

Case No. 17,893.

WINTER ET AL. V. SIMONTON.

[3 Cranch, C. C. 62.]¹

Circuit Court, District of Columbia.

Dec. Term, 1826.

COVENANT—ACTION BY SURVIVING PROMISEES.

In an action of covenant by two survivors, upon a charter-party made with three persons, the declaration should state the death of one, and aver that the defendant had not paid the money to the three, or to either of them.

Covenant, on a charter-party made to Samuel Winter, Samuel G. Bowman, and Joshua Bowman. The declaration was in this form:—"John W. Simonton, late of Washington county, was summoned to answer to Samuel Winter and Samuel G. Bowman, survivors of Joshua Bowman, in a plea that he keep with them the covenants made between the said Samuel Winter, and Samuel G. Bowman, and one Joshua Bowman, now deceased, and the said John W. Simonton according to the force, form, and effect of certain articles of agreement of charter-party executed between them, &c., and whereupon the said Samuel Winter and Samuel G. Bowman, by Samuel B. Barrell their attorney, say," &c. And after setting forth the terms of the charter-party, and the employment of the vessel by the defendant, until she was totally lost by the perils of the sea, and that according to the terms of the charter-party the sum of \$2,734.17 had become due by the defendant, of which he had notice, "yet though often requested the said Simonton has never paid said sum of \$2,734.17 to the plaintiffs, but hath wholly refused and neglected so to do contrary to the form and effect of the said charter-party, and of the said covenants of the said defendant, by him in that behalf made with the said plaintiffs in manner and form aforesaid," &c.

To this declaration the defendant demurred generally; and objected: (1) That the death of Joshua Bowman is not stated in the declaration, but only in the recital of the writ, which is no part of the declaration, but a mere formal part of the record to be made up by the clerk. (2) That it is not averred that the money was not paid to Joshua Bowman in his lifetime. 2 Selw. N. P. 405, 406; Hardr. 320; 1 Chit Pl. 79, note, 304, 317, 326. (3) That it is not averred that the defendant did not give good bills on Boston, New York, or Philadelphia, which by the

terms of the charter-party he was allowed to do.

Mr. Jones, for plaintiffs, contended: (1) That the recital was a sufficient averment of the death of Joshua Bowman. 1 Har. Ent. 35. (2) That the averment that the defendant had never paid the money, implies that it was not paid to the three, or either of them. (3) That although there were two modes of payment allowed, yet a general averment of non-payment included both.

R. S. Coxe, in reply. (1) The death of Joshua Bowman is only suggested in the recital of the writ. There is no averment of his death upon which the defendant could take issue. The precedents all require a positive averment of the death in the declaration. 1 Har. Ent. 35, 163; 2 Chit. 45; 2 Selw. N. P. 405. (2) The averment in the declaration is that the defendant did not pay the money to the plaintiffs; but he might have paid it to Joshua in his lifetime. The covenant is to pay to the three, not to two only. The breach should be coextensive with the covenant. (3) The covenant upon over differs from the statement of it in the declaration, where it does not appear to be in the alternative.

THE COURT (MORSELL, Circuit Judge, absent) said that the 2d objection was fatal, and gave no opinion as to the others. The plaintiffs had leave to amend on payment of costs.

{See Cases Nos. 17,892 and 17,894.}

¹ [Reported by Hon. William Cranch, Chief Judge.]