

kind was needed, and that Noyes & Noyes, the plaintiff's attorneys, would inform him as to the particulars. If the telegram had said, "Please provide bondsmen for attachment in Tucker v. Johnson," the principle contended for by defendants might apply. But the request was not limited in any way, except that the bondsmen were to be in the suit of Tucker v. Johnson. In all other respects it was a broad request to sign whatever bonds Noyes & Noyes presented. The plaintiff was fully justified in assuming, after this general reference to Noyes & Noyes, that they knew their clients' wishes, and were acting in conformity to their clients' instructions. Having been directed by the defendants to Noyes & Noyes he could do nothing else than sign the bonds which they assured him were required in the suit of Tucker v. Johnson.

It seems to the court that the defendants do not meet the issue by the assertion that they are not liable upon this unqualified promise, because the bonds which the plaintiff signed for their benefit were not the bonds which they expected him to sign, and not the bonds which they thought he had signed. They could have limited their liability to a specific bond. This they did not do. It was conceded on the argument that the judgment against McKelvey in the suit brought against him by Titus cannot be attacked in this action. In other words, it is not disputed that McKelvey's property to the extent of nearly \$4,000 has been taken from him by due process of law for the sole and only reason that he became bondsman for the defendants. It was purely a matter of accommodation on the part of the plaintiff. He acted without a particle of interest in the matter and in entire good faith. He received the defendants' request to sign the bonds, and on their promise to hold him harmless, he signed, and he lost. The question is whether he or the defendants shall suffer this loss. To this question it seems to the court that but one answer is possible. The defendants must reimburse the plaintiff for the injury which he has sustained solely on their account. They induced him to sign the bonds, and promised to pay the loss if he did sign. That promise is now invoked and must be enforced.

There must be a judgment for the plaintiff.

CABOT v. McMASTERS.

(Circuit Court, N. D. Illinois. March 18, 1893.)

ACTION ON BOND—DECLARATION—EXTENT OF SURETY'S LIABILITY.

Plaintiff entered into an agreement to consign goods to an agent for sale, and defendant executed a bond conditioned that the agent should duly pay for all goods consigned "under said agreement, or otherwise." *Held*, in an action on said bond, that a declaration which did not state whether the goods for which the agent failed to pay were consigned before or after the date of the agreement was demurrable, since defendant was not liable on the bond for goods consigned before the agreement was made.

At Law. Action by Samuel Cabot against William L. McMasters upon a bond. Defendant demurs to the declaration. Demurrer sustained.

Dent & Whitman, for plaintiff.

Hand, Milchrist & Smith, and Shedd & Underwood, for defendant.

GROSSCUP, District Judge. This action is brought to recover of the defendant, on account of a bond executed by him, to secure the performance of a certain contract on the part of one Edwin A. Mason, entered into between said Mason and the plaintiff. The declaration sets forth, at large, both the agreement and the bond. The agreement was executed on the 25th day of January, 1889, and provides, in substance, that the plaintiff shall consign to the said Mason, as his agent, through a period of three years from that date, certain shingle staves, and allow to said Mason, as commission for their sale, certain discounts or percentages. In consideration of this, Mason agrees to pay for the staves ordered by him, less the discounts, freightage, etc., on the 1st of each succeeding month, and to render an account of stock and sales every two months. The bond executed by the defendant to the plaintiff is dated the 14th of February, 1891, and is conditioned that, if the said Mason "shall well and truly perform and keep each and every promise, agreement, undertaking, and stipulation on the part of said Mason to be performed and kept in and under said agreement, and if the said Cabot shall duly receive payment for all staves consigned or sent by said Cabot to said Mason, or on his order, under said agreement, or otherwise, then this obligation to be void." The breach assigned is that on the 25th of January, 1889, and on divers days thereafter, before the 25th of January, 1892, the plaintiff consigned to Mason staves to the amount of \$5,000, for which Mason has refused to make payment, whereby an action has accrued, etc. To this declaration the defendant demurs.

It is obvious that the purpose of the bond was to secure to plaintiff, prospectively, Mason's promises and obligations under the agreement. The bond must be construed strictly in favor of the obligor, and there is no term which shows an intention on his part to respond for past delinquencies, or stand responsible for past-due promises, of Mason. Such a purpose could only have been effected by an agreement showing, in plain and apt words, an intention to assume such responsibility. The breach set out in the declaration may have been for staves consigned after the date of the bond, or for those consigned prior to the bond, the payment for which, by Mason, under the terms of the agreement, fell subsequent to that date; but it is not averred that such was the case. So far as the declaration discloses, all the delinquencies may have occurred prior to the execution of the bond. It is the duty of the plaintiff to allege a cause of action which, if proven to be true, would entitle him to a judgment. The breaches set forth in this declaration might all be true, and yet the plaintiff be entitled to no judgment. It would be manifestly unjust to subject the defendant to the costs and an-

noyances of a trial until some fact is alleged upon which he is compelled to take issue or suffer judgment. Such, indeed, is the sole purpose of pleadings in a cause. For the foregoing reasons the demurrer to each of the counts of the declaration is sustained.

GRAYDON v. HURD.

(Circuit Court of Appeals, Sixth Circuit. May 9, 1893.)

No. 73.

1. ADVERSE POSSESSION—POSSESSION OF OWNER AFTER FORECLOSURE—TENANCY BY SUFFERANCE.

If lands are sold under a decree of foreclosure, the grantee of the mortgagor being made a party to the foreclosure suit, the sale extinguishes the title of such grantee; and if he remains in possession after the sale his possession is that of a tenant by sufferance, in subordination to the title of the purchaser at the sale, and does not become adverse until the relation of tenant by sufferance is disavowed, and the purchaser has knowledge or notice of the disavowal.

2. SAME—EJECTMENT—INSTRUCTIONS—NOTICE OF DISAVOWAL OF TENANCY BY SUFFERANCE.

Where the possession of a defendant in ejectment was originally in subordination to the title of the plaintiff, an instruction that if the defendant's possession was so notorious and open and visible as to be known to the people generally in that vicinity, and if it was of such a character as to be hostile to, and inconsistent with, the plaintiff's title, the jury may find that the plaintiff had notice of its adverse character, although there may be no proof of actual notice or knowledge, ignores the distinction between the essential elements of adverse possession on the part of a person who entered in subordination to the plaintiff's title, and adverse possession on the part of a person who originally made a hostile entry, and is erroneous.

3. RES JUDICATA—FORECLOSURE OF MORTGAGE OF EQUITABLE TITLE—ESTOPPEL OF OWNER OF LEGAL TITLE.

Where the owner of the legal title to lands contracted to convey them, and the owner of the equitable title under the contract thereafter mortgaged his interest in the lands, and sold and assigned it, and his assignee took title to the lands by warranty deed from the holder of the legal title, a decree of foreclosure of the mortgage of the equitable title, in a suit to which the assignee of the mortgagor and grantee of the legal title is made a party, is a final adjudication that such assignee's interest is subject to the mortgage, and he is estopped from asserting against the purchaser at the foreclosure sale that the legal title which he acquired from the original owner was paramount to the mortgage when the foreclosure suit was begun.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

At Law. Action of ejectment by William Graydon against Lovell Hurd. Verdict and judgment for defendant. Plaintiff brings error. Reversed.

Cahill & Ostrander, for plaintiff.

Geer & Williams, for defendant.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.