NEW JERSEY COURT OF ERRORS, &c.

John S. Wood
vs.
Samuel L. Fithian
& Robert J. Fithian,
} In Error, &c.

JNO. T. NIXON, for def'ts in Error.

The Counsel for def'ts in Error, as a preliminary step, asks this Court to strike out all that part of the printed state of the case on page 8, from 1st to 10th line, inclusive. In no sense does it belong to the case, and it was inserted by the Counsel for plt'ff without the shadow of authority. The record, in the minutes of the Supreme Court, shows that a writ of Cer. was allowed, returnable to the Supreme Court, at the Term of February, 1852; that the case was argued before the Supreme Court at the Term of Nov., 1852, and that the opinion of the Supreme Court was delivered by Mr. Just. Elmer at the Feb. T., 1853. The Counsel for plt'ff should not go behind the record, at least, without consent.

I. The first reason assigned for reversal is, "that the argument in Cer. was heard and the cause decided by *one* of the Justices of the Supreme C't, sitting alone, in a separate apartment from that in which, at that time, three or more of the Justices were then holding a stated term of said Court, &c."

The first reply to this reason is, that there is no evidence to support it, unless the unauthorized assertion of the Counsel for the plt'ff in Cer. will be received by the Court as evidence. It appears, by the entry in the minutes of the Supreme Court, that the cause was argued in that Court, and decided there. The Court of Errors will hardly look behind the record and listen to the allegations of Counsel.

But, secondly, the 3d Sec. of the "act relative to the Supreme and Circuit Courts" (Rev. S. 196) does not in any sense establish another Sup. C't. It only designates the mode by which the same Court may expedite its business, and thus accommodate suitors and counsel. When a case of sufficient magnitude arises to authorise Counsel to be heard before "the Chief Justice and the four associate Justices," it will be time enough to decide the question, now mooted, whether a Sup. C't can be constitutionally held by any less than the whole number.

II. The second reason assigned for reversal is, "Because the Justice did not sign his name to the summons."

By reference to the summons, page 1, lines 7—10, it will be seen that it was signed "A. E. Hughes, Justice of the Peace." The objection, therefore, must be that his christian name was not written in full. The various cases cited by the Counsel for plt'ff in Error, have no reference to this point, and it is submitted that he can find no

authority requiring a Judge, or Justice of the Peace, to write his christian name in full to a summons.

The statute, it is true, requires Justices of the Peace to sign their names to all precepts, summons, &c. Yet the statute, with like directness, requires that Judges, Clerks, and other judicial officers, as well as Lawyers, shall sign their names to judgments, writs, &c., and it has always been held that the duty was well performed, altho' the christian name were not written in full. If this objection were sustained, nineteen-twentieths of the judgments in New Jersey would be invalidated.

III. The third ground for reversal is, "That the action is brought in the name of two individuals, to maintain which they must have been co-partners in trade, or have had a community of interest in the premises."

The action was brought in the name of Samuel L. Fithian and Robert J. Fithian, for goods, wares, and merchandize furnished by them to the owner of the Sloop Gen'l Jackson, and the state of demand alleges that the said Wood was such owner. Whether the Plaintiffs had a community of interest in the goods thus sold, is a question of *fact*, not a question of *law*; and a question of *fact* is no ground for reversal. If they had such joint interest, the suit was not only rightly brought, but could be brought in no other way.—As several witnesses were examined, both before the Justice and the Common Pleas, this Court will now assume that the fact was proved to the satisfaction of those courts respectively.

IV. The next reason assigned for reversal is, "That the demand varies from the plaintiff's books of account."

The first reply is, that the facts do not sustain the reason. There is no variance between the state of demand and the books of account that is material, or that could possibly mislead the plt'ff in error.—The charge in the books is against "The Sloop Gen'l Jackson and owner," and the state of demand, after stating the names of the parties, and that plt'ff in Error is owner of the Sloop Gen'l Jackson, commences with "Sloop Gen'l Jackson and owner" Dr. to Def'ts, &c.

The next reply is, that def'ts in Error were not obliged to rely solely upon their books of account to prove their demand, or to prove that the specific articles were furnished, as alleged. The Capt. not only admitted the delivery of the articles, but the Counsel for plt'ff in Error has taken pains to perpetuate his testimony as to this point, —see p. 6, l. 34—5.

The Counsel for plt'ff in Error quotes many authorities to prove "that books of account are not evidence to charge one with goods, received by a third person, unless an authority to deliver them is shown."

That is a well-settled principle; but it is also settled that it does not apply to captains of vessels, who are the agents of the owners, and, as such, bind them by their acts even when it may not be known who the owners are. Upon this point see particularly the leading English case of Rich Exr. *vs.* Coe et. al. Cow. R. 636, in which L'd Mansfield states the law with great clearness and power; also, Smith Mer. L. p. 91, (note Z.); ib., p. 119, 3 Kent Com. 161.

V. The next reason assigned is, "That the plaintiffs claim and charge interest on their account, on some items, before the pretended sale of the articles; and the Justice, after striking out some of the items, retained all the interest, and the Common Pleas added interest on the whole amount."

Nor is this reason sustained by the facts. By looking at the state of demand (page 3, l, 30) it will be seen that the whole claim of the plt'ffs, below principal and interest, was $22.19. The Justice gave judgment for $21 94—not allowing the whole claim. But if we assume that the Justice did allow the whole amount of interest charged, to wit, $1.30, it can be easily ascertained, by computation, that more than that sum accrued between the time of the delivery of the last bill of goods (Aug. 17, 1848) and the judgement (Dec. 7, 1849).

