*OCTOBER TERM, 1796.

Present, WILSON and PETERS, Justices.

SCHERMERHORN *v.* L'ESPENASSE *et al.*

Injunction.

An injunction may issue, without affidavit, if other sufficient evidence be produced.

An injunction will not be dissolved, by reason of delay in bringing the cause on for hearing, which appears to have arisen from inadvertence and mistake—there being no evidence of wilful procrastination.

BILL IN EQUITY. This bill stated, that on the 31st of December 1790, the defendants, merchants of Amsterdam, had executed to the complainant (who resided at the same place) a power of attorney, to receive to his own use, the interest due on $180,000 of certificates of the United States, bearing interest at six per cent. from the 1st of January 1788, to the 31st December 1790, amounting to $32,400; but that, notwithstanding this assignment, the defendants, on the 16th June 1792, received certificates for the $32,400 of interest, and agreeable to the act of congress, funded the amount at three per cent. in their *own names. The bill then prayed relief, according to the equity of the case, and that an injunction might issue [*361 to prevent the defendants from transfering the stock, or receiving the principal or interest; and also to prevent the register and transfer clerk of the treasury, and the cashier of the Bank of the United States, from allowing a transfer, or paying the principal or interest of the stock, pending the suit.

On filing the bill, *Du Ponceau* exhibited to the court the power of attorney, duly authenticated, from the defendants to the complainants, and his own affidavit, stating that he had inspected the books of the treasury, where he saw that the identical stock in question was registered in the names of the defendants. Under these circumstances, the injunction issued; but no *subpœna* was ever taken out, nor any further proceedings had in the suit, until the present term, when *Lewis* moved for a rule to show cause why

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makes the rule, as in an action of debt on a bond (in which only the penalty and interest can be recovered), when that rule is to be pursued, whatever may be the damages laid in the declaration.[1]

IREDELL, Justice, agreed in the opinion of the court, as it applied to the original suit in the inferior court: but he dissented from its application to the case of a writ of error, when the sum rendered by the judgment was, in his opinion, to be deemed the value of the matter in dispute, in the supreme court.

CHASE, Justice, agreed in the decision of the court, because the legal judgment (of which alone the court could take notice) was for the penalty of the bond, on which the action had been brought; though, in an irregular manner, the record says, that judgment was to be released, upon payment of a smaller sum, than would authorise the party to bring a writ of error. He thought that, to ascertain the value of the matter in dispute, the court must always refer to the original suit; but he would not admit, that the demand of the plaintiff furnished the rule, as the plaintiff might, on that ground, entitle himself, in every case, to a writ of error, by laying his damages proportionally high.

[1] 3 Dall. 401.

the injunction should not be dissolved. Before the motion was argued, *Du Ponceau* filed another affidavit, stating that the delay in issuing process was by mistake and accident, and not from motives of malice and oppression; that he had heard that *Lewis* was to make the present motion, near a year ago; and that in expectation it would be made, he had suspended the proceedings on the part of the complainant, intending, as soon as *Lewis* should appear in the cause, to serve him with the process, as clerk in court. *Lewis* admitted, that he had been applied to, about a year ago, not on behalf of the defendants, but of Messrs. Pollocks, who claimed the stock (as he alleged), by virtue of a deposit from the complainant himself; but he insisted that he had postponed making his application to the court, one term, at the instance of *Du Ponceau*. These facts being understood—

Lewis endeavored to support his motion on two grounds: 1st. That the injunction had issued irregularly, as there was no affidavit made of the truth of the allegations contained in the bill: and 2d. That the complainant had unreasonably delayed bringing the cause to a hearing and decision.

On the first ground, he observed, that he did not object, because the injunction had issued before a *subpœna* was served, as there were various cases in which justice could not otherwise be attained; but in no case can an injunction be issued or awarded, without a previous affidavit of the truth of the facts stated in the bill. 2 Harr. Pr. Ch. 221, 222, 223, 232, 245, 259; 1 Brown Rep. Ch. 452; 3 Ibid, 12, 24, 463. The affidavit filed in this case is not in support of the bill, but in proof of an extrinsic, immaterial fact; and the power of attorney was not of itself sufficient. Such powers, given in a foreign country, do not always, on their face, explain the meaning of the parties; nor can they be deemed competent evidence of the right of property. It is true, that Harr. P. Ch. 221, and Hinde 583, mention that an injunction *may issue on the exhibit of deeds, writings or other evi- *362] dence; but the former cites Vernon, where not a word is said on the subject, and the latter refers to no authority.

On the second ground, it was urged, that the complainant's delaying his suit is assigned in all the books of practice as a good reason for dissolving an injunction. 2 Harr. Pr. Ch. 259, 16, 17; Prec. in Ch. 508. In this case, there has never been even an attempt to serve a *subpœna*, and the property being within the jurisdiction of the court, the defendants (who are not, however, proved by affidavit to be resident abroad) might have been *subpœnaed*, even in Amsterdam. If a *subpœna* is not served, the only excuse which can be allowed, and which must be proved, is that the party cannot be found—but the attempt to find must be made.

