an action for money had and received, against B., for the amount agreed to be paid for such labor: *Kent* v. *Watson*, Sup. Court N. H.

And if C. should sell this order to a third person, before or after suit brought upon it, the action might still be maintained in the name of C., by his consent, for the benefit of the real owner: *Id.*

[1] We are indebted for these notes to the courtesy of the judges. The volume of reports in which the cases will appear cannot yet be indicated.

Damages for Conversion of Gold Coin.—Where gold coin was pledged as security for becoming bail, and it afterwards rose in value much above par, it was *held*, that, in an action for money had and received, the damages must be limited to the amount of money received, with interest, and could not be enhanced by an increase of its value as merchandise; and *held*, also, that, in trover, the measure of damages would be the value of the coin at the time it was converted, and not when the verdict was rendered: *Frothingham et al.* v. *Morse*, Sup. Court N. H.

Agreement to exchange Lands—Performance by one Party and Refusal by Other—Action for Value of Land conveyed.—Plaintiff and defendant had made a parol agreement by which plaintiff was to convey to defendant a tract of wild land in part payment for a farm which defendant was to convey to plaintiff. Plaintiff had conveyed the wild land to defendant, but defendant refused to convey the farm to plaintiff. *Held*, that plaintiff might rescind the contract and recover the value of the wild land in an action of *indebitatus assumpsit* for land sold: *Smith* v. *Hatch*, Sup. Court N. H.

Also *held*, that where the defendant had sold the wild land for cash, the plaintiff might rescind the original contract, adopt the defendant's act of selling, and ratify the sale, and recover of defendant the price he received for the land in an action for money had and received: *Id.*

Variance.—In assumpsit on account annexed, the plaintiff cannot go outside of his specification, either in respect to debt or credit, without an amendment; and, therefore, proof that an item of credit was entered by mistake, is incompetent: *Saunders* v. *Osgood*, Sup. Court N. H.

Bills and Notes.

Illegal Consideration —The payee of a note, part of the consideration of which was the sale of intoxicating liquor in violation of the law of the state, having accepted the note with notice, cannot recover upon it against the maker: *Kidder et al.* v. *Blake et al.*, Sup. Court N. H.

Where A., the payee of a note void between himself and B. and C., the makers, for illegality of consideration, surrendered it to B. and D., in whose hands it was equally invalid: *Held*, that this was not a sufficient consideration for a note from B. and D. to A.: *Id.*

The release by A. of an attachment in a suit brought by him against B. and D. upon their note so given to him, is no sufficient consideration for a promise by D. to A. that "the note should be paid;" and such a promise upon condition that the attachment should be released, and the consequent release of the attachment will not, in a subsequent suit by A., against B. and D. upon the note, estop D. to deny its validity: *Id.*

Common Carrier.

Right of Consignee to examine Goods before Acceptance.—Where a package of goods is forwarded by a carrier, to be paid for on delivery, the consignee is entitled to a reasonable opportunity to inspect them before he accepts them; and the carrier may afford him reasonable facilities for doing so, without making himself chargeable for the price, even if he put them into the hands of the consignee for that purpose, and receive from him the price as personal security to the carrier that the goods shall be returned if not accepted, after a reasonable opportunity to examine them: *Lyons & Co.* v. *Hill & Co.*, Sup. Court N. H.

Contract.

Money paid with Knowledge of Failure of Consideration cannot be recovered back.—An action for money had and received will not lie to recover back money paid upon a promissory note, upon the ground that the consideration had partially failed, where the plaintiff, when he paid the note, was fully aware of the facts upon which such claim of failure was founded, but the payment must be regarded as voluntary: *Sessions* v. *Meserve*, Sup. Court N. H.

It would be the same where it was agreed, when the note was given, that a deduction should be made to conform to the appraisal of a third person of some grain for which the note was given, and, on making such appraisal, the plaintiff claimed the deduction, which the defendant refused, and thereupon the plaintiff paid the whole: *Id*

Statute of Frauds.—A contract to work for another two years, for one hundred dollars for the first year, and two hundred dollars for the second, is within the Statute of Frauds as a contract not to be performed within a year, and a memorandum in writing is necessary: *Emery* v. *Smith*, Sup. Court N. H.

Such a contract is not taken out of the statute by its performance on one side; but the party doing the work must resort to a *quantum meruit*, even if there has been part performance on the other side: *Id.*

In a *quantum meruit* for such services, where the defendant insists upon the statute, the plaintiff may recover the value of those services, but the agreement is not admissible to affect the amount of damages: *Id.*

Costs.

Money paid for Copies of Deeds used as Evidence at Trial.—Money paid for copies of deeds which are necessary to be used in evidence, in proving title to the premises in question, may be properly charged in bills of costs: *Ela* v. *Knox*, Sup. Court N. H.

