No. 14431

Supreme Court of Illinois

Biglow

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vs.

Andress et al

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

1431

No. 129.

1863

Bylaws

vs

Andrews

129

SUPREME COURT.

THIRD GRAND DIVISION, AT OTTAWA—APRIL TERM, A. D. 1863.

CHARLES ANDRESS, ET. AL.,
Defendants in Error,

ADS.

JOSHUA R. BIGELOW, ET. AL.,
Plaintiffs in Error.

} Error to Cook County.

ARGUMENT AND AUTHORITIES FOR DEFENDANTS IN ERROR,

BY MCALLISTER, JEWETT & JACKSON.

BEACH & BARNARD'S Print, 14 South Clark Street

Notice May 15. 1863
S. Scates
atty

SUPREME COURT.

THIRD GRAND DIVISION, AT OTTAWA—APRIL TERM, A. D. 1863.

CHARLES ANDRESS, ET. AL., Defendants in Error, ADS. JOSHUA R. BIGELOW, ET. AL., Plaintiffs in Error.	Error to Cook County.

ARGUMENT AND AUTHORITIES FOR DEFENDANT.

The facts presented by the bill of complaint in this cause, may be concisely stated as follows: Complainants have sued out a writ of attachment against Henry W. Andress, upon an alleged claim against him, for goods sold and delivered. There was no levy upon property of any kind, and no service of the writ upon the defendant; but Charles W. Earl was summoned as garnishee. The bill then alleges that Henry W. Andress had, before the issuing of the attachment, made a fraudulent sale of goods to Charles Andress, his father; that the goods were in the possession of Earl, as the agent and clerk of Charles Andress; and that he was selling and disposing of them as such agent and clerk. That Henry W. Andress had left the State, and that Charles Andress resided in Cincinnati, Ohio. And prays that the sale of the goods to Charles Andress be set aside as fraudulent and void; that the goods may be sold to pay complainants' claim; and that, in the meantime, the parties be restrained from selling and disposing of them.

To this bill, Charles Andress and Earl filed a demurrer, alleg-

ing that the case made by the bill did not entitle the complainants to the relief prayed for. This demurrer was sustained, and the bill dismissed in the court below. And this action of the court is assigned for error.

The single question in the case is, not whether fraud is a ground of equity jurisdiction, as a general proposition; but whether the bill, upon its face, shows that the complainants are in a position to ask the interference of a court of equity in their behalf. In considering this question, we shall endeavor to show that the premises upon which the complainants' counsel has built up so formidable an argument, are entirely false; leaving the structure to take care of itself, as it best can; and then simply refer the court to a few authorities which, in our judgment, control the case.

The first position of the learned counsel is, in substance, that the issuing of the writ of attachment, and the service of it upon Earl, created a lien upon, or right to, the property sought to be reached in Earl's hands. The same idea is doubtless intended to be conveyed again, upon the same page of the argument, in this language:

"From the time of the garnishment, the effects in the hands of "the garnishee are considered *in custodia legis.*"

This position is the turning point upon which the greater part of the counsel's argument rests; and, in support of it, he cites two cases: 7 Peters, 608, and 7 Dana, 405; the former of which is decided upon a statute of Pennsylvania, essentially and radically different from the law of this State; and the latter, we do not hesitate to say, contains no allusion whatever to the subject.

The law of Pennsylvania under which the decision in *Brashear* vs. *West et al.*, 7 Peters, 608, was made, and upon which that decision rests, directs that the officer executing the attachment writ "shall go to the house, or to the person in whose hands or posses- "sion the defendant's goods or effects are supposed to be, and then "and there declare, in the presence of one or more credible per- "sons in the neighborhood, that he attacheth the same goods or "effects. From and after which declaration, the goods, money or "effects so attached *shall remain in the officer's power, and be by "him secured*, in order to answer and abide the judgment of the

" court in that case, unless the garnishee will give security there-
" for." (See same case, p. 620.)

Without quoting from the opinion of the court, we may safely claim that the decision, so far as it relates to the point made by the counsel, rests solely upon that statutory provision. As to the case in 7 Dana, 405, we pass it over with the single remark that it does not, even in the remotest degree, illustrate or sustain the counsel's position.

The proceeding by attachment is strictly a statutory proceeding; and the effect, as well as the manner of it, is limited by the provisions of the law authorizing it. We suppose that even the complainants' counsel will hardly venture to assert that the mere issuing of an attachment writ creates a lien upon the property and effects of the defendant. In order to create a lien under the writ, there must be a levy upon the identical property sought to be reached. That this is so, is evident from the consequences which follow the recovery of a judgment when there is no service of the writ on the defendant. It is everywhere treated as a judgment *in rem.*, and a special *fieri facias* is issued, and none other can be, for the sale of the identical property levied on; and no other property of the defendant is reached or affected by the proceeding. This practice is too well settled under our attachment law, and is too familiar to the court to need the support of any authority. The 15th section of the attachment act provides that "all the estate at-
" tached, and not replevied, shall be sold for and towards satisfying
" the plaintiff's judgment," etc. It is not *all the defendant's property* that may be sold; but simply "the estate attached." That is, the property actually levied upon by the officer, as provided in section 3 of same act.

If this is not sufficient to determine the question, the 26th section of chapter 57, Revised Laws of 1845, p. 305, certainly is. The 25th section relates to the lien of writs of attachment and execution, issued from the court of one county to the sheriff of another county; and the 26th section then proceeds:

" When a writ of attachment is levied upon any real estate, *in*
" *any case*, it shall be the duty of the officer making the levy to

"file a certificate of such fact with the recorder of the county "where such land is situated; and, *from and after the filing of the* "*same*, such levy shall take effect, as to creditors and *bona fide* pur- "chasers, without notice, *and not before*."

It is true, this law relates to real estate, and the proceeding by attachment against real property only; and it is also true, that the filing of a certificate of levy is not necessary or proper, when the subject of the attachment is personalty. Still, the section cited sufficiently and clearly establishes a wide distinction between an attachment writ, and an execution upon a judgment *in personam;* and shows that the mere issuing of a writ, without an actual levy, creates no lien.

But the connsel's point is, perhaps, that the service of the writ upon the garnishee created a lien upon the property of the defendant in the attachment in his hands. This we deny. If it were so, it must be by virtue of some law to that effect; for it is not easy to perceive any reason why the mere service of a garnishee summons should have any greater force or effect in the way of creating a lien upon property, than the service of an ordinary summons upon a defendant in an action of assumpsit or debt. They are both processes alike designed and intended to bring the parties served personally into court, for such future proceedings as the case shall warrant. They equally give the court jurisdiction of the person, and authority to proceed to judgment against the party served. The service of the common summons creates no lien; nor does it, in any way, even in theory, prevent the defendant from disposing of his property. Why, then, should the service of the garnishee summons? The counsel says, the garnishee may dispose of the property in his hands. So may the defendant, after service of summons; and with consequences quite as serious and embarrassing to the creditor. It is not a question of what would be best for the creditor; nor whether the Pennsylvania or some other statute, on the whole, would not be better than ours; but what is, in fact, the law of this State upon the subject? If our law is defective or inadequate, the remedy is with the legislature, and not the courts.

