

Daley & Goss, for the plaintiffs.

Albert S. Twitchell, for subsequent attaching creditors.

PIKE, J. The description of the property mortgaged was sufficient. *Morse v. Pike*, 15 N. H. 529, 532; *Fuller v. Rounceville*, 31 N. H. 512, 519; *Call v. Gray*, 37 N. H. 428; *Sumner v. Blakslee*, 59 N. H. 242; *Benton v. Benton*, 63 N. H. 289, 295. Any description is sufficient from which the property can be identified. *Sherman v. Hanno*, 66 N. H. 160, 163.

It is immaterial that the oath was not varied. The mortgages were valid as between the parties, and as against subsequent purchasers with notice and the defendant assignee, without any oath or record. *Smith v. Moore*, 11 N. H. 55, 63; *Gooding v. Riley*, 50 N. H. 400, 402; *Roberts v. Crawford*, 58 N. H. 499, 500; *Lovell v. Osgood*, 60 N. H. 71, 72; *Adams v. Lee*, 64 N. H. 421, and cases cited.

The claim of the defendant based upon the doctrine of *Putnam v. Osgood*, 51 N. H. 192, and kindred cases, has been disposed of by the decision in *Thompson v. Esty*, *ante*, p. 55.

The plaintiffs, although entitled to judgment as against the assignee for the value of the mortgaged goods in his hands, cannot hold the goods upon the facts stated as against attaching creditors without notice. *Putnam v. Osgood*, 51 N. H. 192; *Wilson v. Sullivan*, 58 N. H. 260, 263. If at the trial term it appears that there are such creditors, they may, upon proof of their claims, have judgment for the amounts thereof to the extent of the value of the goods under attachment by them. In that event the plaintiffs will be entitled to judgment for the value of the mortgaged goods, if any, remaining after satisfying the claims of such attaching creditors.

Case discharged.

All concurred.

Rockingham, }
June, 1897. }

WARNER v. WARNER.

In a proceeding for divorce on the ground of adultery, evidence of the general reputation of the libelee for virtue and chastity is admissible.

LIBEL FOR DIVORCE, charging adultery. Subject to the plaintiff's exception, the defendant was permitted to introduce testimony relating to her general reputation for virtue and chastity.

Eastman, Young & O'Neill, for the plaintiff.

J. Warren Towle and John S. H. Frink, for the defendant.

CARPENTER, C. J. Libels for divorce are, and until the legislature otherwise provides must be, tried by the court. Const., art. 76 (now art. 75); *Sheafe v. Sheafe*, 24 N. H. 564, 567. "The jurisdiction in cases of divorce *a vinculo matrimonii* is unknown to the common law, . . . and is exercised in modes unknown to the common law." *Brown v. Brown*, 37 N. H. 536, 537. In the trial the court has never been governed by strict rules of evidence or practice, and has always exercised a broad discretion, as well in the admission of evidence as in other respects. *Sheafe v. Sheafe*, 24 N. H. 564, 568. This doubtless is one reason for the fact that only two or three of the numerous reported cases relate to the competency of evidence. Although by the common law and until the act of 1857 (Laws 1857, c. 1952) a party to a civil action could not testify, the testimony of the parties in divorce cases was always received. *Poor v. Poor*, 8 N. H. 307, 310, 314; *Quincy v. Quincy*, 10 N. H. 272, 274-277; *Smith v. Smith*, 12 N. H. 80, 81; *Kimball v. Kimball*, 13 N. H. 222, 224, 225; *Masten v. Masten*, 15 N. H. 159, 161; *Corson v. Corson*, 44 N. H. 587, 588; *Melvin v. Melvin*, 58 N. H. 569, 571. The necessity for the testimony of the parties in order to secure the administration of justice between them was no greater than in many common-law actions. It warranted the judicial abrogation of the established rules of evidence no more in one case than in the other. The testimony was received, not merely because it was necessary, as in many cases it was not, but on the ground that the court was not bound under the statute by the strict rules of evidence. The anomaly is otherwise unaccountable. So, although at common law evidence in support of the credibility of a witness is not competent until his reputation for truthfulness is attacked, yet in divorce cases it has been the uniform practice of the court not only to admit, but in some cases to require, testimony that the witness, especially if a party, is worthy of belief. *Kimball v. Kimball*, 13 N. H. 222, 225. With nearly the same uniformity, it is believed, the court in cases where there is not a clear preponderance of testimony has received evidence of the party's general character relative to the charge against him. In general it may be said that the court has always received any evidence which in its judgment may properly and reasonably instruct its conscience. The limits of this broad discretion need not now be defined. The reception or the rejection of evidence of character in divorce causes is not legal error.

The common-law doctrine, established by a great weight of

authority, that while proof of an unblemished character has a legitimate tendency to show that a defendant in an indictment is not guilty of the offence charged it has no such tendency upon the same issue in a civil action, is not here involved; and the question whether it can on principle be defended (2 Stark. Ev. 367) is not considered.

Exception overruled.

BLODGETT, J., did not sit: the others concurred.

Rockingham, }
June, 1897. }

HETT v. BOSTON & MAINE RAILROAD.

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A refusal to deliver property to the owner upon his demand is evidence tending to show a conversion, and like other inconclusive acts, is open to explanation.

The failure of a railroad company to deliver to the owner and consignee upon his demand property entrusted to them for carriage and afterward attached in an action against the consignor does not constitute a conversion.

A refusal by the agent of a railroad company to deliver freight upon the demand of the owner and consignee unless a disputed charge for detention was paid, or until further instructions were received from the company, is not sufficient evidence of a conversion.

TROVER, for articles used in a merry-go-round. Trial by the court. The writ is dated October 10, 1895. July 29, 1895, the plaintiff owned the property and leased it for the term of three months to D. & H., reserving the right to retake the same whenever the payments for its use were not made each week in advance. D. & H. set up and used the merry-go-round at various places until the evening of September 21, 1895, when they yielded to the plaintiff's demand for the property because of the non-payment for its use. They loaded it upon a freight car of the defendants at Nashua, to be transported to the plaintiff at Portsmouth, and took a way-bill containing the following conditions: "The owner or consignee shall pay freight and all other charges accruing on said property before delivery. . . . The delivering carrier may make a reasonable charge per day for the detention of any car, and for the use of track after the car has been held forty-eight hours for unloading, and may add such charges hereunder and hold said property