what they were under the old regime; and this is, no doubt, true, but the difference is against, rather than in favor of their efficiency. The old-fashioned sturdy yeomanry of the county, who, forty years since, made up the panel of petit juries, in the rural districts, and some of whom still linger, were a much better material for jurors than the modern graduates of the high schools. And these men never entered upon any new study of the law in their consultation-rooms. The decision upon this point was eminently proper. A jury is no more competent to fix the proper construction of statutes, at their consultation-rooms, than they are to determine a nice question of constitutional law. But some of the modern jurors hold themselves entirely competent for both. If jury trials continue to be improved for a few years more, as they have been of late, by the infusion of greater intelligence, shown from the study of algebra and botany, we think it may not be difficult to find a majority in favor of abolishing them. But it will, in our judgment, be an evil day for the country, when either grand or petit juries become too far debased to be longer endured.

There is another evil in this country becoming quite too rife for quiet and good order, *i. e.*, parties taking the law in their own hands from an intuitive knowledge of what it is. The respondent in this case, from the advice of some law student, just out of college, or from reading for himself the history of Kenilworth or of Guy of Warwick, appears to have come to the very sage conclusion, that as a dwelling-house was the owner's castle, he might defend it in the same mode as the barons of the middle ages did. I. F. R.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

SUPREME JUDICIAL COURT OF MAINE.[2]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[3]

SUPREME COURT OF NEW YORK.[4]

Accord and Satisfaction.

The payment in money, of part of a debt concededly due, which is agreed to be taken in full payment, is not an accord and satisfaction. But when the existence of the debt, or the amount of it is disputed, and a sum of money less than the amount claimed is received in full payment, it is an accord and satisfaction: *Howard et al.* v. *Norton*, 65 Barb.

So, too, when the note of a third person, for less than the debt, or property other than money is received in satisfaction of the debt, it is an accord and satisfaction, and bars a recovery for any part of the resi-

[1] From J. B. Black, Esq., Reporter; to appear in 37 Ind. Rep.

[2] From Edwin B. Smith, Esq., Reporter; to appear in 60 Me. Reports.

[3] From J. M. Shirley, Esq., Reporter; to appear in 52 N. H. Rep.

[4] From Hon. O. L. Barbour; to appear in vol. 65 of his Reports.

due of the debt But when the debtor delivers to his creditor, and the creditor receives property, at a price agreed upon by them, and the amount thus paid is less than the debt, it is not an accord and satisfaction, notwithstanding the creditor agrees to take it as full payment of the debt: *Id.*

It is only when property is received in satisfaction without any price being agreed upon, at which it is to be estimated between them, that it becomes a valid accord and satisfaction: *Id.*

Where sheep, delivered by the defendant to the plaintiff and others of his creditors, in part payment of 20 per cent. of the amount of their respective debts, were received at $5 per head; it was *held* that this operated only as the payment of so much money, and being less than the debt, was not an accord and satisfaction: *Id.*

ASSUMPSIT. See *Vendor.*

ATTACHMENT.

Of bulky Articles—Manual Possession.—An officer, having a writ of attachment against A., went to the barn where some hay was stored, and there posted a paper, written thus: "I have attached all the hay in this barn, in which [A.] has any interest." A. knew at the time, and the plaintiff soon after, and prior to his subsequent purchase of the hay of A., of the posting of this notice and its contents. The officer made return upon the writ, to the effect that he had "attached all the * * * hay * * * in the town of W., in which the said A. has any right, title, interest, or estate; and on the same day left at the office of the town clerk of said town a true and attested copy of this writ, and of this my return endorsed thereon." *Held*, that these proceedings did not constitute a valid lien upon the property, as against the plaintiff: *Bryant* v. *Osgood*, 52 N. H.

The statute, which provides that an attachment of bulky and ponderous articles shall not be defeated or dissolved by any neglect of the officer to retain actual possession thereof, provided he leave an attested copy of the writ, and of his return of such attachment thereon, as in the attachment of real estate (Gen. Stats., chap. 205, § 16), requires that the return should be so certain and explicit in its description of the property and its situation, as to give to subsequent attaching creditors or purchasers substantially the same notice they would derive from knowledge of the actual retention of possession of the property by the officer:" *Id.*

CERTIORARI.

Allowance and Dismission.—The common law writ of *certiorari* is allowed, and the remedy sought by it granted, in the discretion of the court; and where, after a return is made to such writ, the court is satisfied, upon a hearing, that the writ improvidently issued, or that justice and equity, or a regard to considerations of public policy or public inconvenience require such a decision in respect to it, it will dismiss the writ, without passing upon the merits, upon the particular questions raised, or designed to be raised by it for review: *The People ex rel. Curtis* v. *The Common Council of the City of Utica*, 65 Barb.