And so with regard to the judgment in the Common Pleas, which was for $23,69 (p. 3, l. 33). The amount of principal claimed by plt'ffs was $20.89, and the interest thereon to the date of the judgment, in C. P. (Feb. 20, 1851), was $3.50, whereas only $2.80 was allowed; hence, there was no over charge.

It is not necessary here to decide the question raised and argued by the Counsel for plt'ff in Error, whether this Court, in the absence of all agreement between the parties, can or ought to allow interest upon book accounts. The articles may have been charged at the cash price, and if so, interest should have been paid from the time of the delivery; or there may have been an agreement with def'ts in Error that interest should be paid. This Court, in the absence of all knowledge, will assume that the Courts below had satisfactory evidence for making the allowance.

VI. The last reason insisted upon for reversal is, "That the Courts below had no jurisdiction, and that, under the circumstances, the charges being against the vessel and no person named, the vessel herself under the maritime law of the U. S., was liable."

If Counsel for plt'ff in Error mean by this that no ship owners can be held liable for supplies furnished to their vessels unless they are named at the time of the sale of the articles, it is submitted that no authority has been or can be produced to sustain any such ground.

The Books of Reports, in England and the U. S. every where show, that a common mode of charging for repairs and supplies, to

vessels, is against the vessel itself; and upon such a charge the owner, altho' not named or known, is liable.

The case of Rich *vs.* Coe, (Cow. 636) already cited, is in point. The charge was against the owners of the Ship Henry & Thomas, altho' their names were not known at the time. The suit was against the owners by name. Lord Mansfield would not hear the question of the owner's liability argued; but says "Whoever supplies a ship with necessaries has a *treble* security. 1, The person of the master. 2, The specific ship. 3, The personal security of the owners, whether they know of the supply or not." S. P. Farmer *v.* Davies 1 Term, R 109, Garnham *v.* Bennett, Str. R. 816.

Ch. Kent lays down and enforces the same rule 3 Com. 161.

In the case of Schemerhorn *vs.* Loines, (7 John, R. 311) the Counsel for both parties, admitted to the fullest extent, the principle now contended for: but the Counsel for def't sought to evade payment by showing that plt'ff had given the credit to *one* of the owners, and taken his note for the payment. The Court held, that the taking a note from *one* of the owners, unless it was afterwards paid, was no bar to the liability of the other owners, afterwards discovered.

Under this reason the Counsel for plt'ff in Error discusses the question of *ownership* of the Sloop General Jackson, at the time that the supplies were furnished by def'ts; and it is now submitted, that this is the *only real* question in the case.

The credit was given to the "owner of the Sloop Gen'l Jackson," as is manifest by the charges in the Books of account. It was not given to the master, (Hann) or the articles would have been charged to him.

The ownership is a question of *fact*, as well as of *law*. It was proved, that J. S. Wood stood upon the Custom House books, as the Registered owner: that a short time previous to the trial, he took the oath of ownership; and that the papers then recognized him as the only owner; and that the vessel was then in his possession.

It was not contended, that this proof was *absolute*, but was *prima facie*, and threw the burden on the defendant.

To rebut this, Wood offered Capt. Hann, who admitted that his only claim to the vessel was by virtue of a certain article of agreement, given to him by Wood, (see state of the case p. 4, l. 37 to 46,) and that it was a *private* agreement only known to himself and Wood, (p. 7, l. 5—8.)

The Court will see that this paper is only an agreement to sell, when Hann should pay $5.50, which was never paid, as Hann admits, (p. 7, l, 4.)

The only witness of def't below, proves that the Messrs. Fithian had no knowledge of the agreement when the goods were furnished, or until the trial. They dealt with the vessel and its owner, as they

stood before the world, and could not have acted in reference to a private agreement between the master and owner, without notice.—Mr. Wood held himself out to the public as owner, and must bear all the legal responsibilities growing out of the relationship.

A similar attempt was made, and upon the same grounds, to shift responsibility from the owner to the master, in the case above cited of Rich *vs.* Coe. There was a private agreement, between the owners and master, that the master was to have sole conduct and management of the ship and keep her in repairs, &c. "But," asks L'd Mansfield, "how does that affect the creditors who were strangers to the transaction?" "To be sure, if it appeared that a tradesman had notice of such a contract, and, in consequence of it, gave credit to the captain, *individually*, as the *responsible person*, particular circumstances of that sort might afford a ground to say he meant to absolve the owners and to look singly to the personal security of the master. But here it is stated the plt'ff had no notice of the contract, &c."

Many cases are cited by the Counsel for the plt'ff in Error to show "that the registered owner is not responsible for stores furnished the ship by order of the master, if he has divested himself of all control and possession of the ship, for the time, in favor of the charterer."

But the cases all turn upon the point, that the person furnishing the supplies *had a knowledge of the agreement or transfer, and that a credit was given to the parties in possession.*

Thus in the case of Wendover and al. *vs.* Hogeboon (7 John. 308), *the credit was given to Vosburgh*, and upon that ground the registered owners were deemed not liable.

And so Leonard *vs.* Huntington (15 John, 298) is a leading case upon this point. There, the Brig Recompense was sold by former owners to one Bingham, but by the contract, a Bill of sale was not to be given until the stipulated price was paid. Possession was taken by Bingham, who sent her to the plaintiffs to be repaired, they being *previously informed that she was owned by Bingham*, and he occasionally attending while the repairs were going on, and giving directions relating to them. After the repairs were made, Bingham, having paid for the Brig in full, received his bill of sale according to the contract.

"As between the parties to the contract" says Ch. Just. Thompson, who delivered the opinion of the Court, "there can be no doubt this would relate back to the time when the Contract was entered into. Third persons are not, however, to be prejudiced by such relation; and had the defendants remained in possession of the Brig, or *had the repairs upon her been made upon their credit, in any manner, the plaintiffs ought not to be affected by such relation.*"