The 12th section of the attachment law authorizes the summon-

ing of persons designated by the creditor "as having any property, "effects or choses in action, in their possession or power, belonging "to the defendant; or who are in any way indebted to such defend- "ant, *to appear before the court*, etc., then and there to answer, "upon oath, what amount they are indebted to the defendant, in "the attachment; or what property, effects or choses in action he "or she had in his or her possession or power, at the time of serv- "ing the attachment."

Here the object and effect of the summons is clearly stated—and that is, the *appearance* of the person summoned. If he appear and discharge himself by his answer, and the answer is not contested, the proceeding as to him is at an end. If he fail to appear and answer, or if his answer admit assets in his hands belonging to defendant, or the fact be so found upon trial, the consequence is a personal judgment against him, in case the plaintiff obtain judgment againt the defendant in the attachment. He can, under the provisions of the 16th section, by surrendering to the officer serving the summons upon him all the property in his hands belonging to the defendant, discharge himself from personal liability; but he is nowhere required to make such a surrender, and the court cannot compel him to do it. The most and all that the law authorizes against the garnishee, is a personal judgment, which secures to the plaintiff the benefit of his individual responsibility. Upon this judgment, a general execution may issue, and all the consequences follow from it that attend judgments and executions in other cases. If there is any difference, it is to be found in the provision contained in section 15, cited by the complainants' counsel, but strangely misapplied by him. It is the concluding paragraph of the section, and is as follows:

"All goods and effects whatsoever, in the hands of the gar- "nishee or garnishees, belonging to such defendant, shall also be "liable to satisfy such judgment."

What judgment? Why, the judgment against the garnishee. The law, then, provides that, in addition to the property of the garnishee, the defendant's property in the garnishee's hands may be taken by the officer to satisfy the judgment recovered against

the garnishee. May be taken, how? Certainly, upon the execution issued upon the judgment. When? After the execution is issued! What property of the defendant? Of course, it can only be such as the officer finds in the hands of the garnishee, when the execution is delivered to him; and cannot, by possibility, refer to the property of the defendant in the hands of the garnishee at the time of the service of the garnishee process. We regard this as a clear demonstration, from the statutes of this State, that the service of the attachment writ upon a garnishee creates no lien whatever in favor of the attaching creditor.

In the case of *Stahl et al.* vs. *Webster et al.*, 11 Ill., 518, the court say:

"The proper practice would seem to be, to enter the judgment "against the garnishee in favor of the defendant in the attachment, "for the benefit of such attaching and judgment creditors as are "entitled to share in the proceeds."

The clear inference from this practice, recommended by the court, and correct beyond a doubt, would be, that the service of the garnishee in a writ of attachment should have precisely the same effect as the service of a summons in an action instituted by the defendant in the attachment, for the benefit of his creditors against the garnishee; and no other. And, in these suggestions, we have said all that we desire to say, in reply to the first thirty-two pages of the argument of complainants' counsel.

The second and only other point presented by the complainants' counsel is: "That irrespective of the lien which the complainants "acquired by virtue of the garnishment, the bill alleges such facts "and circumstances as show affirmatively that the complainants "had rights, recognized by law, to inforce and protect which, the "legal remedies were inadequate and incomplete."

Here, we shall again be under the necessity of insisting that the counsel is misapplying a well-recognized rule; and that is, that when the legal remedies fail or are inadequate, equity will interfere to protect the rights of the parties. The rule we do not dispute; but that it has any application to the case made by the complainants' bill, we deny. It is not necessary for us, in this case, to in-

sist that the complainants have no rights whatever; and we freely admit that they have a right to all the usual and prescribed remedies for the inforcement of their claim. The bill utterly fails to show that they are obstructed in the exercise of any of those remedies; or that they are not ample and sufficient for the securing of the desired end, to wit: the collection of the complainants' debt. In fact, the complainants, by their own showing, have instituted proceedings at law; the prosecution of which is open and unobstructed, and in the course of which, the thing most complained of by them—to wit: the fraudulent sale by Henry W. Andress—may be fully investigated; and if that allegation of their bill is true, and they should so make it appear, the sale would present no obstacle to their recovery. The sale or disposal of the goods by Earl, the garnishee, would not prevent a judgment against him, if he should, by his answer, admit goods in his possession belonging to Henry W. Andress at the time he was summoned as a garnishee; or if the complainants should so make it appear, upon a trial of issues formed upon his answer. And in this investigation, the complainants could examine both the vendor and vendee as witnesses. The fraudulent sale, therefore, would not stand in the complainants' way. If their bill is true, they were certain to recover a judgment against Earl; and there is not an intimation in the bill that such judgment could not be collected, or that Earl is not entirely responsible.

The opposite of the counsel's position is thus sustained by the bill, to wit: the bill alleges such facts and circumstances as show affirmatively that the legal remedies are adequate and complete for the protection and inforcement of the complainants' rights; but nevertheless, these complainants, being simple contract creditors, without a lien of any kind, with all the remedies of the law open to them and untried, and without even waiting to ascertain what Earl would answer to their garnishment, rush precipitately into a court of equity, and piteously appeal to the Chancellor to overlook all legal distinctions, the settled practice of the courts, and all the defects of the case made by them, and to give them a relief different from that which a court of law, to which they first resorted, is

authorized to give them. For the purpose of helping out the jurisdiction of this court, neither the writ of attachment nor the garnishment assist the complainants' case, because no lien is created by them. If the complainants had, under their attachment writ, levied on the stock of goods in Earl's possession, there would have been some excuse for resorting to this court to set aside a sale of the property levied on; but even then, a bill would have been premature until they had reduced their claim to a judgment, and sought to subject the property to the payment of such judgment. But the complainants have not taken that course; they have preferred the responsibility of Earl to a levy on the goods, in their suit at law, and now ask this court to create for them a lien on the goods, and thus give them a double remedy and relief. We had always understood that it was the province of courts to inforce the rights and liens of parties, and not to create them. We see nothing in the elaborate argument of the counsel for complainants which, in any way, modifies or changes this understanding, and therefore dismiss it—hoping that the court will have more patience with it than we have been able to feel or exercise.

The principle upon which this case must be decided is so simple, and the statement of it may be so concisely made, that we feel very much like apologizing for our attempt to show the fallacy of the complainants' argument. At any rate, we will now be brief.

The complainants are simple contract creditors; and, as such, having no judgment and execution, nor any other lien to inforce, they have no right to the relief asked for in this bill. They cannot, under such circumstances, inquire into the validity of a sale made by their debtor, nor in any manner question the good faith or fairness of his transactions. This we understand to be the settled rule and practice of courts of equity; and notwithstanding the strictures and criticisms of them by the complainants' counsel, we cite, in support of it, the following cases:

Angell vs. *Draper*, 1 Vern., 399.
Bennett vs. *Musgrove*, 2 Vesey S., 51.
Wiggins vs. *Armstrong*, 2 Johns. C. R., 144.
Brinkerhoff vs. *Brown*, 4 Johns. C. R., 671.
Beck vs. *Burdett et al.*, 1 Paige, 305.

The complainants' counsel seems to have carefully shunned any allusion to the law and decisions of this State, where, as it seems to us, the most apt and pertinent authority is to be found. Section 36, chapter 21, of Revised Laws of 1845, entitled "Chancery," provides that—

"Whenever an execution shall have been issued against the property of a defendant, on a judgment, at law or in equity, and "shall have been returned unsatisfied, in whole or in part, the party "sueing out such execution may file a bill in chancery," etc.