What adjudications may be reviewed by it.—The common council of a city passed the initiatory resolutions required by the charter of the

city for the publication of notice of an intended improvement in a street; and such notice was duly published, with a notice that, on a day named, final action would be had upon the application, and sealed proposals for the work received and considered. On the day named, various proposals were received and opened, and the common council, by resolution, determined that a certain proposal was reasonable and favorable, and on a subsequent day passed an ordinance accepting and approving of said proposal, and directing the work to be done, according to the plans and specifications. *Held*, that this was such a final adjudication as would warrant the allowance and retention of a writ of *certiorari* to review the same: *Id.*

Within what time to be applied for—Laches.—Where upwards of two years have elapsed since the first proceedings for paving a street were initiated, and nearly two years since the final ordinance for the construction of the work, and the acceptance of proposals therefor; and a superintendent of the work had been appointed, on the petition of the relator and others; and the work had been completed, and an assessment for the expense thereof duly made and confirmed, and the assessment-roll delivered to the city treasurer for collection, and more than one-half the amount of the assessment paid; it was *held*, that a writ of *certiorari* to review the proceedings of the common council in respect to such improvements ought not to be entertained: *Id.*

Estoppel.—Held, also, that the relator and others, in whose behalf the writ was sued out, having stood by and seen the work constructed, for the benefit of their property, should be *estopped* from questioning the right of the city to make such improvement: *Id.*

Chattel Mortgage.

A chattel mortgage was given, upon a stock of goods in a store, worth $8000, to secure a debt evidenced by the mortgagor's promissory notes for $1400. It contained a provision that it should be a continuing lien and security upon stock or goods to be thereafter brought into the store, said property then being and remaining in the possession of the mortgagor; provided always, that the mortgagor should pay to the mortgagee $1400, the amount of said notes, with interest, as provided therein; with the right to enter into said store and take possession of the property, on the non-payment of said notes, or in case the mortgagees should, at any time, deem themselves unsafe, and sell the same for said debt. *Held*, that such mortgage was clearly fraudulent, as against creditors, upon its face and the undisputed facts of the case: *Yates* v. *Olmsted, Adm'r, &c.*, 65 Barb.

Held, also, that a fair interpretation of the mortgage itself implied or involved an agreement and understanding between the parties that the mortgagor should go on with the store, selling the goods on his own account, and replenishing the stock from time to time, precisely as he had previously done, and without respect to the mortgage, till the notes, or one of them, which the mortgage was given to secure, should fall due: *Id.*

Held, further, that the provision that the mortgage should be a continuing lien and security upon "the stock of goods to be thereafter brought into the store," imported that the new goods were expected to

be brought into the store to replace those sold, so that the lien should be continued and transferred from those sold to the new goods thereafter to be brought into the store; and the lien was thus a lien fluctuating from old goods as sold, to new goods substituted in their place. That this was the clear purpose and intent of the parties, is fairly inferrible from the terms of the mortgage itself.

Under such circumstances, although no express agreement, in words, between the parties, that the mortgagor shall continue to sell the goods mortgaged, and the business proceed as before the giving of the mortgage, is found by the referee, such an agreement or understanding may be implied: *Id.*

Criminal Law.

Evidence—Admissions.—Whether the court below was right or wrong in allowing questions to be put to the prisoner and others on the trial, with the view of impeaching his testimony—what the prisoner said, at any time after the commission of the offence, is competent against him as admissions; and these admissions can be proved by himself, or any other person who knew of them: *Fralich* v. *The People*, 65 Barb.

Prisoner a Witness in his own behalf—Contradicting him.—When a prisoner, on the trial, takes the stand as a witness in his own behalf, he is subject to the same rules of examination, and to be contradicted, as any other witness: *Id.*

It is therefore competent to show that his testimony as to being unconscious of what he did, while committing the crime, and for some time afterwards, was not true. It could not be true, if, very soon thereafter, he related to the witness the manner in which the crime was committed: *Id.*

Judge's Charge.—The counsel of a prisoner cannot be heard to assail the charge of the court, upon the trial, when he has not excepted to it, or the exception is too general to be available: *Id.*

Provocation—Reducing grade of Crime.—Whether or not mere words, uttered in the hearing of a person who, by reason thereof, kills another, can be permitted to reduce the killing from murder to manslaughter, it is clear that information communicated by others to the person who kills another because of it, can never be permitted to reduce the grade of the crime: *Id.*

Motion for New Trial, for newly-discovered Evidence.—Upon a writ of error, the court has no power to hear a motion for a new trial upon the ground that, since the trial, material evidence, favorable to the prisoner, has been discovered: *Id.*

If such a motion can be made in any court, it must be made in the Oyer and Terminer. It cannot be made, in the first instance, at the general term: *Id.*

Damages. See *Trespass.*

Penalty—Liquidated Damages.—As a general rule, a sum of money in gross, stipulated to be paid for the non-performance of an agreement, is considered as a penalty or security for the payment of such damages as the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It will be incum-

bent on the party who claims to recover the sum as liquidated damages to show that they were so considered and intended by the contracting parties: *Davis* v. *Gillett*, 52 N. H.

