

## KIMBALL v. BRUCE.

When a minor buys and receives property of his debtor at an agreed price, in part payment of the debt, and on coming of age is unable to restore the property, rescinds the executed contract of purchase and payment, and sues for the amount of the debt, he is not chargeable for the excess of the agreed price above the value of the property.

ASSUMPSIT, for money had and received. The plaintiff, when a minor, bought and received of the defendant certain chattels at an agreed price, in part payment of a debt of \$1,100 (money had and received) due him from the defendant. While still a minor he sold the chattels, and is unable to restore them to the defendant. After coming of age, he brought this suit to recover the \$1,100. The court instructed the jury to allow the defendant the value of the chattels, and not the agreed price, and the defendant excepted. Verdict for the plaintiff.

*Wadleigh & Wallace* and *C. P. Sanborn*, for the defendant.

*Barnard & Leach*, for the plaintiff.

DOE, C. J. The defendant has made no effort, by brief or argument, to maintain his exception, and it is untenable. *Carr v. Clough*, 26 N. H. 280, 293, 294; *Heath v. West*, 28 N. H. 101, 110; *Locke v. Smith*, 41 N. H. 346, 353; *Young v. Stevens*, 48 N. H. 133, 137; *Heath v. Stevens*, 48 N. H. 251; 2 Kent Com. (12th ed.) 236, n. 1, 240; Benjamin on Sales, s. 27, n. If the chattels were necessities, the plaintiff was not chargeable for more than their value.

*Judgment on the verdict.*

BINGHAM, J., did not sit.

## TILTON v. PITTSFIELD.

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68	84

In an action upon the statute of highways, a town is not estopped to deny the existence of a highway not established in a statutory method.

CASE, on the statute of highways, for damage happening to a traveller. Facts agreed. The alleged highway runs from a highway to a railroad depot. It was not laid out in the mode prescribed by statute, and has not been used twenty years for public travel. It was opened

by the railroad company within twenty years, upon an agreement between the company and the town that the public should have the free use of it as a highway, and the company should keep it in repair so long as the company used the depot, and that the town should discontinue so much of the highway at another place as the new way was a substitute for. This agreement was executed: the discontinued highway was enclosed, and the plaintiffs and the public in general had reason to believe, and did believe, that the new way was a highway provided for public use by the action of the town, and used it as such.

*A. F. L. Norris*, for the plaintiffs.

*Minot and Mugridge*, for the defendants.

DOE, C. J. A way not laid out in a mode prescribed by statute, and not used twenty years as a highway, is not a highway. Gen. St., c. 68, s. 8; Rev. St., c. 53, s. 7. The town is not estopped, in this case, to deny that such a way is a highway. *Haywood v. Charlestown*, 34 N. H. 23; *Northumberland v. A. & S. L. Railroad*, 35 N. H. 574; *Smith v. Northumberland*, 36 N. H. 38; *Hall v. Manchester*, 39 N. H. 296; *Eames v. Northumberland*, 44 N. H. 67; *Stevens v. Nashua*, 46 N. H. 192. In *Gilbert v. Manchester*, 55 N. H. 298, the way had been used as a highway more than twenty years. When a way is a highway, the question may arise whether the town can divest itself of its duty of keeping it in repair. *Watson v. Tripp*, 11 R. I. 98.

*Nonsuit.*

ALLEN and CLARK, JJ., did not sit.

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HARRIMAN & a., Ex'rs, v. JONES.

An attorney may be required to testify who his client was, in a certain suit; and letters written to the attorney are competent evidence against their author to show that he was the client for whom the attorney brought and conducted the suit.

In a suit brought by an executor, letters written by the defendant as agent of the testator, and at his request, are competent evidence as admissions made by the testator, although the defendant cannot testify.

ASSUMPSIT, on a note for \$250, signed by the defendant, and payable to the plaintiffs' testator. The defence was want of consideration. The question was, whether the defendant bought of the testator a \$250 note against one Hill, and gave the note in suit for the Hill note, or whether he merely assisted the testator in an unsuccessful