We do not claim that the court of chancery gets its jurisdiction in cases of creditors' bills, by virtue of this statute; but we do claim that it is, at least, declaratory of the law, and the practice of courts of chancery upon this subject; and, as such, is binding upon the courts of this State. And so it has been regarded:

Balentine et al. vs. *Beall*, 3 Scamm., 203.
Miller et al. vs. *Davidson*, 3 Gilm., 523.
Manchester et al. vs. *McKee Ex's*, 4 Gilm., 515
Farnsworth vs. *Strasler*, 12 Ills., 485.
Ishmael vs. *Parker*, 13 Ills., 328.
Hitt et al. vs. *Ormsbee*, 14 Ills., 233.

The case of *Greenway et al.* vs. *Thomas et al.*, 14 Ills., 271, was a case precisely like the one now before the court, excepting that there was no service upon a garnishee. In every other essential particular, the cases are parallel. We refer to the case as fully establishing the principle we are contending for, and decisive of the case at bar. Until this court overrules that decision, there is very little occasion for further argument. It is not possible that, by the facts alleged in the bill in this case, a foundation is laid for overturning a current of authority running through so many years of the judicial history of this State; and we therefore confidently expect that the ruling of the circuit court will be sustained, and its decree affirmed.

McALLISTER, JEWETT & JACKSON,
Solicitors for Defendants.

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IN THE

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

April Term, A. D. 1863.

JOHN R. BIGELOW, CHARLES H. HAYDEN, AND HENRY W. BIGELOW,
Plaintiffs in Error,

vs.

HENRY W. ANDRESS, CHARLES ANDRESS, AND CHARLES W. EARL,
Defendants in Error.

Error to Cook County Circuit Court.

ABSTRACT OF RECORD.

Filed Apr. 21-1863
L. Lorland
Clerk

CHICAGO:
PRINTED BY BEACH & BARNARD, NO. 14 SOUTH CLARK STREET.
1863.

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Page 1. **Placita.**

2 **Bill of Complaint.** Filed Dec. 6, 1861, as follows:

That heretofore, to wit, on the fifth day of December, A. D. one thousand eight hundred and sixty-one, your orators caused a writ of attachment to issue out of the said Circuit Court of Cook County, State of Illinois, against the goods and chattels, lands and tenements of said defendant, Henry W. Andress, which said writ has been served by summoning Charles W. Earl as garnishee of said Henry W. Andress.

That the said defendant, Henry W. Andress, was formerly engaged in the paper-hanging business, in the city of Chicago, and State of Illinois, and between the eighth day of September, A. D. 1859, and the first day of May, A. D. 1860, purchased sundry bills of goods of your orators on a credit, and that for the goods so purchased of your orators, with interest on the same from maturity until the first day of December, A. D. 1861, the said defendant, Henry W. Andress, was, on the day last named, indebted unto your orators in about the sum of eight hundred and forty dollars, and which said sum is due and wholly unpaid.

And your orators further show unto your honor, upon information and belief, a short time since (at what particular time your orators are not informed and cannot state), the said defendant, Henry W. Andress, made a pretended sale or

transfer of his stock of goods to his co-defendant and father, Charles Andress, who is, as your orators are informed and believe, a resident of Cincinnati, in the State of Ohio, and that the said Charles Andress now claims and pretends to own said stock of goods, and is, by his pretended agent, Charles W. Earl, selling and disposing of them in said city of Chicago, where the goods still remain, the said Henry W. Andress having left Chicago for parts unknown to your orators.

And your orators would further show unto your honor, that they are informed and believe that said defendant, Charles W. Earl, is in possession of said stock of goods, and is engaged in selling and disposing of said stock of goods, as the agent or clerk of said defendant, Charles Andress.

And your orators would further show unto your honor, that they are informed, and believe that the said defendants, Henry W. Andress and Charles Andress, were, some two and a half years since, co-partners in said business, in the city of Chicago, that while so engaged in business, they contracted debts, some of which the said defendant, Charles Andress, claims that he afterwards paid, and the said defendant, Charles Andress, now pretends, as your orators are informed and believe, that the said stock of goods was transferred to him as aforesaid, by his said son, Henry W. Andress, in payment of the amount which he, the said Charles Andress, had or claims to have paid on the said co-partnership indebtedness, as aforesaid.

And your orators further show unto your honor, that they are remediless in the premises at, and by the direct and strict rules of the common law, and cannot have adequate relief except in a court of equity, and that they cannot safely proceed to attach and sell the said goods of said Henry W. An-

dress, by reason of the said pretended transfer, and of the claim of said Charles Andress in and to said goods.

And your orators charge, upon information and belief, that the pretended sale or transfer of said stock of goods from said Henry W. Andress to said Charles Andress, is fraudulent and void as to your orator and other creditors of said Henry W. Andress, and that it was made for the purpose of hindering and delaying the creditors of said Henry W. Andress in the collection of their debts against him, and of placing said stock of goods beyond the reach of the creditors of said Henry W. Andress, and that a full and adequate consideration was not paid by said Charles Andress to said Henry W. Andress for said stock of goods.

And your orators further state, upon information and belief, that the said defendant, Henry W. Andress has no property within the State of Illinois aside from said stock of goods out of which your orators could make any portion of their said debt against him.

And your orators pray that the said pretended sale or transfer of said goods from said defendant, Henry W. Andress, to Charles Andress, may be adjudged and decreed to be fraudulent and void, as to your orators, and that said stock of goods may be ordered to be sold to satisfy the amount which shall be found to be due and owing to your orators from said Henry W. Andress, and that the said defendants, Henry W. Andress, Charles Andress and Charles W. Earl, may be enjoined and restrained from selling, assigning, transferring, delivering, or in any manner incumbering or disposing of any of the said goods so as aforesaid transferred by said Henry W. Andress to Charles Andress, or from paying over, or in any manner disposing of any money, the avails of sales of said goods until the further order of this court.

dress, by reason of the said pretended transfer, and of the claim of said Charles Andress in and to said goods.

And your orators charge, upon information and belief, that the pretended sale or transfer of said stock of goods from said Henry W. Andress to said Charles Andress, is fraudulent and void as to your orator and other creditors of said Henry W. Andress, and that it was made for the purpose of hindering and delaying the creditors of said Henry W. Andress in the collection of their debts against him, and of placing said stock of goods beyond the reach of the creditors of said Henry W. Andress, and that a full and adequate consideration was not paid by said Charles Andress to said Henry W. Andress for said stock of goods.

And your orators further state, upon information and belief, that the said defendant, Henry W. Andress has no property within the State of Illinois aside from said stock of goods out of which your orators could make any portion of their said debt against him.

And your orators pray that the said pretended sale or transfer of said goods from said defendant, Henry W. Andress, to Charles Andress, may be adjudged and decreed to be fraudulent and void, as to your orators, and that said stock of goods may be ordered to be sold to satisfy the amount which shall be found to be due and owing to your orators from said Henry W. Andress, and that the said defendants, Henry W. Andress, Charles Andress and Charles W. Earl, may be enjoined and restrained from selling, assigning, transferring, delivering, or in any manner incumbering or disposing of any of the said goods so as aforesaid transferred by said Henry W. Andress to Charles Andress, or from paying over, or in any manner disposing of any money, the avails of sales of said goods until the further order of this court.

