THE TEMPLAR.

BODE et al. v. THE TEMPLAR.

(District Court, N. D. California. December 28, 1893.)

No. 10,575.

1. MARITIME LIENS—STATE STATUTES—AUTHORITY OF MASTER AND PART OWNERS IN HOME PORT.
   Where a state statute gives a lien on a vessel for repairs and supplies furnished in her home port, the same presumptions in favor of the master's authority to contract therefor on her credit arise as exist under the maritime law where repairs and supplies are furnished in a foreign port; and the same rule obtains as to the authority of part owners.
2. SAME—NOTICE—PENDENCY OF POSSESSORY SUIT.
   The right to a lien given by a state statute to persons furnishing supplies or labor for repairs to a vessel, under contracts with her master and part owner, is not affected by the filing of a bill by other part owners for possession, after the contracts were made.
3. SAME.
   The filing of a libel by part owners of a vessel for possession, or to restrain her leaving port until security is given for her return, which alleges her need of repairs, and a belief that, if she proceeds on her voyage, she may be condemned as unseaworthy, and excessive charges for repairs be imposed on libelants, is not notice that her master has no authority to contract on her credit for reasonable repairs and supplies in her home port, and does not prevent the acquirement of a lien therefor under a state statute. Code Civil Proc. Cal. § 813.
4. ADMIRALTY—DISTRIBUTION OF PROCEEDS OF VESSEL.
   Where there are funds in the registry from the sale of a vessel in a possessory suit, the court has power to pay therefrom claims for repairs and supplies furnished to the vessel.

In Admiralty. Libel by M. W. Bode and others against the bark Templar for supplies and repairs. Decree for libelants.

A. P. Van Duzer, for libelants.
Andros & Frank, for respondent.

MORROW, District Judge. This is an action in rem against the bark Templar to recover for supplies furnished and repairs made upon the vessel in the port of San Francisco. The bark is an American vessel, and, at the time the libel was filed in the case, she was owned by residents of San Francisco. Prior to the filing of this libel, a disagreement arose between the owners as to her employment, and a libel of possession was filed by the part owners representing seven-sixteenths interest of the bark, alleging that the other part owners, holding the remaining nine-sixteenths interest, had constituted one Simon G. Benson (also a part owner) master of the bark, and that he was about to take her on a voyage to sea; that the bark was unseaworthy, and in need of considerable repairs, and was unfit to perform any voyage without such repairs, and libelants believed that, upon such voyage, said bark might be condemned as unseaworthy, and excessive charges for her repair be imposed upon the libelants. The libel prayed that the part owners holding the nine-sixteenths interest should be cited to show cause why Benson should not be restrained from proceeding to sea

with said bark until good and sufficient security had been given, to the amount of the value of the shares of the libelants, for the return of the vessel to the port of San Francisco. This last-mentioned libel was filed March 18, 1893, and, the majority owners not having furnished a bond for the possession of the vessel, the proceedings were still pending when the present libel was filed, April 15, 1893. It further appears that, on the 14th of March, the master engaged three seamen, March 21st, a mate, and March 23d, a cook. These parties went on board the vessel, and continued in her service for about a month, but, as they did not receive their wages, they also commenced proceedings in this court to recover the several amounts due them. The libel for the seamen's wages was filed May 5, 1893. This action was not resisted by the owners, and the default of all parties was accordingly entered. While these proceedings were pending, a petition was presented to the court representing that the vessel was being detained at great cost and expense on account of marshal's fees and wharfage charges, and other expenses, and that it would be to the interest of all parties that the vessel should be sold pendente lite, and the proceeds brought into court to await the final adjudication of the cause. The bark was accordingly sold, June 23, 1893, and the proceeds paid into the registry of the court. July 11, 1893, interventions were filed for supplies furnished the crew serving on board the vessel. September 1, 1893, by consent of all parties, the claims of the seamen were paid. The present action now involves the consideration of the claims of the libelants and interveners against the balance of the proceeds remaining in the registry of the court.

