a non-resident has pursued a citizen of this state through years of expensive litigation in the state courts—if after all the important and vital questions in the case have passed into judgment, as between the parties, and he sees his antagonist about to pluck the fruits of his toil and sacrifice, he can by an affidavit under this statute turn those fruits to ashes, and transfer his case to another court of original jurisdiction to start anew, certainly such results will challenge for the act the closest scrutiny of the grounds upon which the power to pass it is asserted.

The order appealed from must be reversed, and the cause remanded for further proceedings.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

### SUPREME COURT OF KANSAS.[1]

### SUPREME COURT OF NEW HAMPSHIRE.[2]

### SUPREME COURT OF NEW YORK.[3]

#### ARBITRATION.

*Submission of a pending Action.*—A mere submission to arbitration will not be a discontinuance of a pending suit where, by express agreement or necessary implication, the cause is to be kept on foot until the arbitration is perfected by an award: *Lary* v. *Goodeno*, 48 N. H.

Such an agreement will be implied from a stipulation, that judgment shall be entered on the report or award: *Id.*

Where under a misapprehension as to the effect of a submission to arbitration the action is entered "neither party," it is a proper exercise of discretion to strike off such entry and let the cause stand for trial: *Id.*

Whether a mere submission to arbitration will operate as a discontinuance of a pending suit, even if there is no agreement to enter judgment on the award, *quære: Id.*

#### ASSUMPSIT. See *Contract.*

*Money received by Public Officer, and not appropriated to the purpose of his Office.*—If the prudential committee of a school district receive the money assigned to the district for the support of schools, and neglect to appropriate it to that use, the district, after the committee's term of office has expired, may recover the money in an action for money had and received: *School District No. 7 in Auburn* v. *Sherburne*, 48 N. H.

---

[1] From Hon. C. K. Gilchrist; to appear in 5 Kan. Rep.

[2] From the Judges; to appear in 48 N. H. Rep.

[3] From Hon. O. L. Barbour, Reporter; to appear in vol. 53 of his Reports.

BOUNTY.

*Commissioned Officer.*—A man who entered the army as a commissioned officer of volunteers, is not entitled to the bounty voted by a town under the statute, which authorized towns to raise and appropriate money "to encourage enlistments in the army:" *Hilliard* v. *Stewartstown*, 48 N. H.

BROKER.

*Power to bind Principal.*—An authority to sell, given to one whose occupation is that of a real estate broker, authorizes the broker to sign the contract and bind his principal: *Pringle* v. *Spaulding*, 53 Barb.

COMMON CARRIER. See *Railroad.*

CONSTITUTIONAL LAW.

*Trial by Jury—Opportunity of Defence.*—The Act of July 3d 1863, entitled "An act in relation to damages occasioned by dogs," so far as it undertakes to charge the owner with the amount of damage done by his dog as fixed by the selectmen of the town without an opportunity to be heard, is unconstitutional; because it is contrary to natural justice and not within the scope of legislative authority conferred by the constitution on the General Court; and also because it is in violation of the provision in the Bill of Rights, which secures the right of trial by jury in all controversies concerning property, except in cases where it had not theretofore been used and practised: *East Kingston* v. *Towle*, 48 N. H.

An act may be in part beyond legislative authority and within it for the residue, and, if it is capable of being administered in the parts which are within the power of the legislature to enact, it will so far be a valid law: *Id.*

The legislature have power to make towns liable for damage done within their limits by dogs, and to give towns a right of action to recover the actual damage from the owners of the dogs: *Id.*

A town may maintain an action against the owner of a dog under the Act of July 3d 1863, and recover the amount of actual damage done as found by the jury on trial, not exceeding the amount of the order drawn for the damages by the selectmen: *Id.*

On the question whether the defendant's dog did the damage, the character of the dog is not competent evidence, nor the fact that he had killed other sheep: *Id.*

CONTRACT. See *Frauds, Statute of.*

*Rescission.*—To entitle a party to recover back money advanced to a corporation for shares of its capital stock, upon the ground of a failure to issue it according to agreement, the party must rescind the contract and demand the money before suit: *Swazey* v. *Choate Manufacturing Co.*, 48 N. H.