A. by his bond, acknowledged himself to be "holden and firmly bound" to B. "in the sum of one thousand dollars." The condition of the bond was that A. should not engage in a specified business within a certain time and place. In the absence of any evidence concerning the intention of the parties, it was *held* that the sum of one thousand dollars was to be regarded as a penalty, and not as liquidated damages: *Id.*

DEBTOR AND CREDITOR. See *Chattel Mortgage; Fraud; Fraudulent Conveyance.*

Where the defendants, at the time of making a fraudulent transfer of their property, had in their possession a 5-20 U. S. bond for $1000, belonging to the plaintiff, which they afterwards converted to their own use: *Held*, that although the plaintiff was not, at the time of making the conveyance, a creditor, in the ordinary meaning of that term, yet she was equitably entitled to protection against the fraudulent transfer, to the same extent as if she had then held a debt for $1000 against the defendants: *Pendleton* v. *Hughes*, 65 Barb.

DEED.

Where a deed executed by H. and wife, to M., was put into the hands of a third person, with directions to obtain a deed from M. to H.'s wife, and was delivered upon that condition, and M. retained the same, and refused to execute a deed to H.'s wife; *Held*, that the deed to M. never became operative, by reason of the non-performance of the condition on which it was delivered: *Pendleton* v. *Hughes*, 65 Barb.

EASEMENT.

Release by Administrator.—A voluntary release of an easement by an administrator does not bind the estate nor the heirs of an intestate: *Mowe* v. *Stevens*, 60 Me.

ESCAPE.

Judgment against Sheriff—Recapture.—Where a defendant in a bastardy suit is imprisoned for a failure to pay or replevy a judgment rendered against him in such suit, and escapes without the consent of the sheriff, and is not recaptured for three months thereafter, and judgment is recovered against the sheriff, on his bond, for the escape, by the relatrix in the original suit, and the judgment is not paid, the defendant cannot be recaptured and imprisoned: *Ex parte Voltz*, 37 Ind.

EVIDENCE. See *Receipt.*

Parol inadmissible to vary subsequent written; or to contradict statement of collateral fact drawn from Witness on cross-examination—Evidence that the defendant contracted with another person to do the same work to recover pay for which plaintiff sues, is no defence: *Bell* v. *Woodman*, 60 Me.

In a suit between persons not party to a written contract it cannot be varied by parol testimony of a different oral agreement previously made; for such agreement is merged in the writing: *Id.*

If the statement of a fact collateral to the issue be drawn from a witness upon cross-examination, the party eliciting the testimony cannot contradict it: *Id.*

Written Contract—Attempt to change by Parol.—Where an order was given upon A. to pay certain claims out of the proceeds of a certain note in his hands, and he accepted the same in writing, "so soon as the maker pays the note," and A. afterward obtained a judgment and foreclosure of a mortgage given to secure the note held by him, and bought in the mortgaged property, and was subsequently offered more than the sum due upon the note for the property: *Held*, that he could not defend against the payment of the claims included in the order accepted by him, on the ground that the person who gave the order was, at the time when A. accepted the same, indebted to A. for more than the amount at which he had bid in the land, and that it was understood by the person for whose benefit he accepted the order that this indebtedness was to be first paid, and that it is not yet discharged: *Miller, Ex'r*, v. *Goldthwait, Adm'r*, 37 Ind.

Contract of Service—Failure of Performance by Servant.—In an action to recover for work and labor, the plaintiff claimed that, by the original contract of hiring, he was to work "so long, and so long only, as he chose." The defendants claimed that the hiring was for a specified time; and it appeared that the suit was commenced before the expiration of that time. *Held*, that evidence to show the extent of damage occasioned the defendants by the plaintiffs' leaving their employ before the expiration of the term of service claimed by them was properly excluded: *Blodgett* v. *Berlin Mills Co.*, 52 N. H.

A breach or failure of performance by the employee of the original contract of hiring may be shown by the employer in defence, *pro tanto*, to an action against him for the wages, under the general issue: *Id.*

Improper Receipt of—New Trial.—The plaintiff called the defendant as witness-in-chief. Then, to affect his credit and to impeach him, under sect. 15, ch. 209, General Statutes, and sect. 1 of ch. 38 of the Laws of 1871, a record from the municipal court of Boston, Mass., was introduced and admitted to show that the defendant had there been convicted of larceny; but the record was not properly authenticated, to make it admissible as evidence. After verdict for the plaintiff: *Held*, that the verdict should not be set aside, if the proper evidence of authentication of the record used on the trial is furnished to the court; and when thus furnished, that being the only ground of exception, judgment will be rendered on the verdict: *Hutchins* v. *Gerrish*, 52 N. H.

FORMER RECOVERY. See *Partnership*.

FRAUD. See *Vendor*.

Judgment without Relief.—Where judgment-creditors sue to recover of the defendant the value of property fraudulently sold to him by the judgment-debtor, to defeat their claims, judgment in their favor cannot be rendered without relief from valuation or appraisement laws: *Whitehall* v. *Crawford et al.*, 37 Ind.

FRAUDS, STATUTE OF.