The libelants and interveners claim a lien under the provisions of section 813 of the Code of Civil Procedure of this state which provides as follows:

"All steamers, vessels and boats are liable: * * * For supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees." "For work done or materials furnished in this state for their construction, repair, or equipment. * * * Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands."

In the recent case of The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, the supreme court had before it a question relating to the priority of a claim for supplies and necessaries furnished to a vessel in its home port, over a subsequently recorded mortgage. In considering this question, the court reviewed the authorities relating to maritime liens, and determined that, in the admiralty and maritime law of the United States, the following propositions had been established by the decisions of that court:

"For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty." "For repairs or supplies in the home port of the vessel, no lien exists or can be enforced in admiralty, under the general law, independently of local statute." "Whenever the statute of a state gives a lien, to be enforced in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a

foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States." "This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States sitting in admiralty."

In the case at bar, the majority owners concede the right of the libelants to be paid the several amounts due them out of the fund in court, but the minority owners interpose the objection that it does not appear that the supplies or repairs furnished in this case were necessary, or that they were furnished on the credit of the vessel. It is also contended that the proceedings instituted by them on March 18, 1893, calling upon the majority owners to furnish good and sufficient security for their possession of the vessel, was notice to the world that the interests of the minority owners, at least, would not be liable for any debts that might be contracted for any supplies, repairs, or equipments furnished the vessel.

With respect to the objection that it has not been established that the supplies and repairs were necessary, and furnished on the credit of the vessel, it is to be observed that the articles and labor were furnished on the order of the master, who was a part owner, and consisted of utensils for use in the galley, materials and labor for calking and painting the vessel, and for the repair of sails, board of the crew, meat supplied for the crew on board the vessel, and for the services of a watchmaker in rating a chronometer. The testimony is to the effect that the utensils for the galley were furnished to the ship, and charged to the bark Templar; the materials for calking and painting were "sold to the ship," and charged to the bark Templar and owners; the bill for labor in calking was "charged to the bark Templar;" for the repairs of the sails, "credit was given to the ship and owners," and charged to the bark Templar and owners; the board of the crew was "charged to the bark Templar;" and the bill for meat was charged to the bark Templar and owners. To whom credit was given for rating the chronometer does not appear. All the charges appear to be reasonable, with one exception, to be noticed hereafter, and the character of the supplies and labor indicate that they were necessary for the vessel. The minority owners contend, however, that, as these supplies and labor were furnished at the home port of the vessel, this evidence is not sufficient; that the libelants and interveners must not only prove a necessity for the supplies and labor, but they must also prove that there was a necessity, at the time, to resort to the credit of the vessel to obtain such supplies and labor.

In the case of The J. E. Rumbell, supra, the same objection was made as in the present case. Although the question certified to the supreme court by the circuit court of appeals did not directly involve a consideration of the objection, nevertheless, it was assumed by the court, for the purpose of deciding the question of priority, that all the claims for supplies and repairs were contracted under such circumstances that a lien upon the vessel for their payment existed under the statute of Illinois, and should be enforced in admiralty by the courts of the United States against

the proceeds of the vessel, unless the mortgagees were entitled to a priority in the distribution; and it was accordingly held that the lien for necessary supplies and repairs did take precedence of a prior mortgage. The statute of this state provides that for services rendered on board of a vessel, or for supplies furnished, in this state, at the request of the master, owner, agent, or consignee, a lien is created upon the vessel, and, for work done or materials furnished in this state for the construction, repair, or equipment of a vessel, a lien is created without such request. These provisions do not, however, relieve such transactions from the limitations on the master's authority, as established by the maritime law. Thomas v. Osborn, 19 How. 30; Pratt v. Reed, Id. 359; The Grapeshot, 9 Wall. 129; The Young Mechanic, 2 Curt. 404; The Lady Franklin, 1 Biss. 557; The Guiding Star, 18 Fed. 263; The Samuel Marshall, 4 C. C. A. 385, 54 Fed. 396; S. H. Harmon Lumber Co. v. Lighters Nos. 27 and 28, 57 Fed. 664. The question remains as to what presumptions arise where the master, representing a majority of the part owners, contracts for supplies at the home port on the credit of the vessel.

