The President, in his message of June 1st, 1872, said:—

"It is a general principle of both international and municipal law that all property is held subject not only to be taken by the Government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, *but also subject to be temporarily occupied*, or even actually destroyed, in times of great public danger and *when the public safety demands it*, and in this latter case governments do not admit a legal obligation on their part to compensate the owner. The temporary occupation of, injuries to, and destruction of property caused by actual and necessary military operations are generally considered to fall within the last-mentioned principle."[70]

WM. LAWRENCE.

(To be continued.)

RECENT AMERICAN DECISIONS.

Court of Chancery of New Jersey.

SARAH M. GARNSEY ET AL. *v.* ELIZABETH MUNDY ET AL.

A voluntary deed of trust, reserving no power of revocation, made with a nominal consideration and without legal advice as to its effect, and where there was evidence that its effect was misunderstood by the grantor, was set aside and a reconveyance ordered.

The fact that the grantor's infant children were the beneficiaries under the trust-deed was not sufficient to prevent the relief.

THIS was a bill in equity to have a trust-deed set aside and cancelled. The facts appear in the opinion.

Wm. R. Martin, for complainants.

R Wayne Parker, for defendants.

RUNYON, Chancellor.—On the 4th of Febuary 1861, the complainant, Sarah M. Garnsey, who was then a single woman (her waiden name being Sarah M. Mundy), and of the age of about twenty-one years, was seised in her own right, in fee, in possession, through inheritance from her father, James Mundy, deceased, of a parcel of unimproved farming land of about seven acres in Middlesex county in this state, and was also the owner of an undivided

[70] Senate Ex. Doc. 85, 2d sess. 42d Cong., veto bill for relief of J. Milton Best; Senate Rep. 412, 3d sess. 42d Cong; Vattel (6th Am. Ed.) 402; 4 Term R. 382.

third of the remaindor, in fee, of two other lots there—one a wood lot of about two acres, and the other the house lot, containing about nine and a half acres, which had been set off to her mother, Elizabeth Mundy, in dower. She had no other property, real or personal. By a deed of that date she conveyed in fee to her mother, for the expressed consideration of natural love and affection to the grantor's daughter, Elmina May, and of 50 cents to her paid by her mother, the whole of said property on the following trust:—

"That the said Elizabeth Mundy shall and will hold, use, occupy, and rent the same, and receive the rents, issues and profits thereof to and for the maintenance of said Elmina May Mundy until she shall arrive at the age of twenty-one years, or in case of her death, the said Elizabeth Mundy, her heirs or assigns shall pay the rents or profits arising as above to the said Sarah M. Mundy, and in further trust to convey the land and premises, with the appurtenances hereinbefore mentioned, in fee simple, to the said Elmina May Mundy, or in equal shares to her and any other children of said Sarah M. Mundy (should there be any other) when the youngest of said children shall have attained the age of twenty-one years; and in the event that no issue of the said Sarah M. Mundy shall survive to inherit the same, that the estate herein named shall be conveyed according to the direction of the executor of the will of the said Sarah M. Mundy heretofore made."

In 1864 Sarah M. Mundy was married to Silas Garnsey. The bill is filed by her and her husband against her two children and her mother, the trustee, to set aside the deed. The property at the time of making the conveyance in question was and still is of but little value as farming land. The buildings upon the house lot, which alone was improved, were old and dilapidated and have gone to decay, and even the fences on the premises are down. The trustee, who is a woman of advanced age, was and is wholly without means except her dower. The deed was wholly voluntary. It was made at the suggestion and on the advice of the grantor's mother and of her uncle, Dr. Jacob Martin, her mother's brother. The grantor neither proposed nor suggested it. Indeed it appears she knew nothing of it until it was presented to her for her signature and she was urged by her mother and her uncle to execute it "for her good." Their motive, they say, was to save the property for her, to prevent her from improvidently disposing of it. No professional advice whatever was taken. The deed was drawn

by a son of Dr. Martin, at the latter's direction, and its execution was witnessed by Dr. Martin, who being a commissioner of deeds took the grantor's acknowledgment. The grantor had no advice whatever except that which her mother and uncle gave her. Not only was she not consulted in regard to the matter in any way, but it was clear that she did not understand the provisions of the deed, nor their effect. She did not suppose that the effect of the conveyance would be to place the property beyond her reach and control. Nay, her mother and uncle both supposed that the trust was revocable, and that the grantor under it retained full power to sell the property with the trustee's consent. The conveyance not only deprived the grantor of all her property without reserving a power of revocation to enable her to meet the exigencies of life, but the arrangement which it made was in other respects injudicious, disadvantageous and improvident. The motives and intentions of the mother and uncle were most praiseworthy. Their design manifestly was simply to put the property in such a position that the grantor could not dispose of it without her mother's consent and concurrence. They in good faith urged her to make the deed. She and they were alike under an erroneous impression as to the effect of it. From the operation of such a conveyance, made under such circumstances, equity will relieve the complainants. The rigidity of the ancient doctrine that a voluntary settlement, not obtained by fraud, is binding on the settlor and will not be set aside in equity, although the settlor has not reserved a power of revocation (*Villers* v. *Beaumont*, 1 Vernon 100; *Petre* v. *Espinasse*, 2 M. & K. 496; *Bill* v. *Cureton*, 2 M. & K. 503), has been relaxed by modern decisions. In the case first cited, *Villers* v. *Beaumont*, decided in 1682, the Lord Chancellor said: "If a man will improvidently bind himself up by a voluntary deed and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put on himself, but he must lie down under his own folly." Recent cases, however, have narrowed the doctrine, and have held not only that the absence of a power of revocation throws on the person seeking to uphold the settlement the burden of proving that such a power was intentionally excluded by the settlor, and that in the absence of such proof the settlement may be set aside, but that equity will set aside the settlement on the application of the settlor where it appears that he did not intend to make it irrevocable, or where the settlement would be unreasonable or improvident for the lack of a provision for revocation. In *Everitt* v. *Everitt* (1870), L. R. 10 Eq. 405, a case almost

precisely similar in its facts to that under consideration, a voluntary settlement was set aside on the application of the donor. The court said: "It is very difficult indeed for any voluntary settlement, made by a young lady so soon after she attained twenty-one, to stand if she afterwards changes her mind and wishes to get rid of the fetters which she has been advised to put upon herself."

In *Wollaston* v. *Tribe* (1869), L. R. 9 Eq. 44, a voluntary gift, which was not subject to a power of revocation, but was meant to be irrevocable, was held to be invalid, and was set aside on the donor's application. In pronouncing the decree, the court said: "Of course, a voluntary gift is perfectly good if the person who makes it knows what it is, and intended to carry it into execution." In *Coutts* v. *Acworth*, L. R. 8 Eq. 558, it was held that "Where the circumstances are such that the donor in a voluntary settlement or gift ought to be advised to retain a power of revocation, it is the duty of the solicitor to insist on the insertion of such power, and the want of it will in general be fatal to the deed." In *Prideaux* v. *Lonsdale* (1863), 1 D. J. & S. 433, a voluntary settlement, which the settlor was advised to execute by persons under whose influence as regarded money matters she was, and which subjected her property to trusts and contained provisions which the court thought it was impossible to suppose she understood, and against which she ought to have been advised and cautioned, was set aside. In *Hall* v. *Hall*, L. R. 14 Eq. 365, it was held that a voluntary settlement should contain a power of revocation, and if it does not the parties who rely on it must prove that the settlor was properly advised when he executed it, and that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement, and, further, if that is not established and the court sees from the surrounding circumstances that the settlor believed the instrument to be revocable, it will, even after the lapse of twenty years and the death of the settlor, interfere and give relief against it. The decree in that case was reversed. (1873, L. R. 8 Chan. Ap. 430.) In his opinion, SELBORNE, L. C., said: "The absence of a power of revocation in a voluntary deed, not impeached on the ground of any undue influence, is of course material, where it appears that the settlor did not intend to make an irrevocable settlement, or where the settlement itself is of such a nature or was made under such circumstances as to be unreasonable and improvident, unless guarded by a power of revocation." *Forshaw* v. *Welsby*,

30 Beav. 243, was a case where a voluntary settlement was made by one, *in extremis*, on his family. It contained no power of revocation in case of the settlor's recovery. On his recovery it was set aside on his application, on the ground that it was not executed with the intention that it should be operative in case of his recovery from his illness. See also *Huguenin* v. *Baseley*, Lead. Cas. in Eq. 406; *Cook* v. *Lamotte*, 15 Beav. 241; *Sharp* v. *Leach*, 31 Beav. 491; *Phillipson* v. *Kerry*, 32 Beav. 628. It is not necessary, however, to rest a decision of this case adverse to the deed on so narrow a foundation as the mere absence of a power of revocation. The circumstances under which a voluntary deed was executed may be shown, with a view to impeaching its validity, and if it appears that it was fraudulent or improperly obtained, equity will decree that it be given up and cancelled. In the present case there is no room for doubt that the grantor was induced by those in whom she very justly placed confidence, and by whose better judgment she was willing to be guided, to execute a voluntary deed whose effect she and they not only did not understand, but, on the other hand, misapprehended, and which, so far from being according to their intentions, was in two very important respects, at least, admittedly precisely the reverse. It was irrevocable, but they all supposed it was revocable and intended that it should be so. It deprived the grantor of the power of sale, but they all supposed that she would have that power and intended that she should have it, clogged only by the necessity of obtaining her mother's consent and concurrence in any bargain or conveyance she might make. The deed contains no power of sale whatever. The testimony of all the parties to the transaction, the grantor, her mother and uncle, has been taken in the cause. It satisfies me that the deed was not "the pure, voluntary, well-understood act of the grantor's mind"—(Lord ELDON in *Huguenin* v. *Baseley*)—but was unadvised and improvident, and contrary to the intention of all of them. The fact that the infant children of the grantor are beneficiaries under the deed will not prevent the court from setting it aside: *Huguenin* v *Baseley*, *Everitt* v. *Everitt*, *ubi sup.* There will be a decree that the deed be delivered up to be cancelled.

