

ant answered over, as the case might be. If the defendant had not appeared, the judgment would have been precisely what it was here.

It is asked why did the defendant appear, if not to submit generally to the jurisdiction, when, if he had stayed away, the present questions could not have been mooted. He may not have been wise, but his motive probably was to prevent the recovery of a judgment, which, as the law of Vermont is understood to be, and as it undoubtedly was in 1873, would be held a valid personal judgment against him in that state. Decisions of the state courts, affirming the validity of judgments obtained in other states, could not have been reviewed by the supreme court of the United States until the adoption of the fourteenth amendment, and I do not know that any such case has been so reviewed since that time, though there is an intimation in *Pennoyer v. Neff*, 95 U. S. 714, that such a jurisdiction may now exist. It was therefore of some importance to the defendant to prevent a judgment from being obtained which might oblige him to avoid the state of Vermont, which he had some occasion to visit.

I decide that the judgment sued on is not a valid personal judgment against the defendant. Twenty days are given for settling a bill of exceptions, after which there will be judgment for the defendant.

TILTON v. BARRELL and another.*

(Circuit Court, D. Oregon. December 27, 1882.)

1. MARRIED WOMAN—STATUTORY RIGHTS.

Under the act of October 21, 1880, (Sess. Laws, 6,) the wife is relieved of all "civil disabilities" not imposed upon the husband; and her "rights and responsibilities" as a "parent" are "equal" to those of the latter, and therefore she is, in legal contemplation, as much the head of the family as he is, and he may as well be presumed to be living with her as she with him.

2. SAME—LIABILITY AT COMMON LAW.

At common law a husband and wife might be jointly sued for a trespass which, in legal contemplation, might be committed by two persons; and this includes an action of ejectment, which was originally only a remedy for trespass upon the rights of the termor or lessee, by depriving him of the possession during his term or time in the land.

3. SAME—LIABILITY UNDER STATUTE.

But under the act of October 21, 1880, *supra*, the wife is as liable for the unlawful occupation of another's property as the husband is; and, if they are both in the possession they may be joined as defendants in an action to recover the same as though they were unmarried, and an allegation in the complaint that they "are husband and wife," is immaterial and may be disregarded.

*Affirmed. See 7 Sup. Ct. Rep. 332.

At Law. Action to recover possession of real property.

Henry Ach, for plaintiff.

W. W. Chapman, for defendant.

DEADY, D. J. The plaintiff, a citizen of New York, brings this action against the defendants, citizens of Oregon, to recover the possession of a tract of land containing $13\frac{1}{4}$ acres, alleged to be worth \$13,000, and situate in the county of Multnomah. It is alleged in the complaint that the plaintiff is the owner in fee-simple of the premises, and entitled to the possession of the same; that "the defendants are husband and wife," and are in "the wrongful and actual possession" of the premises, and "wrongfully withhold a possession thereof from the plaintiff."

The defendant Aurelia Jane Barrell demurs to the complaint, and assigns as causes of demurrer the following:

"(1) That as the wife of Colburn Barrell she is improperly joined with him in the plaintiff's complaint.

"(2) That the complaint does not state facts sufficient to constitute a cause of action, because she is sued as the wife of her co-defendant, and there are no allegations in the complaint of a cause of action for which she, as such, is responsible or liable."

The allegation that "the defendants are husband and wife" is an immaterial one—quite as much so as if it had been alleged they were father and daughter, brother and sister, uncle and niece, or even partners in trade. The defendants are not sued *as* "husband and wife," but as Colburn and Aurelia Jane Barrell,—two natural persons, and distinct individuals,—to recover from them and each of them the possession of certain premises which plaintiff alleges that they, both of them, wrongfully withhold from him. A judgment against one of them for the possession will not authorize the removal of the other. Nor is it known but that the defendants are in possession under a claim of right to or interest in the premises in both the husband and wife, or in the latter exclusively. Assuming, as the demurrer admits, that the complaint is true, the occupation of the premises by the wife is as much a wrong to the plaintiff as the husband's. The removal of one of them upon the judgment and process of the court is as necessary to the full enjoyment of his right of possession as the other.