In the case of The Grapeshot, supra, the supreme court held that—

"Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit." "Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship." "The ordering, by the master, of supplies and repairs on the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material man, or of the ordinary lender of money to meet the wants of the ship, who acts in good faith."

The question at issue in this case, however, was as to the lien of a bottomry bond executed in a foreign port by the master of the vessel for repayment of advances to supply the necessities of the ship, and it may be said that the case is not authority beyond that question.

In Crawford v. Roberts, 50 Cal. 235–241, the supreme court of this state held that—

"The master's power is presumed, in the absence of evidence to the contrary, to extend to making contracts for supplies in the home port, which shall bind the owners. Provost v. Patchin, 9 N. Y. 239, and cases there cited. Whatever the doctrine of the maritime law, by the analogies of the common law, the duties and relations of the master furnish presumptive evidence of his authority to purchase supplies."

In applying the rules of the maritime law, establishing a lien for repairs or supplies furnished in a foreign port, to the lien created by the statute of the state for repairs or supplies furnished to a vessel in her home port, the supreme court, in The J. E. Rumbell, supra, recognizes no difference in principle, and accords to the latter the same precedence that is accorded to the former. In commenting on the character of these two liens the court says:

"Each rests upon the furnishing of supplies to the ship on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit

of all having any title or interest in her. Each creates a jus in re,—a right of property in the vessel,—existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only."

It would seem to follow that if these liens are of the same maritime character, subject to the same limitations, and enforced by the same rules of procedure, the same presumptions must arise in favor of the master's authority to contract on the credit of the vessel for necessary supplies and repairs, and the same rule would obtain with respect to the authority of part owners. The Two Marys, 10 Fed. 923.

In the case at bar the claims are not based upon running accounts. The bark had not been to sea for nearly a year, and it does not appear that the libelants or interveners had given the owners alone any previous credit, or that they did so on this occasion. In these particulars the case differs from at least two of the cases cited where the lien was denied. Without evidence to the contrary, and upon the facts established in support of these claims, it seems to me that there is a presumption that such articles and labor as were furnished by the libelants and interveners in this case were necessary to fit the vessel for a voyage, and that it was necessary that the articles and labor should be obtained on the credit of the vessel. It may be further observed that the libel of Cornwell and Boole in the suit for possession distinctly alleged that considerable repairs were necessary, and that the bark was unfit to perform any voyage without such repairs. It is true, the libel did not specify what repairs were necessary; but the libelants in that case are the parties who now object to the payment of these bills, and they have not shown, as they might have done if it were true, that their allegations had reference to other and different repairs and supplies.

But it is urged that the possessory suit was notice to all the world that the control of the vessel was in controversy, and that the master's authority to contract on the credit of the vessel was at an end. There are two answers to this proposition: First. The libel for possession was filed, as before stated, March 18, 1893. Benson took charge of the vessel March 14, 1893, and before March 18th he had contracted for at least part of the supplies, and engaged labor to make some, if not all, repairs. Second. The complaint in the libel for possession was that the vessel was about to enter upon a voyage; that she was in need of repairs, and libelants believed that, upon such voyage, the bark would be condemned as unseaworthy, and excessive charges for repairs be imposed on libelants. It will be noted that the complaint was not that the vessel was being repaired, or about to be repaired, and furnished with supplies, in this port, nor was it objected that she was incurring, or about to incur, charges for which liens would attach. Moreover, the prayer of the libel was that the other part owners should show cause why Benson should not be restrained from proceeding to sea with the bark until good and sufficient security should be given, to the

amount of the value of the share of the libelants, for the return of the vessel to San Francisco. There was certainly nothing in the allegations of this libel to put the material men on notice that the master had no authority to contract, on the credit of the vessel, for reasonable repairs and supplies in this port.