*Reward offered for Arrest of Criminals.*—Under a statute authorizing the mayor and city council of any city, or the selectmen of any town, to offer and pay from the treasury of such city or town a suitable reward,

not exceeding $300, for apprehending and securing a person charged with a capital or other high crime, any city or town may be bound by an offer of a reward in such cases; and any person who performs the service relying upon such offer, may in an action of *assumpsit* recover the amount offered of such city or town: *Janvrin* v. *Town of Exeter*, 48 N. H.

*Ten Hours' Work as a Day's Labor.*—Under the statute, which provides that in all contracts for, or relating to, labor, ten hours of actual labor shall be taken to be a day's work unless otherwise agreed by the parties, if work is done through the season at a certain agreed price per day, and the work done from time to time in a day is done and accepted without objection as a day's work, an agreement may be implied that the work done in a day, whether more or less on an average than ten hours, shall be reckoned and paid for as a day's work: *Brooks* v. *Cotton*, 48 N. H.

### Criminal Law.

*False Pretences—Evidence.*—Where the false pretences consist in words used by the defendant, it is sufficient to set them out in the indictment as they were uttered, without undertaking to explain their meaning: *State* v. *Call*, 48 N. H.

Upon an indictment for obtaining goods by falsely pretending that the buyer owed but little, and had ample means to pay all his debts, and that his note for $250 was good, it is competent for the state to prove that within three days after he mortgaged the greater part of his personal property to another, as bearing upon his intent in making such representations: *Id.*

### Damages.

*For Breach of a Contract to sell Land.*—In an action to recover damages for the breach of a contract to sell real estate, the proper rule of damages is the amount paid by the purchaser on executing the contract, together with the difference between the contract-price and the actual value of the premises, at the time the contract was to have been performed: *Pringle* v. *Spaulding*, 53 Barb.

### Debtor and Creditor. See *Husband and Wife.*

### Estoppel.

*Misrepresentation as to Ownership of Goods.*—If the owner of goods voluntarily represent that the goods belong to another, and the party to whom the representation is made, relying, and having reason to rely, on the representation as true, attach the goods for a debt due from the party to whom it was represented that the goods belonged, in trover for attaching the goods, the owner will not be permitted to show that his representation was false, though at the time when he made it he had no notice of the debt on which the goods were attached: *Horn* v. *Cole*, 48 N. H.

*Encouraging other Persons to Purchase.*—Where the plaintiff having a claim of dower in premises advertised to be sold by a receiver, attended the sale, and requested the defendant to purchase the property, stating

that she had no claim thereon, on the faith of which the defendant became the purchaser, and the plaintiff subsequently took a lease of the premises from him: *Held*, that these circumstances worked a perfect and effectual *estoppel in pais*, against any claim or title of the plaintiff in hostility to that which the defendant acquired at such sale: *Maloney* v. *Horan*, 53 Barb.

## Evidence.

*Witness—Competency—Admissions.*—After the entry of a suit by a minor by her next friend, she died, and her administrator was admitted as the party to prosecute the suit: it was held that the wife of such next friend was a competent witness for the plaintiff: *Taylor* v. *The Grand Trunk Railway*, 48 N. H.

Held, also, that it was too late to object to her competency after the direct examination in her deposition had been read, the counsel being aware of her situation at the commencement: *Id.*

The admission of the representations of a sick person should be confined to such expressions as furnish evidence of the present condition of the patient, excluding carefully everything in the nature of a narrative of what is past: *Id.*

The statement that a person was lamer in the morning than the day before, is not matter of opinion but a statement of a fact, and not objectionable: *Id.*

The admissions of the father of the person alleged to be injured, and bringing suit for the injury, made before her death, are not admissible against her administrator, unless it be shown that the father is the real party in interest for whose benefit the suit is prosecuted: *Id.*

If this be shown the admissions would be competent, although when they were made the father had no interest: *Id.*

But the mere fact that the estate of the daughter would descend to the father subject to the claims upon it, would not make him the party to the suit, so as to render his admissions competent: *Id.*

The testimony of a physician that injuries from railroad accidents were more severe than from other causes, though bearing the same external appearance, is admissible, although his knowledge is derived from study alone: *Id.*

On the cross-examination of a witness offered by the railroad, and who had charge of the section where the alleged injury happened from a defective rail, it is proper to ask him if he was short of iron at the time: *Id.*

## Execution. See *Partnership*.

*Trustee—Process—Practice.*—Under the general statutes the answers of the trustees are to be written by the magistrate as in the case of other depositions; and they cannot insist upon the right to retire with their counsel and prepare the answers: *Morrison, Adminstrator*, v. *Annis*, 48 N. H.