Parol Promise to answer for Debt of another.—G. held a note

against S., and J. held a note and mortgage against G., and it was agreed between J. and H. that J. was to surrender to G. the note and mortgage, and release him from that indebtedness, and take from him an assignment of the note which he held against S., and H. agreed by parol to pay to J. the latter note. J. accordingly did release the note and mortgage against G. and took an assignment from G. of the note against S. *Held*, that the contract was within the Statute of Frauds, which requires a special promise to answer for the debt of another to be in writing, in order that an action may be maintained thereon: *Crosby et al.* v. *Jeroloman*, 37 Ind.

Fraudulent Conveyances.

A conveyance, voluntary, and without consideration, of land, was executed by H. and his wife, when he was in embarrassed circumstances, and shortly before his failure, to his wife's mother, with the understanding and upon the condition that the premises should be conveyed back to H.'s wife. *Held*, that without reference to the conduct of the grantee, the deed was fraudulent and void, by reason of the conduct of the grantors alone: *Pendleton* v. *Hughes*, 65 Barb.

Where the direct effect of a conveyance, and of omitting to put the same on record, is to defraud a creditor of the grantor, who relying on the grantor's apparent ownership of land, has entrusted property to him or his firm, and the same has been embezzled and appropriated, such conveyance will be held fraudulent and void as to the creditor: *Id.*

And this, whether the creditor occupied the position of a creditor before, or not until after, the execution of the fraudulent conveyance. In either case he is entitled to relief by a judgment declaring the conveyance fraudulent and void, and that it be cancelled of record, &c.: *Id.*

Highway.

What is defect in is for the Jury—Wife as Witness.—Whether a cellar along the line of a public street, unprotected by a suitable barrier, constitutes a defect, is a question for the jury in an action against a city to recover damages for an injury caused by such defect; and this, although the cellar is not in the general direction of travel, and although the plaintiff was not travelling along the street, but was crossing it, and intended to pass from the street into a lane (where he had a right to go), but mistook its locality in a dark night, and fell into the cellar: *Stack* v. *Portsmouth*, 52 N. H.

The admission of the plaintiff's wife to testify to his physical condition after an injury, and to his statements, when alone with her, of suffering pain, involves no violation of marital confidence: *Id.*

Husband and Wife. See *Highway.*

Judgment. See *Fraud; Record.*

Entry of nunc pro tunc.—After verdict for the plaintiff, the case was transferred to the law term for the consideration of the full bench, upon exceptions taken by the defendant. While the cause was thus pending in the law term, the defendant died. Afterward, the defendant's exceptions being overruled, it was *held*, that the plaintiff should have judgment as of the term when the verdict was rendered: *Blaisdell* v. *Harris*, 52 N. H.

JURY.

Value—Evidence—Finding.—A jury need not fix the value of personal property at the exact sum testified to by any one witness or by any two, but may find an intermediate sum: *Jeffersonville, &c., Railroad Co.* v. *Tull*, 37 Ind.

MARRIED WOMEN.

Liability upon Contracts.—A married woman is not liable upon any executory contract, unless it be made in connection with her separate business or separate estate. Hence a bond executed by her is of no validity where it is not alleged that she carries on any separate business, nor that it was given for or on account of her separate estate: *Kidd et al.* v. *Conway*, 65 Barb.

But although a bond accompanying a mortgage is void, it does not follow that the mortgage also is void. The latter recites a consideration, and is under seal. There is therefore a sufficient consideration to support it: *Id.*

A statement in a mortgage executed by a married woman, that the mortgaged premises are occupied by her as a dwelling-house, and that the mortgage is intended to cover all the lands and buildings in connection therewith, is a distinct allegation or admission that the premises are her separate estate: *Id.*

Where a married woman gives a mortgage on real estate, the court must assume that it is her separate property until the contrary appears; and *it seems* that she will be estopped from denying that it was such: *Id.*

If a charge upon the separate estate of a married woman, contained in her endorsement of a promissory note, is valid, as was held in *The Corn Exchange Ins. Co.* v. *Babcock*, 42 N. Y. 613, a charge created by her mortgage is equally valid: *Id.*

MASTER AND SERVANT. See *Evidence; Railroad.*

A servant cannot recover from his employer for injuries resulting from the unskilfulness of his fellow-servants, if he has the same knowledge, or means of knowledge, of such unskilfulness, that the employer has: *Haskin, Adm'r*, v. *The N. Y. Central, &c., Railroad Co.*, 65 Barb.

MECHANICS' LIEN.

Necessary Parties—Priority over Conveyances.—In a suit to enforce a mechanics' lien for the material furnished and labor performed in the erection of a building, where, subsequent to the contract for the work, the owner of the land has sold and conveyed it, he is not a necessary party.: *Kellenberger* v. *Boyer et al.*, 37 Ind.

The lien of the mechanic relates to the time when the work commenced or the material began to be furnished, and takes priority as well over subsequent conveyances as over subsequent encumbrances: *Id*

NEGLIGENCE. See *Railroad.*

Liability of Owner for acts of Contractor.—The defendant and others, a committee of the town of Keene, to make improvements in and about a certain pond for the purpose of supplying the citizens of Keene with water, found it necessary to clear off a strip of land about

the margin of said pond, which land the town of Keene had purchased for that purpose; and the committee had let to one Nourse the job of so clearing this land at a stipulated price. Nourse prepared the land for burning, and set fire to the brush and logs upon this land, which escaped, as was alleged, through the carelessness and negligence of Nourse, to the plaintiff's land, and consumed his wood, timber and fences. *Held*, that the defendant would not be liable for the negligence or carelessness of Nourse by virtue of any relation between the defendant as committee of the town, and Nourse as a contractor or sub-contractor, who had the entire management and control of the clearing of the land, according to his contract: *Wright* v. *Holbrook*, 52 N. H.