But copies of deeds procured for the purpose of preparing the case for trial on either side but which are not to be used in evidence in proving title, or some other competent fact, will not be allowed: *Id.*

In cases where surveys and plans are needed in preparing the case for trial, and where the plans are used on trial, the expenses of the survey and making the plans are not to be allowed in the bill of costs: *Id.*

Taxation of, by Commissioner.—The report of a commissioner, appointed by the court to tax the costs in an action at law, should show what items of costs are allowed by him: *Morse* v. *Allen*, Sup. Court N.H.

Deed.

Delivery—Presumption of Grantee's Assent.—To constitute a valid delivery of a deed, it must pass into the hands of the grantee, or some one for him, in such way as to be beyond the legal control of the grantor, and therefore, if placed in the hands of a third person to be by him delivered to the grantee, it will not be good against an intervening attachment of the land: *Johnson* v. *Farley*, Sup. Court N. H.

Where a deed of land is delivered to a third person for the use of the grantee, his assent will not be presumed unless it be clearly beneficial to him; and therefore, if the deed conveys all of a debtor's real estate

as security for the debts of forty different persons, and at the same time all the rest of the debtor's property is conveyed as security for other creditors, but not in the manner prescribed by the laws regulating assignments, the assent of the grantees in such deed will not be presumed: *Id.*

EXECUTION.

Evidence of Partnership Debt.—Where the priority of different creditors attaching the property of a firm is to be determined by the individual or partnership character of their respective claims, the mere fact that a promissory note is signed by the individuals who compose the firm, is insufficient to show that it is a partnership debt: *Gay & Co.* v. *Johnson*, Sup. Court N. H.

HUSBAND AND WIFE.

Purchase by Wife of Promissory Note signed by Husband.—A negotiable note given to a third party by a husband before his marriage, is not extinguished by the mere fact of its purchase from such third party by the wife, after marriage, with money belonging to her before marriage, not reduced to possession by the husband: *Russ* v. *George*, Sup. Court N. H.

One to whom the wife has subsequently to her purchase of the note transferred it with her husband's assent, may maintain an action upon it against the husband: *Id.*

The mere facts that the money with which the note was purchased by the wife was "the proceeds of the wife's real estate" sold after marriage, and was "kept in her control and not converted by her husband," and that the "note was never by the husband reduced to possession or in any way converted, but was held by the wife till its transfer," do not, as matter of law, amount to an assent by him to her disposing of it: *Id.*

Such an assent may be inferred from circumstances; but whether such an inference is to be made is ordinarily a question of fact for the jury: *Id.*

Earnings of Wife belong to Husband, but not attachable by Creditors.—The personal services and earnings of the wife, and the profits and income of any business in which she may engage, at common law and under our statutes of 1846 and 1860, relating to the rights of married women, belong to the husband absolutely, and cannot be held by the wife to her sole and separate use: *Hoyt* v. *White*, Sup. Court N. H.

But while the husband may thus enjoy and appropriate the earnings of his wife and the profits of her services, still, under our law regulating the trustee process, the husband's creditors cannot, on that process, hold any of the avails of the wife's personal services or earnings: *Id.*

Rights of Widow as to Dower and Homestead in an Equity of Redemption.—A widow is entitled to dower and homestead in an equity of redemption in real estate of her late husband against all persons, except the mortgagee or those claiming under him: *Norris* v. *Morrison*, Sup. Court N. H.

But she cannot have dower or homestead as against the mortgagee, except by payment of the whole mortgage-debt: *Id.*

Against any and every one having an interest in the redemption and

who has actually redeemed the mortgage, she can hold her dower and homestead upon payment of contribution: *Id.*

If the administrator redeems the mortgage from assets of the estate, then the widow takes dower and homestead without contribution: *Id.*

After the decease of the mortgagee, if the equity of redemption is purchased by the mortgagor, the two estates, that under the mortgage and the equity of redemption, become merged, as though some third person had purchased the equity and then redeemed the mortgage; and in such case the widow may hold her dower and homestead discharged from the mortgage by paying contribution only: *Id.*

In such case, it is immaterial whether the dower and homestead or either of them be first assigned or the equity be first sold, since the owners of these interests, in either case, stand on the same ground in equity, their separate estates commencing, not from the time of the assignment or sale, but from the death of the intestate: *Id.*

Hence the mortgage-debt is to be shared between the owner of the equity of redemption and the widow having dower and homestead, according to the relative value of the proportion of mortgaged property held by each: *Id.*

Limitations.