And to the end that the said defendants may, if they can show why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect, answer make to all and singular, the matters and things herein stated and charged, and particularly to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are required to answer, that is to say—

1st. Were not the said defendants, Henry W. Andress and Charles Andress engaged in business at Chicago as co-partners, as hereinbefore stated?

2d. Did the co-partnership contract debts; if yea, state to whom, and for what amount?

3d. Did the said defendant, Charles Andress, pay any portion of said co-partnership debts; if yea, state the amounts paid, the names of the persons or firms to whom paid, and the date of payment?

4th. What consideration (if any), did the said Charles Andress pay to said Henry W. Andress for the stock of goods so as aforesaid transferred to said Charles Andress, and when, and how was the same paid; give all the facts and circumstances in relation to said transfer and the understanding between said Henry W. and Charles Andress in relation thereto?

5th. What was the object and purpose of the said transfer of said stock of goods, and where did the said Henry W. Andress go when he left Chicago, and where is he at this time, and when was said transfer of said stock of goods made?

6th. What was the amount in value, at cost price, of said stock of goods at the date of said transfer; was there a correct invoice of said goods then taken; if yea, attach copy of said invoice to your answer?

7th. Has the said defendant, Henry W. Andress, any property in the State of Illinois other than said stock of goods so as aforesaid transferred to Charles Andress; if yea, give a description of such property, with its value?

8th. What portion of said stock of goods now remains unsold and undisposed of, and what is the value of cost price of the said goods now remaining in the hands of said Charles Andress?

And that the said defendant, Henry W. Andress, last named, may also be in like manner prohibited from making any assignment of his property, and from confessing any judgment for the purpose of giving preference to any other creditor over your orators, and from doing any other act to enable other creditors to obtain his property; and that a receiver may be appointed, according to the course of practice in this court, and with the usual powers of receivers in like cases, of all the property, equitable interests, things in action and effects of the said defendant, Henry W. Andress, and that your orators may have such further or such other relief in the premises as the nature of their case shall require, and as shall be agreeable to equity and good conscience.

May it please your honor to grant unto your orators the people's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said defendants, Henry W. Andress, Charles Andress, and Charles W. Earl, and to their counsellors, attorneys, solicitors, trustees and agents, therein and thereby commanding and strictly enjoining the said defendants and the persons before mentioned in manner aforesaid.

And may it please your honor to grant unto your orators the people's writ of summons, issuing out of and under the seal of this honorable court, to be directed to the said defendants, Henry W. Andress, Charles Andress and Charles W. Earl, therein and thereby commanding them and each of them, on a certain day and under a certain penalty, to be therein inserted, that they personally be and appear before the Judge of the Circuit Court of the county of Cook aforesaid, at the court room in the city of Chicago, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to your honor shall seem agreeable to equity and good conscience; and your orator will ever pray, &c.

E. S. SMITH,
JOSHUA R. BIGELOW,
CHARLES H. HAYDEN,
HENRY W. BIGELOW,
By E. S. SMITH.

E. S. SMITH,
Complainants' Solicitor and of Counsel.

Verification of Bill of Complaint.

5 **Bond for Costs,** filed December 6th.

6 **Summons Issued,** December 6th, 1861.

6 **Demurrer** to Bill of Complaint, filed February 28th, 1862, as follows:

And the said Charles Andress and Charles W. Earl, by Scates, McAllister and Jewett, their solicitors, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show

that the complainants have not, by their said bill, shown such a case as entitle them to any such relief as it thereby prayed, inasmuch as it does not appear thereby that they have ever obtained any judgment at law against the said Henry W. Andress upon the said supposed indebtedness, or that there has ever been any lien obtained or acquired by the issuing of any execution against the said Henry W. Andress; and in as much as it also appears thereby that at the time of filing their said bill of complaint, the said complainants had only sued out an attachment against the estate of said Henry W. Andress, and it does not in any manner appear in and by the said bill of complaint that the complainants have recovered any judgment whatever in the said attachment suit in said bill mentioned.

Wherefore these defendants demand the judgment of this henorable court, whether they shall be compelled to make any further answer to the said bill, or any of the matters or things therein contained, and pray to be hence dismissed, &c.

7 **Notice,** argument, demurrer and admission of service.

8 **Decree** on argument; demurrer.

1. That the allegations in complainants' bill of complaint contained, are not sufficient to entitle them to the relief prayed for therein.

2. That the demurrer be sustained and the complainants electing to stand by their bill of complaint.

3. That the complainants' bill of complaint be and the same is hereby dismissed out of this court, with costs to be taxed.

8 **Exception** by Complainants.

9 **Certificate** of Clerk.

ASSIGNMENT OF ERRORS.

1. The court erred in sustaining the demurrer to the complainants' bill of complaint.

2. The court erred in decreeing that the complainants' bill of complaint be dismissed.

3. The allegations in the bill of complaint are sufficient to entitle the complainants to the relief prayed for, and the court erred in ruling otherwise.

4. The court erred in not overruling the demurrer to the complainants' bill of complaint.

E. S. SMITH,

Attorney for Plaintiff in Error.

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the Circuit Court for the County of Cook Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Cook County, before the Judge thereof, between Joshua R. Bigelow, Charles H. Hayden, and Henry W. Bigelow

plaintiffs and Henry W. Andrus, Charles Andrus Henry W. Earl

defendants, it is said manifest error hath intervened, to the injury of the aforesaid plaintiffs

as we are informed by their complaint and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. JOHN D. CATON, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this thirty first day of March in the Year of Our Lord One Thousand Eight Hundred and Sixty three

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Deputy

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Joshua R. Bigelow
dals: —

No. *vs.*

Henry W. Andrip dals.

WRIT OF ERROR.

FILED Dec. 31st A. D. 1863.

L. Leland
Clerk.

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Cook County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Cook County, before the Judge thereof, between Joshua R. Bigelow, Charles H. Hayden and Henry W. Bigelow

plaintiffs, and Henry W. Andress, Charles Andress and ~~Henry~~ Charles W. Earll

defendants, it is said that manifest error hath intervened, to the injury of the said ~~defendants~~ plaintiffs

as we are informed by their complaint the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said ~~Henry W. Andress~~ Henry W. Andress, Charles Andress and Henry W. Earll

that they be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if they shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Henry W. Andress, Charles Andress and Charles W. Earll

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 31st day of March in the year of our Lord One Thousand Eight Hundred and Sixty-three.

L. Leland
Clerk of the Supreme Court.
by J. B. Rice Dep'y

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Joshua R. Bigelow
& als.

No. vs.

Henry W. Andrews & als.

SCIRE FACIAS.

Filed March 16th A. D. 1863

L. Leland Clerk.

Served this writ by reading the same to the within named Charles W. Earl this 4th day of April 1863. The other Defendents not found in my County. —

D. S. Hammond Sheriff Cook Co
By A. Nelson Deputy

Fees 70 Pd by Pl'ffs atty

Charles W. Earl on clark St. near Randolph
rest are in Cincinnati

Supreme Court of the
State of Illinois

Joshua R Bigelow
Charles A Hayden
Henry W Bigelow
Pltffs in error

vs

Henry W Andress
Charles Andress
Henry W Earll
Defts in error

I do enter myself security for costs in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this suit either to the opposite party or to any of the officers of this court in pursuance of the laws of this state.

