

signee. The assignee has moved to dismiss the appeal for this cause, among others; and the motion has been heard by consent of parties, which was required before hearing, although this case is not within the terms of the statute in relation to hearing appeals from a district court by a district judge. Rev. St. § 614.

The failure to give notice of the appeal to the adverse party, as required by section 4981, Rev. St., is fatal to it, and good ground for moving to dismiss it. *Wood v. Bailey*, 21 Wall. 640. Unless the moving creditor in the district court is the adverse party, within the meaning of section 4981, this appeal must, on the authority of that case, be dismissed. The provisions of that section must be read with the others on the same subject for a correct understanding of them. The preceding section allows appeals in equity, and writs of error at law, when the debt or damages claimed amount to more than \$500, and gives an appeal to "any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim." This section requires the notice to be given "to the assignee or creditor, as the case may be." The assignee represents the estate, and is the adverse party to all claimants against the estate. He is the party who, by section 4984, must plead or answer to the declaration of the claimant, and against whom, by section 4985, costs are to be taxed as "the adverse party," if the claimant prevails. A creditor applying for and procuring the examination of a claim does no more than the court may do of its own notion, and does not become a party to that particular claim. Section 5081. Such creditor merely sets the machinery in motion to have the claim adjudicated by the court; the defense of the claim must always be in the name and behalf of the assignee. There are no provisions for making such moving creditor any otherwise a party. The words "assignee or creditor, as the case may be," must mean assignee when the creditor appeals, and creditor when the assignee appeals. When the creditor appeals, the assignee is the one who must plead and make defense, and the one who needs notice of the appeal to act upon. He is the adverse party, in the sense of section 4981.

Motion granted and appeal dismissed.

UNITED STATES *v.* SMITH.

(Circuit Court, D. Massachusetts. August 8, 1883.)

1. VERIFICATION OF SUMMARY COMPLAINT FOR OFFENSE ON HIGH SEAS—NOTARY PUBLIC.

In case of a summary complaint for an offense on the high seas the oath must be taken before the court or judge, or clerk of court, or some commissioner, who, in the absence of the judge, may be applied to for a warrant or summons; and

an affidavit taken before a deputy clerk, acting not as clerk, but as a notary public, is not sufficient.

2. SAME—MOTION IN ARREST OF JUDGMENT.

Such summary proceedings are put by the statute substantially on the footing of civil cases, and it seems that the want of due verification of the complaint is waived by the voluntary appearance of the accused. At any rate the error is amendable, and cannot be urged for the first time in arrest of judgment.

On Writ of Error.

Chas. Almy, Jr., Asst. U. S. Dist. Atty., for the United States.

E. W. Burdett, for Smith.

LOWELL, J. The defendant, who was the second mate of the American bark *Fantie*, was charged with an assault upon one of the crew of the same vessel, upon the high seas. The charge was made in the form of a summary complaint, presented to the district court, under section 4301 of the Revised Statutes. Upon a trial by jury the defendant was convicted, and moved, in arrest of judgment, that the complaint was not duly "verified by oath in writing," as required by the section cited. The complainant's oath was taken before a notary public. This motion was denied, and the defendant was sentenced to imprisonment for two months, and duly prosecuted his writ of error.

Two questions have been argued: *First*, whether a notary public has power to administer and certify the oath; *second*, whether the objection can be taken for the first time in arrest of judgment.

1. The first point appears to be well taken by the defendant. Counsel have examined the statutes with diligence, and none has been found which gives a general authority to any officer to take affidavits in criminal cases. The law of August 23, 1842, § 1, (5 St. 516,) makes a distinction between civil and criminal business, giving commissioners of the circuit courts authority to take bail, affidavits, and depositions in civil causes; while, in criminal proceedings, they are to have the powers of justices of the peace, and other magistrates, in arresting, imprisoning, and bailing offenders. This distinction is preserved in the Revised Statutes. Notaries are put on the footing of commissioners, in respect to depositions and affidavits, by St. 1876, c. 304, (19 St. 206;) but this is in civil causes, because commissioners have no general powers in respect to depositions and affidavits in criminal proceedings. Their power is to hold to bail, etc., according to the course of practice in the several states, (Rev. St. § 1014;) and, as incidental to that power, they can, of course, take the requisite evidence. In Massachusetts, the same magistrate who takes the oath to the complaint must issue the warrant, or summons, as the case may be. Pub. St. . 212, § 15. One magistrate cannot commit upon an affidavit taken before another.