Whether the town of Keene, as owner of the land which Nourse was clearing, could, under the circumstances, be held liable for the carelessness or negligence of Nourse, *quære? Id.*

Steam Vessels—Excessive pressure on Boiler.—Even if a pressure upon a steam boiler in excess of the amount allowed by the government inspectors, by their certificate, to be used, is not legal negligence under the Act of Congress of February 28th, 1871, for the better security of life on board of steam vessels; yet, in an action in a state court, for damages, at common law, the court, or a referee, may properly hold that it is evidence of negligence, and sufficient evidence to warrant a finding of negligence in fact: *Carroll* v. *The Staten Island Railroad Company*, 65 Barb.

Concurrent—Proof of—Contributory Negligence of Third Person.—In an action to recover damages for an injury, resulting from the negligence of the defendant, the rule as to the burden of proof of concurring negligence on the part of the plaintiff is, that the plaintiff must satisfy the jury, in order to entitle him to recover, that he was not guilty of negligence which contributed to produce the injury; but he is not called on to make such proof in the first instance, unless the circumstances disclosed by his own witnesses tend to show him guilty of negligence. Where negligence is not thus established it is to be affirmatively proved by the defendant: *Robinson* v. *The N. Y. Central, &c., Railroad Co.*, 65 Barb.

The rule is the same in cases of negligence as in other cases. If the plaintiff's own evidence establishes a defence, the plaintiff, before he rests, must rebut it, or he will be nonsuited: *Id.*

Contributory negligence is matter of defence, and is not to be affirmatively disproved in order to entitle the injured party to recover: *Id.*

A person who is injured by the negligence of another, is not responsible for any contributory negligence of a third person with whom he happens to be riding at the time, over whom or whose conduct he has no control: *Id.*

Where in an action for negligence the charge was, not that the jury must be satisfied, in order to find a verdict for the plaintiff, that she was not chargeable with concurring negligence, which they might do from the absence of any evidence tending to prove it; but was, that negligence must be affirmatively disproved by the plaintiff: *Held*, that the charge was erroneous; the jury, by the language used, being given to understand that they must find for the defendant, unless the plaintiff, by evidence on her own part, disproved or rebutted negligence which was otherwise

imputable to her, or, what was the same thing, presumed against her: *Id.*

PARTNERSHIP. See *Unincorporated Company.*

Contract—Joint—Several—Former Recovery.—Where a mortgage executed by one of the members of a partnership in his own name, but for the firm, and upon property held in his own name, but in trust for the firm, contained this agreement: "He assuming the payment of said notes, and they being for the purchase-money for the above-described real estate, and the mortgagor expressly agrees to pay the sum of money above described," the notes referred to having been given by another person, and the partnership having purchased an interest in the real estate, and thus assumed their payment. *Held*, that the contract was the joint contract only of all the partners, and not the several contract of each: *Crosby* v. *Jeroloman*, 37 Ind.

Where suit had been brought upon the notes and mortgage against the maker of the notes and the member of the firm in whose individual name the mortgage was executed, and judgment only of foreclosure taken against the member of the firm, and a personal judgment against the maker of the notes. *Held*, that, as judgment on the agreement to pay the notes might have been taken against the partner in that action, the proceedings and judgment taken were a bar to any further suit against him on the contract, and therefore a bar to any suit against his partners, who were only liable jointly with him: *Id.*

Assumption by incoming Partner of out-going Partner's share of Debts.—Where one purchases the interest of one of the partners in a firm, and takes his place therein, not agreeing to pay at once all the debts of the firm, but only that he will "assume" the share of the liabilities of the firm which belong to the out-going partner, the intent and meaning of such assumption is to indemnify the out-going partner. If the latter is obliged to pay any of the old debts, under such circumstances, then and then only he is entitled to maintain his action: *Coleman* v. *Lanning et al.*, 65 Barb.

Application of Payments.—At the time of the purchase by the defendants of an interest in a partnership firm, there was a balance of $200 due from the firm to R. The account was kept along with the new firm, and was one continuous account; and payments were made to R. more than sufficient to extinguish such balance of $200, without any specific appropriation by either party, other than such as arose from the charges and credits in the continuous account and the appropriation thereof assumed by the rules of law. *Held*, that the rule, in such a case, is that the payments are to be applied to the earliest items in the account, although the payments are made by the new firm, some of whom are not liable to the creditor for the debt extinguished by their application, and that this is especially so, where the incoming partner has assumed his share of the old liabilities: *Id.*

PLEADING.

Jurisdiction.—If a court has no jurisdiction, there is no trial, and the Supreme Court will not look to the record to see whether the merits of the cause were fairly tried: *Loeb* v. *Mathis*, 37 Ind.