Note Secured by Mortgage.—Under our Statute of Limitations, when a note has been secured by any mortgage under seal, whether of real or personal estate, if such note has not been paid or the mortgage given to secure it discharged, an action upon the note will not be barred by the statute until such statute would operate as a bar to a suit upon such mortgage: *Alexander* v. *Whipple*, Sup. Court N. H.

And it makes no difference in that respect whether or not the property mortgaged is still available for the payment of the mortgage-debt: *Id.*

Pleading.

Waiver of Objection to Time of Pleading a new Plea.—Where the plaintiff, during the pendency of his action, had recovered a judgment against the defendants in another state for the same cause of action, an agreement in due form between the parties, made several terms after the recovery of that judgment and after the general issue had been pleaded, that the defendants may file a plea setting forth the judgment recovered "without prejudice to the legal rights of the parties," in bar of the further maintenance of the action, without costs, setting forth the plaintiff's objection to "the reception of this plea from the defendants," and stating that the counsel for the defendants appear for subsequent attaching creditors and the assignee of the defendant corporation, and agreeing that the question whether this judgment so recovered can avail the defendants, be reserved for decision, is a waiver of any objection on account of the time when the plea is offered, if it is duly filed according to the agreement: *Child* v. *The Eureka Powder Works*, Sup. Court N. H.

Subsequent attaching creditors and the assignee of the defendant upon the record, having been admitted to defend in his name, may plead a former recovery by the plaintiff, where the defendant could have pleaded such a recovery as a defence: *Id.*

In assumpsit, a judgment for the same cause of action rendered in the Supreme Court of New York during the pendency of the plaintiff's

action here, may be pleaded in bar of the further maintenance of the action; and it is not a sufficient replication to such a plea that the plaintiff in his action here had caused the defendants' property to be attached, and that the defendants' property in either state alone was insufficient to satisfy the amount due the plaintiff upon the cause of action set forth in his declaration: *Id.*

PRACTICE.

Appeal from Decree of Probate Judge—What Matters are open to Review.—Upon an appeal from a decree of the judge of probate allowing a guardian's account, the only matters open to inquiry by the appellant are those specified in his reasons for appeal; but the appellee is not thus confined, but may, on such appeal, show error in any part of the decree and have it corrected: *Patrick* v. *Cowles*, Sup. Court N. H.

In such case the original reasons for appeal may be amended in any way that does not change the nature of the claim; the manner of stating the claim may be changed, and the grounds on which it is sought to be recovered, provided the court can see that the same thing is sought to be recovered or accomplished under the amendment as under the original reasons for appeal: *Id.*

New and independent reasons for appeal cannot be assigned by way of amendment: *Id.*

In such cases of appeal, neither party can claim, as a matter of right, that any question of fact that may arise shall be submitted to a jury; but the court may, in its discretion, submit any such fact to a jury when deemed proper: *Id.*

Where an auditor is appointed by this court, in a case like this, to hear the evidence and report the facts, he does not derive his powers from the statute providing for the appointment of auditors to state accounts between parties, nor have the parties in such case any right to try by a jury any facts thus found by the auditor: *Id.*

If either party desires a jury trial, the motion for issues should be made before the appointment of an auditor: *Id.*

SET-OFF.

Note or Judgment against Principal and Surety may be set off against Claim by Surety alone.—A note signed by a principal and surety may be set-off against a note due to such principal alone. So a judgment against two, where it is admitted or proved that one is principal and the other surety, would stand on the same ground as an offset as a note against the same persons in the same capacity: *Andrews* v. *Varrell*, Sup. Court N. H.

Where the plaintiff's claim is sued in the name of some nominal party, or where the defendant's claim against the plaintiff is a judgment in the name of some nominal party, but belongs to the defendant and did so at the time of suit brought, the offset may be made, as the demands will be regarded as mutual if between the same parties in interest, without regard to parties merely nominal: *Id.*

Where defendant held a note against the plaintiff at date of plaintiff's writ, which afterwards, and during the pendency of plaintiff's suit, passes into judgment, he cannot file either the note or the judgment in offset to plaintiff's claim: *Id*

SHERIFF.

Suit for Default of Deputy—Deputy being released, is competent Witness—Return made by order of a Party.—In a suit by an administratrix against a sheriff for the default of his deputy, the latter, not having taken upon him the defence of the suit, and having been released by the sheriff, is a competent witness, although the plaintiff did not elect to testify: *Stevens, Administratrix*, v. *Colby*, Sup. Court N. H.

If an attorney of a creditor, acting under authority, delivers an execution to a deputy sheriff, and assumes to give special directions as to the mode and manner of executing the process, and makes a return upon it which he directs him to sign, and the officer obeys those directions, he is to be regarded as the agent of such creditor, and the sheriff will not be liable for a defect in such return: *Id.*

TROVER.