It may be premised, before entering upon a discussion of the subject suggested by the principal case, that the decision itself could be undoubtedly sustained upon the simple ground (if upon no other) that the grantor acted withou

any independent professional advice. The absence of such advice, in the case of a voluntary conveyance, would seem to be decisive in favor of the right of the party executing it to ask that it be set aside. And this is particularly the case where the party for whose benefit the voluntary conveyance is made, or even he who induces its execution, stands in any confidential relation towards the grantor. "I take it to be a well established principle of this court," said Lord Justice TURNER in *Rhodes* v. *Bate*, L. R. 1 Ch. 252–257, "that persons standing in a confidential relation towards others, cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show, to the satisfaction of the court, that the persons by whom the benefits have been conferred *had competent and independent advice in conferring them.*" In accordance with this doctrine it had been held in *Prideaux* v. *Lonsdale*, 4 Giff. 159 (affirmed on appeal, in 1 D. J. & S. 433), that a settlement of a legacy made by a lady a short time before her marriage, under the persuasion of the executors of the will, could be avoided by her on the ground that it had been made without any consultation with her solicitor. In *Leach* v. *Farr*, a case in the Supreme Court of Pennsylvania, at Nisi Prius, it appeared that an ante-nuptial marriage settlement, which was attacked on the ground that it was a fraud upon the husband's marital rights, had been executed by the young lady without any independent advice of counsel; and, therefore, upon an intimation from the court (Mr. Justice SHARSWOOD) that, on that ground alone, the settlement would have to be set aside, the case was compromised. Indeed, the doctrine is doubtless well established in England and in this country; and the cases just cited are only illustrations of a thoroughly settled principle.

Passing, now, to the question suggested by the principal case, viz., what is the effect of the absence of a power of revocation in a voluntary deed? it will be convenient before noticing the cases, to state briefly one or two principles which should always be borne in mind in considering the authorities upon this point.

First; It is a well settled rule—as well settled as any other rule of law or equity—that an executed voluntary settlement not tainted with fraud or affected by mistake, is binding on the settlor. No matter how unfortunate, unjust or absurd such a settlement may unexpectedly prove to be, the general rule, above stated, is certainly beyond dispute. Nor is the rule altered by the circumstance that the limitations of the trust are of an executory character; for if the trust is completely declared, equity, it is now held, will give effect to its provisions in favor of a volunteer. The leading authority upon this subject, it will be remembered, is *Kekewich* v. *Manning*, 1 De G. M. & G. 176, in which the former conflict between the cases was settled, and this decision has been followed in many subsequent authorities; see Hill on Trustees 140, note, 4th Am. Ed. Indeed, the strength of the modern tendency in favor of upholding voluntary settlements may be seen from those decisions in which it has been held that an instrument inoperative as an assignment of the legal title, may yet take effect as a declaration of trust on the part of the would-be assignor: See *Richardson* v. *Richardson*, L. R. 3 Eq. 686; *Morgan* v. *Malleson*, L. R. 10 Eq. 475.

Secondly; On the other hand it is equally well settled that an instrument obtained by fraud, or which is executed under a mistake and so as not to correctly represent the intention of the party executing the same, will be set aside on the application of the grantor.

A principle so plain and so well recognised as this, seems to require no citations in its support.

Between these two well established doctrines there runs a line of cases (of which the principal case is a type), in which it has been found necessary to use not a little care and skill in order to avoid a violation of one or the other of the two principles just stated. And although the question involved is not one of very great difficulty, there seems to have been, at times, a confusion in the minds of some of the judges leading to expressions of opinion, some of which, if followed to their legitimate consequences, would make a serious inroad upon the doctrine of voluntary trusts. This will be apparent from an examination of a few of the cases.

One of the earliest reported decisions upon this subject, is *Villars* v. *Beaumont*, 1 Vern. 99, decided in 1682. The case was this: William Beaumont, who was entitled to a lease of a hospital in Leicester for three lives, a short time before his death, by a little scrap of paper at an alehouse, but under his hand and seal, settled the term upon the plaintiffs (his cousins) to the intent to pay his debts, and *gave the surplus to them.* Afterwards, being dissatisfied with the settlement, he made his will in writing, whereby he devised the term, subject to the payment of his debts, to the defendant. After argument by counsel on both sides: "There is no color in this case," said the Lord Chancellor (NOTTINGHAM). "If a man will improvidently bind himself by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you relieve in such a case, you must consequently establish this proposition, viz.: *That a man can make no voluntary disposition of his estate, but by his will only, which would be absurd.*"

The next case appears to be *Naldred* v. *Gilham*, 1 P. Wms. 577, which occurred in 1719, and in which there began, upon this subject, that fluctuation in the decisions which seems to have continued down to very recent times. In this case the aunt of the plaintiff made a voluntary settlement upon him but retained the deed in her possession. Having subsequently determined to settle the premises upon her nephew Gilham (the defendant), and having consulted counsel upon the subject, she was informed (it afterwards turned out, erroneously) that she had put it out of her power—whereupon she expressed great concern, saying that she had been imposed upon. She afterwards destroyed the settlement and executed a new settlement in favor of the defendant. The plaintiff, by fraud, subsequently procured a copy of the first settlement, and in this bill attempted to set it up. On the case coming before the Master of the Rolls, "his Honor, *with great clearness*, determined for the plaintiff;" but on appeal to Lord Chancellor PARKER, his Lordship reversed the decree at the Rolls, declaring "*that it was plain* that the aunt intended to keep the estate in her power, that she designed there should be a power of revocation in the settlement * * * * that in fact she appeared to have been imposed upon by preparing and making the conveyance absolute, which it had been unreasonable in any one to have asked of her." It will be observed that this decision proceeded upon the ground of fraud; but the intimation is also thrown out that *in the absence of any motive for an irrevocable gift*, it is unreasonable that a voluntary conveyance should be without a power of revocation, which points to the idea, expressed in very recent cases presently to be noticed, that the burden of sustaining such a gift falls upon the donee.

In 1807, in the celebrated case of *Huguenin* v. *Baseley*, 14 Ves. 273, the

judicial intellect of Lord ELDON and the eloquence of Sir SAMUEL ROMILLY were brought to bear upon this subject.

In that case the doctrine is put upon the true ground, and one which has been again adopted in the most recent English decisions upon the subject, by the most accomplished equity judges of modern times.

In Lord ELDON'S mind, following Lord HARDWICKE'S reasoning in *Bridgman* v. *Green*, 2 Ves. 627, the effect to be given to the absence of a power of revocation appears to have been that it was to be regarded as *strong evidence* that the party did not understand the transaction, whence arose a strong inference of an undue purpose (14 Ves. 296). "Repeating therefore, distinctly," said the Chancellor, "that this court is not to undo voluntary deeds, I represent the question thus: whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature and consequences which the defendant Baseley and the attorney were bound by their duty to communicate to her before she was suffered to execute them:" (Id. 300).

It must be remembered, however, that in this case the attorney obtained a benefit under one of the instruments, and that Mrs. Baseley had no independent professional advice.

The decisions in both of the cases last cited could manifestly be sustained on the general ground of fraud, and therefore the remarks of Lord Chancellor PARKER and Lord ELDON, already quoted, cannot be considered as absolutely essential to the decision in either case. Nor should it be supposed that because Lord EDDON laid great stress upon the absence of a power of revocation, *that* circumstance alone is sufficient to set the instrument aside. That it would be an error to draw such a conclusion from the opinion in *Huguenin* v. *Baseley*, has been recently pointed out by Lord Justice JAMES in *Hall* v. *Hall*, presently to be noticed: see L. R. 8 Ch. 436. Still, it may be fairly said that the *dicta* of Lord ELDON go very far towards approving of the conclusive effect of the absence of a power of revocation *when there is no apparent motive for an irrevocable gift.*

Leaving these cases, it will be proper, before coming to the most recent authorities, to notice one or two intermediate decisions in which the courts seemed inclined to return to the stricter rule of *Villars* v. *Beaumont.*

In *Petre* v. *Espinasse*, 2 M. & K. 496, the court refused to disturb a voluntary settlement which had been made by an extravagant spendthrift to protect himself from the consequences of his own improvidence; and in *Bill* v. *Cureton*, 2 M. & K. 503, a similar decision was made in the case of a lady who had made a settlement, not at all in contemplation of matrimony, and entirely untainted with fraud and unaffected by mistake. The Master of the Rolls, indeed, in his opinion (page 509) speaks somewhat of putting the case upon the same ground as that upon which *Petre* v. *Espinasse* was decided; but the statement of facts in the report presents no such ground, and the decision would seem to be a direct authority against the position that the absence of a power of revocation is, of itself, sufficient to sustain an application to set the instrument aside.

In *Hastings* v. *Orde*, 11 Sim. 205, the doctrine of the necessity for the insertion of a power of revocation came again into the ascendant. If brevity is the soul of law as well as of wit, then the opinion of Vice Chancellor Sir LAUNCELOT SHADWELL is a model as a statement of a case, and an announcement of the conclusion reached. "The case is this: A female infant being entitled to choses in action, a settlement was made of them, on her marriage, in trust

for her husband for life, and after his decease, in trust for her for life, and after the decease of the survivor, in trust for the children of the marriage, and if there should be no child, then in trust for such persons as she should appoint by her will with the ultimate trust for her next of kin; and the marriage having been put an end to, and there being no issue, the question is whether the lady is still bound by the settlement. I am of opinion that she is not bound by it." It will be observed, however, that in this case there was a failure of the motive which had induced the creation of the voluntary trust.