Dated this 31st day of March 1863.

E. S. Smith
for Def Atty

Miles Abney

J. R. Bigelow et als.

vs

H. W. Andrews et als.

Bond for costs

Filed March 21. 1863.

Leland

Clk.

delivered the opinion of the Court.

Mr. Justice Walker. This record presents two questions for determination. First whether by commencing an attachment suit, and the service of garnishee process, the attaching creditor acquires such a lien upon property in the hands of the garnishee, as will authorise a court of equity, to interpose its restraining power, to prevent him from disposing of it before a judgment a judgment and execution are had in the proceeding at law. The second is, whether, independent of a lien, the court will entertain a bill to preserve the property, until it can be subjected to ~~legal~~ a sale on legal process, on the ground, that the garnishee has acquired all of his rights to the property, in fraud of the creditors of his vendor.

In reference to the first proposition, it may be said, that the plaintiff in attachment acquires all of his rights in that proceeding from the statute. If a lien exists by virtue of the service of garnishee

of proceeds, it is by virtue of the statute, as this proceeding is unknown to the common law. But the statute has not in terms made such service a lien, upon the effects of the debtor, in the hands of the garnishee. Under the act regulating attachments it seems to be the levy alone which creates a lien on property. The delivery of the writ does to the officer does not, as with an execution on a judgment, create a lien. Pierson vs. Robb, 3 Scam, 139. It is true the act does not give any priority of lien to the first levy, but requires a pro rata disposition of the proceeds of the sale of the property attached, on all the judgments rendered at the same term, on writs against the defendant, issued to that term.

It has been held, that such a levy is a qualified lien, on the estate attached for the satisfaction of the debt, which becomes merged in the judgment. The People vs Learned, 2 Gilm, 491. It was again held, that a levy on real estate, under a writ of attachment, pursued to judgment

execution and sale, made under it, operates as a lien on the lands, from the date of the levy. Martin vs Longden, 1 Wilm., 213. ~~Penny vs Little 3 Scam 305.~~ Again the court in the case of Burnell vs. Robertson, 5 Wilm., 282, held that when personal property was sold at private sale, ~~and~~ by the defendant in attachment, and the purchaser has not reduced it to possession, before the writ was levied, ~~it was held~~ to be subject to the attachment. These cases establish the fact that a lien is created by the levy of the writ upon the property.

But this ~~case~~ question of when the service of the garnishee summons, creates an actual or a qualified lien upon the effects in the hands of the garnishee, has not been determined, in terms, by this court. If as we have seen it is the levy upon the defendant's property which alone creates the lien, we are at a loss to perceive how, the mere service of a summons on a third person to appear and answer, whether he is indebted to, or has effects of the defendant in his possession, can create

a lien of any character. It is the seizure of the property and the writ, and not its delivery to the officer, that constitutes the lien. It is not notice actual or constructive as in case of a fi. fa. that produces that effect. The property is only in the custody of the law, when it is re-
=duced to the possession of the of-
=ficer.

By the service of the garnishee process, there can be no pretense, that the property is in any sense transfered to the officer, or that he thereby acquires any right to control it. The garnishee still has the right to retain it, and by the service only becomes liable, to ac-
=count for it or its proceeds, if judg-
=ment shall be rendered against him on the trial. The statute does not prohibit him from disposing of it, but only renders him liable on failing to produce it, to satis-
=fy the judgment.

The fifteenth section ~~section~~, it is urged, renders the ~~fund~~ property in the hands of the garnishee liable to satisfy the judgment against the

a lien of any character. It is the seizure of the property and not its delivery to the officer, that constitutes the lien. It is not notice actual or constructive as in case of a fi. fa. that produces that effect. The property is only in the custody of the law, when it is re-
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The fifteenth section ~~section~~, it is urged, renders the ~~fund~~ property in the hands of the garnishee liable to satisfy the judgment against the

debtor in attachment. The judg-
ment then refers to is obvious
by the one that ~~should~~ may be
recovered against the garnishee.
The latter clause of this section only
has reference to the judgment that
may be recovered against the gar-
nishee. By this provision, ~~the prop-~~
~~erty~~, not only ~~of~~ his, but the debt
or's property in his hands are made
liable to satisfy the judgment
against the garnishee.

The statute has nowhere provid-
for the sale of property, in the
hands of the garnishee, to satisfy
the judgment against the debtor.
This would seem to place it be-
yond doubt, that it was not the
design of the legislature to, ~~create~~
any lien on such property. It
was, however, regarded as eminent
by just, that the garnishee might
summon in the debtor's property in
his hands, to satisfy the judgm-
ent recovered against him, not
because he was a debtor but a
mere bailee, and in no default to
any person.

~~It would hardly be contended~~

It is insisted, that the construction contended for was given to a similar statute in Pennsylvania. Bradshaw vs West, 7 Pet., 608. But the provisions of that act are materially different from ours. It provides, that the officer executing the attachment, "shall go to the house, or to the person in whose hands or possession the defendants goods or effects are supposed to be, and there and then declare in the presence of one or more credible persons of the neighborhood, that he attacheth the property same goods or effects. Form and after which declaration, the goods money or effects so attached shall remain in the officer's power, and be by him secured, in order to answer and abide the judgment of the court in that case, unless the garnishee will give security therefor." It will be observed, that this statute, unlike ours, expressly declares that the property shall remain in the power of the officer, and be secured by him, to abide the judgment of the court. Our statute does not require the officer to secure

the property, nor does it require the garnishee to enter into bond before he can be permitted to retain it in his custody. If the garnishee desires to free himself of all liability he may surrender the property to the officer, and terminate the responsibility of its custody, or he may turn it out to be sold on execution to satisfy the judgment against himself. This is provided for by the statute. These provisions all repel the presumption, that the legislature designed, to create any lien upon, or place the property in the hands of the garnishee, in the custody of the law.

Then will a court of equity, independent of any lien acquired by the garnishment, entertain the bill, on the ground of the alleged fraud upon the creditors of the defendant in attachment, by the sale of his property to the garnishee. If so, it can only be, so for the reason, that complainant does not have a perfect, adequate and complete remedy at law. He has resort

to his action at law, and by that proceeding has acquired no other or different rights to, or interest in, the property, than he had before the proceeding was instituted. He may have acquired rights against the garnishee but not against the property of the defendant in his hands. Nor can we perceive, that his footing, in a court of equity, is any better or different than if the attachment had not been sued out. And we are not aware, that it has ever been seriously contended that an equitable attachment could be sustained. It was no doubt because no such remedy existed, that the legislature provided the means of reaching the garnishee property by garnishee process.

We are unable to perceive any thing to prevent the suit at law from progressing to its final termination, precisely as attachment suits always do. If discovery is desired, it can be as effectually had by the answer of the garnishee as by his answer to a bill. The interrogatories propounded to him may be made as searching and efficacious, as if they were

contained in a bill. If the answer of the garnishee is untrue it may be contradicted as well as an answer to a bill. Nor do we see that any grounds are shewn for an injunction, to restrain the garnishee from disposing of the property. The bill contains no allegation that there is any danger of loss before a trial can be had at law.

