# FERRETT ET AL. V. ATWILL.

Case No. 4,747.

{1 Blatchf. 151;[1] 4 N. Y. Leg. Obs. 215, 294.}

Circuit Court, S. D. New York. April Term, 1846.

QUI TAM ACTION—NUMEROUS SUITS AGAINST SAME DEPENDANT—ABIDING THE EVENT OF ONE—COPY-RIGHT IMPRINT ON WORK NOT COPYRIGHTED—PENALTY—RECOVERY BY TWO PERSONS—DEMURRER—ALLEGATION OF ALL NECESSARY FACTS.

1. Where a plaintiff brought eleven qui tam actions for penalties against the same defendant, the defendant having demurred to the declaration in each case, and the pleadings in all being alike, a motion by the plaintiff that the demurrer in one of the cases be argued, and that the others abide its event, and all proceedings in them be stayed meanwhile, was denied.

{Cited in Keep v. Indianapolis & St. L. R. Co., 10 Fed. 459; Winne v. Snow, 19 Fed. 508.}

2. Upon issues of law, the party bringing a multiplicity of suits must take the responsibility of meeting them in the usual way.

3. The penalty imposed by section 11 of the copy-right act of February 3, 1831 (4 Stat. 438), for putting the imprint of a copy-right upon a work not legally copy-righted, and given by the act to "the person who shall sue for the same," cannot be recovered in the name of more than one person.

4. A declaration for such penalty in the name of two persons is bad on general demurrer.

5. In an action on a statute, the party prosecuting must allege every fact necessary to make out his title and his competency to sue.

{Cited in Fish v. Manning, 31 Fed. 341.}

{Cited in Waddle v. Duncan, 63 Ill. 225; Tabor v. Herrick, 54 Vt. 631; Cummings v. Brock, 56 Vt 311.}

6. The language of the statute is to be particularly adhered to in the construction of penal laws.

{Cited in U. S. v. Morris, Case No. 15,814; U. S. v. Clayton, Id. 14,814; U. S. v. Williams, 3 Fed. 491; Pentlarge v. Kirby, 19 Fed. 503, 504; U. S. v. Comerford, 25 Fed. 904.}

7. It seems, there might be a difference between the construction of a statute giving a penalty to a common informer, and of one imposing a penalty for the benefit of a person aggrieved by its violation.

8. A charge by a defendant in a bill of costs, for services in putting in special bail a second time, is not taxable, where the second service was made necessary by the failure of the bail first put in to justify.

9. Nor are an attorney's charges for a rule to declare, or for services in obtaining security for costs, allowable in each one of eleven suits, where the attorneys in all the suits were the same, and the services were rendered on one set of papers entitled in all the suits.

10. Nor are such charges allowable in each suit, even where separate sets of papers are made in each suit.

11. A charge for perusing demurrer by counsel in each one of eleven suits is allowable, although the pleadings in all the suits were alike.

12. Where the pleadings in eleven suits were alike, and they were all argued on demurrers, but there was only one argument in fact for all the cases: *Held,* that demurrer books, and brief and points, were taxable in each case, if they were actually made out in each at the time of the argument, which fact must be shown to the officer, if the charges were objected to; and that attorney and counsel fees on argument were taxable in each case.

{This was an action at law by Edmund Ferrett and Timothy S. Arthur, suing jointly for themselves and the United States, against Joseph F. Atwill.}

This suit was one of eleven brought by the same plaintiffs against the same defendant. Each of the actions was debt for a penalty, for an alleged violation by the defendant of the eleventh section of the copyright act of February 3, 1831 (4 Stat. 438), in publishing a musical composition, called the "Alethia Waltz," with an imprint of a copy-right upon it, when he had not at the time legally acquired a copy-right. The defendant was held to bail in each suit. The defendant demurred specially to each declaration, and the plaintiffs joined in demurrer. The plaintiffs now applied for an order that

demurrer in one of the cases be argued, and that, in the meantime, all proceedings in the others be stayed and they abide the event of the one to be argued. The pleadings were alike in all the suits.

The court said that they knew of no case where such an application had been made by the plaintiff on an issue of law; that applications of the kind in regard to issues of fact to be tried at a circuit were generally made by a defendant, in which cases a regard for the time of the court and for the expenses of trials entered into the question; that upon issues of law, the party bringing a multiplicity of suits ought to take the responsibility of meeting all the cases in the usual way, if his adversary saw fit to notice them for argument; that, of course, if it turned out that the same question was involved in all of them, one argument only would be heard; but that to relieve a plaintiff from the responsibility in cases like these, might lead to experiments upon the court as regarded the law of the cases, without any proper check upon the multiplication of suits. Motion denied, with costs.