In several modern English authorities there appeared a strong tendency to insist upon the presence of a power of revocation in voluntary settlements; and the doctrine was on the point of being pushed beyond its legitimate bounds, when it was arrested by two recent decisions of the Court of Appeals in Chancery. The cases in which the doctrine was carried to extreme lengths are *Coutts* v. *Ackworth*, L. R. 8 Eq. 558; *Everitt* v. *Everitt*, 10 Id. 405, and *Hall* v. *Hall*, 14 Id. 365. *Coutts* v. *Ackworth* could, indeed, be supported on the ground that the settlor had no independent advice, but relied upon the solicitor of the party who was benefited by the settlement; but *Everitt* v. *Everitt* was not favorably regarded in *Phillips* v. *Mullings*, L. R. 7 Ch. 244; and the judgment in *Hall* v. *Hall* was reversed on appeal; L. R. 8 Ch. 430. In *Phillips* v. *Mullings*, Lord HATHERLEY, after adverting to the rule that any one taking any advantage under a voluntary deed, and setting it up against the donor, must show that he thoroughly understood what he was doing, or at all events was protected by independent advice, and also to the rule that where a person executes a voluntary irrevocable deed, it must be shown, in order to support the deed, that the nature thereof was thoroughly understood by the party executing it, reached the conclusion that whether there should be a power of revocation or not depends upon circumstances; and that "it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation." But in *Hall* v. *Hall*, L. R. 8 Ch. 430, the whole subject was most satisfactorily discussed and the authorities reviewed. In that case a widow executed a deed, which she had instructed her solicitor to prepare, settling certain houses and buildings on herself for her life and after her death for the benefit of her children. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, and expressed her satisfaction at having got rid of it. It was held that the deed was valid, and was not affected by the want of a power of revocation. "The true rule," said Lord Justice JAMES, "is that which was laid down by Lord Justice TURNER in *Toker* v. *Toker*, 3 D. J. & S. 487, 491, that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of each case." See also *Henshall* v. *Fereday*, 29 Law Times 46, where, under the circumstances, the voluntary deed was set aside. Reference may also be had to *Cooke* v. *Lamotte*, 15 Beav. 234, and *Wollaston* v. *Tribe*, L. R. 9 Eq. 44.

Besides the principal case, we have found but one American decision where this doctrine has been discussed and applied. The case referred to is *Evans* v. *Russell*, 31 Leg. Int. 125, in the Supreme Court of Pennsylvania, decided in April 1874. The case was this: The complainant, prior to her marriage, executed a settlement conveying her property in trust to pay the income to herself for life, with power to appoint the capital by will among the children of the marriage, and in default of issue to and among her sisters and brother, and in default of

appointment, to them in certain proportions. The deed contained no power of revocation nor of testamentary appointment after the cesser of the marriage in her lifetime, and nothing was said at or before the time of the execution of the instrument as to the omission of these powers, except that the complainant was informed that she could make her will if she pleased. There was no issue of the marriage, and the complainant survived her husband. It was held that she was entitled to a reconveyance by the trustees. The ground upon which the case was put was that of a mixed mistake of law and fact; the contingency which happened not having been presented to the mind of the settlor, and, therefore, her attention not having been directed to the circumstance that the legal operation of the deed upon the happening of this contingency would be different from what she would have provided had the contingency been suggested to her. In this case Chief Justice AGNEW seems to have laid down the true rule upon this subject. "*In the absence of a certain intent to make the gifts irrevocable,*" says that learned judge, "the omission of a power to revoke is *primâ facie* evidence of a mistake, and casts the burden of supporting the settlement upon him who, without consideration or *motive to benefit him or protect the donor*, claims a mere gratuity against one who is *sui juris* and capable of taking care of his own estate."

From the decisions which have been here briefly discussed the following conclusions can safely be drawn.

First: Where there is a deliberate gift, with full knowledge of the consequences of the act, made by a person *sui juris*, the absence of a power of revocation is not, *primâ facie*, enough to set the instrument aside. The absence of *motive* is immaterial, if an *intent* to make an irrevocable gift is apparent. And (it is submitted) that this *intent* is sufficiently proved, in the first instance, whenever a person of sound mind and *sui juris* executes an instrument of whose contents he has been informed. Thus if a person of perfect mental capacity, and under no disability, were deliberately to execute a gift to an entire stranger, with a full knowledge of the contents of the instrument, and without the slightest evidence of fraud or mistake, it would seem reasonable that an *intent* on the part of the settlor to make an irrevocable gift of his property should be presumed.

Second: Even in the absence of a certain and definite *intent* to make an irrevocable gift, the omission of a power of revocation will not, of itself, be enough to set the instrument aside, if there exists a *motive* for making and sustaining an irrevocable gift: *e. g.*, where the settlement is made for the purpose of the settlor's guarding against his own extravagance or dissipation, as in *Petre* v. *Espinasse*, and (*semble*) *Bill* v. *Cureton*, *supra*.

Third: But where the deliberate *intent* to make an irrevocable gift does not appear, and where no *motive* for such a gift is shown, the absence of a power of revocation is *primâ facie* evidence of mistake. The rule is the same when the motive has failed, as was the case in *Hastings* v. *Orde* and *Evans* v. *Russell*, *supra*.

Fourth: It is the *duty* of the solicitor who prepares the settlement to see that the irrevocable nature of the instrument is fully understood by the settlor: see May on Voluntary Alienations 452.

G. T. BISPHAM.

Supreme Court of Errors of Connecticut.

STATE *v.* BUCKLEY AND ANOTHER.

The Act of 1872 imposes a penalty on every person who shall keep a place where it is reputed that intoxicating liquors are kept for sale, without having a license therefor. Held to be sufficient that the place was reputed to be one where intoxicating liquors were kept for sale, and not necessary that it be reputed that they were kept for sale without a license.

In a prosecution under this act the accused claimed that the act was unconstitutional, and asked the court to charge the jury that they were judges of the law as well as of the facts. The judge instructed the jury that in a criminal case they were judges of the law as well as of the facts, but that they were under the same obligation in the matter with the judge on the bench, and were not authorized to say that that is not law which is so; that the Supreme Court had decided the act to be constitutional, and that in his opinion it was constitutional; that if they decided that to be unconstitutional which the Supreme Court had decided to be constitutional, they would disturb the foundations of law; but that, after all, they were judges of the law, and if on their consciences they could say that the act was unconstitutional they ought to acquit the accused. Held, on motion of the accused for a new trial, that the charge was correct.

By statute the jury are made the judges of the law in criminal cases, but not in any such sense that they are at liberty to disregard the law. They are to inquire what the law is, and where their judgment is satisfied, the law as thus ascertained is binding upon them, and should be their guide, whether it is or is not as they may think it ought to be.

INFORMATION to the Superior Court in Litchfield county, for a violation of the Act of 1872, which provides that "every person who shall keep a house, store, shop, saloon, or other place, where it is reputed that spirituous or intoxicating liquors, ale, or lager beer, are kept for sale, without having a license therefor, shall be punished, &c.;" tried to the jury on the plea of "not guilty," before MINOR, J. Verdict "guilty," and motion for a new trial by the defendants. The case is fully stated in the opinion.

W. W. Eaton and *E. W. Seymour*, in support of the motion.

Foster and *Fenn*, contrà.

CARPENTER, J.—This motion presents two questions. The first relates to the construction of the act on which the prosecution is brought. The defendants' counsel asked the court to charge the jury that the state must prove that the place kept by the defendants was a place in which it was reputed that spirituous liquors were kept for sale; and also, that it was reputed that such liquors were kept for sale without a proper license therefor. The court declined to comply with the last request, and charged the jury otherwise. The instruction given was entirely correct. The mani-

fest intention of the legislature was to prohibit any person, *not having a license*, from keeping a place in which it was reputed that spirituous, or intoxicating liquors, &c., are kept for sale. That is the obvious meaning of the language of the act, and it would be a forced and unnatural construction to hold that the reputation must extend beyond the matter of keeping for sale, and negative a license.

The other question arises from the charge to the jury.

The defendants claimed that the act under which they were prosecuted was unconstitutional and void. The court submitted that question to the jury, telling them that they were the judges of the law as well as of the facts. The court then added as follows:—"But the jury are the judges of the law under the same obligations that attach to the judge on the bench; they are not authorized to say that that is not law which is the law of the state. The Supreme Court has decided that section to be constitutional. The judges of that court are selected for their learning in the law. Will you say it is unconstitutional, when they say it is constitutional? The next case to be tried may be a civil case, the law applicable to which may have been decided by the same Supreme Court; you would not suffer your private views and interests to influence you to disregard the law thus decided. Neither have you anything to do with the policy of the law; that belongs to the legislature which enacted it. The court also says to you that in its judgment the section of the statute, upon which this prosecution is founded, is constitutional. If you decide that to be unconstitutional which the Supreme Court holds to be constitutional, you will disturb the foundations of law. But after all, you are the judges of the law, and if on your consciences you can say this section is unconstitutional, then you ought to acquit the accused."

The defendants now claim that the court in so charging infringed upon the province of the jury. Our statute on that subject is as follows:—"The court shall state its opinion to the jury, upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict." This statute makes the jury the judges of the law, but not in the sense in which it is sometimes claimed. They are not the judges of the law in such a sense that they are at liberty to disregard it; nor are they in any case at liberty to set aside the law, and substitute for it something else which suits their prejudices or caprices better. Neither are they

at liberty, if the law applicable to the case does not meet their approval, to make law for the occasion. But they are to inquire what the law is; and when their judgment is satisfied, the law, as thus ascertained, is binding upon them, and should be their guide, whether it is or is not as they think it ought to be. The jury were well told that they were the judges of the law under the same obligations that attach to the judge on the bench. "No one is wiser than the law," and we may add that no jury, however capable and intelligent they may be, are wiser than the law. The judge and jury, and all concerned in the administration of justice, are equally bound by the law. In that way, and that alone, can persons and property be reasonably protected. In that way, and that alone, will justice be impartially administered. Any other theory, if practically carried out, will sap the foundations of the government, and render uncertain and capricious the administration of criminal law. A guilty man will escape through the sympathies of the jury, while the innocent will be convicted by reason of their prejudices; and what governs one panel as law, will be repudiated by another.

