

recognizance had not been returned to and made of record in the supreme court.

Suloway & Topliff, for the defendant.

Smith, city solicitor, for the state.

CLARK, J. There is no statute requiring the recognizance to be returned to the supreme court. It was ordered and taken under Gen. St., c. 238, s. 8, which is as follows: "Any person sentenced by a justice or court for any criminal offence, or ordered to recognize for his appearance before the same or another court, may be required to recognize to keep the peace and be of good behavior for such time as the court or justice may direct." There is no provision for the return of the recognizance to the supreme court. The preceding sections of the same chapter relate to recognizances to keep the peace in other cases; and the section immediately preceding is as follows: "Every recognizance taken in pursuance of the foregoing provisions shall be transmitted by the justice to the supreme court for the county, on or before the first day of the next trial term, and there filed with the clerk." The section under which the recognizance in this case was taken follows that section, and is not included in its provisions.

The recognizance upon which this action is founded was entered into before a court of record, it was not taken on appeal, and there is no statute requiring it to be transmitted to the supreme court. It is not, therefore, necessary that it should have been returned to the supreme court and made a matter of record there, to render it valid. If this proceeding were *scire facias* instead of an action of debt, it would fail, because in that form of proceeding the record must be in the same court from which the writ issues. *State v. Kinne*, 39 N. H. 129.

Exceptions overruled.

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

HARRIMAN v. HARRIMAN.

59	135
68	134

A devise of the use, occupation, and improvement of land for the support of A. H. and his wife during their natural lives, with remainder in fee to such person or persons as shall take care of and support the said A. H. and his wife in their old age, is not void for uncertainty.

WRIT OF ENTRY. The demanded premises were formerly owned by John Harriman, deceased, and both parties claim title under the

following provision in his will: First, "I give and bequeath unto my brother, Amos Harriman, and his wife, during their natural lives, and the survivor of them, the use, occupation, and improvement of a piece of land lying in said Goffstown [describing the demanded premises]; the said use, occupation, and improvement of said land to be for comfort and support of said Amos Harriman and his wife for and during the time aforesaid, and not to be taken from them to pay any debts of the said Amos; and after the decease of the said Amos and his wife, I will and bequeath the said land, in fee simple, to such person or persons as shall take care of and support the said Amos and his wife in their old age, and the survivor of them; that is to say, it is my will that the same go to John Harriman, Jr. [the defendant], the youngest son of the said Amos, to his heirs and assigns forever, if he will take care of the said Amos and his wife as aforesaid; if not, then to such person or persons as do."

'The question was reserved whether the foregoing devise was void for uncertainty, excepting as to the life estate of Amos Harriman and his wife.

Cross and Burnham, for the plaintiff.

Patten, for the defendant.

CLARK, J. A devise is never construed absolutely void for uncertainty, but from necessity. If it be possible to reduce it to a certainty, the devise is good. Powell on Devises 421. A devise is held to be void for uncertainty only when, after a resort to competent oral proof, it still remains matter of mere conjecture what was intended by the instrument. *Society v. Hatch*, 48 N. H. 393, 397.

In the present case there is no ambiguity appearing upon the face of the will. The intention of the testator is clearly expressed, that the remainder, after the termination of the life estate of Amos Harriman and his wife, should go to such person or persons as should take care of and support Amos and his wife in their old age, giving the preference to John Harriman, Jr., the defendant. The devise was to take effect, not at the death of the testator, but upon the termination of the life estate of Amos Harriman and his wife; and it was then to be determined who was entitled to the fee in the lands. This question is to be determined upon evidence. It is a question of identity. If no person has complied with the conditions of the will, the devise fails for want of a devisee. If it appears that the defendant, John Harriman, Jr., has complied with its conditions, then he is entitled to hold the lands under the will. If he has failed to do so, and the plaintiff has performed the conditions, then he is entitled to recover. Whether the devise shall fail for want of a suitable person to take it,

depends upon the evidence that may appear in the case. The court cannot say, as matter of law, that the devise is void for uncertainty.

Case discharged.

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

WILLARD v. DECATUR & Trustee.

59	137
67	79

A receiver, appointed in a proceeding in equity to wind up a partnership, may be charged as the trustee of one of the partners for money, belonging to such partner, remaining in his hands after the termination of the equity proceedings.

FOREIGN ATTACHMENT. Decatur, the principal defendant, and one Sullivan, being partners, Decatur filed a bill in equity against Sullivan for a dissolution of the partnership and a settlement of the partnership business, and the trustee was appointed a receiver to take possession of, hold, and collect the partnership property and effects during the pendency of the bill in equity. Upon the termination of the equity suit, it was adjudged that there was a balance due from Sullivan to Decatur, and that a portion of the funds in the hands of the trustee belonged to him. The question is reserved whether the trustee is chargeable.

D. P. & D. L. Perkins, for the plaintiff.

Salloway & Topliff, for the trustee.

CLARK, J. A creditor of an individual partner may avail himself of the interest of such partner in the partnership funds by proceedings in equity to wind up the partnership affairs. *Treadwell v. Brown*, 41 N. H. 12. In the present case the partnership affairs have been adjusted, and the trustee holds in his hands money adjudged to belong to the principal defendant. The proceedings in the equity suit cannot be embarrassed by the trustee process. Our statute, authorizing the attachment of the goods, chattels, rights, and credits of the principal defendant in the hands and possession of a trustee, has been held to be sufficiently broad to charge administrators, executors, guardians of insane persons, after settlement of their accounts, and sheriffs for money collected on execution in favor of the principal defendant; and we see no reason why the trustee should not be charged in this case. *Palmer v. Noyes*,