

execution to enable him to avail himself of his attachment. *Ives v. Sturgis*, 12 Met. 462.

We are of the opinion that in this state, where a creditor of a bankrupt has acquired a vested right in his security by the lapse of time after an attachment, he is entitled to a special judgment against the property, or the avails of it, or its substitute or equivalent, whether the identical property remains in the hands of the officer, or it has been sold by consent, under sec. 19, ch. 205, Gen. Stats.; or upon the certificate of examiners, under sec. 22; or restored to the debtor upon his giving bond, under sec. 25; or taken from the officer by a writ of replevin, under sec. 26; or given up upon a bond in review, under the 48th rule of court. See *Zollar v. Janvrin*, 49 N. H. 114.

The plaintiff must, therefore, be permitted to take judgment *in rem* for such sum as he might lawfully recover against the defendant, if there were no bankruptcy proceedings. *Case discharged.*

SPEAR v. HILL.

The defendant gave a receipt to the plaintiff, a deputy sheriff, for goods attached on a writ against E. Afterwards one H., claiming to be the owner of the property, sued the officer in trover for it, and that suit was finally determined against him. In an action of trover, brought by the officer against the receiptor for the same property—*Held*, that the defendant could not be permitted to show title to the property in H. by way of defence, being concluded therefrom by the judgment in the suit of H. against the plaintiff.

TROVER, by Justin Spear against Charles H. Hill, for a portion of the property included in a receipt given by the defendant to the plaintiff, for property attached by the plaintiff, as a deputy sheriff, upon a writ in favor of William Stewart against Dudley B. Emerson. The receipt was dated October 10, 1866.

The defence was, that one Joseph G. Hill was at the time of the attachment in possession of the property attached, and was the owner of the same, not only as against Emerson, but also as against Emerson's creditors, and that upon the giving of the receipt the property went back into, and remained in, the hands of said Joseph G. Hill.

The plaintiff proved that in 1871 it was decided, in an action brought by Joseph G. Hill against this plaintiff (Spear), that the articles sued for in the present writ could not be held by Joseph G. Hill, but were the property of Emerson.

The court ruled that the defendant was concluded by the judgment in the former suit of Joseph G. Hill against Spear; and directed a verdict for the plaintiff, which the defendant moved to set aside.

Charles R. Morrison, for the defendant.

I. The receptor is discharged, if the goods attached did not belong to the debtor but to a third person, who has reclaimed them. *Learned v. Bryant*, 13 Mass. 224; *Webster v. Harper*, 7 N. H. 594; *Scott v. Whittemore*, 27 N. H. 309; *Fisher v. Bartlett*, 8 Greenl. 122. And in this case, if the goods receipted for, upon the giving of the receipt, went back into the possession of J. G. Hill, and J. G. Hill was the rightful owner, the receptor was thereby discharged, and could no more be concluded by the subsequent suit of J. G. Hill than by the acts of any other third person. *Hunt v. Haven and Upham, Adm'rs*, Grafton, July, 1872; *Dickinson v. Lovell*, 35 N. H. 16; *Flanders v. Davis*, 19 N. H. 149; *Thrasher v. Haines*, 2 N. H. 445; *Jacobs v. Knapp*, 50 N. H. 71, 82; *Campbell v. Hall*, 16 N. Y. 575; *Taylor v. Ranney*, 4 Hill 619; *Doe v. Earl of Derby*, 1 Ad. & El. 783; *Starkie Ev.* 328. The fact that the receptor has a remedy over which he (erroneously, it may be) deemed sufficient, in no way affects his liability. *Giltinan v. Strong*, 64 Pa. St. 242; *Cutler v. Jones*, 52 Ill. 84; *Fowler v. Brooks*, 13 N. H. 240; *Jackson v. Griswold*, 4 Hill 522; *Douglass v. Howland*, 24 Wend. 35, 52; *Laflin v. Field*, 6 Met. 287; *Smith's Leading Cases* 552.