But the provisions of the general statutes do not apply to pending suits, no intention that they should being expressed; and, therefore, trustees in suits then pending have the right to retire and prepare their answers, with the aid of counsel: *Id.*

## FRAUDS, STATUTE OF.

*Contract for Labor not within.*—If a contract be essentially for the sale of goods, whether they are then manufactured or not, it is within the Statute of Frauds; but where the labor and skill of a workman are of the essence of the contract the statute does not apply, although they are to be expended in the production of goods and chattels, and from the workman's own raw materials: *Pitkin et al.* v. *Noyes*, 48 N. H.

The same doctrine will apply to an agreement to raise three acres of potatoes and deliver them to the other party, at a fixed price per bushel; the inquiry being whether it was of the essence of the agreement that the contractor should himself raise the potatoes: *Id.*

The compromise of doubtful and conflicting claims, understood so to be by the parties, is a good and sufficient consideration to uphold an agreement; although it would be otherwise if the claim was utterly without foundation, and known to be so: *Id.*

*Part-performance—Performance within the Year.*—A contract for the sale of 700 cords of wood upon a certain lot of land, at $5 per cord, made on the 1st of January, the vendor to deliver as much thereof as he could that winter, and the balance thereof during the next following winter and year, the buyer to pay for what was delivered at the close of each winter's delivery, is an entire contract of sale of the whole quantity; and a delivery and acceptance of a part the first winter will take the case out of the Statute of Frauds: *Gault, Brown & Co.* v. *Brown et al.*, 48 N. H.

And it was held, also, that this was not a contract which was not to be performed in one year, within the meaning of that statute: *Id.*

*Authority of Agent.*—The Statute of Frauds does not require that the authority of the agent contracting for the sale of lands should be in writing. It may be established by parol, and it will be inferred, where the principal adopts the act of the agent: *Pringle* v. *Spaulding*, 53 Barb.

*Agreement for Sale of Lands.*—By the Statute of Frauds an agreement for the sale of lands, to be valid, must be binding upon all the parties by whom the sale is to be made: *Snyder* v. *Neefus*, 53 Barb.

The word "party," in the statute, means all the vendors, when more than one are included in the contract of sale: *Id.*

*Subscription by Agent—His Authority*—Where an agreement for the sale of land owned by two persons as tenants in common, is subscribed by a third person as their agent, it must appear that he was duly authorized by both the vendors to sign the contract. If authorized by one only, the agreement is not binding upon either of the parties thereto: *Id.*

To be binding, the contract must be signed by the vendors, all of them, personally, or by an authorized agent, and the contract as it appears on its face must be assented to by the vendee: *Id.*

## HIGHWAY.

*Petition to open—Practice.*—Where upon a petition to lay out a highway the county commissioners report against it upon the merits, and there is judgment upon the report; it was *held*, that another peti-

tion for the same highway at the expiration of two years ought not to be referred to the county commissioners, if it was made to appear by testimony laid before the court that there was no change of circumstances, but that the case was substantially the same; and that in such case the petition ought to be dismissed: *Whitcher et al.* v. *Town of Landaff*, 48 N. H.

*Opening of—Practice.*—Objections to the form of a petition for a new highway must be taken before the reference to the county commissioners, or they will be considered as waived; and this applies to an omission to state when application was made to selectmen: *Wensworth* v. *Town of Farmington*, 48 N. H.

