be void if the defendant should pay the sum mentioned therein by certain instalments at certain times therein stated, "according to the tenor of certain promissory notes drawn by" defendant, &c.

3. Draper, C. J., in *Fraser et al.* v. *Armstrong* (10 U. C. C. P. 506), alludes to cases in which, future advances being contemplated, and a mortgage or other security by deed being given to secure the debt to be created as well as a debt already due, the courts have deduced, from what appeared on the face of the higher security, that it was collateral to, and therefore no merger of the lower security given by bills or notes either for the existing debt or the new advances.

4. The rule has been well established, that parol evidence cannot be admitted to vary the legal effect of an agreement under seal; and it would seem to follow, that no amount of evidence as to what the understanding was between the parties can prevent the note from merging in the mortgage, and thereby putting an end to the right of action on the note (*Matthewson* v. *Brouse* (*ante*); *Parker* v. *McCrea*, 7 U. C. C. P. 124). Nor can the holder of the note be heard to say that the maker of it, at the time the mortgage was given, was liable to a third party who had discounted and held these notes notwithstanding the mortgage (*Fraser et al* v. *Armstrong*, 10 U. C. C. P. 506).

The creditor may, however, although he has a clear right to sue on the note, waive that right by his own act. The case of *Evans* v. *Bell* (8 U. C. C. P. 378) is an example of this. The plaintiff held defendant's note, to secure which the latter agreed to transfer to him some shares in a road company, and the plaintiff was in consideration of this to extend the time for payment of the note for one year. An assignment was accordingly made under seal, reciting the note, and stating that for the purpose of securing the same the defendant transferred this stock to the plaintiff; *habendum* to plaintiff, subject to a proviso for making the same void upon payment of the note and interest at the expiration of two years instead of one. The plaintiff refused to carry out this arrangement, and commenced an action on the note, at the same time holding the stock and refusing to transfer it. The plea as amended at the trial was that this transfer was made for the purpose of securing the amount of the note, and that the plaintiff by his acceptance of it had agreed to postpone the payment of the note for two years. The learned judge directed the jury that there was no evidence to support this plea, and a verdict was found for the plaintiff. A new trial was ordered, on the ground that it was a question for the jury to decide whether the plaintiff, by retaining the security, did not "accept the assignment on the terms it expressed, namely, as a security for the note, and redeemable at the expiration of two years."

The position which the various parties to a bill or note occupy in transactions of this nature now require consideration; and we must again refer to the leading case of *Matthewson* v. *Brouse*, and to subsequent cases, to illustrate this branch of our subject. In the former case the defendant sued as an endorser on a note made by one Carman. The notes were dated on the 11th November, 1842, and fell due on the 14th February following. According to agreement the defendant on 16th November gave the plaintiff a mortgage on certain lands. The question before the court was, "whether the taking the mortgage from the defendant for the amount intended to be secured by Carman's notes extinguished the claim against him for the same money as a party upon Carman's notes, which he had indorsed before making the mortgage."

Robinson, C. J., in delivering the judgment of the Court said:—"If Brouse, on the 11th November, had made a note to Matthewson for the sum due to him, payable on the 14th February, and had afterwards given him a mortgage for the same debt with a covenant to pay the money on the 4th March, it is clear that the debt due on simple contract would be merged in the higher security, and there would no longer remain to Matthewson a remedy on the note. *But I see no substantial difference between that case and the present.* Every indorser of a promissory note is a new maker, and in effect Brouse did, on 11th November, give his note to Matthewson, with this difference only, that his promise to pay was a qualified one, that he would pay the money if Carman (the maker of the note) did not."

In the case of *Shaw et al.* v. *Crawford*, as in the last, the action was brought against the endorser of a note, but, unlike that case, the mortgage was given by the maker to the plaintiff as a collateral security to the note. The note sued on was made by one Polley, payable to defendant's order, and endorsed by him to the plaintiff. The judgment of the court was delivered by Robinson, C. J., who said:—"We are of opinion that the effect of the stipulation in the mortgage given by Polley, the maker of the note, to Shaw and others, the indorsees, that it was agreed between them that the mortgage should operate as a collateral security only, is to save to the plaintiffs, the indorsees, their remedy upon the note, so that they may enforce payment of the note against the maker, Polley, in the meantime according to the terms of the note. Then as a consequence it follows of course, that if these plaintiffs, by reason of their reserving their remedy on the note, can make Polley pay according to the note, they can also make this defendant, as endorser, pay in the same manner, for he is as a new maker and must be bound to pay whenever the maker can be made to pay; and it follows also, that this defendant, as endorser, will stand in the same situation in regard to