Under section 54 of the code (2 G. & H. 81) an objection to the

jurisdiction of the court over the subject-matter of the action is not waived by failing to demur or answer. Such objection may be raised on a motion in arrest of judgment: *Id.*

RAILROAD.

Duty in regard to Improvements in Machinery, &c.—It is the duty of railroad companies to use upon their trains, all improvements in machinery, or in the construction of cars, &c., commonly used by other companies; and it is negligence if they do not use them, for which they are liable to a person injured, if the improvement would in any appreciable degree have contributed to prevent the injury: *Costello* v. *The Syracuse, Binghamton, &c., Railroad Company*, 65 Barb.

Railroad companies are bound to supply their trains with brakes, and if a person is injured on, or while crossing a track, and the injury could have been avoided by the use of brakes, the omission to have them, or to use them, would be such negligence as would render them liable to the person injured: *Id.*

If they are obliged to have some brake, the public safety requires that it should be the best in use. They cannot use an old brake which will not stop a train in less than 1000 feet, when running ten miles per hour, when other companies use brakes that will stop a train in 500 feet, running at the same rate of speed: *Id.*

A railroad company is as much bound to prevent doing injury to a person on its track, by using all the facilities that experience has provided for the purpose, as the person on the track is bound to use all the means in his power to escape the injury, when he is aware that it is impending: *Id.*

Rate of speed through Cities, &c.—It seems to be no more than reasonable to require railroad companies to run their trains through cities and villages at such moderate rate of speed as that, by the use of brakes a train may be speedily stopped, so that neither person nor property shall be exposed to injury from it; and this without regard to whether or not there is a municipal regulation as to the speed at which trains shall be run.—Per MULLIN, P. J.: *Id.*

Contributory Negligence.—A charge to the jury that a child that is *sui juris* is bound to exercise the same degree of caution, in approaching and crossing a railroad track, to prevent injury from an approaching train, that an adult is bound to exercise, is erroneous, and being so, the jury may, upon the evidence, find that a child seven years of age, injured while attempting to cross a railroad track, is not chargeable with negligence that contributed to produce the injury: *Id.*

Negligence.—In an action against a railroad company, brought by the administrator of one of its employees, to recover damages for the negligent killing of the deceased by the cars of the defendant, it is unnecessary to consider the question whether the persons employed on the train that killed the deceased were guilty of negligence that caused his death. The sole question is, was the defendant guilty of negligence in employing an incompetent person as conductor on such train, or in not prescribing rules which would apply to trains moving where such train was, and provide for warnings to persons passing, or being on or near

the track when such train was moved: *Haskin, Adm'r.* v. *The N. Y. Central, &c., Railroad Co.*, 65 Barb.

Raising to the post of conductor a person who has served seven years in the inferior stations of car-coupler and shover, the duties of which places made him acquainted with the modes of making up trains, the dangers incurred by those employed in the work, and by others, when the trains are in motion, and the precautions necessary to guard against accidents, is not of itself negligence; where it does not appear that he had ever shown himself to be incompetent, or unfaithful, prior to the happening of the injury sued for. *Id.*

Corporations, as well as individuals must be at liberty to raise men from lower to higher places; and such elevation of them cannot be imputed to the employers as negligence, unless the places from which they are raised are not such as to properly prepare them for the higher. *Id.*

It being utterly impossible for a railroad company to move its trains, when being made up, according to a time-table, the omission to provide regulations for the movement of trains engaged in and about the freight and engine-houses and depots of the company is not negligence: *Id.*

But it is practicable to prescribe in what manner engineers and conductors shall give notice of the approach of an engine, with or without cars, when trains are being made up, or moving about freight-houses, depots, or engine-houses. And if proper precautions are not taken for the protection of life and limb from injury by such engineers and trains, a person injured, who is not an employee of the company, has just cause of complaint, and is entitled to recover damages for any injury sustained by reason of the omission of the company to adopt all reasonable guards against liability to injury: *Id.*

One, however, who enters into the employ of such company, with full knowledge that no provision has been made for protecting its servants against injury from moving trains or engines, has no claim to recover damages if he sustains an injury by reason of the company omitting to make such provisions and regulations as prudence, and a proper regard for the lives of others, might require: *Id.*

Real Estate.

Possession of Land.—Where one has a right to use land for certain purposes his occupation of it must be presumed, *primâ facie*, to be in accordance with his legal right: *Mowe* v. *Stevens*, 60 Me.

Receipt.

Where explainable.—A receipt for money, though it be stated to be in full of the debt or demand upon which it is received, may be contradicted or explained by parol evidence: *Howard et al.* v. *Norton*, 65 Barb.

A receipt for the note of a third person is explainable, unless it be stated in it, that it is received in full payment of the debt or demand on which it is to be applied: *Id.*

A receipt was given by the plaintiff in these words: "Rec'd. of L. H. $167.40 in payment of an acc. of $837, against J. B. M. & Co., for apples bought by J. S." *Held*, that considering this as a mere receipt for a given sum of money in full of the plaintiff's debt, it was explainable, unless it was to be treated on the evidence as an accord and satis-

faction. But that if it was to be considered an accord and satisfaction it could not be explained or contradicted by parol evidence: *Id.*

RECORDS.

