PHIPPS *v.* SEDGWICK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 100. October Term, 1876. — Original motion in a cause decided at the last term. — Decided May 6, 1878.

Whether this court can recall its mandate, and modify it, after the term is ended in which the judgment was rendered, *quære*.

In this case the mandate of this court, and the decree and mandate of the Circuit Court entered on that mandate, correctly represent what this court decided.

This was a motion for a recall and modification of the mandate in the case of *Phipps* v. *Sedgwick*, reported in 95 U. S. 3. The case is stated in the opinion.

Mr. Justice Miller delivered the opinion of the court.

This case was argued and decided at the last term of the court, and the mandate sent in due time to the Circuit Court. The Circuit Court has also entered its decree in conformity to the mandate, and the case having originated in the District Court, sitting in bankruptcy, has remanded it to that court for further proceedings.

A motion is now made in this court to correct the mandate which was sent to the Circuit Court on the ground that it does not convey correctly to that court the decree which this court intended to make.

A very serious question is raised *in limine* as to the power of this court to recall its mandate and make the modification suggested, after the term has ended in which the judgment of the court was rendered. It is not necessary, however, to decide this question, because we are of opinion that the decree and mandate of this court and the decree of the Circuit Court entered on that mandate do correctly represent what this court decided, and what it intended to decide, and we are quite sure that if the District Court has misapprehended this, and shall, in consequence, in any future action of that court, injure the parties here moving in the matter, it will be corrected by a second appeal to the Circuit Court, or, if necessary, finally, to this court.

The case originates in the bankruptcy of J. K. Place and James Sparkman, and a bill in chancery brought by Sedgwick, assignee of these bankrupts, in the District Court. The main object of that suit was to have certain valuable real estate, conveyed by Place to

his wife some time before the bankruptcy, subjected to the claims of the creditors as being made in fraud of their rights. To this bill Mrs. Place and Place himself, and many others, including Phipps & Co., were made defendants.

Phipps & Co. were creditors holding heavy obligations of the bankrupt firm, for which they had recovered a judgment about the time the proceedings in bankruptcy commenced. Mrs. Place had also given a mortgage to secure this debt, on the real estate mentioned, some time before that, in which her husband had joined. The District Court held that the conveyance of the lots by Place to his wife was but a reasonable provision out of his estate at the time it was made, and dismissed the bill. The Circuit Court, on appeal, held that the conveyance was a fraud upon the creditors of the firm; that it should be set aside and held for naught; and that the proceeds of the property which had been sold by order of the court pending the proceedings, should be paid to the assignee.

In the finding of facts by the Circuit Court embodied in its decree, it is recited that the mortgage to Phipps & Co. was made in fraud of the provisions of the bankrupt law, and with a view to prevent the property from coming to the assignee, and that Phipps & Co. had reasonable cause to believe Place insolvent when it was made.

Phipps & Co. and the executors of Mrs. Place, who had died, appealed to this court.

On final hearing this court made the following decree:

"On consideration whereof it is now here ordered, adjudged and decreed by this court, that so much of the decree of said Circuit Court in these causes as directs the payment of the proceeds of the sale of the Fifth Avenue property, to wit: the sum of $93,161.42 to the assignee, John Sedgwick, is affirmed; but this affirmation is without prejudice to the right of any person now holding the debt growing out of Phipps & Co.'s commercial debt against James K. Place & Co. to present it for the purpose of having it allowed as a claim against the bankrupt estate, and without any determination of that right.

"And so much of said decree as directs that the complainant recover from the executors of Susan A. Place the sum of $22,160 and interest, be and the same is hereby reversed.

"In all other respects the decree is affirmed."

The Circuit Court on receiving the mandate which followed the words of this decree, made its own decree in the same terms by

entering the mandate on its record, and then remanded the case to the District Court for further proceedings. In that court the decree of this court is entered as part of its decree, but there is also added that part of the decree of the Circuit Court which contains the findings that Phipps & Co. had obtained a preference for their claim in fraud of the bankrupt law, and it is the fear of counsel that they will be used as conclusive against that claim, since filed with the assignee for a share in the distribution of the assets, which has caused the present motion.

But this court is unanimously of the opinion that no such defence to that claim is consistent with the decree of this court, and that of the Circuit Court founded on it.

In affirming that part of the decree of the Circuit Court which gave to the assignee the proceeds of the sale of the real estate, from which Phipps & Co. with others had appealed, the decree says in express terms that "their affirmance is without prejudice to the right of any person now holding the debt growing out of Phipps & Co.'s commercial debt against James K. Place & Co. to present it for the purpose of having it allowed as a claim against the bankrupt estate, and without any determination of that right."

For the District Court to hold that this leaves in force the finding of the Circuit Court that Phipps' claim was the subject of fraudulent preference, is to render nugatory the carefully considered words of the decree which we have given *verbatim*. It is as plain as language can make it, that this court intended to declare that while Phipps & Co. had no lien on the land claimed by Mrs. Place, they might present their claim to the assignee, unaffected by the decree of the circuit or of this court; that neither the decree which we were reviewing nor the one we rendered on that review, should establish or defeat, or in any wise affect the action of the assignee or of the court on that claim, when presented for allowance as against the estate. If it did not mean that, it meant nothing; and it is too carefully inserted to justify the latter conclusion.

The opinion of this court, 95 U. S. 5, is in strict conformity to this. In speaking of Phipps & Co.'s claim the court carefully avoids the question of fraudulent preference, but says: "It seems to be clear that the mortgage was taken under such circumstances of notice of the nature of Mrs. Place's title, on the part of Phipps & Co. that their claim under that mortgage is no better than the title of Mrs. Place." As we held that Mrs. Place's title was void,

their mortgage on that property failed, without considering whether they had done anything in fraud of the Bankrupt Law or not. And so that question was left intentionally by the court, as fairly deducible also from the words of the decree, to be an open one if raised by anybody when the claim should be presented for allowance.

We see no occasion to change a word in our decree or mandate, to give effect to the intent of the court, and the motion is, therefore,

Denied.

Mr. J. H. Ashton for the motion. *Mr. F. N. Bangs* opposing.

MEVS *v.* CONOVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 169. October Term, 1876. — Decided March 13, 1877.

Upon a bill in equity by the owner against an infringer of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendant made by the use of the invention.

The surrender of his patent by a patentee, in order to obtain a reissue, made after obtaining final judgment against an infringer, does not affect his rights which have passed into the judgment.

THE opinion of the court in this case is reported in full in 125 U. S. 144, 145, in the marginal note. *Mr. A. J. Todd* and *Mr. Edward Patterson* for appellant. *Mr. Rodney Mason* for appellee.

FOREE *v.* McVEIGH.

ERROR TO THE SUPREME COURT OF THE STATE OF VIRGINIA.

No. 478. October Term, 1876. — Decided April 16, 1877.

It appearing that the only Federal question involved in this case has been decided in another case at the present term, the court postpones the hearing of a motion to dismiss, in order to allow it to be amended, under the rules, by adding a motion to affirm.

THE case is stated in the opinion.

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

This case comes before us upon a motion to dismiss for want of jurisdiction. A similar motion was made and overruled at the last term, and we are satisfied with that decision.

Rule 6 provides "that there may be united with a motion to dis-