We cannot see that the judge on this trial violated these principles. On the contrary, he seemed to appreciate their importance. He evidently had strong convictions upon the question, and sought to impress those convictions upon the minds of the jury. He referred to the statute, to what was understood to be the decision of the Supreme Court in another case, and to his own opinion. Thus the jury could see that there were in favor of the constitutionality of the law, the wisdom and judgment of the legislature, the decision of the Supreme Court, and the opinion of the presiding judge; and that they could only declare it to be unconstitutional by assuming to be superior in wisdom to all these.

The reference to the principles governing in civil cases was evidently by way of illustration. The jury could not have understood that they were bound by the opinion of the court as in civil cases, for at the close they were distinctly told that they were the judges of the law, and that if they conscientiously believed that the act was unconstitutional they ought to acquit the accused.

We do not advise a new trial.

The question discussed in the foregoing opinion is one always of considerable difficulty, and sometimes productive of great uncertainty in the administration of criminal law. There seems to have been, in this country especially, no little conflict of opinion upon the right of the jury, independently of stat-

ute, to determine questions of law in criminal cases. Mr. Justice STORY, in *United States* v. *Battiste*, 2 Sumner 240, assumes the ground, that the jury are no more to be regarded as rightfully judges of the law in criminal than in civil cases; and this rule is followed in *Commonwealth* v. *Porter*, 10 Met. 263, *State* v. *Peirce*, 13 N. H. 536, and numerous other cases in the state courts, more or less directly upon the very point of the lawful right of juries to decide the law in criminal cases. And on the other hand, Mr. Justice CHASE, in the trial of Fries, *Ghase's Trial*, by Evans, App. 12, 45, charged the jury in favor of the right of juries to decide the law in all criminal cases, upon their own responsibility. And Mr. Justice BALDWIN, in *United States* v. *Wilson and Porter*, 1 Bald. C. C. 99, took the same view, which he somewhat modified in the second trial of the case: Id. 108, and in *United States* v. *Shrive*, Id. 510. This view is maintained in a large number of decisions in the state courts: *State* v. *Wilkinson*, 2 Vt. 48; *State* v. *Croteau*, 23 Id. 14; *State* v. *Shaw*, 6 Shep. 436; *Ross* v. *Com'th*, 1 Gratt. 557; *State* v. *Allen*, 1 McCord 525; *Holden* v. *State*, 5 Ga. 441; *State* v. *Armstrong*, 4 Blackf. 247. These lists of authorities in favor of either view of the law, might be very much extended. They will be found extensively cited in *State* v. *Croteau*, *supra*, in the opinion of the court by Mr. Justice HALL, and in the dissenting opinion of Mr. Justice BENNETT, both of which are very elaborate and learned, and characterized by uncommon ability.

But the real difficulty in the case turns far more upon the wisdom and discretion of the judge, than upon the abstract rights of the jury. For since it is clear the jury have the right to rejudge any question of law involved in a criminal cause, and to settle it in their own way, without regard to the directions of the court, and thus to acquit the accused by a general verdict, upon the mere fancy that the law is not wise or useful, which it is easy to dignify by the name of unconstitutional; and such verdict will be final, as the court cannot grant a new trial after such verdict, and as all this is confessedly true, there seems no great use in having much controversy upon the question whether this is the legitimate *right* of the jury, or only a *power*, which juries sometimes assert, in vindication of what they may, rather indefinitely, call justice.

But we apprehend there will never be much controversy on these points between court and jury where the jury are fairly and respectfully allowed their proper function in deciding cases. We know indeed that juries sometimes prove restive, out of mere conceit, and a false sense of the importance of their own office; but this is seldom the case, with properly educated jurors, unless they are over educated, a matter we briefly alluded to in the late case of *State* v. *Patterson*, *ante*, Vol. 12. N. S., p. 655.[1] We have said all we desire to say upon this topic of jurors deciding the law in criminal cases, in *State* v. *McDonnell*, 32 Vt. 491, 531–533, and we should certainly not feel justified in repeating it here.

I. F. R.

1 We are somewhat surprised that our cotemporary, the London Solicitors' Journal, should represent our comments, in a brief note to *State* v. *Patterson*, as having been uttered by the present Judge REDFIELD of Vermont, in the trial of the cause, (with which he had nothing to do); or that he should suppose we were still acting as judge in Vermont (a thing now far in the past), and used the same freedom of criticism upon the bench, which we do as a journalist. Whether the misstatement of the matter by our cotemporary was a mere blunder, or was half intentional, in order to give special point to our strictures, they certainly were not in his usual good taste. But we think we have less cause of complaint than others who had nothing to do with either the trial or the strictures, to be thus made responsible for both.

Supreme Judicial Court of Maine.

DANIEL DENNETT, EXECUTOR, *v.* SAMUEL HOPKINSON.

Unharvested crops go to the devisee of the land and not to the executor. As against the heirs at law they go to the executor; but as against a devisee they do not, unless it appear by the will that the testator so intended.

Hay in a barn passes under a bequest of "all the household furniture and other articles of personal property in and about the buildings."

NATHAN HOPKINSON made his will February 6th 1864, by which he directed as follows: "*First.* I give, devise and bequeath to Nathan Hopkinson, son of my cousin, Samuel Hopkinson, now residing in the state of Illinois, my homestead farm; also all the live-stock of all kinds and all the farming utensils, implements and tools not otherwise disposed of which I may leave at my decease, to have and to hold to the said Nathan Hopkinson, his heirs and assigns for ever."

Then followed twenty-two pecuniary legacies to distant relatives, friends and former employees of the testator and to a literary institution. Then item "24. Until Nathan Hopkinson, named in the first devise and bequest in this will, shall arrive at the age of twenty-one years, I give and bequeath the use, improvement and income of my said farm and of the live-stock and farming-tools, utensils and implements to the said Samuel Hopkinson, his father; provided and on condition that the said Samuel shall keep the farm, buildings and fences, tools and utensils, in as good order and condition as when they shall be left by me, and shall keep the stock good without diminution or depreciation, and shall support and properly educate said Nathan till he arrives at full age. And I also give and bequeath all the household furniture and other articles of personal property in and about the buildings to the said Samuel, to be used by him till the said Nathan becomes of age, and afterwards to the said Nathan as his own property."

By the twenty-fifth clause, the testator declared his intention to dispose of his whole estate and directed the division of any surplus, after payment of debts and legacies and satisfying devises, among those to whom pecuniary bequests are given. The next and final clause appointed Daniel Dennett executor.

The testator died August 31st 1868, never having been married,

and having neither parents, brother nor sister. His namesake, to whom he devised his farm, was living in Illinois with his father, Samuel Hopkinson, and was then about six years old. The death of the testator was not communicated to Samuel and his family till October 24th 1868. They came to Maine and entered upon possession of the farm and property connected therewith January 19th 1869, and afterwards consumed and sold the hay and other crops which they found stored in the buildings upon the place.

The item of chief value was the hay, worth several hundred dollars, which had been cut, and stowed in the barns before August 31st 1868, the day of the testator's death. The other crops, corn, beans, potatoes, &c., were gathered and placed in the buildings upon the estate after that date by the plaintiff, claiming to act as executor. He subsequently demanded these articles of produce, including the hay, of Samuel Hopkinson, after the latter entered into possession of the premises; and upon his refusal to deliver them, or pay for them, this action of trover was commenced, which was submitted to the court upon the foregoing facts and such inferences as might properly be drawn therefrom. The substance of the issue was that each party claimed title in himself to the property in controversy under the above-recited testamentary provisions.

L. B. Dennett, for plaintiff.—This is a question of intention. The word "income" in the devise to defendant is preceded by the words "use and improvement," showing that it is only the income derived from such use and improvement that is given him, and not the income already acquired before the testator's death.

The condition attached to the bequest shows this. The hay does not pass because not *ejusdem generis* with the articles named.

Edwin B. Smith, for defendant, relied on the distinction between the rights of a devisee and an heir at law as to crops growing at the time of the testator's death, citing numerous text writers and *West* v. *Moore*, 8 East 339; *Spencer's Case*, Winch Rep. 51, with many cases in this country, claimed to be analogous, though not made directly upon this point. As to the hay, he claimed it to be in its use for carrying on the estate devised, *ejusdem generis* with the articles enumerated.

The opinion of the court was delivered by

WALTON, J.—Unharvested crops go to a devisee of the land and not to the executor. As against the heirs at law they go to the executor; but as against a devisee they do not.

It is not easy, says Mr. Hargrave, to account for this distinction, which gives corn growing to the devisee, but denies it to the heir. Mr. Broom also expresses the same opinion. Lord ELLENBOROUGH thought the distinction "capricious." But they all agree that such is the law.

Mr. Broom's statement of the law is as follows: He says that where a tenant in fee or in tail dies after the corn has been sown, but before severance, it shall go to his personal representatives and not to the heir; but if a tenant in fee sows the land and then devises the land by will and dies before severance, the devisees shall have the corn and not the devisor's executors: Broom's Legal Maxims, 4th ed. 269.

Lord ELLENBOROUGH'S explanation of the distinction is as follows: He says that in the testator himself the standing corn, though part of the realty, subsists for some purposes as a chattel interest, which goes on his death to his executors as against the heirs, though as against the executors it goes to the devisee of the land, upon the presumption that such was the intention of the devisor in favor of his devisee; but that this presumption may be rebutted by other words in the will which show an intent that the executor shall have it: *West* v. *Moore*, 8 East 339.