There is, besides, another element in this case to be considered. This is not a controversy between creditors over remnants in the registry in the court. There are sufficient funds in the registry to pay these debts, and leave a small balance to the owners. If I am mistaken as to the presumptions that arise in favor of the libelants and interveners as to the necessity for the supplies and repairs, and that they were furnished on the credit of the vessel, I am certainly not mistaken as to the power of the court to entertain these claims as against the proceeds in the registry of the court. Schuchardt v. Babbidge, 19 How. 239; The Lottawanna, 21 Wall. 558; The Guiding Star, 18 Fed. 263; The E. V. Mundy, 22 Fed. 173; The Island City, 1 Low. 375. In the latter case, Judge Lowell declares the power of the court over the proceeds in the registry in the following language:

"When a ship has been sold, the admiralty court has jurisdiction to distribute the proceeds. The Angelique, 19 How. 239. It is not a question of admiralty jurisdiction, but of the power of the court to deal justly with a fund in its registry. On the day this case was argued, I ordered the moiety of a fine which had been recovered by indictment in the name of the United States to be paid to the informer. I had no jurisdiction, nor had any other court, of a suit by the informer against the United States; but I had the jurisdiction which all courts have to deal with funds in the registry according to the rights of those whose property has been converted into money by the order of the court, or who have, for any other reason, a lawful interest in the fund."

Under these authorities, it is clear that the libelants and interveners are entitled to have the equities of their claims recognized, and, as against only the objection of the minority owners of the vessel, they should be paid out of the proceeds in the registry of the court. The claims of the libelants and interveners will therefore be allowed and paid, as follows: W. S. Ray & Co. Manufacturing Company, galley utensils, $48.23; Pacific Marine Supply Company, materials for calking and painting, $73.47; J. H. Farnham & Co., labor, materials, and cartage, etc., for calking, $351.37; A. Anderson, boarding crew, $36; Witzman & Staiger, meat supplied to crew, $51.60.

The testimony relating to the bill of E. E. Hitch, for repairing sails, $363.08, is to the effect that the repairs, to the extent that it is claimed that they were made, were unnecessary, and the charges unreasonable. It appears that the repairs were reasonably worth $75. The claim will therefore be allowed for that sum. The claim of Dillon & Co. for rating chronometer, assigned to M. W. Bode for collection, is not supported by sufficient evidence, and it is rejected. The claim of the board of state harbor commissioners, for $438.30, for wharfage incurred while the vessel was in the custody of the marshal, will be paid, as an expense of the marshal, for the sum of $316.10. A decree will be entered accordingly.

P. SCHWENK & CO. v. STRANG et al.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1893.)

No. 313.

1. REMOVAL—LOCAL PREJUDICE—AFFIDAVITS.
   A removal should not be granted, under the act of 1887–88, upon an ex parte affidavit, merely alleging the existence of local prejudice, without stating any facts tending to show it.
2. SAME—NOTICE.
   Parties to be affected by the removal should have reasonable notice of the application, and opportunity to contest it.

Appeal from the Circuit Court of the United States for the District of Nebraska.

In Equity. Suit commenced in a state court by P. Schwenk & Co. against A. L. Strang, A. L. Strang & Co., the Norfolk Waterworks Company, J. H. Millard, the Omaha National Bank, the Shickle, Harrison & Howard Iron Company, and C. G. Miller. The cause was removed to the United States circuit court on the ground of local prejudice, and the complaint was afterwards dismissed. Complainant appeals. Reversed.

H. C. Brome and R. A. Jones, for appellant.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. This action was commenced in the district court of Madison county, Neb. The defendant the Shickle, Harrison & Howard Iron Company filed its petition in the circuit court of the United States for the district of Nebraska for the removal of the suit to that court on the ground of prejudice and local influence. The petition and affidavit for removal make only this averment in relation to the alleged prejudice and local influence:

"Affiant further says that on account of prejudice and local influence the said petitioner will not be able to obtain justice in the said district court of Madison county, in the state of Nebraska, or in any of the said courts in the state of Nebraska to which, on account of local influence or prejudice, the said defendant may, under the laws of the state of Nebraska, have a right to remove said cause, and that if said cause be tried in the district court of said Madison county, Neb., or in any other district court of the said state of Nebraska, said petitioner is liable to suffer pecuniary loss and damage on account of such prejudice and local influence."

