

Eastman
vs.
Burleigh.

But granting that a special authority existed in fact from *William* to *Daniel*, yet the evidence of it does not appear on record, and should *William* now deny the fact and prosecute the plaintiff anew for the timber, the presumption before mentioned would not make the record an estoppel to *William*, though it may have been to the plaintiff, but the plaintiff would be compelled to resort to the other evidence concerning the authority. The record shows no appearance by *William* in person, nor appearance for him by any practising attorney, and no appearance for him by his brother, under any authority whatever. The record is, therefore, defective. The proceedings on the face of them are not a final bar on the subject of the controversy. In England, by a rule of court when a judgment is confessed by an attorney, for a third person, the warrant of attorney must be filed. *Tidd* 500.

This proceeding under a special statute ought certainly to be no less strict. The authority of a practising attorney *ex officio* to refer a cause by a rule of court is a different question; and the mode of doing it if permissible may well enough conform to other common law proceedings. *Kyd Aw.* 45.—1 *Dall.* 164.—7 *Cranch.* 436, 449, *Holker vs. Parker.*—*Caldwell on Arbitrations* 31.

Judgment reversed.

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THEODORE MOSES vs. MARY RANLET, adm'x. of HENRY A. RANLET.

When a claim against an insolvent estate is secured by a mortgage of land, the commissioners should allow the whole claim, and not deduct first the value of the land, and allow only the residue of the claim.

This was an appeal from the report of the commissioners, on the estate of *Henry A. Ranlet*, deceased and insolvent.

The claim of the plaintiff was founded on a note from said *Henry* to *Teresa Orne*, for \$3194 78, secured by a mortgage of real estate. The note and mortgage had both been duly assigned to the plaintiff, and the land described in the mortgage was not equal in value to the amount of the note. When the plaintiff exhibited his claim to the commissioners, the ad-

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ministratrix contended, that the value of the land should first be deducted from the whole amount of the note, and only the balance allowed in their report. On the contrary, the plaintiff contended for an allowance of the whole note in their report, and his right after receiving a dividend on the whole, to hold the mortgage as security for what should then remain unpaid. The commissioners adopted the latter course, whereupon the defendant filed her objections, and the plaintiff was compelled under the statute, to prosecute his claim here by way of appeal.

J. Smith, for the plaintiff.

Sullivan, for the defendant.

WOODBURY, J. The first position in favor of the decision of the commissioners is, that the whole note was due to the plaintiff, and should, therefore, be allowed in their report.

This position appears to us unanswerable. The power of commissioners to "receive, examine and adjust all claims of the creditors,"⁽¹⁾ so far from being a warrant to reject part of a claim, honestly due, is subject to be revised by an appeal, and the just amount ascertained by a court and jury, as at common law. 1 *N. H. Laws*, 220.

(1) 1 *N. H. Laws* 218.

It is not pretended, that any part of the sum allowed by these commissioners had previously been paid or released, and the only ground for its rejection seems to be the circumstance, that the plaintiff has for its eventual payment collateral security. But in ordinary cases this circumstance is no objection to a suit, and recovery of the whole claim, since the creditor can in no way obtain but one payment of his demand. Such, it is admitted, would be the course here were the debtor alive. But the death of the debtor cannot in itself change the principles of justice or the terms of the contract; and the statute does not profess to make any change, except to introduce an equal dividend among the creditors of such estate as belonged to the insolvent at his death. 1 *N. H. Laws*, 218.

Property mortgaged, however, belongs to the mortgagee, save an equity of redemption; and that equity of redemption is equally divided among the creditors. But it is con-

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tended that by the statutes of bankruptcy, the whole mortgaged land reverts to the common mass, and the mortgagee receives only a proportionate share out of the whole; and that this provision furnishes an analogy for the position of the defendant. But this rule in cases of bankruptcy is the consequence of an express statute, and is not, in all respects, the rule contended for by the defendant. 1 *Atkyns* 523.—4 *Brown. Ch.* 543.—*Cooper on Bank*, 186.

But if from some fancied equity we should adopt it, the effect would be utterly to change the law as to pledges and mortgages, and introduce a condition, making them revert in the representatives of the former owner on his death, without either a payment or release of the principal debt. An alteration of this character belongs to the legislative, rather than the judiciary department.

Other difficulties in the course proposed by the defendant seem insurmountable. To hold that a collateral security of any kind, operates as full payment by the debtor's death, would be unprecedented.

When property pledged is unequal in value to the debt, to hold that it is payment to the extent of its value, would still occasion insuperable inconveniences; for who is empowered by our present laws to fix this value; the judge of probate, the commissioners, or the parties in interest?

By what process likewise, can a mortgage estate be rendered absolute in the mortgagee, unless he choose to enter or to foreclose by a suit for condition broken? and in what tribunal resides the power to compel a conveyance of it by him to third persons, at an appraised value, unless his whole debt is paid?

On the contrary, the rule adopted by these commissioners accords with the contract of the parties. The land can be held no longer than till payment of the whole debt. It accords with real equity; because after payment of the whole debt by means of a dividend from the rest of the estate, and advances of the residue from the administrator, the land reverts to the administrator, and may under license be

sold to remunerate his advances, and reduce farther other claims against the estate. Because, too, the land is security for the whole debt, and not simply for an amount equal to the value of the land; and in all other cases can be held till every part of the debt is satisfied out of the residue of the estate. Moreover, we apprehend that this rule accords with the weight of authority. For though the 16 *Mass. Rep.* 308, seems opposed; yet the doctrines contained in the following cases are in support of our conclusions. 1 *Barn. & Ald.*—1 *Thomas et al. vs. Courtney.*—2 *Maul. & Selw.* 39, *Semb.*—2 *Mass. Rep.* 302, *Hatch et al. vs. Brooks.*—6 *Mass. Rep.* 149. Judgment affirmed.



ARVEN BLANCHARD vs. CHARLES GOSS.

In an action of trespass for false imprisonment, brought by *A.* against *B.*, *B.* pleaded that he sued out a writ of *capias* returnable to this court, and declared against *A.* in debt upon a judgment for \$8 damages, and \$5 costs, rendered by a justice of the peace, by virtue of which writ he caused *A.* to be arrested. *A.* replied, that the judgment was founded upon a contract made after Jan. 1, 1819, for a less sum than \$13.33. To this there was a demurrer. It was held 1st, that *A.*'s body was not liable to arrest in an action upon the said judgment. 2d, that an action of trespass could not be maintained, until the writ was quashed, or in some way vacated.

THIS was an action of trespass for an assault and false imprisonment, on the 27th July, 1821.

The defendant pleaded in bar that on the 4th June, 1821, he sued out of the office of the clerk of the superior court in this county, a writ of *capias* and attachment, returnable to this court at September term, 1821, against the plaintiff, in which he declared against the said *Blanchard* in a plea of debt upon a judgment rendered by *Henry Sweetser*, Esq. one of the justices of the peace within this county, for \$8 damages and \$5 costs; which writ he afterwards delivered one *Daniel Burnham*, a deputy sheriff, to be executed, who at the time when, &c. by virtue of said writ, took and arrested the said *Blanchard*, and detained him in custody for the space of time mentioned in the declaration, as was lawful for him to do, for the cause aforesaid, of which writ the said *Burnham* made due return.