II. The receptor was not bound by the judgment against Emerson, not being a party or privy. A judgment for certain purposes is evidence against strangers, just as a deed is evidence; but whether offered against a party, privy, or stranger, its admissibility depends upon the purpose for which it is offered, and it is conclusive only for its proper purpose and object. *King v. Chase*, 15 N. H. 9; *Gresley on Law of Evidence* 432; *Phillipp's Ev.* 258; *Fish v. Lighter*, 44 Mo. 268; *Barrs v. Jackson*, 1 Young & Call's New Rep. 585, 595; 2 Story's Eq. Pl. 801, note; *Kilborn v. Robbins*, 8 Allen 468; *George v. Barker*, 3 Allen 326; *Mead v. City of Boston*, 3 Cush. 404; *Woodward v. Haven*, Grafton, 1871.

For the purpose of showing that the officer was still liable to Stewart for the goods provided they were the property of Emerson, and therefore entitled to recover them of the defendant, the judgment and-execution were competent. And it would be no defence to show that it was irregular or erroneous. *Towle v. Towle*, 46 N. H. 431. For while in force it would be conclusive of the officer's liability, provided the goods were the property of Emerson. But the officer might defend by showing that the property did not belong to Emerson, and upon that issue the judgment against Emerson would be no evidence whatever, or, at least, no conclusive evidence, against the officer; and it can have no greater force against the receptor. See cases before cited, and *Warren v. Cochran*, 27 N. H. 339; *Green v. Cross*, 45 N. H. 574, 578; *Chamberlain v. Carlisle*, 26 N. H. 551.

So, where one claims by levy subsequent to a deed, for the purpose of showing a valid levy as against the debtor, the judgment against the debtor is conclusive to uphold the execution; but for the purpose

of proving him entitled, as a creditor at the date of the deed, to impeach the deed as fraudulent, the judgment, if admissible at all, most certainly is not conclusive. *Vogt v. Ticknor*, 48 N. H. 242; *Pomeroy v. Bailey*, 43 N. H. 118; *Jenness v. Berry*, 17 N. H. 549; *Church v. Chapin*, 35 Vt. 231; *Inman v. Mead*, 97 Mass. 310. These cases cannot be distinguished in principle from that before the court, so far as relates to the effect of the judgment against Emerson.

III. Upon the facts assumed in the request for instructions, Stewart would have been indictable here, and his sale did not entitle him to impeach the mortgage. *Hill v. Spear*, 50 N. H. 253-293, and cases cited; Gen. Stats., ch. 266, secs. 1, 7; *State v. Moore*, 26 N. H. 448; *Commonwealth v. Gillespie*, 7 Serg. & Rawle 469; Bouv. Law Dict. 44, 352.

IV. The whole of the goods being of the agreed value of \$800, the parties are estopped by the receipt, and the plaintiff cannot recover for a part (and he has brought his suit only for a part), the full price of the whole. The very object of the valuation of the goods in the receipt was to "fix their value in any dispute that might arise concerning them." *Drown v. Smith*, 3 N. H. 299, 302; *Remick v. Atkinson*, 11 N. H. 256, 258; *Wakefield v. Stedman*, 12 Pick. 562; *Jones v. Richardson*, 10 Met. 481, 494. It does not alter the case that the receiptor signed at the request of Hill. If Hill had signed the receipt himself, the estoppel in respect to the valuation would have been precisely the same as in the ordinary case. See authorities above cited, and *Morse v. Hurd*, 17 N. H. 246; *Barron v. Cobleigh*, 11 N. H. 557; *Robinson v. Mansfield*, 13 Pick. 139; *Bursley v. Hamilton*, 15 Pick. 40.

Morrison & Stanley, for the plaintiff.