Of Judgments—How amended.—The clerk of a court has, *ex officio*, no right, without the express order of the court to that effect, to complete, alter, or amend the record kept by a predecessor in that office, whose term has expired: *Rockland Water Co.* v. *Pillsbury*, 60 Me.

If there be a failure to make record of a judgment, the party claiming to have it recorded should present a petition to the court to have this done, and give due notice to the adverse party: *Id.*

REFEREE.

Power to sell Real Estate—Title of Purchaser.—When, in an action brought by a judgment-creditor, to set aside a conveyance made by his debtor, as fraudulent against creditors, the deed is declared fraudulent and void, and a referee is appointed, and ordered to sell the premises; who sells the same at public auction, and executes a deed thereof to the purchaser, no title will pass thereby; by reason of a total want of power in the court to authorize the referee to sell; but the title will remain in the grantee in the fraudulent conveyance, and pass by his deed: *Dawley* v. *Brown*, 65 Barb.

SALE. See *Vendor.*

Passing of Title.—The trustee purchased of the defendant a hog which he took into his possession, some sugar which he mixed with his sugar, and other articles, the prices of all which were agreed upon, and took out his wallet to pay for them, but the writ was served upon him before he could deliver the money, and he did not deliver it; whereupon the defendant reclaimed the property. *Held*, that this was a sale for cash, and that the title did not pass until payment, and so no debt was created, and (the articles being exempt from attachment) the trustee was discharged: *Paul* v. *Reed*, 52 N. H.

STREAM.

Dedication of Way—Way terminating on Navigable Stream presumed to extend to Low-water Mark—Damages.—Where riparian proprietors have laid out and sold their land in lots as delineated upon a plan, having streets thereon terminating upon a navigable stream, such streets will be considered as dedicated to the use of purchasers of such lots, and of the public, down to the water at all stages of the tide, unless there be some express reservation of the flats; although the lines, upon such plan, indicating the boundary of the tier of lots nearest the river be drawn at high-water mark: *Stetson* v. *Bangor*, 60 Me.

The conversion of a way dedicated to the use of the purchasers of adjoining lots into a public way does not authorize the award of more than nominal damages: *Id.*

SUNDAY.

An action against carriers of passengers, to recover damages for an injury sustained by a passenger through their negligence, being brought for the violation of a plain duty on the part of the defendants, to trans-

port the plaintiff with care and in safety, it is no defence thereto that the accident causing the injury occurred on *Sunday*, when the plaintiff was not travelling for any of the purposes allowed by the act for the observance of the Sabbath: *Carroll* v. *The Staten Island Railroad Company*, 65 Barb.

If the obligations of the defendants, and the rights of the plaintiff, in such a case, rest on contract, the fact that the contract for the transportation of the plaintiff was made on *Sunday* will not exempt the carriers from liability for damages occasioned by their negligence: *Id.*

Surety.

Official Bond—Powers of Selectmen—Their neglect no discharge of Sureties on Treasurer's Bond.—The failure of the selectmen to examine the accounts of a town treasurer, as directed by Rev. Sts., ch. 6, § 152, will not affect the liability of the sureties upon his bond: *Farmington* v. *Stanley*, 60 Me.

Nor will surety be released if the selectmen, failing to detect an error in addition, certify the treasurer's account to be correct, when, in fact, there is a deficit; even if this certificate be made known to the surety soon after its entry upon the treasurer's books and while the treasurer has attachable assets enough to cover the deficit, though he subsequently die insolvent: *Id.*

Town.

Charter of Incorporation does not give Title to Land—Evidence of Title by Votes.—Where land and the franchises of a town containing it were granted to the same persons by the same charter, this was held to vest no title to the land in the town as a municipal body: *South Hampton* v. *Fowler*, 52 N. H.

A town acquires no title, by virtue of its act of incorporation, to land within its limits not before granted: *Id.*

If the title to lands in Hampton not granted to individuals was in the town, and a new town was formed within its limits containing the land, the title still remained in Hampton; affirming the doctrine of *Union Baptist Soc.* v. *Candia*, 2 N. H. 20: *Id.*

Votes of a town in possession of land, showing a claim of title, are admissible, as giving a character to its possession; but where there is no evidence of possession, they are inadmissible: *Id.*

Records of a town which holds land as a private corporation, unless accompanied by possession, are not admissible, even against a stranger, to prove that the town claimed the title: *Id.*

Trespass.

Lawful Entry—Abuse of Authority.—The plaintiff had been postmaster, and had kept the post-office in a room set apart for that purpose, in his own dwelling-house. The defendant, acting as the servant and assistant of a newly-appointed postmaster, entered the office so kept by the plaintiff, under orders from his principal, to remove the furniture and fixtures, &c., belonging to the government, to the new office. *Held*, that such entry being, by authority of law, an abuse of the authority, as by committing an assault and battery on the plaintiff and his wife,

might have the effect to make the original entry wrongful, and the defendant a trespasser *ab initio*: *Sterling* v. *Warden*, 52 N. H.

