

cause the question of the degree of the crime, if murder, was not left to the jury, but was determined by the court; and he calls attention to section 2, chapter 278, of the Public Statutes, which provides: "If the jury shall find a person guilty of murder, they shall, by their verdict, find also whether it is of the first or second degree."

If it is assumed, without deciding the point, that the respondent is entitled to the benefit of his exception taken long after the trial, it is not necessary to determine at this time the questions raised thereby. Whether the charge of the court was erroneous, as now claimed by the respondent, and, if it was, whether he did not effectually waive his right to take advantage of it by assenting thereto at the trial, or whether it was competent for him to bind himself by such assent, are questions of so much difficulty that it is not deemed advisable to express an opinion upon them. As there must be a new trial for other reasons, it would not be useful to determine these questions, in anticipation that they will again be presented upon the next trial.

Exceptions sustained: verdict set aside.

All concurred.

Rockingham, }
May 24, 1901. }

SEABROOK v. BROWN & a.

DEBT, on bonds given by Brown as principal and the other defendants as sureties, for the faithful performance by Brown of his duties as collector of taxes for Seabrook in the years 1896 and 1897. The facts were found by a referee, and the case transferred from the October term, 1900, of the supreme court by *Wallace, J.*

The bonds were not filed in either year, within six days after Brown's appointment, as required by the statute. He acted as collector. The report was in favor of the plaintiffs, and judgment was ordered upon it, subject to the defendants' exception.

Page & Bartlett, for the plaintiffs.

John W. Kelley and *Samuel W. Emery*, for the defendants.

CHASE, J. It is immaterial whether Brown was collector of taxes *de jure*, or only *de facto*. The defendants, having bound themselves for the faithful performance of his duties as collector, are estopped from denying that he was such officer. *Horn v. Whittier*, 6 N. H. 88; *Hall v. Brackett*, 62 N. H. 509.

Exception overruled.

All concurred.