Cases Omitted in the Reports.

Mr. Charles B. Singleton, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* for the motion. *Mr. Thomas J. Durant* and *Mr. C. W. Hornor* opposing.

Van Norden v. *Washburn*, No. 795, at the same Term, with a like state of facts and argued by the same counsel, was dismissed at the same time for the same reasons.

THATCHER *v.* KAUCHER.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

No. 126. October Term, 1877. — Decided December 17, 1877.

The acts of a person assuming to be an agent in the sale of personal property will not bind the principal, unless he either authorized him to make the sale, or held him out to the public as clothed with the authority of an agent; and there being no evidence in this case either of authority to sell the property in dispute, or of consent to the agent representing himself to have such authority, no basis has been laid for the propositions which the court was asked to give the jury.

There was no error in the rulings of the court admitting evidence to show the market-value of the property converted.

Trover. Verdict for plaintiff and judgment on the verdict. The case is stated in the opinion.

Mr. Justice Strong delivered the opinion of the court.

The several instructions which the defendant below desired to have given to the jury were properly refused. The bill of exceptions exhibits no evidence that justified a demand for any of them. While it is true that if an owner of personal property authorizes an agent to assume the apparent right to sell it, an innocent purchaser may safely buy from the agent, and his purchase will bind the principal, though in fact there was no real authority to sell, yet the principal is not bound unless he has held out the agent to the public as clothed with such authority. There must be some evidence either of permission to sell or of consent to the agent representing himself to have such a license. We can find no such evidence in this case.

It is not claimed that Minch, from whom Thatcher, the defendant, asserts he purchased the whiskey, had in fact any authority to sell the lot. All that is insisted is that the plaintiff allowed him to assume such authority and held him out to the public as so authorized. But certainly there is nothing in the evidence that could warrant a jury thus to find. Minch was not a salesman employed by the plaintiff, and he assumed no appearance of ownership or of

authority to sell, in the presence of the plaintiff, or while the plaintiff was in the Territory. During that time he made no sales. Nothing, therefore, in the conduct of the plaintiff tended to show that Minch was clothed with any right to dispose of the property. And the act of leaving it in Minch's charge in itself had no tendency to show such a right. A bailee for custody has not the *indicia* of an agent to sell. Nor were the small sales made by Minch, while he had the property in charge, and during the absence of the owner, any evidence of his right to sell. An agent's authority cannot be proved by his own acts alone. The sales were made without the knowledge, and, of course, without the consent of the bailor; at least the sales themselves did not show such knowledge or consent. Nothing remains, then, to show the plaintiff's consent to the sale made to the defendant, if any there was, except the fact that Minch was told to sell enough to pay his board during the plaintiff's absence from the Territory. But there is no evidence that even this was made known to the public or that the defendant ever had knowledge of it. All that was known to the public was the fact that the bailee was selling the whiskey in small quantities during the absence of the bailor. And the limited license given was a very different thing from power to dispose of the whole property entrusted to the bailee's care. There was, therefore, no evidence tending to show that Kaucher, the plaintiff, clothed Minch with the *indicia* of ownership of the property, or with powers fitted to induce innocent third persons to believe that he was authorized to make such a sale as the defendant claims was made to him. Much less is there evidence to show that the defendant was misled by any appearances. And it is not a little remarkable that the record exhibits no proof that such a sale was ever made, though the bill of exceptions contains all the evidence introduced at the trial. All that can be found is an unsworn declaration of the defendant that he had made such a purchase, a declaration made in reply to the plaintiff's demand for the property; but that is no proof of the fact asserted. No witness testified that Minch had made a sale to the defendant, and no written evidence of such a sale was adduced. There was no basis, therefore, for the propositions which the court was asked to give as instructions to the jury.

The remarks we have made are sufficient to show there was no error in excluding from the consideration of the jury the evidence given by the defendant relating to Minch's conduct and declara-

tions after the plaintiff had left the Territory. It was all wholly immaterial.

Nor was there error in any of the rulings of the court admitting evidence to show the market value of the property taken and converted.

The judgment is, therefore affirmed, and the record is ordered to be remitted to the Supreme Court of the State of Colorado.

Mr. W. Willoughby and *Mr. J. W. Denver* for plaintiff in error. *Mr. John Q. Charles* for defendant in error.

ELIZABETH *v.* AMERICAN NICHOLSON PAVEMENT COMPANY.

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

No. 203. October Term, 1877. Original motion in the cause made at October Term, 1878. — Decided November 25, 1878.

This court has power at any time to amend a decree which has by inadvertence or mistake been entered in a different form from that in which the court intended it.

When a joint decree is made in the court below against two or more parties, and the decree is found to be correct as to some of the parties, and incorrect as to the others, the ordinary and proper practice is to reverse it as an entirety, and remand the cause for a new decree; but when such a decree does not affect the rights of the different parties in a different manner, as, for instance, when it is found right in all respects, except as to the amount, the court sometimes reverses it in part and affirms it in part, this being always within the discretion of the court.

This was, in substance, a motion to amend the decree of the court, as not being in conformity with its opinion. *Elizabeth* v. *Pavement Co.*, 97 U. S. 126. The case is stated in the opinion.

Mr. Justice Bradley delivered the opinion of the court.

A motion is made in this case to amend the mandate so as to conform to the opinion delivered by the court at the last day of October Term, 1877. The motion cannot be entertained in the form in which it is made, because no mandate has in fact ever been issued in the case. The appellee, however, desires to convert the notice into one for amending the decree on the ground that it does not conform to the opinion. We have examined the decree and find that it does conform precisely to the opinion. The last sentence of the opinion is in these words: "The decree of the Circuit Court,