The complainants having no judgment, execution or even a lien on the property, they occupy the same situation as any other simple creditor, and an allegation of danger of loss would not give jurisdiction, in such a case. The current, as well as the weight of authority, both in Great Britain, and this country, seem to be, that a court of equity will not interfere, until the plaintiff has obtained his judgment and has acquired if he desires to remove a fraudulent obstruction removed, or if it is, to subject an equitable estate, not liable to sale on execution, he must exhaust his legal remedies, by obtaining a judgment and a return of nulla bona before a court of equity will afford such relief as

This question is not one of first impression in this court, but has been repeatedly before it for adjudication. In the case of Ballentine vs. Beall, 3 Scam., 203. it was held, that when a creditor has obtained a judgment, and has his execution returned no property found, he may file his bill, to subject property to the payment of his debt, not liable to sale on execution. In the case of Miller vs. Harrison, 3 Gilm., 518, it was held that where a party desires, to remove a fraudulent ~~debt~~ incumbrance, out of the way of an execution, he may file his bill as soon as he obtains his judgment. But if he seeks to satisfy his debt out of an equitable ~~estate~~ estate, not liable to sale on execution at law, then he must exhaust his legal remedy, by getting judgment, and an execution returned no property found, before he can resort to equity.

(98) mer. ship.

In the case of Manchester vs. McKee's exr's, 4 Gilm., 511, the same rule is announced as in Ballentine vs Beall. And in the case of Farnsworth vs Strasser, 12 Ills., 482, it was held, that the court

of equity would entertain a bill to remove a fraudulent conveyance, to obtain satisfaction of a money decree, where an execution had already been levied, upon the property. And in the case of Ishmael vs Parker, 13 Ill. 324, the same rule was adopted, as in Miller vs Davidson.

Subsequently in the case of Greenway vs Thomas, 14 Ill. 271, all of the questions involved in the case at bar were before the court. When it was held that a creditor, as a general rule, must first reduce his debt to a judgment before he can resort to a court of equity for aid in its collection. It was likewise held, that the rule would not be adopted, if it was in his power to comply with this requirement. In that case the bill alledged, that the debtor had left the State, after having made a fraudulent assignment for the benefit of his creditors, and put his assignee in possession of his property. It was also alledged, that process could not be served upon him, as an excuse for not first having obtained a judgment at law. It was there said, that

under these circumstances, there would have been no trouble in prosecuting an action at law, by attachment, under our statute, in which he could have reduced his demand to a judgment. The assignment being fraudulent and void as to creditors, the attachment might have been levied directly upon the assigned property, and taken from the possession of the assignees; Or if complainant did not choose to assume the responsibility of such a course, in anticipation of a decision upon the validity of the assignment, he might at least have garnished the debtors, of the assignors. It is true he would not have obtained a personal judgment, but he would still have established his claim in a court of law, which would at least, as to the property and credits attached, have authorized him to have called upon the aid of a court of Chancery to remove the encumbrances, which the fraudulent assignment presents to the collection of his debt."

These cases settle the doctrine, that the complainant, must first establish his claim at law, before a court of equity will lend its aid. And it is

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These cases settle the doctrine, that the complainant, must first establish his claim at law, before a court of equity will lend its aid. And it is

for the reason, that a court of chancery does not assume jurisdiction, to settle and establish purely legal rights. If jurisdiction me entertained in this case to ascertain the legal validity of complainants' demand, it being wholly of a legal character, ~~no reason is perceived~~ so as to afford relief against obstructions, that might afterwards present themselves to an execution, no reason is perceived why such jurisdiction, might not be assumed in all cases, where legal demands might be so obstructed. This would be an innovation on the settled practice of this court, as well as the chancery practice, generally. Whatever may have been held in other courts, we regard this as the practice of this court, too long and too firmly settled, to be departed from simply because it may have been differently held in some other tribunals. If the authorities are uniform against it, and it was not calculated to promote justice, there then might be some reason for a change. But when such is not the case,

and the amount of authority sustains the practice, we must adhere to the rule as the settled doctrine of the court. These decisions are conclusions of this case, and the decree of the court below must be affirmed.

~~Decree affirmed~~

~~In this opinion the whole Court concurred.~~

Decree affirmed.

J R Bigelow

129. WS 57.

A H Andrews

Opinion by
Williams.

Recorded
Page 703.

Complaint

$7 00

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the second Monday, (being the Fourteenth day) of April in the year of our Lord One Thousand Eight Hundred and Sixty two and of the Independence of the said United States the Eighty sixth

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Haven States Attorney.

Arthur Keeney Sheriff of Cook County.

Attest, William H Church Clerk.

Be it remembered that heretofore to wit on the Sixth day of December in the year of our Lord One thousand Eight Hundred and Sixty one there was filed in the office of the Clerk of said Court on the Chancery side thereof a certain Creditors Bill in words and figures following to wit.

State of Illinois
Cook County Circuit Court } In the Judges of said Court in Chancery Sitting.

Your Orators Joshua R Pegelow Charles H Hayden Henry M Pegelow who are Citizens of the State of Massachusetts residing and doing business at Boston under

the name style and firm of J R Bigelow Mayo & Co bring this their Bill against Henry W Andrews Charles Andrews and Charles W Earl.

And therefore your Orators Complain and say that heretofore to wit on the fifth day of December A. D. One thousand Eight hundred and Sixty One your Orators caused a Writ of attachment to issue out of the said Circuit Court of Cook County State of Illinois against the goods & Chattels lands and tenements of said defendant Henry W Andrews which said Writ has been served by Summoning Charles W Earl as Garnishee of said Henry W Andrews. And your Orators further State that the said defendant Henry W Andrews was formerly engaged in the Paper hanging business in the City of Chicago and State of Illinois and between the Eighth day of September A D 1859 and the first day of May A D 1860 purchased Sundry bills of goods of your Orators on a Credit and that for the goods so purchased of your Orators with interest on the same your Orators entitled to the first day of December A. D. 1861 the said Defendant Henry W Andrews was on the day last named indebted unto your Orators in about the Sum of Eight Hundred Forty Dollars and which said Sum is due and wholly unpaid, and your Orators further show unto your Honor upon information and belief a short time since (at what particular time your Orators are not informed and cannot state) the said

defendant Henry W Andrews made a pretended Sale or transfer of his Stock of goods to his Co-defendant and father Charles Andrews who is as your Orators are informed and believe a resident of Cincinnatti in the State of Ohio and that the said Charles Andrews now claims and pretends to own said Stock of goods and is by his pretended Agent Charles W Earl selling and disposing of them in said City of Chicago where the goods still remain. the said Henry W Andrews leaving left Chicago for parts unknown to your Orators.