Damages.—Where a complaint for trespass upon real estate avers a consequential injury to personal property, such averment will be taken only as a matter of aggravation of the damages: *Loeb et al.* v. *Mathis*, 37 Ind.

TROVER.

Damages—Effect of Verdict.—In an action of trover by a payer against a payee for the conversion of a note for thirty-five dollars, the plaintiff recovered a judgment for one cent damages and costs, which was satisfied by the defendant. *Held*, that this did not entitle the defendant to enforce the collection of the note as a valid outstanding obligation against the payor: *Dearth* v. *Spencer*, 52 N. H

TRUST.

Discharge of—How enforced by Cestui que trust, using name of Trustee.—If a *cestui que trust* be induced by fraud to discharge the trust, it must be considered as extinguished so far as an innocent purchaser of the trust-property, who buys, relying upon the discharge, is concerned: *Penobscot Railroad Co.* v. *Mayo*, 60 Me.

But if a person whose own note is deposited in trust for others, among whom its proceeds are to be divided, obtain possession of it without the consent of the *cestui que trust*, an action for money had and received brought against him, in the name of the depositary, by and for the benefit of one of those entitled to a share of the amount due on the note, is maintainable; nor can the suit be discontinued by the nominal plaintiff or his assignee, without the consent of the party in interest: *Id.*

UNINCORPORATED COMPANY.

Who are Members—their Liability.—Every member of an unincorporated joint-stock company is personally liable for all of its debts: *Frost* v. *Walker*, 60 Me.

It is sufficient to authorize a finding that persons are members of such company, if it be proved that their names are found upon the subscription-papers for its capital stock, and that they paid, without objection, assessments for the number of shares set against their respective names, even if it be not shown by whom their names were so subscribed: *Id.*

By thus contributing to the working capital, the subscribers became entitled to share in the profits of the company, and liable, as copartners, for its debts: *Id.*

It seems that there is no distinction, in respect to this liability, between a subscriber for stock and a stockholder; however this may be, an actual payment of assessments upon shares subscribed for will create such liability: *Id.*

VENDOR AND PURCHASER.

Rescission of Contract—Fraud—Assumpsit to recover part paid.—When a party seeks to rescind a contract entered into on fraudulent representations, he must return or offer to return the property acquired by such contract, within a reasonable time, and in such way as to place the property and the vendor substantially in the same condition as at the time the property was received: *Manahan* v. *Noyes*, 52 N. H.

In case of fraud by the vendor in a sale of real estate, whether a notice by the vendee in possession, of a refusal to retain and pay for the property, given to the vendor four days after the completion of the contract, was a reasonable time, within the rule relating to the rescission of contracts, is a question of fact and not of law: *Id.*

Assumpsit for money had and received will lie where a contract is rescinded, to recover the money paid under it: *Id.*

Where A. gave to B. a five hundred dollar bill in order that B. might change it and pay three hundred dollars of it to C., if the authority of B. to pay such sum to C. was countermanded by A. before payment: *Held*, that all the money remained the property of A., who was entitled to recover it of B. in an action of assumpsit for money had and received: *Id.*

Way.

Deed—Use of Passage—Prescription—Costs.—The owner of two adjoining lots, Nos. 5 and 6, fronting on M street, the southerly of which—No. 5—was bounded on the south by C street, in 1833 conveyed No. 6, "with right of passage-way from C street to the rear of the store,"—there being at that time a store on No. 6, extending back 45 feet from M street. From 1833 to 1860, some 20 feet at the rear end of No. 5 was vacant; and there was evidence tending to show that during that period the occupants of No. 6 used a passage-way across No. 5 from C street to the rear of their store on a particular line. In 1860, the defendant, being the owner of No. 6, extended his building on that lot to the rear, so as to obstruct the passage where it had been so used, but still left a passage-way 12½ feet wide at the rear of the lot, which the jury found to be reasonably suitable, convenient, sufficient and necessary for the purposes for which a right of passage was granted from C street to the place where the rear of the store was in 1833: *Held*, that the call of the deed was answered by any passage-way from C street to the rear of the store as it was in 1833, such as would be reasonably convenient and suitable for the purposes for which it was originally granted: *Held*, also, that as the use was substantially in accordance with the terms of the grant, it must be deemed to have been under the grant and not adverse; and that no prescriptive right was thereby gained: *Smith* v. *Wiggin*, 52 N. H.

The main controversy related to the obstruction of the way. The writ contained one count for an independent injury alleged to result from the defendant's overhanging eaves, to which there was a confession. The jury returned a verdict for the plaintiff as to the eaves, but on the other counts the verdict was for the defendant. It was ordered that each party recover costs on the issues found in his favor: *Id.*

Will.

Undue Influence—Wife.—An influence in procuring the execution of a will, which when exercised by a wife may be lawful and proper, may be illegitimate and undue when exercised by a woman living in unlawful intercourse with the testator: *Kessinger et al.* v. *Kessinger et al.*, 37 Ind.