

tober, the petitioner's counsel sued out a writ of review, but did not take it from the clerk's office until some time after that date. There is no evidence that the petitioner, or his counsel, informed the clerk of the decease of Brown, or gave him any direction but the general one to issue a writ of review. The writ issued against Brown, and was dated Oct. 8, 1863. Neither the petitioner nor his counsel took any measures to procure the appointment of an administrator on the estate of Brown until after the expiration of 90 days from the grant of the review, the counsel alleging that he was waiting for the friends of Brown to move in the matter. On the 16th of March, 1864, the petitioner procured the appointment of an administrator, and, on the 21st, caused the writ of review, which was returnable on the first Tuesday of April, to be served on the administrator and on Mr. Marshall; who had been counsel for Brown in the original suit. At the return term of the writ, the action of review was, on motion of Marshall & Chase, who appeared specially, dismissed.

The particular mistake, accident or misfortune, on which it is claimed to support this petition, has not been pointed out to us. The counsel for the petitioner, in his deposition, says: "In procuring said writ of review and in prosecuting the same till dismissed, I acted upon my best knowledge, and supposed the court would not dismiss it; and if the proceedings were informal, I supposed the court would upon motion grant leave to amend, and save the rights of my client."

If there was any mistake, it did not arise from misapprehension of the facts by the petitioner or his counsel, but was a mistake of the same class with that in *Handy v. Davis* 38 N. H. 415, not resulting "from fortuitous circumstances," but arising "from an error of judgment or misapprehension on the part of the counsel." as to some point involved in the proceedings. *Broom's Leg. Max.* 244. Besides upon the evidence it is not entirely clear that the error, if there were any, or its injurious consequences might not have been avoided by the exercise of ordinary diligence.

As no case for a new trial under the statute, as construed in *Handy v. Davis*, is shown, it becomes unnecessary to inquire whether the fact that a review had already been granted upon a former petition by Heath is any objection to the present proceeding.

The petition must be dismissed..

DANIEL A. HILL v. GEORGE K. GOODRICH.

Where a wife, having a separate income, purchased solely upon her own credit suitable furniture for a house held for her by trustees, and occupied by herself and her husband, and subsequently died, having bequeathed the furniture to her husband, held that the vendor, who had thus sold the furniture to her with knowledge of the facts, could not recover for it of the husband in assumption.

ASSUMPSIT, for certain articles of furniture. It appeared that said

defendant had formerly been considered insolvent, but that his wife, now deceased, had property in her own right, or in the hands of a trustee, of which she had the income and profits; that the farm which she and the defendant had lived on, was in the hands of her trustee, and that she used the income thereof in supporting herself and family; that these facts were known to the plaintiff; that defendant's wife, in her lifetime, bought the furniture in question of plaintiff; that he chose to give the credit for the same to the wife, rather than the defendant; that he sold her the furniture upon credit, and that it was understood at the time by them both, that the credit was given to the wife, and the articles were charged directly to her, upon the plaintiff's book. Since then the defendant's wife has deceased, and this suit is brought against the defendant for that furniture. And it also appeared that the furniture was such as it was proper and necessary that the defendant or his wife should have, if they could get it, to furnish their dwelling-house, and that the wife, at her decease, left a will, in which this furniture with other property was given to the defendant, or left for his use and benefit.

Upon these facts the court ruled that the defendant was not liable, and ordered a nonsuit, and the plaintiff excepted.

H. P. Rolfe, for plaintiff.

Minot & Mugridge, for the defendant.

BARTLETT, J. As the furniture was sold to the wife solely upon her credit, the husband was not liable. 2 Kent 146; Clancy H. and W. 25, 26; Chit. Cont. 183; Story Cont. secs. 101, 103. Nor under these circumstances would the mere fact, if shown, that she used it with his knowledge and assent have tended to show a liability on his part, especially as she had a separate income. Story Cont. sec. 100; *Freestone v. Butcher*, 9. C. & P. 643.

The property came into the defendant's hands through no contract between him and the plaintiff, and even if he had taken it wrongfully from the plaintiff, the latter could not maintain assumpsit against him for it, in the absence of evidence that he had sold it. *Smith v. Smith*, 43 N. H. 539. It is immaterial whether by the transaction with the plaintiff, the wife incurred a debt to him, as the defendant would not as husband be liable to him, and is not sued as her executor or administrator, and is under no liability in this action as her legatee. *Ticknor v. Harris*, 14 N. H. 285. There must be

Judgment on the nonsuit.