

own citizens, or as you limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.”

It was never supposed that the section under consideration conferred on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen, conferred by the State of which they were both residents, on all its citizens alike.

We have, therefore, been unable to find any constitutional authority for the enactment of sect. 5519 of the Revised Statutes. The decisions of this court above referred to leave no constitutional ground for the act to stand on.

The point in reference to which the judges of the Circuit Court were divided in opinion must, therefore, be decided against the *constitutionality of the law*.

MR. JUSTICE HARLAN dissented on the question of jurisdiction. He expressed no opinion on the merits.

ROGERS v. DURANT.

1. The loss of a draft is not sufficiently proved, to support a suit in equity thereon against the drawer or acceptor, by evidence that it was left with a referee appointed by order of court to examine and report claims against an estate in the hands of a receiver, and that unsuccessful inquiries for it have been made of the referee, the receiver, and the attorney for the present defendant in those proceedings, without evidence of any search in the files of the court to which the report of the referee was returned, or any application to that court to obtain the draft.
2. A decree of the Circuit Court, dismissing upon the merits a bill of which this court on appeal holds that there is no jurisdiction in equity, will be reversed, and the cause remanded with directions to dismiss the bill without prejudice to an action at law, and with costs in the court below, and each party to pay his own costs on the appeal.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated in the opinion of the court.

Mr. Lewis L. Coburn and Mr. Henry C. Whitney for the appellant.

Mr. Charles B. Laurence for the appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill in equity, by which Rogers seeks to recover of Durant and seven others, as copartners under the name of James W. Davis & Associates, the amount due upon several drafts, some drawn, and some accepted or promised to be accepted, by that firm, and all alleged to have been held by the plaintiff and lost without his fault after maturity.

The defence of Durant is twofold: First, to the jurisdiction, because there is no sufficient proof of the loss of the drafts; second, to the merits, because he was never a member of the firm of James W. Davis & Associates. The court below, while inclining to the opinion that it had no jurisdiction, did not decide the case upon that ground, but upon the merits, and dismissed the bill generally.

The testimony introduced to show the loss of the drafts, construing it most favorably for the plaintiff, proves no more than this: In a former suit in the Supreme Court of New York to wind up the affairs of the firms of James W. Davis & Associates and of Davis, Sprague & Company, a receiver was appointed, and the claims of creditors, including the plaintiff's, were presented to a referee appointed by the court, and by him reported to the court, and a dividend ordered and paid in part thereof. The drafts in question were handed by the plaintiff to Steiger, his attorney in New York, to be filed before the referee, and were so filed, and were afterwards delivered by the referee to the receiver; neither the plaintiff nor Steiger had since seen them or known where they were; and Steiger had applied for them to the receiver, to his clerk, to the referee, and to Bell, Durant's attorney in New York, and believed, without any foundation beyond his own suspicion, that they were in Bell's possession.

The original papers presented to the referee would properly be returned with his report to the files of the court which appointed him. Yet no search appears to have been made in those files, nor any application presented to that court for

the delivery of the drafts to the plaintiff or his attorney. The plaintiff, having made no inquiry in the place in which the drafts would be most likely to be found, utterly fails in his attempt to prove their loss.

There being no sufficient evidence of loss, there can be no doubt that the case is one within the exclusive jurisdiction of a court of law; and it becomes unnecessary to consider the varying decisions in England and in this country upon the question under what circumstances a court of equity has jurisdiction of a suit upon a lost bill or note; or the voluminous proofs contained in the record upon the question whether Durant was a member of the firm of James W. Davis & Associates, a question of which, for the reason already given, we have no jurisdiction in this case, and which, being a pure question of fact, can never be brought to this court in any future action at law.