And your Orators further show unto your Honor that they are informed and believe that said defendant Charles W Earl is in possession of said Stock of goods, and is engaged in selling and disposing of said Stock of goods as the Agent or Clerk of said defendant Charles Andrews

And your Orators further show unto your Honor that they are informed and believe that the said defendants Henry W Andrews and Charles Andrews were some two and a half years since Copartners in said business in the said City of Chicago, that while so engaged in business they contracted debts some of which the said defendant Charles Andrews claims that he afterwards paid and the said defendant Charles Andrews now pretends as your Orators are informed and believes that the said Stock of goods was

transferred to him as aforesaid by his said son Henry M Andress in payment of the amount which the said Charles Andress had or claims to have from the said Copartnership indebtedness as aforesaid And your Orators further show unto your Honor that they are remediless in the premises at & by the direct and strict rules of the Common law and cannot have adequate relief except in a Court of Equity - And that they cannot safely proceed to attach and sell the said goods of said Henry M Andress by reason of the said pretended transfer and of the Claim of said Charles Andress in and to said goods. And your Orators charge upon information & belief that the pretended sale or transfer of said stock of goods from said Henry M Andress to said Charles Andress is fraudulent and void as to your Orators and other Creditors of said Henry M Andress and that it was made for the purpose of hindering and delaying the Creditors of said Henry M Andress in the Collection of their debts against him, and of placing said stock of goods beyond the reach of the Creditors of said Henry M Andress and that a full and adequate Consideration was not paid by said Charles Andress to said Henry M Andress for said stock of goods. And your Orators further state upon information and belief that the said defendant Henry M Andress has no property within the State of Illinois

aside from said Stock of goods out of which Your Orators could make any portion of their said debt against them. And Your Orators pray that the said pretended Sale or transfer of said goods from said defendant Henry M Andrews to Charles Andrews may be adjudged & decreed to be fraudulent and void as to Your Orators and that said Stock of goods may be ordered to be sold to satisfy the Amount which shall be found to be due and owing to Your Orators from said Henry M Andrews - And that the said defendants Henry M Andrews Charles Andrews and Charles W Ball may be enjoined and restrained from selling assigning transferring delivering or in any manner incumbering or disposing of any of the said goods so as aforesaid transferred by said Henry M Andrews to Charles Andrews or from paying over or in any manner disposing of any money the avails of Sales of said goods until the further order of this Court.

And to the end that the said defendants may if they can show why Your Orators should not have the relief hereby prayed & may upon their Several and respective Corporal Oaths and according to the best and utmost of their Several and respective knowledge remembrance information and belief full true direct and perfect answer make to all and singular the matters and

being herein stated and charged and particularly to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are required to answer that is to say —

1st. Were not the said defendants Henry M. and Charles Andrews engaged in business at Chicago as Copartners as hereinbefore stated?

1st. Were not the said defendants Henry M. Andrews and Charles Andrews engaged in business at Chicago as Copartners as hereinbefore stated?

2nd. Did the Copartnership contract debts if yea — State to whom — and for what Amount.

3rd Did the said defendant Charles Andrews pay any portion of said Copartnership debts if yea State the Amounts paid, the Names of the persons or firms to whom paid and the date of Payment.

4th What Consideration (if any) did the said Charles Andrews pay to said Henry M Andrews for the Stock of goods so as aforesaid transferred to said Charles Andrews and taken and possessed the Same? paid — give all the facts and Circumstances in Relation to said transfer and the understanding between said Henry M and Charles Andrews in Relation thereto.

5th What was the object and purpose of the said transfer of said Stock of goods, and where did the said Henry M Andrews go when he left —

Chicago and where is he at this time and when was said transfer of said Stock of goods made.
6th. What was the Amount in Value at Cost price of said Stock of goods at the date of said transfer. was there a Correct Invoice of said goods then taken: if yea attach copy of said Invoice to your Answer:
7th. Has the said defendant Henry M Andress any property in the State of Illinois, other than said Stock of goods &c as aforesaid transferred to Charles Andress if yea: give a description of such property with its Value?
8th. What portion of said Stock of goods now remains unsold and undisposed of and what is the Value of Cost price of the said goods now remaining in the hands of said Charles Andress.

And that the said defendant Henry M Andress said named may also be in like manner prohibited from making any assignment of his property. and from confessing any judgment for the purpose of giving preference to any other Creditor over your Orator. and from doing any other act to Enable other Creditors to obtain his property. And that a Receiver may be appointed according to the Course of Practice in this Court. and with the usual Powers of Receivers in like Cases. of all the property Equitable interests things in Action and Effects of

the said Defendants Henry W Andress. And that Your Orators may have such further or such other Relief in the premises as the Nature of their Case shall require, and as shall be agreeable to Equity and good Conscience.

May it please Your Honor to grant unto Your Orators the People's Writ of Injunction, issuing out of and under the Seal of this Honorable Court to be directed to the said Defendants Henry W Andress, Charles Andress and Charles W Earl and to their Counsellors Attorneys Solicitors Trustees and Agents therein and thereby Commanding and Strictly Enjoining the said Defendants and the persons before mentioned in manner aforesaid.

And may it please Your Honor to grant unto Your Orator the People's Writ of Summons issuing out of and under the Seal of this Honorable Court to be directed to the said Defendants Henry W Andress Charles Andress & Charles W Earl - therein and thereby Commanding them and each of them on a Certain day and under a Certain penalty, to be therein expressed, that they personally be and appear before the Judge of the Circuit Court of the County of Cook aforesaid, at the Court Room in the City of Chicago there and then to answer all and singular the premises, and to stand to and abide by and perform such order and decree therein as to Your Honor shall -

5

Jews agreeable to Equity and good Conscience.
And Your Orators pray &c.

Joshua R Bigelow
Chas H Hayden
Henry M Bigelow
by J & I Smith

Ed J Smith
Complts Solrs
& of Counsel

State of Illinois }
County of Cook } ss.

On this Sixth day of December one thousand eight Hundred and Sixty one personally came before me John M Clyde who being duly Sworn Saith, that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief and as to those matters he believes it to be true. That he makes this affidavit as the agent of said Complainants

Subscribed and Sworn to
before me this 6th day of
December 1861

J M Clyde

Miles Olney
Notary Public

Seal

And afterwards to wit. On the Sixth day of December in the year last aforesaid Thereupon filed in the office of the Clerk of said Court a Certain Praecipe for Costs, which is in the words and figures following to wit:

Joshua R Bigelow
Charles H Bigelow
Henry W Bigelow
Vs.
Henry W Andrews
Charles Andrews
Charles W Clark

Circuit Court of Cook County
In Chancery

I do hereby enter myself security for Costs in this Cause, and acknowledge myself bound to pay or Cause to be paid all the Costs which may accrue in this action either to the opposite party, or to any of the officers of this Court in pursuance of the laws of this State.

Dated this Sixth day of December A.D. 1861

E S Smith

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It appears by the Entry on the Margin of the Clerks General Docket, that a Summons was issued to the defendants in this Cause, on the paid Sixth day of December in the year last aforesaid, which said Summons does not appear among the files in my office and after diligent search the same cannot be found

Wm L Chunk Clerk

Bill afterwards to wit on the twenty eighth day of February in the Year of our Lord One thousand eight hundred and Sixty two the said Complainants filed in the Office of the Clerk of said Court a certain demurrer to the said Complainants Bill of Complaint which is in the words and figures following to wit

Cook County Circuit Court.

Joshua R Pegelow
Charles H Hayden
& Henry M Pegelow
Complts
vs.
Charles Andrews
Charles H Clark &
Henry M Andrews

} In Chancery.