The argument of the demurrers was then brought on. The declaration contained two counts. The first count alleged that the defendant, within two years before the commencement of the suit, published at New-York a certain musical composition, called the "Alethia Waltz," and printed on its face these words: "Entered according to act of congress, A. D. 1844, by Joseph F. Atwill, in the clerk's office of the district court of the southern district of New-York;" and that he had not, at the time of the publication, acquired the copy-right of the composition under the laws of the United States. The penalty claimed was $100. The second count alleged the like publication of a volume of music by the same name, and with the same imprint, and claimed the same penalty. The principal ground of demurrer assigned was, that the action was commenced by two jointly, for themselves and the United States, whereas an action to recover the penalty sued for in the case, could only be brought by one person qui tam.

Samuel Sherwood and Randolph "W. Town-send, for plaintiffs.

Marshall S. Bidwell and Samuel Owen, for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. The decision of the court in this case being limited to two points, we do not consider it proper to discuss the other questions involved in the pleadings, and argued at length by the counsel; and our judgment being peremptory against the action, an attempt now to settle the other points presented by the case, will not, as if an amendment were allowed, tend to abridge litigation or to aid the parties in the disposition of the cause.

The declaration contains two counts, each of which demands a distinct penalty of $100. The first count charges that the defendant, on the first of July, 1845, at New-York, published a musical composition, called "Alethia Waltz," and falsely inserted therein and impressed upon the face thereof, the words: "Entered according to act of congress, &c,"

without having at the time legally acquired the copy-right of the said musical composition. The second count alleges that the defendant, at the time and place aforesaid, published a volume of music, called "Alethia Waltz," and falsely inserted therein and impressed upon the title thereof, the words: "Entered according to act of congress, &c.," without having at the time legally acquired the copy-right of the said volume of music.

The defendant demurs to the declaration, and, in connection with the general demurrer, assigns various causes of demurrer, only one of which is passed upon by the court; to wit, that the action is brought by two persons jointly, for themselves and the United States of America. Some exceptions were taken to the sufficiency in form of the special demurrer, but we do not regard the question as material, the objection to the declaration being good on general demurrer; because the right of action, if any, is under the statute, and the declaration must show that the party suing is competent to maintain the suit. Almy v. Harris, 5 Johns. 175. The decision, accordingly, rests upon this, that the act of congress does not authorize an action in the name of several persons and the United States, for the recovery of the penalties incurred by its violation.

The provisions governing the question are contained in the eleventh section of the act, which enacts, "that, if any person or persons, from and after the passing of this act, shall print or publish any book, map, chart, musical composition, print, cut, or engraving, not having legally acquired the copy-right thereof, and shall insert or impress that the same hath been entered according to act of congress, or words purporting the same, every person so offending shall forfeit and pay one hundred dollars; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action of debt, in any court of record having cognizance thereof."

In actions directly upon a statute, or on rights derived from a statute, the party prosecuting must allege, and consequently prove, every fact necessary to make out his title to the thing demanded, and his competency to sue for it. Com. Dig. "Action on Stat." A 1–3, and "Pleader," c. 76. An informer cannot support an action unless there be an express provision in the statute enabling him to sue. Rex v. Malland, 2 Strange, 828; Fleming v. Bailey, 5 East, 313. And, if

the statute creating the penalty, and bestowing it upon the informer, does not give the mode of proceeding, he is hound to set forth the special matter upon which the right of action arises, and allege and prove in what way the penalty vests in him. Cole v. Smith, 4 Johns. 193; Bigelow v. Johnson, 13 Johns. 428; Smith v. Merwin, 15 Wend. 184; Fairbanks v. Antrim, 2 N. H. 105; Ellis v. Hull, 2 Aiken, 41. The doctrine in effect is applicable to actions founded upon statutes other than for penalties; for, when a statute is made to remedy any mischief or grievance, or to bestow any interest or right upon an individual, the mode of remedy, when one is designated by it, must be exactly followed. Stowell v. Flagg, 11 Mass. 364; Stevens v. Proprietors of Middlesex Canal, 12 Mass. 466. And, if the form of remedy is not pointed out, and the law supplies one by implication, the plaintiff must aver and prove every fact necessary to show the existence of the right in him under the statute. Bigelow v. Cambridge & C. Turnpike Co., 7 Mass. 202; Bigelow v. Johnson, 13 Johns. 428. We think, under these well established rules of law, that the two plaintiffs prosecuting this action do not come within and satisfy the provisions of the statute giving the penalty "to the person who shall sue for the same."