The decree of the Circuit Court, dismissing the bill generally, might be considered a bar to an action at law, and should therefore be reversed, and the cause remanded with directions to enter a decree dismissing the bill for want of jurisdiction, without prejudice to the right of the plaintiff to sue at law. *Horsburg v. Baker*, 1 Pet. 232; *Barney v. Baltimore City*, 6 Wall. 280; *Kendig v. Dean*, 97 U. S. 423. In accordance with the spirit of the twenty-fourth general rule of this court, and under the discretionary power therein reserved, costs should not be allowed to the plaintiff, because, so far as concerns the present suit, the decree is wholly against the relief that he seeks; but the dismissal is to be with costs in the court below, and each party is to pay his own costs on this appeal.

Decree accordingly.

THE "STERLING" AND THE "EQUATOR."

1. A decree against two vessels at fault should be, not *in solido* for the full amount of damages sustained by the libellant, but severally against each for one-half of his damage and costs, any balance which he shall be unable to enforce against either vessel to be paid by the other or its stipulators, to the extent of her stipulated value beyond the moiety due from her.
2. Inasmuch as the form of the decree was not in this case called to the attention of the Circuit Court, the parties are required to pay their respective costs in this court.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated in the opinion of the court.

Mr. J. Warren Coulston and *Mr. William L. Putnam* for the appellant.

Mr. Joseph P. Hornor and *Mr. William S. Benedict* for the appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a suit in admiralty against the ship "Sterling" and tow-boat "Equator," for damages sustained by the bark "Sif" in a collision. Both the ship and tow-boat were found to be in fault, and they were condemned *in solido* for the whole amount of the loss. From a decree to that effect this appeal was taken.

It is conceded that upon the facts found the owners of the "Sif" are entitled to a decree against the ship and the tow-boat, as both were in fault. The well-established rule in such cases is to apportion the damages equally between the two offending vessels, the right being reserved to the libellant to collect the entire amount from either of them to the extent of her stipulated value, in case of the inability of the other to respond for her portion. *The Washington and The Gregory*, 9 Wall. 513; *The Alabama and The Gamecock*, 92 U. S. 695; *The Virginia Ehrman and The Agnese*, 97 id. 309; *The City of Hartford and The Unit*, id. 323. As in this case the decree was against both vessels for the full amount of the loss, it should be modified so as to be against the "Sterling" and the

“Equator,” and their respective stipulators, severally, each for one-half of the entire damage and costs, any balance of such half which the libellant shall not be able to enforce against either vessel to be paid by the other vessel or her stipulators, so far as her stipulated value extends. As it does not appear from the record that the attention of the court below was called to this objection to the form of the decree, each party will be required to pay his own costs in this court.

Decree reversed, and cause remanded with instructions to enter a new decree in accordance with this opinion, adding interest to the date of such entry.

FITZPATRICK v. FLANNAGAN.

1. Leave to amend the affidavit, by inserting a new ground for an attachment sued out in Mississippi, is not the subject of a valid exception, it not appearing that the defendant was thereby prejudiced.
2. Where a firm is dissolved by the death of one of its members, and no bill is filed by his representatives, or by the firm creditors seeking the intervention of a court of equity to wind up the business of the firm, marshal its assets and apply them to the firm debts, the surviving partner may, by paying his individual indebtedness with those assets, make a disposition of them, which is not a fraud in law upon the firm creditors, nor, in the absence of an actual intent to defraud, a just ground for suing out an attachment under the statute of Mississippi.
3. Section 1420 of the Code of Mississippi of 1871, *post*, p. 658, did not forbid an insolvent debtor to give a preference to one or more of his creditors, if it were *bona fide* and with no intent to secure a benefit to himself.
4. A continued recognition of his liability, and his agreement to discharge it after he has a full knowledge of all the facts in relation to which the alleged false representations were made at the time of his original promise, estops the party from setting them up as a defence to an action on that promise.
5. According to the practice of the Circuit Court in Mississippi, the judgment sustaining the attachment and the personal final judgment on the merits against the defendant are separate, and may be considered here separately on a writ of error brought to review the latter judgment.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The facts are stated in the opinion of the court.

Mr. Alfred B. Pittman for the plaintiff in error.

Mr. Jefferson Chandler and *Mr. William K. Ingersoll* for the defendants in error.