By the act of October 21, 1880, (Sess. Laws, 6,) the wife is relieved of all "civil disabilities" not imposed upon the husband. Her "rights and responsibilities" as a "parent" are "equal" to those of the husband. In short, she is now, in legal contemplation, as much the

head of the family as he is, and he may as well be presumed to be living with her as she with him. More properly speaking, they may be said to live together as equals—conforming, so far as may be, their individuals wills and conduct to the requirements and exigencies of the marital relation.

But I do not understand that, even at common law, ejectionment to recover the possession of premises unlawfully withheld did not include the case of an unlawful occupation by a married woman, or that her occupation, if conjointly with that of her husband, was therefore so merged in his that the law could not take cognizance of it and give relief against it directly.

Mr. Chitty says (1 Chit. 105) that for "trespass, which may in legal contemplation be committed by two persons conjointly, and for which several persons may be jointly sued, the husband and wife may be sued jointly for the act of both;" but the wife can only be sued "for her own actual wrongful trespass," and cannot become a party to a trespass "by her previous or subsequent assent" thereto during coverture.

The foundation of the action of ejectionment—*ejectione firmæ*—is the trespass committed by the intruder upon the term of the termor or lessee, and originally the relief obtained by it was confined to damages for such trespass, but by the end of the fifteenth century the plaintiff in the writ was allowed to recover both his term and damages. Adams, Eject. 7-9.

The trespass or injury to the plaintiff's right of possession complained of in this case, so far as appears, is the act of each of the defendants, and can only be redressed by a judgment for the possession against both of them. It may be that if the husband is removed from the premises, the wife, from considerations of domestic convenience or marital obligations, will follow him. But she may not; and, as has been said, she may remain in the possession, claiming the same in her own right, and may also allow her husband to return to the premises and occupy under her, and thus compel the plaintiff to relitigate his right to the possession with her in a separate and subsequent action. But the plaintiff is entitled to bring his action against all persons in the actual possession of the premises (Or. Code Civil Proc. 314) and recover the same, as against them all, in one action. If there is any one among them who has no claim to the possession otherwise than as a person sustaining a domestic relation to a co-defendant, he or she must decline the contest, or stand or fall with such co-defendant.

The demurrer is overruled.

BULL and others v. FIRST NAT. BANK OF KASSON and another.

(*Circuit Court, D. Minnesota. January, 1883.*)

1. NEGOTIABLE PAPER—DRAFT—WHEN OVERDUE.

In determining a question as to the sufficiency of a defense interposed by the drawer or indorser of a draft, payable on presentation or demand, when sued thereon, the draft must be considered as overdue if it was not presented for payment within a reasonable time, and a delay of over five months is unreasonable.

2. SAME—REASONABLE DILIGENCE IN PRESENTMENT AND DEMAND.

The holder of a draft or check, payable on demand, is bound to use reasonable diligence in forwarding the same according to the usual course of business, and notice of non-payment be given to the indorser in order to hold him.

3. SAME—DEFENSES—SET-OFF.

Under the statute of Minnesota defendant may set up any claim against the original party which arose out of the subject-matter of the action, or was acquired by defendant while the chose in action was in possession of the original party, or before defendant had notice that he had assigned it for a valuable consideration.

At Law.

Jury waived, and tried by the court.

Lamprey, James & Warren, for plaintiff.

Charles C. Willson and Jones & Gove, for defendants.

McCRARY, C. J. This is a suit upon two drafts drawn by the defendant bank in favor of the defendant La Duc, for \$500, each dated October 13, 1881. They are in the usual form of bank drafts. No time of payment is named, but they were payable upon presentation and demand. On the day of their date they were indorsed by defendant La Duc and delivered to one M. Edison, who, the next day, left the state of Minnesota, carrying the drafts with him, and leaving numerous debts unpaid and no property out of which they could be collected. The said Edison held the drafts over five months without presenting them for payment, and then sold them to the plaintiffs at Quincy, Illinois. The bank pleads by way of defense a set-off or counter-claim against Edison. The defendant La Duc claims that he is discharged as indorser by the long delay before the drafts were presented for payment.

The sufficiency of these defenses depends upon the question whether the paper can be regarded as overdue or dishonored at the time the plaintiffs took it. The general rule undoubtedly is that a draft or check is not due, for the purpose of being made the foundation of a suit against the drawer or indorser, or for the purpose of