And in a case tried before Chief Justice HOLT, where the question was whether corn growing passed to the devisee of the land or his mother, the widow, to whom the testator had bequeathed "all his goods, chattels, &c., and *the stock of his farm*," the case of *Spencer*, Winch 51, was urged, where it was resolved that the devisee of land sown should have the corn and not the executor of the devisor; to which it was answered, "That is true, if the intention of the testator does not appear to be otherwise." And Chief Justice HOLT held that in that case it did appear that the intention of the testator was otherwise.

It has been doubted whether Chief Justice HOLT'S construction of the will was correct, but the decision is valuable as showing, first, that the general rule of law is that a devisee of the land will hold the unharvested crops; second, that the rule is based on the presumption that such was the intention of the testator; and

third, that this presumption may be rebutted by other clauses in the will showing that such was not his intention: *Cox* v. *Godsalve*, 6 East 604, note.

And such we take it is the settled rule where the common law is in force. It is not only so laid down in the text books and cases already cited but in many others: Buller's Nisi Prius 34; Co. Litt. sect. 68, note 2; 4 Bac. Ab., Bouvier's ed. 83; 1 Chitty's General Practice 92; 2 Bl. Com., Sharswood's ed. 122, note 2; 2 Redf. on Wills 141; Broom's Legal Maxims, 4th ed. 269; Gilbert on Ev. 214; Cro. Eliz. 61; *Spencer's Case*, Winch 51; *Cox* v. *Godsalve*, 6 East 406; *West* v. *Moore*, 8 Id. 339.

We find on examination that in many of the states this matter is regulated by statute, but we are not aware of any such statute in this state. There is a provision that when from any cause there is a delay in granting letters testamentary, or of administration, a special administrator may be appointed, whose duty it shall be to collect all the goods, chattels and debts of the deceased, control and cause to be improved all his real estate, and collect the rents and profits thereof, and preserve them for the executor or administrator thereafter appointed, &c.: R. S. c. 64, § 33. And we find another provision declaring that if any part of the real estate is used or occupied by the executor or administrator, he shall account for the income thereof to the devisees or heirs in the manner ordered by the judge of probate, &c., R. S. c. 64, § 55; but these provisions were obviously intended for other purposes and were not designed to change the rule of the common law with respect to the ownership of unharvested crops. And we are inclined to think the law is best as it is; that although the rule which gives to the devisee of the land the unharvested crops and denies them to the heir at law, may seem to be unphilosophical, it is nevertheless founded in practical wisdom. Not unfrequently the heirs at law are mere children, without discretion of their own to enable them to care for the growing crops, and without legal guardians to aid them. They are sometimes scattered and far away. The death of the ancestor may be sudden and the condition of his family such that the crops, unharvested as well as harvested, may be needed for their immediate support. Will it not be better, therefore, in the great majority of cases, that all the crops, the unharvested as well as those that are harvested, should be regarded as personal property, and go to the adminis-

trator? We cannot resist the conviction that it is better that it should be so.

Not so, however, of a devisee of the land. He is the selected object of a specific donation. If for any cause it is probable that he will not be in a condition to take charge of it at the donor's death, the contingency can be provided for in the will. It is a matter which the testator would be likely to think of and provide for if necessary. If there is no such provision and the gift is unconditional, without words of limitation or restraint, we think it may fairly be presumed that it was the intention of the donor that his donee should take the land, as a grantee would take it, with the right to immediate possession and the full enjoyment of all that is growing upon it, as well the unsevered annual crops, as the more permanent growth.

In this case the homestead farm of the testator was devised to his cousin and his cousin's son—the father to have the use, improvement and income of it till the son should arrive at age, who was then to have it as his own property. There is nothing in the devising clauses, or in any other part of the will, to rebut the presumption that the devisees were to have the unharvested crops that might be growing upon it at the time of the testator's death. On the contrary the presumption is very much strengthened by the fact that the testator gave all his live-stock and farming tools, and all his household furniture and all other articles of personal property in and about the buildings, to the same persons. It is impossible to except out of these two sweeping clauses any of the crops, whether harvested and in the barns, or still growing upon the land unharvested. If harvested and in the barns, they would pass by virtue of that clause in the will which bequeaths all articles of personal property in and about the buildings. If not harvested they passed as part and parcel of the realty.

The result is that this action, which is trover by the executor against one of the devisees named for the conversion of these same crops to his own use, cannot be maintained. As against the executor the defendant's was the better title.

Judgment for defendant.

Supreme Judicial Court of New Hampshire.

BROWN v. COLLINS.

A person whose horses, frightened by a locomotive, became uncontrollable, ran away with him, went upon land of another, and broke a post there, is not liable for the damage if it was not caused by any fault on his part.

TRESPASS by Albert H. Brown against Lester Collins to recover the value of a stone post, on which was a street lamp, situated in front of his place of business, in the village of Tilton. The post stood upon plaintiff's land, but near the southerly line of the main highway leading through the village, and within four feet of said line. There was nothing to indicate the line of the highway, nor any fence, or other obstruction, between the highway as travelled and the post.

The highway crosses the railroad near the place of accident, and the stone post stood about fifty feet from the railroad track at the crossing. The defendant was in the highway, at or near the railroad crossing, with a pair of horses, loaded with grain, going to the grist-mill in Tilton. The horses became frightened by an engine on the railroad near the crossing, and by reason thereof became unmanageable, and ran, striking the post with the end of the pole, and breaking it off near the ground, destroying the lamp with the post. No other injury was done by the accident. The shock produced by the collision with the post threw the defendant from his seat in the wagon, and he struck on the ground between the horses, but suffered no injury except a slight concussion. The defendant was in the use of ordinary care and skill in managing his team, until they became frightened as aforesaid.

The foregoing facts were agreed upon for the purpose of raising the question of the right of plaintiff to recover in this action.

Rogers, for the plaintiff.

Barnard and *Sanborn*, for the defendant.

The opinion of the court was delivered by

DOE, J.—It is agreed the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated

that the defendant was without actual fault, that he was not guilty of any malice or unreasonable unskilfulness or negligence, but it is to be inferred that the fact was so, and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there against the will, intent and desire of the defendant.

Sir THOMAS RAYMOND'S report of *Lambert & Olliot* v. *Bessey*, T. Raym. 421; and *Bessey* v. *Olliot & Lambert*, T. Raym. 467, is, "The question was this: A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction. Whether the gaoler be liable to an action of false imprisonment? And the judges of the Common Pleas did all hold that he was, and of that opinion I am, for these reasons:—

"I. In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore, Mich. 6 E. 4, 7 *a.* pl. 18. *Trespass quare vi et armis clausum fregit, et herbam suam pedibus calcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns; and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As, if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stops the water so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbor's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up, hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.*

"*Guilbert* v. *Stone*, Mich. 23 Car. 1, B. R.; Stile 72. Trespass for entering his close, and taking away his horse. The defendant pleads that he, for fear of his life, by threats of twelve

men, went into the plaintiff's close and took the horse. The plaintiff demurred, and adjudged for the plaintiff, because threats could not excuse the defendant, and make satisfaction to the plaintiff.

"*Weaver* v. *Ward*, Hob. 134. Trespass of assault and battery. The defendant pleads that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant, with his musket, *casualiter et per infortuniam et contra voluntatem suam*, in discharging of his gun hurt the plaintiff, and resolved no good plea. So here, though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained * * * But the three other judges resolved that the defendant, the gaoler, could not be charged, because he could not have notice whether the prisoner was legally arrested or not."

In *Fletcher* v. *Rylands*, L. R. 3 H. L. 330, Lord CRANWORTH said, "In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert* v. *Bessey*, T. Raym. 421, reported by Sir THOMAS RAYMOND, and the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

The head-note of *Weaver* v. *Ward*, Hob. 134, is, "If one trained soldier wound another in skirmishing for exercise, an action of trespass will lie, unless it shall appear, from the defendant's plea, that he was guilty of no negligence, and that the injury was inevitable." The reason of the decision, as reported, was this: "For though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence, playing their prizes, kill one another, that this shall be no felony, or if a lunatic kill a man, or the like; because felony must be done *animo felonico*. Yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man he shall be answerable in trespass; and therefore no man shall be accused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with

the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

There may be some ground to argue, that "utterly without his fault," "inevitable," and "no negligence," in the sense intended in that case, mean no more than the modern phrase "ordinary and reasonable care and prudence"; and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all "the circumstances" or evidence sustaining the plea, would be substantially in compliance with the law of that case, due allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts, seems to differ materially from the view now prevailing in this country. Formerly in England there seems to have been no well-defined test of an actionable tort. Defendants were often held liable "because," as Raymond says, "he that is damaged ought to be recompensed": and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party suffering," more than the negligence and blameworthiness of the defendants: but how much more it regarded the former than the latter, was a question not settled, and very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party, would often be a hardship to him: when and why the "loss and damage" should, and when and why they should not, be transferred from one to the other, by process of law, were problems not solved in a philosophical manner. There were precedents, established upon superficial, crude and undigested notions: but no application of the general system of legal reason to this subject.

