

had been elected until after the defendant, Furber, had also been elected, and the board, consisting of Phillips, Yeaton, and Furber, qualified by taking the oath of office in open meeting; after which Cotton was elected auditor, and accepted the office by being sworn, in open meeting. It does not appear to have been discovered that he had been elected prudential committee till after all this had been done. No objection is shown to have been made to the election of Furber, but, on the contrary, all the voters present acquiesced in the *status* in which matters were left at the adjournment of the meeting.

We have just decided, in *Cotton v. Phillips*, *ante*, 220, that Cotton, by accepting an incompatible office, disqualified himself from holding that of prudential committee. Whatever of irregularity existed in the election of prudential committee was cured by the general acquiescence of the voters in the doings of the district at that meeting, and by the action of Cotton in accepting the office of auditor, by which he must be regarded as having declined that of prudential committee. Under these circumstances I think the validity of Furber's election cannot be questioned.

Whether this proceeding should have been brought in the name of the attorney-general, it becomes unnecessary, therefore, to inquire.

CUSHING, C. J. I fully agree with what has been said by my brother SMITH. I do not understand that in this case any intentional wrong is complained of in the government of the meeting by the moderator. When the voting commenced, he understood that the election was by major vote, whereas, in point of fact, it was by plurality. I think the party ought to have discovered his rights and claimed them before another person had been elected and qualified, or not at all. However this may be, his acceptance of the office of auditor clearly disqualified him, and was a waiver of any right he might have to the office of prudential committee.

LADD, J., concurred.

Writ denied.

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MARCH v. PUTNEY.

Guaranty—Practice.

On suggestion that a material fact was omitted from the referee's report, the plaintiff was permitted to move in the court below to recommit the report for further hearing.

FROM MERRIMACK CIRCUIT COURT.

ASSUMPSIT on guaranty. The guaranty was the same mentioned in

March v. Putney, ante, 34. The report of the referee showed that the guaranty was executed by the defendant on the evening of September 8, and mailed to the plaintiff the next morning; and the goods which were the subject-matter of the suit were delivered and charged September 8.

J. H. Benton, Jr., and *Sargent & Chase*, for the plaintiff.

Mugridge, for the defendant.

*CUSHING, C. J. It seems clear to me that by this contract the defendant intended and expected to guarantee the payment for goods to be sold after its execution, and not otherwise. The report of the referee does not find the fact that the goods were delivered after the execution of the guaranty. It is not the province of this court to find the facts, and if it were so, I should infer from the report that these goods were delivered before the execution of the guaranty.

Unless, therefore, the plaintiff can have the report recommitted, for the purpose of determining this, and other facts desired in the court below, there must be

Judgment for the defendant.

LADD, J., and STANLEY, J., C. C., concurred.

HARDY v. MERRILL.

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Evidence—Opinions of non-professional witnesses—Insanity—Practice—Right to open and close.

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Non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of the testator, when founded upon their knowledge and observation of the testator's appearance and conduct. *Boardman v. Woodman*, 47 N. H. 120, *State v. Pike*, 49 N. H. 399, and *State v. Archer*, 54 N. H. 468, upon this point, overruled.

The party who affirms that a will was duly and legally executed, has the burden of proof and the accompanying duty of opening, and the right to close, no matter in what form the issues for trial may be drawn.

FROM MERRIMACK CIRCUIT COURT.

APPEAL, by William H. Hardy against Isaac D. Merrill, from the decree of the judge of probate approving and allowing, in solemn form,

*SMITH, J., did not sit.