Property not in the Plaintiffs.—A melodeon was sold to one Ripley, for the price of which he gave his promissory note, but the property was not to vest until his note was paid. Afterwards Ripley sold the instrument to the defendant, and Ripley's note was transferred by the vendors to a third person. *Held*, that the interest of the vendors in the melodeon was incident to the note, as in the case of a mortgage or pledge, and that upon the transfer of the note the interest of the payees in the melodeon passed to the indorsee, and that consequently the vendors, these plaintiffs, could not maintain trover for it: *Esty & Green* v. *Graham*, Sup. Court N. H.

Sufficiency of Description—Bank Bills.—In trover for bank bills, a description of them as "certain current bank bills, representing in all one hundred and fifty dollars in money, and of the value of one hundred and fifty dollars," is good after verdict: *Town of Colebrook* v. *Merrill*, Sup. Court N. H.

WILL.

Rule against Perpetuities—Mortgage by Tenant in Common—Estoppel of Co-tenants—Liability of Tenants in Common for Life to Remainder-man.—Where there was a devise to J. W. and wife for their lives, and after their death to the children of J. W. for their lives, and the lives of the survivors of them, and then to the grand children of J. W. in fee, it was *held*, that the limitation over to the grandchildren was void for remoteness, inasmuch as it *might* not take effect during the life or lives of persons in being at the death of the testator, and twenty-one years after. *Held*, also, that the children of J. W. took only a life estate, and that it was not enlarged to a fee by the fact that the limitation over was void: *Wood et al.* v. *Griffin*, Sup. Court N. H.

Where one of the children of J. W. mortgaged all his interest in the estate, the others saying at the time to the mortgagee that they would make no trouble about his cutting the timber on the mortgagor's share, it was *held*, that the other children, after the death of the mortgagors, were not estopped by such declarations, the mortgagee being fully aware of the true state of the title: *Id.*

Where such mortgagee enters upon the share so mortgaged, claiming the entire title, it is in law an ouster of the other tenants in common, and they may maintain trespass therefor: *Id.*

Where such action is commenced by a husband and wife in her right,

and she afterwards dies, the action may still be prosecuted by the husband: *Id.*

Tenants in common for life are liable to the remainder-man or reversioner for an injury to the inheritance, by a stranger, or by part of the tenants in common; and, having made satisfaction for the injury to such remainder-man or reversioner, they may recover over against the wrong-doer the amount they have been compelled to pay; but, until they have made such satisfaction, they can recover only for the injury to their possession: *Id.*

Bequest of Personal Property for Life with Remainder.—Where a remainder in personal property was given by will to a married woman in 1825, and at the death of the tenant for life it came into the possession of a third person, *held*, that the next of kin of such married woman on her death can maintain no suit for it, either at law or equity, against such third person, without taking out administration: and *held*, also, that the surviving husband of such married woman was, at common law, entitled to the beneficial use of such property, even although he had not taken administration: *Weeks* v. *Jewett and Wife et al.*, Sup. Court N. H.

Where an executor had delivered over to the tenant for life the personal property given by the will, and such tenant had received and retained it until her death, it was *held*, that the executor could not, as such, maintain a suit against a third person to recover it, as his duty must, in the absence of any provisions in the will to the contrary, be regarded as discharged by the delivery to the legatee: *Id.*

WITNESS.

Opinions not of Experts.—Opinions or conclusions of witnesses not experts, from facts and appearances observed by them, are sometimes admissible from necessity and to prevent the failure of justice, as in question of identity of person, handwriting, sounds, size, distance, and the like: *Whittier* v. *Town of Franklin*, Sup. Court N. H.

But when the facts or appearances on which these conclusions rest can be described so as to be understood by others, they should be, and the jury left to form their own opinion: *Id.*

Where the question was whether a horse went over a bank by a highway in the defendant town, by reason of fright or otherwise, a witness was allowed to state in substance that the horse did not appear to be frightened but sulky; and it was held to be admissible, as coming within the exception arising from necessity: *Id.*

To prove the bad habits of the horse at the time of the accident, evidence of particular instances of vicious conduct is admissible: *Id.*

Witness to a Will must be competent at time of Attestation—Witness to a Deed need only be competent at time of Proving—Construction of Statutes.—The "credible witnesses" which the statute requires in the case of wills, must be witnesses who are at the time of the attestation competent to testify and prove its execution: *Frink* v. *Pond*, Sup. Court N. H.

But in case of a deed of real estate, the "two or more witnesses" by whom the statute requires it shall be attested, need not be competent at the time of attesting the deed; but if either be competent at the time the attestation is to be proved, that is sufficient: *Id.*

Where the legislature adopt or re-enact a statute, the previous construction of the statute, as settled by the courts of law, is also adopted: *Id.*