Where there was an application for a highway filed with the clerk of the court, and an order of notice issued before January 1st 1868, it will be considered that the proceedings were had and commenced and were pending when the general statutes took effect, and therefore that the proceedings must be governed by the old law: *Id.*

Accordingly, where the commissioners imposed part of the expense of making the road upon towns out of the county, it was held that the report must be recommitted: *Id.*

## Husband and Wife.

*Divorce—Support of Child born after Decree.*—The husband and wife were divorced by the District Court of Leavenworth county upon her application, and the custody of the three minor children was awarded to her. Two days after the decree a fourth child was born. In an action of debt brought against the father for the entire support and education of all the children by the mother, held that she could not recover in such action: *Harris* v. *Harris*, 5 Kan.

That the only way for relief was by opening the decree as to the children, and making such provision for them as might be just under all the circumstances, or by other proper proceedings under or supplemental to the original decree: *Id.*

*Effect of Wife's joining in Conveyance.*—The legal effect of a wife's uniting with her husband in a conveyance of his lands is to release her dower. Before admeasurement, she has no interest or estate in the lands, and her deed operates not as a grant, but as an estoppel: *Maloney* v. *Horan*, 53 Barb.

When the deed of the husband has been avoided at the suit of creditors, on the ground that it was made with intent to hinder, delay or defraud them, there remains an estate in the fraudulent grantee, which is sufficient to support or feed this estoppel; for the fraudulent deed is good and effectual as between the parties to it. A payment by the fraudulent grantee or grantor to the creditors of their debts, would extinguish the same, and render his title valid: *Id.*

*Merger of Dower.*—Where a wife, after having knowingly and designedly participated in her husband's fraud, by joining with him in conveying his land to a third person, for the purpose of defrauding his creditors, takes from such fraudulent grantee a conveyance of the same premises, the court will not help her to undo the consequences of her

acts, one of which was to accept a merger of her dower, in the fee conveyed to her: *Maloney* v. *Horan*, 53 Barb.

As a wife cannot be endowed of her own lands, the taking of such a conveyance will destroy the claim, if any, which previously existed: *Id.*

## Infant.

*Disaffirmance of Contract.*—An infant may recover for what he has paid or done while an infant in execution of his voidable contract, by restoring what he received under the contract, if it remain in specie, or, if not, by accounting for the value of it: *Heath* v. *Stevens*, 48 N. H.

Where an infant received money under his contract, and afterwards while an infant paid money in execution of the contract, in an action to recover back money paid under the contract, it is not necessary that the infant should first repay the money he received under the contract; but he must account for so much towards the sum which he paid in execution of the contract: *Id.*

Where the consideration of an infant's contract consisted partly of money paid for him, and partly of an undertaking by the defendant involving uncertain risks, if the infant seeks to recover back money paid by him in execution of the contract, it must be left to a jury to determine what, under all the circumstances, it was reasonable the infant should engage to pay; and that sum should be allowed to the defendant against the money paid by the infant in execution of the contract, and the balance, if any, recovered by the plaintiff: *Id*

## Landlord and Tenant.

*Lease of Farm Land—Construction.*—In a lease of a farm for two years, it was stipulated that for every ton of hay produced and not consumed on the farm, the lessee should leave, or haul on to, and use on the same, one extra half cord of good dressing; and at the expiration should leave on the farm dressing in value equal to what he finds there at the commencement of the lease; and that he shall carry on the farm during the term in a good husbandlike manner, and will not commit strip or waste:

Under this lease it was held that the tenant was to use on the farm, or leave there for use, all the manure made there in the usual course of husbandry, together with what he was to bring on for hay sold off. And that he was not entitled to sell or carry off any of such manure, notwithstanding he might leave at the end of the term as much as he found there: *Hill* v. *De Rochemont*, 48 N. H.

*Held*, also, that the tenant was not at liberty to carry off manure made from eel-grass gathered on the farm, and mixed with manure made by the cattle and pigs on the farm: *Id.*

## Limitations, Statute of.

*Mortgage with Collateral Agreement as to Time of Payment.*—A note and mortgage were given on the 22d day of May 1862, due one day after date: at the same time, and as part of the agreement of the parties, the obligees in the note gave the obligor an instrument of writing, stipulat-

ing that the obligor should have five years' time in which to pay the note:

*Held*, that no right of action accrued on the note until the expiration of five years, and consequently the Statute of Limitations did not begin to run till five years had expired: *Round* v. *Donnell & Saxton*, 5 Kan.