Mr. Holmes says, "It may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort (than actual fault), and in modern times to more or less definitely thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, anything savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a

cause of action as an intentional one. On the other hand, when, as in *Rylands* v. *Fletcher*, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle sufficient to charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments to take the risk on their own shoulders." He alludes to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at a certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly-assumed ground of decision: 7 Am. Law Rev. 652, 653, 662; 2 Kent Com. 12th ed. 561, *n.* 1; 4 Id. 110, *n.* 1. If the hazardous nature of things or of acts is adopted as the test or one of the tests, and the English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from anything done upon his own land," (*Mellish's* argument in *Fletcher* v. *Rylands*, L. R. 1 Ex. 272,) and that an individual is answerable "who, for his own benefit, makes an improvement on his own land according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor if he thereby unwittingly injure his neighbor:" GIBBS, C. J., in *Lutton* v. *Clarke*, 6 Taunt. 44; approved by BLACKBURN, J., in *Fletcher* v. *Rylands*, L. R. 1 Ex. 286. If danger is adopted as a test, and the English authorities are abandoned, the fact of danger controverted in each case will present a question for the jury, and expand the issue of tort or no tort into a question of reasonableness in a form much broader than has been generally used; or courts will be left to devise tests of peril under varying influences of time and place that may not immediately produce a uniform, consistent and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether by transferring the hardship to the other party anything more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party

who has suffered by making another suffer the expense of his relief. For some of those decisions better reasons may now be given than were thought of when the decisions were announced, but whether a satisfactory test of an actionable tort can be extracted from the ancient authorities; and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in *Fletcher* v. *Rylands*, 3 H. & C. 774; L. R. 1 Ex. 265, L. R. 3 H. L. 330, can be sustained, is very doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view, is by BLACKBURN, J., who says in *Fletcher v. Rylands*, L. R. 1 Ex. 278, 280, 281, 282: "We think that the true rule of law is, that the person who for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default: or perhaps that the escape was the consequence of *vis major* or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own: and it seems but reasonable and just, that the neighbor who has brought something on his own property which was not naturally there, harmless to others, so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there, no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches. The case that has most commonly occurred and which

is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is with regard to tame beasts. For the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore (or he might have added, dogs to bite), but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. * * * In these latter authorities (relating to animals called mischievous or ferocious), the point under consideration was damages to the person, and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages, but where the damage is like eating grass or other ordinary ingredients in damage feasant, the natural consequences of the escape, the rule as to keeping in the animal is the same. * * *. There does not appear to be any difference in principle, between the extent of the duty cast on him who brings cattle on his land to keep them in and the extent of the duty imposed on him, who brings on his land water filth or stenches or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor."

This seems to be substantially an adoption of the early authorities, and an extension of the ancient practice of holding the defendant liable in some cases on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damage to the defendant. The ancient rule was, that a person in whose house, or on whose land, a fire accidentally originated which spread to his neighbor's property and destroys it, must make good the loss: *Filliter* v. *Phippard*, 11 A. & E. (N. S.) 347, 354; *Tubervil* v. *Stamp*, 1 Comyns 32, s. c. 1 Salk. 13; Com. Dig. *Action upon the case for negligence*, (A. C.); 1 Arch. N. P. 539; *Fletcher* v. *Rylands*, 3 H. & C. 790, 793; *Russell v. Fabyan*, 34 N. H. 218, 225. No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied by BLACKBURN to everything which a man brings on his

land which will, if it escape, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth for necessary purposes with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence:" *Losee* v. *Buchanan*, 51 N. Y. 476, 487.

Everything that a man can bring on his land is capable of escaping against his will and without his fault; with or without assistance in some form, solid, liquid or gaseous, changed or unchanged by the transforming processes of nature or art, and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things. It must be applied to all his acts that disturb the original order of creation, or at least to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger; pays no heed to the essential elements of actual fault; puts a clog upon natural and reasonably-necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty carefully to do. The distinction made by Lord CAIRNS, *Rylands v. Fletcher*, L. R. 3 H. L. 330, between a natural and a non-natural use of land, if he meant anything more than the difference between a reasonable use and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognise the peculiar rights of savage life in a wilderness; ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law; it would impose a penalty upon efforts made in a reasonable, skilful and careful

manner to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. "Most of the rights of property, as well as of person, in the social state are not absolute but relative;" *Losee* v. *Buchanan*, 51 N. Y. 485; and if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In *Fletcher* v. *Rylands*, L. R. 1 Ex. 286, 287, Mr. Justice BLACKBURN, commenting upon the remark of Mr. Baron MARTIN, "that when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible," says, "This is no doubt true, and as was pointed out by Mr. *Mellish* during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as for instance, when an unruly horse gets on the footpath of a public street and kills a passenger, (*Hammack* v. *White*, 11 C. B. N. S. 588, 31 L. J. C. P. 129), or where a person in a dock is struck by the falling of a bale of cotton, which the defendants' servants are lowering, (*Scott* v. *London Dock Company*, 3 H. & C. 596, 35 L. J. (Ex.) 17, 220), and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so, subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse

for what, *primâ facie*, was a trespass, can be explained on the same principle, viz.: that the circumstances were such as to show that the plaintiff had taken that risk upon himself." This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident, carrying a traveller off the street. But such a doctrine would open more questions and more difficult ones than it would settle. At what distance from a highway, would an object be near it? What part of London is not near a street? And then as the defendant had as good a right to be at home with his horses, as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbors, but the whole human race? If a person by remaining in England, is held to take upon himself one class of the inevitable dangers of that country because he could avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to voluntarily expose himself to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage, done by brutes or by fire, found in the early England cases, were introduced by sacerdotal influence, from what was supposed to be the Roman or the Hebrew law: 7 Am. L. Rev. 652 *note;* 1 Domat Civil Law (Strahan's translation, 2d ed.) 304, 305, 306, 312, 313; Exodus xxi, 28–32, 36; xxii, 5, 6, 9. It would not be singular if these rules should be spontaneously produced, at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England, at an immature stage of English jurisprudence and an undeveloped state of agriculture, manufactures and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules, now universally recognised as principles of the common law, had not been demanded by the growth of intelligence, trade and productive enterprise, when the common

law had not been set forth in the precedents as a coherent and logical system on many subjects, other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them as they were extended in *Rylands* v. *Fletcher* seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case, would be contrary to American authority, as well as to our understanding of legal principles.

The difficulty under which the plaintiff might labor, in proving the culpability of the defendant, which is sometimes given as a reason for imposing an absolute liability, without evidence of negligence, (*Rixford* v. *Smith*, 52 N. H. 355, 359), or changing the burden of proof, (*Lisbon* v. *Lyman*, 49 N. H. 553, 568, 569, 574, 575), seems not to have been given in the English cases relating to damage done by brutes or fire. And, however large or small the class of cases in which such a difficulty may be the foundation of a rule of law, since the difficulty has been so much reduced by the abolition of witness disabilities, the present case is not one of that class.

There are many cases where a man is held liable for taking, converting, (*C. R. Co.* v. *Foster*, 51 N. H. 490), or destroying property, or doing something else, or causing it to be done, intentionally, under a claim of right, and without any actual fault. "Probably one-half of the cases, in which trespass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights." METCALF, J., in *Stanley* v. *Gaylord*, 1 Cush. 536, 551. When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act; or by an act of which he knew, or ought to have known, the damage would be a necessary, probable or natural consequence; or by an act which he knew, or ought to have known to be unlawful; we understand the general rule to be, that he is not liable. In *Brown* v. *Kendall*, 6 Cush. 292, the defendant having interfered to part his dog and the plaintiff's which were fighting, in raising a stick

for that purpose, accidentally struck the plaintiff, and injured him. It was held, that parting the dogs was a lawful and proper act, which the defendant might do, by the use of proper and safe means; and that if the plaintiff's injury was caused by such an act done with due care, and all proper precautions, the defendant was not liable. In the decision, there is the important suggestion that some of the apparent confusion in the authorities has arisen from discussions of the question whether a party's remedy is in trespass or case, and from the statement, that when the injury comes from a direct act, trespass lies, and when the damage is consequential, case is the proper form of action, the remark concerning the immediate effect of an act, being made with reference to damage for which it is admitted there is a remedy of some kind, and on the question of the proper remedy, not on the general question of liability. Judge SHAW, delivering the opinion of the court, said: "We think as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable: 2 Greenl. Ev., §§ 85 to 92; *Wakefield* v. *Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom: *Davis* v. *Saunders*, 2 Chit. R. 639; Com. Dig. *Battery*, A. (Day's ed.) and notes: *Vincent* v. *Stinehour*, 7 Verm. 62; *James* v. *Campbell*, 5 C. & P. 372; *Alderson* v. *Waistell*, 1 C. & K. 358."

Whatever may be the rule, or the exception, or the reason of it, in cases of insanity (*Weaver* v. *Ward*, Hob. 134; Com. Dig. *Battery*, A, note *a*, Hammond's ed.; *Dormay* v. *Barradaile*, 5 M. G. & S. 380; Sedgwick on Damages 455, 456, 2d ed.; *Morse v. Crawford*, 17 Vt. 499; *Dickinson* v. *Barber*, 9 Mass. 225; *Krom* v. *Schoomaker*, 3 Barb. 647; *Horner* v. *Marshall*, 5 Munf. 466; *Yeates* v. *Reed*, 4 Blackf. 463), and whatever may be the full legal definitions of necessity, inevitable danger, and unavoidable accident, the occurrence complained of in this case, was one for which the defendant is not liable unless every one is liable for all damage done by superior force overpowering him and using him or his property as an instrument of violence. The defendant being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a

stronger man, had been thrown through the plaintiff's window. Upon the facts stated, taken in the sense in which we understood them, the defendant is entitled to judgment. 1 Hillard on Torts, ch. 3, 3d ed.; *Losee* v. *Buchanan*, 51 N. Y. 476; *Parrot* v. *Wells*, 15 Wall. 524, 537; *Roche* v. *M. G. L. Co.*, 5 Wis. 55; *Eastman* v. *Co.*, 44 N. H. 143, 156.

Case discharged.

Supreme Court of Indiana.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY *v.* REYNOLDS.

In the management of the property, business or affairs of a corporation by the president or directors thereof, they occupy a relation to the stockholders similar to that of trustees to *cestuis que trust.*

Stock in a corporation is the individual property of the owner, which he may sell or dispose of, like any other property, as he may see proper; and the president and directors have no control, power or dominion over it, and no duty to perform in reference to its sale, unless it be to see that proper books and facilities are furnished for its transfer.

