

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.

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

attempt, made in this defendant's name, to collect the Hill note. The testator endorsed the Hill note, and a suit, brought upon it in the name of this defendant, against Hill, was defeated by Hill's bankruptcy. Subject to the plaintiff's exception, the defendant was allowed to prove, by the testimony of the attorneys who brought and conducted that suit, and by letters written to those attorneys by this defendant in behalf of the testator as his agent and at his request, that the testator was the client of those attorneys in that suit, as a fact tending to show that the testator was the plaintiff in interest in that suit, and that this defendant did not buy the Hill note. Verdict for the defendant.

Hawthorne and *Davis*, for the plaintiffs.

Mugridge and *Albin*, for the defendant.

DOE, C. J. The objection, that evidence is a disclosure of a privileged communication between attorney and client, is founded on proof of the fact that the relation of attorney and client existed. The existence of that relation is not a privileged communication. Proof of the relation is competent for such a purpose as that for which the evidence in this case was received. *Brown v. Payson*, 6 N. H. 443; 1 Greenl. Ev., s. 245.

The letters were as competent as if written by the testator, or by some other agent than the defendant. The statute, which excludes the testimony of the defendant in a suit brought by an executor, does not exclude the letters of the testator, by whosoever hand he may have written them.

Judgment on the verdict.

FOSTER and BINGHAM, JJ., did not sit.

WIGGIN v. BUZZELL.

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Section 33 of c. 1, Laws of 1868, gives a homestead right to "wife, widow, and children," but not to the husband or father.

A divorce obtained by a wife bars her homestead right in her husband's property, unless such right is reserved by the decree of divorce.

Under Laws of 1868, c. 1, s. 33, children have not a homestead right in a homestead owned by their father, and occupied by him, but not occupied by his wife or his or her family.

WRIT OF ENTRY. Facts agreed. The plaintiff was formerly the wife of the defendant. The defendant owning an equity of redemp-