Upon this showing, and without notice to the plaintiff or the other defendants, the circuit court entered an order removing the cause into that court. Afterwards, the plaintiff appeared in the circuit court, and filed affidavits denying that there was any prejudice or local influence against the defendant, and moved to remand the cause to the state court, which motion was overruled.

The question presented for our consideration is whether the showing made in the affidavit filed by the defendant warranted the circuit court in removing the cause from the state court. The affidavit states only a conclusion. Not a fact is stated, from which prejudice or local influence could be inferred. It is not shown that any officer or agent of the defendant was ever in the county or

state, or that a single citizen of the county or state ever heard of the existence of the company, or that the plaintiff is popular or influential in the county, or favorably known, or known at all, to the people of the county. In a word, the affidavit does not contain a hint of any fact or circumstance from which any court could say that it had been made to appear that, from prejudice or local influence, the defendant would not be able to obtain justice in the state court. The grounds upon which the affiant arrived at the conclusion to which he swears are not disclosed. His residence is not disclosed. It does not appear that he ever was in Madison county, or knows a single citizen of the county, or knows anything about the sentiments and feelings of the people of the county towards the plaintiff or the defendant. If he had stated the facts upon which he founded his conclusions, the court could then have determined whether his deductions were sound.

It not unfrequently occurs, as every judge who has had much experience on the circuit knows, that affidavits like the one under consideration are filed when it is perfectly obvious that the only prejudice that has any existence in fact is the prejudice of the affiant against the people of the county, of whom he knows nothing, and whose impartiality and fairness he impeaches without the slightest foundation of fact. Instances are not wanting where such affidavits had no better foundation than an earnest desire on the part of the defendant to harass and delay the plaintiff in his suit. It was the knowledge of these facts that induced congress to change the law on this subject. Under the statute in force prior to the present act, the removal of a cause from the state to the federal court upon the ground of prejudice or local influence was effected by simply filing an affidavit in the state court stating that the party "has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court." Rev. St. U. S. § 639. No inquiry into the truth of the affidavit was permissible. Under the act of 1887 the application for the removal on the ground of prejudice or local influence must be addressed to the circuit court; and the language of the act is that, "when it shall be made to appear to the said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court," etc. It will be observed that this act does not provide, as did the act of 1867, that the cause shall be removed upon filing an affidavit alleging in general terms the existence of prejudice or local influence. Nothing at all is said about an affidavit. The requirement is that, "when it shall be made to appear" to the circuit court that from prejudice or local influence the defendant will not be able to obtain justice in the state court, etc.

How must this fact be made to appear? Obviously, in some of the recognized modes by which facts are proved in courts of justice. It is not made to appear by the simple declaration in an ex parte affidavit that it does exist. That declaration proves nothing, and is evidence of nothing but the opinion of the affiant, and the issue is not one to be determined by the opinion of an expert. An opin-

ion or conclusion expressed in an ex parte affidavit, which does not disclose the facts upon which the conclusion is founded, has no probative force. The court cannot abdicate its functions, and transfer to the maker of such an affidavit the high duty imposed upon it by law, of judging after inquiry and deliberation. The judicial faculty cannot be farmed out in this manner. Before the court can remove the cause, it must be made to appear that the fact exists upon which the right to the removal depends. The statute contemplates a judicial inquiry into the alleged fact. The court must take the responsibility of determining and adjudging judicially that prejudice exists, before it can order the removal. Its judgment on this question must be reached by the customary and approved judicial methods.

An ex parte affidavit, which states no fact, but simply the affiant's opinion or conclusion, is sometimes made sufficient by statute for certain purposes. The act of 1867 is an example of such a statute. But in the absence of a statute such an affidavit ought not to be accepted as satisfactory evidence of the existence of any fact upon which the judgment of a court is to rest. When the court is charged with the duty, as it is under the act of 1887, of ascertaining and determining for itself the existence or nonexistence of prejudice or local influence, it ought not to accept an ex parte affidavit, such as was filed in this case, as sufficient evidence, or indeed as any evidence, on the point. To give effect to such an affidavit is practically to nullify the act of 1887, and revive the act of 1867. The question should be determined by the court as it would determine any other issue of fact arising in the progress of the case, affecting the rights of the parties to the suit. The parties to be affected by the action of the court should have reasonable notice of the application for removal, and an opportunity to contest it. When notice to the party adversely interested is practicable, the court should not, in any case, rest its judgment on a mere ex parte showing. Such hearings are often deceptive and misleading, and for this reason are not favored. When the court comes to act upon the application, it may receive evidence upon the point by affidavits which state facts, or by depositions, or by oral examination of witnesses.