JEREMIAH SMITH, J. The defendant sets up no title in himself to the property. He sets up title in Joseph G. Hill, and justifies solely under that title. He claims that, in allowing the property to go back into the possession of Joseph G. Hill, he was submitting to the authority of the rightful owner. In thus conforming to the wishes and submitting to the authority of Joseph G. Hill, the defendant virtually assumed the position of the servant or agent of Joseph G. Hill, so far as this property is concerned. He thus identified himself in interest with Joseph G. Hill, and merged his legal personality in that of Joseph G. Hill. In contemplation of law, the defendant, seeking to justify himself solely by the authority of Joseph G. Hill, is the same person as Joseph G. Hill. As to the defendant, therefore, the judgment in *Hill v. Spear* is not *res inter alios acta*, but *res inter eosdem acta*. If the defendant claimed a separate right or title in himself to the property, the case might be different. But he claims no rights distinct from those of Joseph G. Hill. He shelters himself exclusively under the authority and right of Joseph G. Hill. He neither has, nor claims, any rights distinct from those of his principal, as to third persons. "His rights as to all persons, except the principal, are the rights of

the principal." His present claim is in the right of the principal, "and this right has passed *in rem judicatam*." See Bigelow on Estoppel 63.

This view might work a great hardship to the defendant if his relation to Joseph G. Hill had been imposed upon him involuntarily. But he voluntarily chose to assume that relation, and now claims the benefit of it. He must therefore submit to all the burdens which the law annexes as incidents to that situation. But, on the other hand, it would be an intolerable hardship on this plaintiff to allow the defendant to assert in the right of Joseph G. Hill a title which Joseph G. Hill himself is conclusively estopped from asserting. Joseph G. Hill has already unsuccessfully litigated this title against the plaintiff. When he was heard, all who claimed to justify their acts in reference to the property by virtue of his authority and ownership (and not on account of any separate right in themselves) were heard. Joseph G. Hill's legal personality included all who acted under him, without any distinct right in themselves. His servants and agents cannot now claim or assert in behalf of his title more than he himself can claim.

The defendant relies on *Hunt v. Haven*, Grafton, July term, 1872 (unreported), *Campbell v. Hall*, 16 N. Y. 575, and other kindred decisions. In those cases it was decided that a grantee was not bound by a judgment against his grantor, rendered after the conveyance from the grantor to the grantee. But there is a wide difference between those cases and the case at bar. After the conveyance, the interests of the grantor and grantee are no longer identical, and, indeed, may be antagonistic. See 47 N. H. 479, p. 482. By the purchase the grantee recognizes the grantor's anterior title and anterior right of control, but he does not recognize that right as continuing. On the contrary, by claiming as grantee he asserts that the grantor's power over the property ceased at the instant of the grant. The purchase is at once an assertion of the grantor's previous right, and an assertion of the cessation of that right at the moment of purchase. Hence, he is not bound by the grantor's subsequent acts. But this defendant, when he allowed this property to be surrendered to Joseph G. Hill, did not thereby assert that Joseph G. Hill's title and right of control instantly terminated. On the contrary, he virtually asserted Joseph G. Hill's continuing right to control it. The defendant cannot take two inconsistent positions. He cannot say that Joseph G. Hill was, at the time of delivery, the owner, entitled to control the property, and at the same time assert that Joseph G. Hill, without any relinquishment on his part, or any change of circumstances, immediately ceased to be the owner, and was no longer entitled to control. On the contrary, the defendant, having grounded his defence on the position that Joseph G. Hill, at the date of the surrender, was the absolute owner and entitled to the control, must accept and be bound by all the logical consequences of that position. The position that Joseph G. Hill was then the absolute owner and entitled to control, involves the position that he continued so entitled to the control until relinquishment on his part, or some change of

circumstances. No such relinquishment or change of circumstances prior to the judgment is suggested.

The defendant may take whichever horn of the dilemma he pleases.

If he says that Joseph G. Hill had no right to control the property after receiving it, he cannot justify the surrender to Joseph G. Hill as against this plaintiff, who was the defendant's bailor.

If he says that Joseph G. Hill had a continuing right to control the property after receiving it, he admits the binding nature of Joseph G. Hill's subsequent acts in reference to the property. See *Rogers v. Weir*, 34 N. Y. 463.