MUNICIPAL CORPORATION. See *Constitutional Law.*

NEGLIGENCE. See *Railroad.*

OFFICER. See *Assumpsit.*

PARTNERSHIP.

. *Levy by Partnership-Creditor on Land of One Partner.*—After the levy of an execution on the land of a partner for a partnership debt has become complete by the lapse of a year from the time of the levy, a creditor of the individual partner cannot defeat the levy for the partnership debt by attaching the same land and levying his execution on it: *Bowker* v. *Smith*, 48 N. H.

PROBATE COURT.

. *Will creating Trust—Jurisdiction over Trustee.*—Where a will creates a trust and appoints the trustees, the Court of Probate, in which the will was proved, and the estate administered, has not jurisdiction to determine conflicting claims to the trust fund, and compel the trustees to execute the trust according to the intent of the will: *Hayes* v. *Hayes*, 48 N. H.

PROMISSORY NOTES.

*Waiver of Demand and Notice.*—Any act of an endorser of a promissory note calculated to put the holder off his guard, and prevent him from treating the note as he would otherwise have done, is, in judgment of law, a waiver of demand and notice: *Sheldon* v. *Horton*, 53 Barb.

Thus, where the holder of a note told the endorser, sixteen days before it fell due, that the maker wanted the note to remain another year, and asked him if he was willing, at the same time taking the note, looking it over, and saying it was a good note: *Held*, that this excused a demand and notice of non-payment: *Id.*

RAILROAD.

*Negligence—Degree of Care required.*—Common carriers of passengers are bound to the exercise of the utmost care and diligence of very cautious persons, and are responsible for any, even the smallest negligence: *Taylor* v. *Grand Trunk Railway*, 48 N. H.

The standard of care and diligence required of a railroad in carrying passengers, does not depend upon its pecuniary condition or the amount of its revenues; but it is bound to provide a track, rolling-stock, and all other agencies suited to the nature and extent of the business it assumes to do: *Id.*

A direction to the jury that a railroad must use such a degree of care

as is practicable, short of incurring an expense which would render it altogether impossible to continue the business, is erroneous and calculated to mislead the jury: *Id.*

Where an injury upon a railroad is caused by the gross negligence of the corporation, the jury may, if they think proper, award exemplary damages: *Id.*

REPLEVIN.

*Title to Property replevied.*—In an action of replevin, under the code of civil procedure of 1859, where the plaintiff gave bond and took possession of the property replevied, neither the suing out of the writ nor the giving of the bond changed the title of the property; and if the defendant was an officer holding the property by virtue of a levy, under an order of attachment, or an execution, his lien on the property was not destroyed, but only suspended until final judgment in the replevin case, and then if the judgment was in his favor, and for a return of the property, he might retake it whenever he chose to do so: *Keyser & Co.* v. *Stein*, 5 Kan.

A person who became the surety on the replevin-bond and took the property into his possession to indemnify himself, was not an innocent or *bonâ fide* purchaser, and obtained no better rights to the property than the plaintiff had: *Id.*

The plaintiff in replevin under said code was bound only to prosecute the action to final judgment, pay the costs and return the property, if such was the judgment of the court; and such judgment being the final adjudication between the parties, neither party could resort to any other proceeding afterwards, but must look to that judgment alone for his rights and his remedies; thence if the defendant in replevin obtained no judgment for a return of the property, the title to the same at once vested absolutely in the plaintiff: *Id.*

TEN HOUR LAW. See *Contract.*

TOWN. See *Constitutional Law.*

TRUSTEE. See *Probate Court.*

TRUSTEE PROCESS. See *Execution.*

WILL. See *Probate Court.*

WITNESS. See *Evidence.*

*Party—Action against Executor.*—Under the law of June 1865, ch. 4074, a party will not ordinarily be allowed to testify when the adverse party is an executor or administrator, unless the latter elect to testify: *Brown and Wife* v. *Brown*, 48 N. H.

But in respect to transactions and admissions arising since the decease of the testator or intestate, it would be a proper exercise of discretion to allow the living party to testify: *Id.*