

Daniels, 152 U. S. 684) are not in point; for in all of them the evidence derived from an examination of the appliance which caused the servant's injury tended to prove that it was constructed from unsuitable material, or that the work of constructing it was unskillfully done, or that the defect which caused the servant's injury originated so long before the accident that the master would have known of it in time to prevent the accident if he had used ordinary care for his servant's safety.

Since there is no evidence from which it can be found either that the defendants ought to have anticipated that this lace would pull out as it did, or that they could have done anything after it did pull out to prevent the accident, it cannot be found that their failure to inspect the belt was the legal cause of the plaintiff's injury, even if it can be found they failed to do what the ordinary man would have done in relation to inspecting it.

Exceptions sustained: verdict set aside: verdict and judgment for the defendants.

All concurred.

Cheshire, }
July 2, 1906. }

BRIGHAM, *Guardian*, & a. v. MADDEN, *Guardian*.

A mortgagee of chattels cannot, without the mortgagor's consent, apply the property in satisfaction of a claim against the mortgagor which is not included in the mortgage indebtedness.

The guardian of an incompetent person may maintain an action for the discharge of a mortgage given by his ward in fraud of creditors and covering property needed for the payment of debts.

BILL IN EQUITY, to compel the defendant to discharge a mortgage of personal property, given by Austin N. Kingsley to Charles C. Kingsley in April, 1904. Brigham is the guardian of Austin, and the defendant of Charles. Transferred from the October term, 1905, of the superior court by *Peaslee, J.*, upon the defendant's exception to a decree ordering him to discharge the mortgage.

At the time the mortgage was executed neither of the parties thereto was under guardianship. Austin was then capable of making a contract, while Charles was not. Austin was largely indebted to various persons and had in his possession property of Charles amounting to about \$4,000, but neither understood that

the mortgage was given as security for Austin's liability on that account. Charles had no purpose when he executed the affidavit on the mortgage, and Austin's sole purpose was to delay and defraud his creditors. Austin is insolvent, and the property covered by the mortgage is needed to pay his debts.

Hosea W. Brigham and Cain & Benton, for the plaintiffs.

Joseph Madden and Charles H. Hersey, for the defendant.

YOUNG, J. If Austin was indebted to Charles when the mortgage was made, the court has found the mortgage was not made to secure Charles against loss on that account. Consequently the latter's guardian cannot hold the property for that purpose; for when the mortgagee has a claim against the mortgagor that is not included in the mortgage indebtedness, he cannot apply the mortgaged property in satisfaction of it without the mortgagor's consent.

Notwithstanding Austin is estopped to deny the validity of this mortgage, his creditors are not, and Austin's guardian represents them in so far as the property is needed to pay his debts (*Cook v. Lee*, 72 N. H. 569, 571); and since the property is needed for that purpose, the order must be,

Exception overruled.

All concurred.

Grafton, }
July 3, 1906. }

CANAAN v. ENFIELD VILLAGE FIRE DISTRICT.

Where exempted property is assessed for purposes of taxation, the owner cannot plead the exemption in defence of an action for recovery of the tax, but must file a petition for an abatement within the time limited by statute.

ASSUMPSIT, to recover the amount of a tax assessed for the year 1904 upon property of the defendants located in the town of Canaan. The writ is dated September 16, 1904. Transferred from the November term, 1905, of the superior court by *Chamberlain, J.*, upon an agreed statement of facts.

The defendants are a municipal corporation within the limits of the town of Enfield. In pursuance of legislative authority and a