In the case, therefore, of a summary complaint for an offense on the high seas, it would seem that the oath must be taken before the court or judge, or, perhaps, the clerk, or before some commissioner, who, in the absence of the judge, may be applied to for a warrant or a

summons. The affidavit here was taken before the deputy clerk, acting not as clerk, but as notary.

2. The second point must be decided for the government. These summary proceedings are put by the statute substantially on the footing of civil cases. It is provided that the defendant may plead, or answer, or make a counter-statement; and that the district attorney may amend his complaint at any time before verdict, if in the opinion of the court the amendment will work no injustice to the accused; and, if necessary, an adjournment shall be made to enable the accused to meet the amended complaint. Rev. St. §§ 4301, 4302. All this is as far removed as possible from ordinary criminal pleadings and proceedings; and the statute is found to be as favorable to defendants as to the United States, in the saving of time and expense. The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court; but, so desirous are the accused to have the benefit of a speedy determination, even when it must be against them, that they will often plead guilty, or *nolo contendere*, to complaints for small offenses, to which they profess to have a defense, rather than be put to the expense of awaiting the action of the next grand jury.

It is not usual to issue warrants of arrest, or, indeed, any process in these cases. The complaint is filed and the accused appears, and the case proceeds. In this case there is no record of any summons or warrant. The fourth amendment to the constitution, therefore, which requires an oath to support a warrant, has no application. Under these circumstances, I am much disposed to believe that the want of due verification of the complaint is waived by the defendant's appearance; for the oath is required, I think, to meet the fourth amendment of the fundamental law, in case a warrant should be called for. I have no doubt that the mistake could have been amended at any time before verdict, because the statute contemplates amendments of substance as well as of form, if the defendant is not to be injured thereby; and even if he is called on to meet a new case, he may be required to do so after a reasonable adjournment. This oath is scarcely a matter of substance, for it may be taken by any one having information and belief, and is almost always taken by the district-attorney, or one of his assistants.

Under these circumstances, and with pleadings as liberal as are provided for civil cases, the modern and reasonable rule of civil pleading should be adopted: that an amendable error is insufficient in arrest of judgment. *Haverhill Loan, etc., Ass'n v. Cronin*, 4 Allen, 141. Nor is there anything in this liberality of pleading which is repugnant to the constitution. Even in Massachusetts, whose constitution provides that a crime shall be not only fully, plainly, and substantially, but "formally," set forth, a statute has been upheld which requires formal defects to be taken advantage of before verdict. *Com.*

v. *Walton*, 11 Allen, 238. Our constitution merely requires that the accused shall be informed of the nature and cause of the accusation, Amendment 6.

For these reasons, I am of opinion that the judgment below was right, and should be affirmed.

FIFIELD v. WHITTEMORE.

Circuit Court, D. Massachusetts. August 8, 1883.)

PATENTS FOR INVENTIONS—LETTERS PATENT No. 150,305 SUSTAINED.

Letters patent No. 150,305, issued to J. Wesley Dodge, February 28, 1874, for an improvement in tools for finishing the edges of soles of boots and shoes, are valid; and the fourth and fifth claims of said patent are not void for want of novelty, or by reason of being anticipated by the Hodges patents, Nos. 117,287 and 129,825, and the Ady patent, No. 142,756, as claimed.

In Equity.

James E. Maynard, for complainants.

Thomas W. Porter, for defendant.

LOWELL, J. The plaintiff owns the patent, No. 150,305, issued to J. Wesley Dodge, February 28, 1874, for an improvement in tools for finishing the edges of soles of boots and shoes. The specification describes a balanced tilting frame hung over head, to which a steel rod is attached by a ball and socket-joint, and at the other end the rod is fastened to the burnishing tool by a similar joint. This arrangement gives in a simple and efficient manner a great freedom of movement to the burnishing tool, so enable it to follow the curves of the edge of a shoe sole. The tool is driven by a belt, which passes round the upper frame near the rod, and comes down through the hollow handle of the tool. The patentee says, in his specification, that an inferior tool may be made with a belt running outside the handle, instead of through the hollow or tubular handle. In practice it is found that when the belt runs through the handle, at the great speed necessary for the best and quickest work, it heats the handle, and the belt itself is quickly worn out. The patentee discovered that he could make a better and not an "inferior" tool by putting the belt outside the handle; and 400 machines, in the new form, have been made and sold by the plaintiff. But in order to carry the belt outside, it was found necessary, or, at least, advisable, to add a supplemental rod, with a spiral spring, which keeps the belt in position when the tool is tipped in various directions to follow the curve of the sole. The improvement was made by Dodge himself, but not patented, and is supposed by the plaintiff to be covered by the original patent, as it certainly is by claims 4 and 5, if they are valid.