

## Syllabus.

variety of cases, as shown by the citations in the brief of counsel for plaintiff in error, are in accord with the construction, by this court, of these clauses of the section in question, and have applied it to cases of agents, factors, commission merchants, and bailees, who have failed to account for proceeds of the sale of property committed to them for that purpose or moneys received upon collections entrusted to them.

The finding of the jury, that the agreement of the plaintiff in error was to collect the money and keep it until the defendants in error called for it, cannot be taken to imply an obligation to keep and deliver to them the identical bills or coms. Even if the agreement between the parties might be construed as creating a trust in some sense, it was clearly not such a trust as comes within the provisions of the bankrupt act. Nor can the subsequent mingling, by the plaintiff in error, of the money collected with his own, constitute the *actual, positive* fraud contemplated by that act, but only such an *implied* fraud as is involved in most, or all, cases of conversion of property or of breach of contract.

The judgment of the Supreme Court of Vermont is in conflict with the principles laid down by the decisions of this court, as well as the general drift of those of the several state courts, and is, therefore, reversed, and

*The case is remanded to the court below, with an instruction to grant a new trial and to take such further proceedings as may not be inconsistent with this opinion.*

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 ANDERSON v. MILLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF VIRGINIA.

No. 135. Argued December 19, 1888. — Decided January 14, 1889.

On the proofs the court holds that there has been no infringement of the appellant's patent by the appellees.

## Opinion of the Court.

THE case is stated in the opinion.

*Mr Charles S. Whitman* for appellant. 5

*Mr John S. Wise* for appellees.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Virginia, by the appellant against the appellees, founded on an alleged infringement by them of letters patent No. 265,733, granted to appellant, October 10, 1882, upon an application filed June 24, 1882, for an improvement in drawers.

The alleged infringement consisted in appellees' placing on drawers manufactured by them a patch extending down the front and lapping the seam of the crotch by at least half an inch, which process of reënforcing the garment, it was alleged, was the invention of the appellant.

The bill avers that "the defendants, Henry T. Miller and William Mitchell, both of the city of Richmond, in the county of Henrico and State of Virginia, and citizens of the said State of Virginia, constituting the firm of Henry T. Miller & Co., doing business at Richmond, in the county, State, and district aforesaid, are now using said patented improvements, or improvements in some parts thereof substantially the same in construction and operation as in the letters patent mentioned, and, in violation of his rights, have made, used and vended within the Eastern District of Virginia large quantities of drawers described and claimed in the letters patent aforesaid," etc.

The answer of the defendants, in their own separate names, with the firm name, precisely as they are stated by the bill, in response to complainant's interrogatories, admits that they are residents of Richmond, Virginia, and engaged in the business of the manufacture and vending of drawers for the clothing trade in that city

The averments of the answer, material to this inquiry, are,

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“that drawers, as reënforced as described in letters patent of plaintiff, had been made and in public use and on sale by sundry and divers persons for many years prior to plaintiff’s application,” that they, the defendants, “have been manufacturing one particular kind, and only one particular kind, of reënforced drawers for more than five years hitherto continuously, a specimen of which drawers, manufactured by them, is filed as ‘Exhibit A,’ etc., and that these are the only kind of reënforced drawers that have been manufactured by them, or either of them, during the last five years;” and that, “even if the drawers manufactured by them are either identically or substantially the same as those manufactured by the complainant, he is entitled to no relief whatever against them, because these respondents are prepared to prove that Henry T. Miller & Co. and Henry T. Miller have hitherto continuously for over five years manufactured the identical reënforced drawers filed as ‘Exhibit A,’ and that for over four years prior to the application for said patent they used and sold reënforced drawers of the pattern and design of those now filed as ‘Exhibit A,’ and none other.”

The Circuit Court dismissed the bill, and an appeal from that decree of dismissal brings the case here.

It is contended by the appellant that the answer of the defendants below did not contain a sufficient notice, under the statute, of the defence of want of novelty and two years’ public use, in that it did not state the names and places of residence of the persons by whom and where it was used. The object of this statutory requirement is, to apprise the plaintiff of the nature of the evidence which he must be ready to meet at the trial. This object is substantially and fully accomplished by the pleadings in this case, and we decline to disturb the action of the court below overruling the motion made at the hearing to strike out the testimony of the witnesses for the defence, who testified to the prior use of the patented article.

We do not deem it necessary to consider the question whether the patent of the appellant is for a new and useful invention within the meaning of § 4886 *et seq.*, Rev Stat.,

## Statement of the Case.

inasmuch as it is the opinion of this court that there has been no infringement of it in this case by the appellees. It is satisfactorily shown by the evidence in the record that for more than two years prior to the application for the patent in question the appellees had been manufacturing, at their place of business at Richmond, Virginia, garments identical in pattern with those that are now alleged to infringe appellant's patent.

The decree of the Circuit Court is

*Affirmed.*

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 CAMDEN v. MAYHEW

 APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
 THE DISTRICT OF WEST VIRGINIA.

No. 80. Argued November 14, 15, 1888.—Decided January 14, 1889.

When the decree of a court of equity, for the sale of a tract of land, requires the sale to be made "upon the terms, cash in hand upon the day of sale," and a person bidding for it at the sale is the highest bidder, and as such is duly declared to be the purchaser, no confirmation of the sale by the court is necessary in order to fix liability upon him for the deficiency arising upon a resale, in case he refuses, without cause, to fulfil his contract; and, if the purchaser refuses to pay the amount bid, the court, without confirming the sale, may order the tract to be resold, and that the purchaser shall pay the expenses arising from the non-completion of the purchase, the application and the resale, and also any deficiency in price in the resale.

When a purchaser at a sale of real estate, under a decree of a court of equity, refuses, without cause, to make his bid good, he may be compelled to do so by rule or attachment issuing out of the court under whose decree the sale was had, or he may be proceeded against in the same suit by rule, (or in any other mode devised by the court, which will enable him to meet the issue as to his liability,) in order to make him liable for a deficiency resulting from a resale caused by his refusal to make his bid good.

THE COURT stated the case as follows

This is an appeal from a final order in the suit, in the court below, of *Mayhew, &c. v West Virginia Oil and Oil Land*