

PERRY & a. v. KEENE & a.

An appropriation in aid of the construction of a railroad may be made by city councils without a popular vote, and may be limited to a part of the road.

BILL IN EQUITY (reported in 56 N. H. 514), brought by tax-payers of the city of Keene, for an injunction to prevent the execution of a vote of the city councils appropriating money to aid in the construction of that part of the Manchester and Keene Railroad which shall be laid out between Greenfield and Keene. The plaintiffs contended that the appropriation was invalid because it was not made or approved by a two-thirds vote of the legal voters of the city, and because it was limited to a part of the road.

Sargent & Chase and Hardy, for the plaintiffs.

Lane and Faulkner, for the defendants.

DOE, C. J. Any town may, by a two-thirds vote, appropriate money to aid in the construction of a railroad; all provisions of statutes relating to towns, apply to cities; the administration of all the fiscal, prudential, and municipal affairs of any city, and the government thereof, is vested in the city councils; and all the powers vested by law in towns, or in the inhabitants thereof, are exercised by the city councils. Gen. St., c. 34, ss. 4, 16; c. 40, ss. 2, 3; c. 44, s. 1. Under these statutes the city councils of Keene were authorized, without a popular vote, to make the appropriation, and it was not rendered invalid by the stipulation limiting it to that part of the road nearest to Keene.

Bill dismissed.

 LARRY v. HERRICK.

An inconsistency in the statement of the facts, in different counts of a declaration, is not evidence of an admission of the plaintiff that the facts are not as stated by him in his testimony upon the trial of the cause.

CASE. The declaration contained two counts,—one in trover for a yoke of oxen, and another setting forth, in detail, grounds upon which the plaintiff claimed to recover special damages for the taking and conversion of the same oxen. At the trial the plaintiff read and relied only on the count in trover. The plaintiff testified, in his own behalf, in relation to an interview with his counsel before the writ

was made, in which he gave them information as to the nature of his claim; and there was no evidence that his counsel derived any such information from any other source. There was no evidence of any special direction by the plaintiff as to the form of the writ or declaration.

At the close of his opening statement to the jury, the defendant's counsel was permitted, subject to the plaintiff's objection, to read to the jury the special count, on the ground that it was part of the record in the case, and that it contained statements inconsistent with the plaintiff's testimony and claim, and was, therefore, proper matter to be considered by the jury for its bearing upon the plaintiff's credit as a witness.

A verdict having been returned for the defendant, the plaintiff moved for a new trial.

Lane, for the plaintiff.

Wheeler & Faulkner, for the defendant.

FOSTER, J. It is customary and proper, under our practice, for the plaintiff's counsel to state his client's case in various forms in different counts, in order to meet the proof which he may encounter upon the trial. Such statements may be apparently inconsistent, if regarded as a narrative of facts instead of a mere form of pleading. At the trial, one count cannot be adduced as evidence against another; nor can the fact, that evidence was offered at one time to sustain such count, be regarded as an admission by the party, on a subsequent trial of the same cause, that the facts as charged in such count are true, and that therefore he cannot proceed to trial on a different count. The exclusion of the inconsistent counts as evidence is by force of an absolute rule of law, founded upon the policy of allowing a plaintiff, in his declaration, to state his case in inconsistent forms. *Cilley v. Jenness*, 2 N. H. 87; *Chapman v. Sloan*, 2 N. H. 467; *Bump v. Smith*, 11 N. H. 48; *Kimball v. Bellows*, 13 N. H. 58; *Buzzell v. Snell*, 25 N. H. 474; *Hull v. Clement*, 41 N. H. 168; *Keeler v. Bartine*, 12 Wend. 110; *Hughes v. Moore*, 7 Cranch 176; 1 Stark. Ev. 295; Gould's Pl. 432.

The verdict must be set aside, and

A new trial granted.

STATE v. NICHOLS.

In an indictment properly laying an offence on a particular day, a *continundo* may be rejected as surplusage.

INDICTMENT, for embezzlement alleged to have been committed on a