The defendant is bound by the judgment against Joseph G. Hill, for much the same reason that a grantee is bound by a judgment rendered against his grantor prior to the grant. The grantee in such case asserts that the title and right of control were in the grantor at the date of the judgment; and this assertion is essential to the showing of title in himself. The grantee thus asserting that the right of control was then in the grantor, cannot deny the binding effect of the grantor's acts. Claiming the benefit of the grantor's ownership, he must also bear the accompanying disadvantages. The estoppel upon him is an application of the maxim *qui sentit commodum sentire debet et onus*. Mr. Broom expressly says that this maxim may "be applied in support and explanation" of the principle of such estoppel. Broom's Maxims, 6th Am. ed., *681.

Upon general principles, irrespective of any special circumstances which might favor the present plaintiff, we think the defendant is estopped by the judgment in *Hill v. Spear*. It is therefore unnecessary to consider the legal effect of his having signed the receipt at the request of Joseph G. Hill, and upon J. G. Hill's express promise of indemnity.

The foregoing views are concurred in by a majority of the court. One or two of our number, however, as at present advised, prefer to place the decision upon a narrower ground, as follows:

If an ordinary bailee would not have been estopped by the judgment in *Hill v. Spear*, the inquiry is presented whether a receptor occupies in all respects as favorable a position as an ordinary bailee. "The contract of a receptor of property, held under attachment by an officer, is a contract *sui generis*, and the rules which govern it are framed to suit the exigencies of the case"—PARKER, C. J., in *Whitney v. Farwell*, 10 N. H. 9, p. 11. "If the debtor tenders a responsible receptor, the sheriff is bound to accept him." PARKER, C. J., in *West v. Meserve*, 17 N. H. 432, p. 436;—and see remarks of DOB, J., in *Spear v. Hill*, 52 N. H. 323. The receipt, therefore, should be, and is, construed as an agreement to indemnify the sheriff for allowing the property to go out of his own hands into those of the receptor. If the property in question had remained in the sheriff's hands, no one could now set up Joseph G. Hill's title to it. How then can that title be set up by the very man who has agreed that the sheriff shall lose no rights, and be subjected to no detriment, by allowing the property to go back into his hands? We think it cannot.

In the view we have taken, no question arises as to the effect of the judgment in *Stewart v. Emerson*.

The question as to value was settled in *Spear v. Hill, sup.* There must be
Judgment on the verdict.

STATE v. BURKE.

A witness in a capital case should not be excluded because the list of witnesses furnished to the respondent does not contain his true name, if it contains the name by which he is known.

In an indictment for murder, a count which charges that the respondent "in some way and manner, and by some means, instrument, and weapon to the jurors unknown," killed and murdered the deceased, is good.

A general verdict of guilty of manslaughter in the first degree being returned on a trial under an indictment which contains several counts, judgment will not be arrested, nor will the verdict be set aside, because there is one count under which, had there been no other, the jury could not have found the respondent guilty of manslaughter in the first degree.

INDICTMENT against John Burke for murder.

The first count alleges a felonious assault, by the respondent, upon Rosa Burke, the deceased, and that, with a certain piece of iron, he, upon the left side of her head, did strike, giving her one mortal wound, of which she instantly died. The second count alleges a like felonious assault, and that he then and there, with a certain stick of wood, in and upon the left side of her head, did strike, giving her one mortal wound, of which she instantly died. The third count alleges a like felonious assault, and that he, with his hands and feet, did strike, beat, and kick, in and upon the head, back, belly, sides, and other parts of her body, and did then and there cast and throw her down unto and upon the ground with great force and violence, giving unto her thereby several mortal strokes, wounds, and bruises, of which she then and there instantly died. The fourth count alleges that the respondent, in a certain building known as Emerald Block, in, &c., upon the said Rosa, "feloniously, wilfully, and of his malice aforethought, did make an assault, and the said Rosa Burke, in some way and manner, and by some means, instrument, and weapon, to the jurors unknown, did then and there feloniously and wilfully, and of his malice aforethought, deprive of life, so that the said Rosa Burke then and there died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said John Burke, the said Rosa Burke, in the manner and by the means aforesaid, to the said jurors unknown, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder."