

In respect to insolvent estates of deceased persons, the law expressly provides that no action against the administrator shall be commenced or prosecuted after a decree of insolvency, except actions of review; but that the cause of action may be presented to the commissioners and allowed, with the costs of any action pending at the time of the decree of insolvency: Rev. Statutes, ch. 161, sec. 8, (C. S. ch. 170, sec. 8;) and under this statute it has been decided that, after the decree of insolvency, the commissioners had exclusive cognizance of claims against the estate, and that the court in which a suit against the deceased was pending at the time of the decree had no longer jurisdiction to determine the merits of the action, or to order any disposition of it, except its discontinuance. *Parker v. Badger*, 23 N. H. 456, cited by defendant's counsel. Under the former acts, which were substantially like this, the same decisions were made. *Glendennin v. Allen*, 4 N. H. 385, *Edes v. Durkee, Adm'r.* 8 N. H. 460, also cited by defendant's counsel.

It is true, that if the administrator comes in and makes no objection, by plea or suggestion of such decree, but allows the action to proceed to judgment, it could not be collaterally impeached, inasmuch as the court had general jurisdiction of the cause and parties: *Lyford v. Dunn*, 32 N. H. 81; but in that case had the objection been taken by plea or suggestion, the suit could not have been further prosecuted, but must have abated.

Assuming, then, that in the case before us the ward was under guardianship by reason of insanity, although it is not expressly so stated, we think the suit *must be discontinued*.

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#### JESSE BOLLES v. UBERTO BOWEN.

The sheriff's return that he has left a true copy of the writ with the defendant, is conclusive upon the parties, and cannot be contradicted for the purpose of defeating the suit in which such return is made; but the remedy is by an action against the officer for a false return.

#### WRIT of ENTRY, on a mortgage.

Defendant pleaded in abatement a defect in the service of the writ, in this,—that the writ contained a clause of *ad damnum* \$500,—and the copy of said writ given to defendant contained no such clause. The plaintiff demurred, the court sustained the demurrer, and defendant filed this bill of exceptions, which is allowed and signed by the court, and the writ, officer's return, and plea in abatement, (not to be printed,) may be referred to as part of this bill.

*Woodward*, for defendant.

The statute requires the officer (if he does not make service by reading,) to give to the defendant an *attested copy* of the writ, or to leave such copy at his usual place of abode. Comp. Stat. chap. 194, sec. 2.

There can be but one meaning to the words, "attested copy." If it fails merely in words of form, as well as in words of substance, to be like the original, it fails to be a copy. If the writing given the defendant by the officer making service of the writ is not a copy of the original, the officer makes no service, and the writ should abate.

Sections 10 and 11, of chap. 198 of the Comp. Stat. (also case of *Berry v. Osborne*, 28 N. H. 279,) are inapplicable to this case, because section 10 of said chapter provides that the court and justices, on motion, may order an amendment "in any such case," referring to all the things mentioned before and in the same section. But this is a case that cannot be amended, therefore said sections 10 and 11 do not and cannot apply.

The case of *Adams v. Wiggins*, 42 N. H. 553, rested upon the 4th sec. of chap. 194, of Comp. Stat., and is therefore inapplicable.

The use of an *ad damnum* in a writ of entry is coeval with the writ itself, and should be considered as a material part of the writ, and especially so in a foreclosure of a mortgage in which the judgment is conditional. Comp. Stat. chap. 203, sec. 11.

*Wheeler & Faulkner*, for plaintiff.

BELLOWS, J. As between the parties, the return of the sheriff is conclusive upon all matters material to be returned; and cannot be contradicted by such parties or their privies, or by bail, endorsers, or others, whose rights or liabilities are dependant upon the suit.

The remedy for a false return is by suit against the sheriff, and not by defeating the proceedings in which such return is made. *Lewis v. Blair*, 1 N. H. 68; *Brown v. Davis*, 9 N. H. 76; *Angier v. Ash*, 26 N. H. 99, and cases cited; *Messer v. Bailey*, 20 N. H. 9; *Hall v. Tenney*, 11 N. H. 516. This last case is much like the present. In a suit upon a bond for the ease and relief of a poor debtor, the defence was that the debtor had taken the oath prescribed by law; and to prove notice of the application, the sheriff's return upon it, that he had left a true copy with the creditor, was introduced, whereupon the plaintiff offered to prove by the copy itself, certified by the officer, that it purported to be the application of *Samuel Stevens* instead of *Lemuel Stevens*, as in the original; but it was decided that the return of the officer, as in other cases, was conclusive.

In the case of a summons left with a debtor, when his goods and estate are attached, the defendant is not estopped by the return, but may cause the summons to be enrolled and become part of the record, and may then plead the defect in the summons. *Nelson v. Swett*, 4 N. H. 256.

The reason for the distinction between this case and that of a copy left by the officer is not stated; but it is obvious that there is a distinction in this, that in the former case the summons is the process of the court, for which the officer is not responsible, while, on the other hand, the copy is made by him and is his act for the correctness of which he is responsible.

But whatever may be the reasons for it, the distinction is now well established.

If, then, it appears by the officer's return that a true copy of the writ was left with the defendant, it is conclusive in this suit, and *the exceptions are overruled.*

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MERRILL v. PLAINFIELD.

Strictly speaking, arguments, or inferences, or matters of law ought not to be stated in the pleading, and if stated in the bill, they will not be taken as admitted though not denied in the answer, and though stated in the answer and not denied in the replication, yet the plaintiff will not be held to have admitted them, if in either case the facts on which these conclusions are founded and from which they are drawn are properly denied, or avoided by an allegation of new facts.

A town cannot properly vote to pay money to its selectmen, or those who have acted in that capacity, for costs and damages sustained by them in resisting criminal prosecutions brought against them for refusing to insert names upon the check-list; and money thus voted cannot be collected.

An injunction will be granted by this court upon such town and its officer, upon the petition of any person who is a tax-payer in such town, and liable to be assessed for the payment of any part of such sum, to prevent the payment of money so illegally voted.

IN EQUITY. Abel Merrill, Ai Read, George Bryant, Samuel B. Duncan, George C. Freeman, George Westgate, Isaac W. Westgate, and Cyrus S. Richards, all of Plainfield, in said county of Sullivan, yeomen, complain against the town of Plainfield, in said county, a municipal corporation duly established by the laws of said State, Albert S. Eaton, Farnam J. Morgan, and Orra C. Pierce, of said Plainfield, yeomen, Selectmen of said Plainfield, and Benjamin C. Smith, of said Plainfield, yeoman, Treasurer of said Plainfield, and say :

That in the warrant for the last annual meeting of said Plainfield, duly notified and holden at the Town Hall, in Meriden Village, in said Plainfield, on Tuesday, the tenth day of March, 1863, the fifth article was : "To see if the town will vote to indemnify Benjamin C. Daniels, Cyrus Smith, and John B. Rowell, Selectmen of said town, in the year eighteen hundred and sixty, and pay them their reasonable charges, costs and expenses which they have sustained on account of divers prosecutions brought against them for their proceedings when acting in their official capacity as such Selectmen."

That under this article, at said annual meeting, duly holden at the Town Hall, in Meriden Village, in said Plainfield, on Wednesday, the eleventh day of March, 1863, by adjournment from Tuesday, the tenth day of March, 1863, said town of Plainfield, "Voted, That the Selectmen be directed to pay the sum of five hundred sixty-one dollars and twenty cents, as money paid for counsel, &c., in defending the suits against Daniels, Smith, and Rowell, named in the fifth article, prosecuted in behalf of the State."