The conclusion we have reached is supported by the opinion of Mr. Justice Harlan in Malone v. Railroad Co., 35 Fed. 625. That case is cited approvingly by the supreme court in Re Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, and in Fisk v. Henarie, 142 U. S. 459, 468, 12 Sup. Ct. 207. In the last case cited, Mr. Chief Justice Fuller, speaking for the court, said:

"The prejudice or local influence must be made to appear to the circuit court; that is, the circuit court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that by reason of those causes the defendant will not be able to obtain justice in the state courts. * * *"

The judgment of the circuit court is reversed, and the cause remanded, with directions to that court to remand the same to the state court from which it was removed.

FULLER et al. v. MONTAGUE et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1893.)

No. 97.

1. EQUITY—LACHES.
In 1892, nearly 30 years after attaining majority, complainants claimed an interest in land, asserting that in 1844 such interest had been fraudulently conveyed by their uncle, cotenant with their father, who died in 1846. They were aware that their father had owned such interest, but accepted their uncle's assurance that it had been conveyed to him, until 1887, when they discovered the facts relied on to sustain their claim. *Held*, that there was such laches as would preclude relief against bona fide purchasers in possession for over 30 years. 53 Fed. 204, affirmed.

2. PARTITION—WHO MAY MAINTAIN.
A suit for partition cannot be maintained by persons not having the legal title to the lands, against persons in possession claiming adversely on a bill seeking to establish complainants' title and to invalidate that of defendants, on the ground of fraud with which defendants are not connected. Per Swan, District Judge.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

In Equity. Bill by John P. Fuller, James H. Fuller, and Simeon Fuller against Theodore G. Montague and others to establish an interest in lands, and for partition. One defendant demurred, and the others joined in a motion to dismiss the bill. Demurrer sustained, and bill dismissed. 53 Fed. 204. Complainants appeal. Affirmed.

Statement by SWAN, District Judge:

The bill in this cause is nominally for partition. The appellants were complainants in the court below. They allege that they are the children and sole heirs at law of Simeon Fuller, Jr., who died intestate in the year 1846, seised in fee simple of the undivided one-half of the following lots or parcels of land, viz. lot No. 54, Chestnut street, the north half of lot 38, Chestnut street, and the south half of lot 37, Market street, as said lots are numbered and described on the original plot of Chattanooga, Hamilton county, Tenn. That the lands were purchased by appellants' father, Simeon Fuller, Jr., and their uncle, Moses Pressley, and conveyed to them jointly in 1839 by the commissioners of Chattanooga, and the conveyance was duly recorded in the office of the register of Hamilton county. That Fuller and Pressley held them as tenants in common until the former's death, in 1846, complainants being then between four and seven years of age. That the lands remained vacant and unoccupied until after Fuller's death. That "the said undivided interest has never been conveyed to any one by the said Simeon Fuller, Jr., his heirs or legal representatives, nor has the title in any way been alienated from him or them * * * and the same is now held by your orators, his only heirs at law, these never having alienated the same, nor been actually ousted therefrom, nor have they been in any way notified of any repudiation or adverse claim or holding; and they expressly deny that there has been any legal or valid adverse possession whatever to be charged against them, or any effective repudiation of their holding in tenancy in common, even till this day. * * * That the records of the Hamilton county registry office clearly show your orators' title, and have always given, and now give notice to all the world that the interest of their ancestor, Simeon Fuller, Jr., has never passed, nor his title been divested, from him nor his heirs. * * * That the said Simeon Fuller, soon after the joint purchase aforesaid, was absent in a distant state, and that he intrusted to Moses Pressley, his cotenant, the care and oversight of the property thus held as an investment,