Come the said Charles Andrews and Charles H Clark, by Scates Mc Allister and Jewett their Solicitors by protestation not confessing or acknowledging all or any of the matters and things in the said Complainants Bill to be true in such manner and form as the same are therein set forth and alleged do demur thereto and for Causes of demurrer show that the Complainants have not by their said Bill shown such a case as entitles them to any such relief as is thereby prayed, inasmuch as it does not appear thereby, that they have ever obtained any judgment at law against the said Henry M Andrews upon the said supposed indebtedness

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or that there has ever been any lien obtained or acquired by the issuing of any Execution against the said Henry W Andress; and inasmuch as it also appears thereby that at the time of filing their said Bill of Complaint the said Complainants had only sued out an attachment against the Estate of said Henry W Andress And it does not in any manner appear in and by the said Bill of Complaint that the Complainants have recovered any judgment whatsoever in the said attachment suit in said bill mentioned.

Wherefore these defendants demand the judgement of this Honorable Court whether they shall be compelled to make any further answer to the said Bill on any of the matters or things therein contained and pray to be hence dismissed &c.

Scates McAllister & Jewett
Sols for Charles Andress & Chas W Earle

And afterwards to wit, on the ~~said~~ Ninth day of April in the year last aforesaid there was filed in the Office of the Clerk of said Court a certain notice which is in the words and figures following to wit

In the Cook County Circuit Court
In Chancery

Joshua R Bigelow
Charles A Bigelow
Henry W Bigelow

Vs.

Henry W Andrews
Charles Andrews &
Charles W Hall

} Plea in aid of Attachment

To Messrs Scates McAllister & Jewett.-
Attorneys &c. for defendants
Henry W Andrews and others

Gentlemen

You will please take notice that on Thursday the 17th day of April A D 1862 at 9 A.M. of said day or as soon thereafter as Counsel can be heard I will call up for argument the Demurrer filed in said Cause. When & where you may be present &c.

April 8th 1862. E S Smith
Solr for Complt

Personal Service of above on this 8th day of April 1862 admitted

Scates McAllister & Jewett
Defts Solrs

And afterwards to Wit. at the April Term of said Court. to Wit: on the twenty eighth day of April in the year last aforesaid. the following proceedings. among others. were had and entered of Record to Wit.

Joshua D Bigelow Complt
Haydon and Henry W Bigelow
Defts

Henry W Andress Charles Andress and Charles W Clark } Creditors Bill

This Cause coming on this day to be heard upon the demurrer of the said Defendants to the Complainants Bill of Complaint filed therein and the Court upon hearing Mr. E J Smith of Counsel for the Complainants and Messrs Coates Macalister & Smith of Counsel for the Defendants and Carefully Considering the premises and being fully advised therein doth find that the allegations in the Complainants said Bill of Complaint contained are not sufficient to entitle them to the relief prayed for therein. Therefore it is ordered that said demurrer be and the same hereby is sustained and the said Complainants ~~Defendants~~ electing to stand by their said ~~Bill of Complaint~~

It is therefore ordered adjudged and decreed that the Complainants said Bill of Complaint be and the same hereby is dismissed out of this Court with Costs to be taxed to which ruling and decision of the Court the Complainants by their Counsel now here Except

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of the Replevin proceedings in a certain cause lately pending in said Court, on the Chancery side thereof, wherein John R Bigelow Etw were Complainants and Henry W Andrews Etw Defendants

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this 25 day of March A. D. 186[illegible]

Wm L Church Clerk.

Supreme Court of Illinois
Third Grand Division

Of the term of April in the year of Our Lord A.D. One thousand Eight hundred and Sixty three.

Joshua R. Bigelow.
Charles A. Hayden.
Henry W. Bigelow.
Plffs in Error.
vs.
Henry W. Andress.
Charles Andress and
Henry W. Earll.
Defts in Error.

} Assignment of Errors.

Afterwards to wit on the first Monday Tuesday after the third Monday of April in this same term before the Justices of the Supreme Court of the state of Illinois at the Court house in the City of Ottawa Come the said Joshua R. Bigelow Charles A. Hayden and Henry W. Bigelow by E. S. Smith their Attorney and say that in the record and proceedings aforesaid and also in giving the decree aforesaid there is manifest error in this to wit

1. The Court erred in sustaining the demurrer to the complainants bill of Complaint.
2. The Court erred in decreeing that the Complainants bill of Complaint be dismissed
3. The Allegations in the bill of Complaint are

Sufficient to entitle the Complainants to the relief therein prayed for, and the Court erred in ruling otherwise

4. The Court erred in not overruling the demurrer to the Complainants bill of Complaint

And the said Joshua R. Pigelow. Charles H. Hayden. and Henry. W. Pigelow pray that the decree aforesaid for the Errors aforesaid. And other Errors in the record and proceedings aforesaid may be reversed. Annulled and altogether held for nothing. And that they may be restored to all things which they have lost by occasion of the said decree &c.

E. S. Smith
Atty for Deff in Error

Supreme Court of Illinois
Third Grand Division

Of the term of April in the
year of our Lord. One thou=
sand eight hundred and
forty sixty three

Joshua. R. Bigelow
Charles. H. Hayden and
Henry W. Bigelow
Plaintiffs in Error.
vs.
Henry. W. Andrews.
Charles. Andrews and
Charles W. Ewell.
Defendants in Error

} Assignment of Errors

Afterwards to wit On the first Tuesday
after the third Monday of April in this same
term before the Justices of the Supreme Court of the
State of Illinois at the Courthouse in the City of
Ottawa. Come the said Joshua R. Bigelow. Charles.
H. Hayden. and Henry. W. Bigelow. plaintiffs in Error
by C. C. Smith their attorney and say that in the record
and proceedings aforesaid and also in giving the
decree aforesaid there is manifest Error in this to wit
1. The Court Erred in sustaining the demurrer to the
Complainants Bill of Complaint 2. The Court erred in
decreeing that the Complainants Bill of Complaint
be dismissed 3. The Allegations in the Bill of Complaint
are sufficient to entitle the Complainants to the relief
prayed for and the Court erred in ruling otherwise.

4. The Court erred in not overruling the demurrer to the complainants Bill of Complaint

And the said Joshua R. Ringlow. Charles N. Ringlow and Henry W. Ringlow pray that the decree aforesaid for the errors aforesaid and other errors in the record and proceedings aforesaid may be reversed annulled and altogether held for nothing. and that they may be restored to all things which they have lost by occasion of the said decree.

C. S. Smith
Attorney for Pltffs in Error

And the said Defendants in Error by McAllister Jewett & Jackson their attorneys, come and say that there is no error in the record and proceedings aforesaid in manner & form as above alleged Wherefore they pray judgment &c

McAllister Jewett & Jackson
Defts attys

Supreme Court of the State of Illinois
Joshua R. Ringlow et al
vs
Henry W. Andrews et al
Errors, in Error

Filed April 16. 1873
E. Leland
Clerk

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Supreme Court of Illinois
Third Grand Division
April Term 1863

John R. Bigelow et al
Defts in Error
—vs—
Henry W. Andrews et al
Defts in Error

Record
and
Assignment of Errors

Filed March 31. 1863.
L. Leland
Clk.