There is a manifest distinction between giving a penalty to a common informer, and imposing one for the benefit of the person aggrieved by the violation of the statute. In the latter case the term "person" might justly be regarded as comprehending every one affected by the injury; because, the design of such enactment must be to give a remedy co-extensive with the mischief or grievance provided against this consideration has no relation to positive penalties established as sanctions of the law, and not intended to recompense individuals because of their particular injuries.

The language of the statute is to be particularly adhered to in the construction of penal laws, and, when it has a natural and plain meaning, an artificial or forced one is not to be adopted. 1 Bl. Comm. 88; Dwar. St. 707, 711; Van Valkenburgh v. Torrey, 7 Cow. 252. Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied. U. S. v. Sheldon, 2 Wheat [15 U. S.] 119; Myers v. Foster, 6 Cow. 567; Daggett v. State, 4 Conn. 61. They sedulously limit the action of penal statutes to the precise cases described in them, and reject an interpretation tending to comprehend matters not named by the legislature, although analogous. The authorities cited are explicit to this point and are in unison with numerous others, English and American. Cone v. Bowles, 1 Salk. 205; Reniger v. Fogossa, 1 Plowd. 17; Fleming v. Bailey, 5 East 313.

The privilege of claiming or enforcing a penalty is one of statutory appointment, and must be construed with like strictness. In an action by husband and wife against executors, to recover a penalty imposed by statute for not proving a will within a fixed period, one-half of the penalty being given to the plaintiff and the other to the legatees, and the wife being a legatee, it was held by the supreme court of Massachusetts, that the suit

could not be maintained in the name of husband and wife, the action being a popular one, and there being no joint interest in the verdict Hill v. Davis, 4 Mass. 137. The doctrine was still more fully and explicitly declared in a later case in that court in which it was held that several persons could not unite in a qui tarn action as informers, the right to sue in such case resting upon the express provisions of the statute. Vinton v. Welsh, 9 Pick. 87. When the penalty is given to "any person or persons," a corporation aggregate cannot sue for it 1 Kyd, Corp. 218; Weavers' Co. v. Forrest 2 Strange, marg. p. 1241. Hammond, in his treatise on Parties (48), says: "It seems two cannot join as common informers in a penal action, unless specially allowed by statute."

The plain language and sense of the statute under consideration, restrict the right of action to a single person; and we should not be disposed, on general principles, to enlarge its operation, so as to encourage associations of individuals in instituting and conducting penal actions, the nature of those actions in our opinion exacting a rigorous adherence to the terms of the law.

Judgment is accordingly rendered in this case for the demurrant with costs; and the same judgment is rendered in the ten other suits between the same parties on like pleadings.

In taxing the defendant's costs on the demurrers in the eleven cases, several questions arose. The costs were taxed by the clerk. There were eleven bills of costs all alike. 1. There were two sets of charges in each bill for putting in special bail, the bail first put in not having justified. 2. Each bill contained charges for a rule to declare, and for services in obtaining security for costs, the attorneys in each suit being the same, and there being but one rule in each matter, and but one set of papers, in which the titles of all the causes were included. 3. Each contained a charge for perusing demurrer by counsel. 4. Each contained a charge for a rule to join in demurrer, there being a separate rule in each suit 5. Each contained charges for five demurrer books, and for brief and points, and for attorney and counsel fees on argument there having been but one argument in fact for all the cases. The plaintiffs appealed to the court from the taxation as to the above items.

NELSON, Circuit Justice. 1. The second set of charges for putting in special bail

should have been stricken out, because they were incurred by the neglect of the defendant in not causing the bail first put in to justify, and for his own benefit. 2. The defendant's attorney is not entitled to a separate charge in each suit for the services embraced in this item. The settled practice is against the allowance. Jackson v. Keller, 18 Johns. 310; Schermerhorn v. Noble, 1 Denio, 682. 3. This item is taxable in each suit Rule 27, Cir. Ct. U. S. 4. It is urged that this item is distinguishable from the second, because there was a separate rule in each suit. But the principle is the same, and has been so held since the case of Jackson v. Clark, 4 Cow. 532. There can be but one charge for the service, as respects attorney's fees. 5. The demurrer books, and brief and points, are taxable in each case, if they were actually made out in each at the time of the argument. The fact must be shown to the taxing officer, if objection be made to the charge. Attorney and counsel fees on argument are taxable in each case.

{NOTE. Subsequently, the defendant in this case filed a bill in equity against Ferrett and others for an injunction and for other relief, for a violation of complainants' copy-right Case No. 640.}

[1] {Reported by Samuel Blatchford, Esq., and here reprinted by permission.}