In the purchase of stock by a director or president of a corporation from a stockholder, the relation of trustee and *cestui que trust* does not exist between them.

THIS was an action by the appellant against the appellee, commenced in the Tippecanoe Circuit Court, and transferred, on change of venue, to the White Circuit Court.

The facts in the case, as alleged, were in substance as follows:

The county of Tippecanoe was the owner of 570 paid-up shares of the capital stock of the Lafayette and Indianapolis Railroad Company of fifty dollars each, amounting to $28,500. On June 24th 1865, the total amount of the stock of the company was only $250,000. The road had been built mainly from the proceeds of bonds sold, and had by its earnings paid off the bonded debt, and also the floating debt was paid, or means accumulated and on hand with which to pay it. The stock owned by the county was at that time worth $342,000. The defendant was the president of the company and the principal manager of its affairs.

It was alleged by plaintiff that the condition of the company had been concealed by the defendant by failing to declare dividends, and by representations that the stock was not worth its face, and by failing to show the condition of the affairs of the

company. That the plaintiffs were ignorant of the value of the stock, which the defendant knew.

That he represented that the depreciation of the value of the stock had been caused by losses sustained by the company, when he knew that the accumulations of the company were sufficient to pay all debts and losses, and leave the stock eleven hundred per cent. above par. That under these circumstances the defendant, through his agent, Moses Fowler, who was also a director of the company, purchased the stock of the county on said 24th day of June 1865, for the sum of $25,650, being ninety cents on the dollar, and had it transferred to one Wilson to hold as his trustee.

That the defendant was then negotiating to sell the road to the Indianapolis and Cincinnati Railroad Company, and afterwards did sell it for $2,500,000, secured by first-mortgage bonds on the road from Lafayette to Indianapolis, with a further lien on the Indianapolis and Cincinnati road.

Prayer for judgment for $315,350 in different forms and for general relief.

Moses Fowler was originally made a defendant, but as to him the action was dismissed.

Reynolds answered by general denial, and the cause was tried by the court, who made what purported to be a special finding, but which was regarded by the court above as only a general finding, it not appearing to have been made at the request of either party, and not being signed by the judge, and no conclusions of law stated.

The plaintiff moved for a new trial because:—

"1. The finding is contrary to law.

"2. It is not supported by sufficient evidence."

The court overruled this motion, and the plaintiff excepted. Final judgment was then rendered for the defendant on the finding.

The opinion of the court was delivered by

WORDEN, J.—Several errors are assigned, but only three of them are presented and relied upon:—

1. The striking out of a part of the prayer of the complaint.

2. Overruling the motion for judgment on the special finding.

3. Overruling the motion for a new trial.

As to the first point made we think the prayer of the complaint, after striking out the parts referred to in the motion, was sufficient

to authorize the court to give the plaintiff any relief to which he might be entitled under the facts alleged.

There was a prayer for judgment for a specific amount and for general relief. It is decided that when the defendant answers any relief may be granted consistent with the case made by the complaint: *Manlove* v. *Lewis*, 9 Ind. 194; *Resor* v. *Resor*, Id. 347.

With regard to the second point, we have already seen that the special finding was not made at the request of either party; was not signed by the judge; contains no conclusions of law, and, we may add, is not set out in any bill of exceptions. We can, therefore, only regard it as a general finding for the defendant, inasmuch as the court rendered judgment upon it for the defendant: *The Peoria, &c., Co.* v. *Walsor*, 22 Ind. 73; *Smith* v. *Jeffries*, 25 Ind. 377; *Davis* v. *Franklin*, Id. 407.

The merits of the entire case, however, arise upon the question involved in the overruling of the motion for a new trial, which we now proceed to consider, the evidence being in the record.

We may remark here that we have had the benefit of a full and able argument on both sides, both oral and written, by which our labors have been lightened, and we have been greatly assisted in arriving at our conclusions in the case. We have carefully considered the evidence in the cause, and are satisfied that no actual fraud was established in the purchase of the stock by the defendant from the plaintiff. The defendant doubtless knew much more about the condition of the affairs of the company and the value of the stock, both present and prospective, than the plaintiff. He purchased the stock greatly below its real value, as subsequent events established, but he paid the market value at the time, so far as it seems to have had a market value. Had the defendant not been connected with the company as one of its officers, there is nothing in the case that would furnish any reasonable ground to claim that the purchase was in any manner infected with fraud. It is not shown by the evidence that there was any special trust or confidence reposed in the defendant by the plaintiffs, which was violated by the former, or of which he took advantage.

These are the conclusions at which we arrive from the evidence, which is quite voluminous, and cannot be set out without extending this opinion to an inadmissible length. It is very clear, according to the well-established practice of the court, that we cannot disturb the finding of the court below on the ground of actual fraud.

Some other element must enter into the case in order to justify us in disturbing the finding. This brings us to the question which has been chiefly argued by counsel, viz.: Was the defendant, in consequence of being a director and the president of the company, a trustee of the plaintiff as a stockholder, whereby it became his duty as a purchaser of the stock to pay a fair and adequate price for it; to take no advantage of the relation which he bore to the company, or the knowledge acquired thereby, and to disclose to the plaintiff all the material facts within his knowledge, not known to the plaintiff, affecting the value of the stock?

We are of the opinion, upon an examination of such authorities as have been brought to our notice upon the point, that the relation of trustee and *cestui que trust* does not exist in such case. It is said very frequently in the books that the directors of a corporation are trustees of the stockholders, and that the relation of trustee and *cestui que trust*, with its consequences, exists between them. But these expressions must always be understood to have relation to the cases to which they are applied, and not to be of universal application.

It may be conceded that in respect to the property of the corporation, whether it be land, money, securities, capital stock or other property held by the corporation, and the management of its business, the directors are trustees for the stockholders. The action of the directors in respect to the property of the corporation, must affect, to a greater or less degree, the stockholders generally. It has been generally in such cases, or where the action of the directors has affected the whole body of stockholders, that the relation of trustee and *cestui que trust* has been held to exist. In a late case in Pennsylvania, *Spering's Appeal*, 71 Penna. St. 11–20, SHARSWOOD, J., in delivering the opinion of the court says, "It is by no means a well settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees."

To show the diversity of language employed in different cases, and the necessity of keeping in view the case to which it is applied, we make a short extract from the case of *Smith* v. *Hurd*, 12 Met. 371. It was an action on the case at common law, brought by an

individual holder of shares in an incorporated bank, against the directors, setting forth various acts of negligence and malfeasance through a series of years in consequence of which, as the declaration alleged, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value.

SHAW, C. J., in delivering the opinion of the court said: "There is no legal privity, relation, or immediate connection between the holders of shares in a bank, in their individual capacity on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders." It was held that the action could not be maintained.

A similar decision was made in the case of *Allen* v. *Custis*, 26 Conn. 456. ELLSWORTH, J., in pronouncing the decision of the court said: "Besides, the directors of the bank are the agents of the bank. The bank is the only principal, and there is no such trust for, or relation to a stockholder as has been claimed by the plaintiff. The entire duty of the directors, growing out of their agency is owed to the bank, which, under the charter, is the sole representative of the stockholders, and the legal protector and defender of their property."

It seems to us, however, keeping in view the current of authorities, that notwithstanding the general language employed in the above cases, for some purposes the directors of a corporation stand in a relation similar to that of trustees for the shareholders. This seems to be the case in reference to the management by the directors of the property and general affairs of the corporation. These are matters usually intrusted to the directors, and in respect to which they are empowered to act, and their action affects the whole body of shareholders beneficiary or injuriously in respect to dividends upon, or the value of their stock.

But stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce, and is bought and sold in market like any other marketable commodity.

The directors have no control or dominion over it whatever: or duty to discharge in reference to its sale and transfer, unless it be to see that proper books and facilities are furnished for that purposes. As the property of the individual holder, he holds it as

free from the dominion and control of the directors as he does his lands or other property. This view is very well illustrated by what was said in the case of *Van Allen* v. *The Assessors*, 3 Wall. 573, in which it was held that shares in the national banks might be taxed by the states. Mr. Justice NELSON, in delivering the opinion of the court, p. 583, said "But, in addition to this view, the tax on the shares is a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes of which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own."

"This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of the *Queen* v. *Arnaud*, 9 A. & E. (N. S.) 806. The question related to the registry of a ship owned by a corporation. Lord DENMAN observed, "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase or loss from its decrease: but in no legal sense are the individual members the owners."

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholders, like any other property that may belong to him. Now it is this interest which the Act of Congress has left subject to taxation by the states," &c.

Such being the nature of the interest of the stockholder in his stock, and the director having no control, power or dominion over it, or duty to discharge in reference to it beyond the duty devolving upon him to prudently manage the affairs and property of the corporation itself, it seems to us to be very clear that, in the purchase of stock by a director from the holder, the relation of trustee and *cestui que trust* does not exist between them.

The case of *Carpenter* v. *Danforth*, 52 Barb. 582, a very well-considered case, is directly in point.

There Danforth, who was one of the trustees or directors of the corporation, purchased of the plaintiff 136 shares of the stock of the National Bank Note Company, and the purpose of the action was to have the sale declared void, and to have the plaintiff restored to the rights and interests which he would have had if the sale had not been made, upon the ground of fraud and undue influence. It was held, that the relation of trustee and *cestui que trust* did not exist.

Many cases have been cited in which it has been said that the directors of a corporation are trustees for the stockholders; but it has been said generally, if not always, with reference to the management by the directors of the property or business of the corporation itself. We proceed to notice the cases.

The case of *Robinson* v. *Smith*, 3 Paige 222, has no analogy to this. It was there held that the directors of a joint stock corporation who wilfully abuse their trust, or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good that loss; and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. In *Verplank* v. *The Merchants' Insurance Company*, 1 Edwards 84, it was held that when a corporation aggregate is formed, and the management and control of its officers are in the hands of directors, the latter become the agents and trustees of the corporators, and a relation is created between the stockholders and those directors, who, as trustees, become accountable for dereliction of duty and violation of trust. The case made by the allegations of the bill was, that the directors had violated the act of incorporation by granting life annuities, without having set apart or appropriated any portion of the capital as an annuity fund; by buying and selling goods and merchandise, it being declared unlawful for the company to deal, use or employ any part of their stock, funds or money in such business, and in buying and selling or investing their money in stock or funded debt.

The case of *Scott* v. *Depeyster*, in the same volume, p. 513, is thus stated by the Vice Chancellor, p. 527, "This is a bill by one of the stockholders of the National Insurance Company in behalf of himself and all others who may come in and contribute to the expenses of the suit, against the president and directors of the same company, in their individual capacities, to compel them, per-

sonally, to account for and make good the losses sustained in the capital stock of the company by the frauds and embezzlements of their secretary."

The statement of the case is sufficient to show that it has no bearing upon the question involved here.

In the case of the *Cumberland Coal & Iron Co.* v. *Sherman*, 30 Barb. 553, it was held that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature, towards his principal; and is subject to the obligations and disabilities incident to that relation.

This was held in reference to a sale of the property of the corporation, the case having no similarity to the one before us.

In *Buist* v. *Wood*, 38 Barb. 181, the relationship of trustee and *cestui que trust* is again asserted, but is in this instance applied to the payment by the directors of the funds of the corporation, to an individual upon a pretended claim, which they knew, or must be presumed to have known, was unfounded.

One more case from New York closes our citations from that state: *Bliss* v. *Matteson*, 45 N. Y. 22.

The following point taken from the syllabus will sufficiently show the nature of the case. "The directors of a corporation are trustees of its stockholders, and in a certain sense, of its creditors, and any agreement to influence the action of such directors for the benefit of others, and to the prejudice of the company, is void."

The *Bedford Railroad Co.* v. *Bowzer*, 48 Penna. 29, decides, also, that the directors of a railroad company are trustees for all the stockholders. We cannot make a more condensed statement of the case to which it was applied than by quoting the following paragraph from the syllabus: "Where a board of directors of a railroad company, after reciting a condition attached to certain subscriptions by the commissioners, resolved that the condition be adopted as the act of the company, that the stock of each subscriber be purchased by the company and the payment of the subscription assumed; that the stock be surrendered, subscription annulled and cancelled by the secretary; such action on the part of the board was irregular and unauthorized, and the cancellation of the subscription in accordance therewith invalid; and it was error on part of the court to charge the jury that if the company had assets sufficient to pay their debts, the cancellation was valid, and released the subscribers, of whom the defendant was one."

This case it will be seen has no features in common with that under consideration.

In *Bayless* v. *Orne*, Freman's C. R. 161, the trust relationship is asserted, and applied to the case of an abuse of their trust by the directors, or waste or misapplication of the funds of the company.

The case of *Hodges* v. *New England Screw Co.*, 1 R. I. 312, holds that the directors of a corporation are liable in equity for a fraudulent breach of trust. The fraud charged related to the management of the business and affairs of the corporation, viz.: "that they took stock in an Iron Company on account of the Screw Company, before two hundred shares had been *bonâ fide* subscribed for; that they and the officer concealed important transactions and papers from the plaintiff, and refused him access to the same; that they paid more than the market price for the rods furnished them by the Iron Company; that they had violated the by-laws of the company; that the business and profits of the company had been diminished by diverting the time and care of its officers to the concerns of the Iron Company, the officers and agents of one company being likewise the officers and agents of the other; and that they had managed the concerns of the two companies with a view to reduce the value of the plaintiff's stock, in order to force him to sell it to them at a greatly diminished price, and retire from the company."

In this case it is clear enough, according to the charges, that the directors might justly be regarded as the trustees of the stockholders, because the wrong charged was all done in the management of the business and affairs of the corporation. The case, however, is totally unlike the one under consideration: *European, &c., Railway Co.* v. *Poor*, 59 Maine 277, holds that if a director of a railroad corporation enter into a contract for the construction of the road of his corporation, he cannot then, nor subsequently, personally derive any benefit from such contract. This we recognise as good law, but it needs no argument to show that it has no application to the case before us.

The case of *Dodge* v. *Woolsey*, 18 How. 331, involves questions entirely foreign to that under consideration here. Dodge was the owner of thirty shares in the Commercial Branch Bank of Cleveland, and he filed a bill in the Circuit Court of the United States for the district of Ohio, against the bank, the directors, and the tax collector, to enjoin the collection of a tax assessed by the

state of Ohio on the bank, upon ground stated in his bill. The Circuit Court enjoined the collection of the tax and the judgment was affirmed.

The case of *Koehler* v. *Black River Falls Iron Company*, 2 Black 715, was a bill in Chancery to foreclose a mortgage purporting to have been executed by the company, to secure the payment of $15,000. The bill, upon the hearing was dismissed. The decree was affirmed upon two grounds. *First*, That the corporate seal was wrongfully affixed to the mortgage. *Second*, That the mortgage had been unjustly obtained, in this: two of the nominal mortgagees were directors of the company; the company was embarrassed and desired to borrow money; at a meeting of the stockholders a resolution was passed authorizing the directors to obtain as large a loan as they could, and secure the same by mortgage on the lands and works of the company. $1200 in money, and $800 in provisions, were received by the company, and for the residue the mortgagees assumed the payment of several debts due from the company in which they, or some of them, were interested.

The court say: "Instead of honestly effecting a loan of money advantageously, for the benefit of the corporation, these directors in violation of their duty, and in betrayal of their trust, secured their own debts, to the injury of the stockholders and creditors. Directors cannot thus deal with important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders. In executing this mortgage, and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees. The directors are trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principle of equity, be suffered to pass without a remedy." This is another case in which the wrong imputed to the directors had reference to their management of the affairs of the company.

We now turn to the English cases. A leading one is that of *York and N. M. Railway Co.* v. *Hudson*, 22 L. J. Rep. N. S. Chan. 529; s. c. 16 Beav. 485. The corporation in that case

had been chartered in the reign of William IV. Subsequently in the reign of Victoria, an Act of Parliament was passed authorizing the formation of new lines of railway, and the increase of the capital stock of the company. Accordingly the stock was increased 50,000 shares. Of these shares 37,950 were divided amongst the original stockholders; and the residue, amounting to 12,050, were to be left at the disposal of the directors.

The relief sought in the case related only to a portion of the shares so left at the disposal of the directors. The number of shares in respect to which relief was sought, was 5259. These shares had been sold by Hudson, who was chairman of the company, at a premium, and the object of the suit was to compel him to account for the profit he thus made on the sale of the shares. With reference to the case made, the Master of the Rolls said: "The directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake, it is their duty to perform fully. and entirely. A resolution by the shareholders, therefore, that the shares or any other species of property should be at the disposal of the directors, is a resolution that it shall be at the disposal of trustees, in other words, that the persons intrusted with the property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their *cestuis que trust.*" This was the case of the disposal of the property of the corporation by a director, for his own benefit. It has no bearing whatever upon the question involved here.

In *The Great Luxembourg Railway Company* v. *Moguay*, 25 Beav. 586, a railway company had furnished a director with a large sum of money to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. It was held that the transaction could not stand.

In the case *Ex parte Bennett*, 18 Beav. 359, the directors permitted a class of dissentient shareholders in an embarrassed company to transfer their shares to the company, under a power in the deed, upon payment of a sum of money, which it was arranged should be paid to one of the directors in discharge of a debt due from the company. Held, that the transaction was void, and, on the winding up of the company, that the dissentients still remained shareholders.

The relation of trustee and *cestui que trust* is assumed in the case. The case was put upon the ground that the director had obtained an undue advantage in securing the payment of his debts from an embarrassed company.

The next and last case is that of *Walsham* v. *Stainton*, 1 De Gex, Jones & Smith 678. We cannot state this case in a more concise manner than by transcribing the syllabus.

"Joseph Stainton and Henry Stainton, who were confidential agents of a company, conspired together to depress the selling price of the shares by a system of false accounts and concealment, in order that they might purchase them at an undervalue. By reason of this scheme, fifty-five shares belonging to Garbett were sold much below their real value, fifteen to Joseph Stainton and forty to Henry Stainton. The executor of Garbett, upon discovering the fraud which had been practised, filed his bill against the executor of Joseph Stainton and the executor of Henry Stainton for relief in respect to all the shares.

"The representatives of Joseph Stainton demurred for want of equity and multifariousness. Held, that although Joseph Stainton derived no benefit from the sale of the forty shares at an undervalue, yet as he stood in a fiduciary position towards the shareholders, and was a party to the fraud, he as well as Henry Stainton was liable to Garbett for the real value of the shares, and that his executor was a proper party to a suit in respect of them: Held, also, that as both sales were affected by the same fraud, it was not multifarious to combine the cases as to the fifteen and the forty shares in the same bill."

In this cause there was not only actual fraud on the part of the Staintons, but that fraud, whether committed as agents or officers of the company, consisted of fraudulent acts committed by them in their management of the affairs of the company, whereby the apparent value of the shares was depreciated. The case states that Joseph Stainton was manager of the company at Carron from 1786 to his death in 1825, and his brother Henry Stainton was London agent of the company from 1808 till his death in 1851.

The fraud charged was that Joseph Stainton entered on the books of the company large quantities of goods sold to the Board of Ordnance at prices much less than those actually paid, and invested the difference in his own name in government stock. This was carried on with the help of Henry Stainton, as manager in