Du Ponceau and *Dallas*, for the complainant, premised, that they were desirous in any mode to obtain a hearing and decision on the merits of the cause; and offered to meet the adverse counsel *instanter*, either on the claim of the defendants, or of the parties for whom he interposed, upon an answer to the present bill, upon a cross-bill, or upon a bill of interpleader. If this overture was rejected, the inference must be conclusive in favor of the complainant, and the court will pay no regard to a motion made in behalf of persons, whose interests are not involved in the existing cause, and who preferring this insidious course, refuse to appear, for the purpose of enabling the complainant to contest their pretensions.

But in answer to the two grounds urged for dissolving the injunction, it was contended: 1st. That, although an affidavit of the truth of the facts contained in the bill, is a regular, and perhaps, the most general foundation for an injunction, is not the only foundation on which it issues. Where the bill states an equity, depending on the discovery of the defendant; or a relief is prayed upon circumstances happening within the knowledge of the complainant, and several other analogous cases, the affidavit of the party is the best evidence of which the subject admits; but a court of equity will not, any more than a court of law, confine itself to one kind of proof, where there are various kinds of equal validity; much less will it adopt an inferior, in exclusion of a higher kind. Suppose, the fact depends on a record; the law says, that a record is the only regular proof of its own existence; and yet, if the rule in chancery is as inflexible as it is stated to be, the necessity for the affidavit of the interested party cannot be superseded by exhibiting the record itself. In the present case, would the complainant's affidavit be more satisfactory to prove the contents of the power of attorney, than the inspection of the instrument itself, as an exhibit in the cause? But it is not on general principles alone, that the regularity of the proceeding is *maintained: all the books of practice concur in stating, that an injunction may be obtained either upon matter confessed in the answer, [*363 or upon some matter of record, or on some deed, writing or other evidence, produced in court. 2 Harr. Pr. Ch. 221; Hinde Pr. Ch. 583. It issues upon payment of money into court; and it has been granted to a bankrupt, upon the bare production of his certificate, to stay proceedings at law. 2 Harr. Pr. Ch. 222, 223. Besides, the present bill must, from the nature of the transaction, be filed by an attorney, as the complainant lives abroad; and it would have been fatal, to wait for an affidavit, as the stock would certainly have been transferred, on the first intimation of the suit, or intention to sue. It is conclusive, however, that by proof, independent of the allegations in the bill, to wit, the defendant's assignment of the property in question to the complainant's use, and *Du Ponceau's* affidavit of the defendant's having afterwards converted it to his own use, there is an apparent spoliation and fraud. The conscience of the court cannot be more satisfactorily informed upon the subject; and it is a strong additional circumstance, that notwithstanding the injunction has so long bound the property, the defendants have never attempted to release it.

2d. This naturally leads to the second consideration, whether the delay has been so unreasonable, as to warrant the court in dissolving the injunction; and of course, putting it for ever out of their power to do justice to the party really injured, as the stock will, doubtless, be instantaneously transferred. Neither of the grounds of the present motion at all relate to the merits; and it may fairly be remarked, that the delay might more easily have been prevented by the defendants, than by the complainant. The delay, however, has not proceeded from any intention to oppress the defendants, nor to avoid a discussion; it is, at most, an error, or *laches* of the solicitor, which the court will not allow to be converted into an instrument for the destruction of a just claim. The defendants being abroad, it was doubtful how the complainant could proceed to bring the suit to a decision; Mitford 30; 2 Harr. Pr. Ch. 222; and where an injunction is granted on the merits, it will not be dissolved, before a hearing. If, therefore, the merits

are with the complainant, no advantage can flow from granting the present motion; as it is expressly laid down in the books, that where the equity appears evidently for the plaintiff, or his case is hard, an injunction dissolved for unreasonable delay, will, upon motion, be revived. 2 Harr. Pr. Ch. 224. The court will not dissolve the injunction merely to give an opportunity to carry the property (which ought in equity to be deemed the complainant's) out of its jurisdiction.

PETERS, Justice.—If this were not a case, in which an irreparable injury
*364] might be done, by allowing the stock to be placed *beyond the jurisdiction of the court, it would, perhaps, be proper to insist upon a more rigid practice then has been pursued. But the dissolution of the injunction would, probably, put the property out of the power of the court; and incapacitate us from doing justice hereafter to the parties, according to the real merits of their respective pretensions. It is proper, however, to observe, that I do not think an affidavit to the contents of a bill, is the only foundation for issuing an injunction. Harrison, on this point, is himself a respectable authority, although he cites no other book; but independently of all written authorities, reason and the dictates of justice require, that other proof besides the party's oath should be allowed. Nor, under all the circumstances, can I decide, that the delay which has occurred is without a reasonable excuse. It will be proper, however, in continuing the injunction, to apprise the complainant, that, unless some good cause to the contrary is shown, I shall be for dissolving it, at the next term.

WILSON, Justice.—This motion is made on two grounds: 1st. That the injunction originally issued on an improper foundation: and 2d. That there has been an unreasonable delay in bringing the suit to a decision under it. It does not appear to me, however, that either of these grounds is sufficiently supported. The irregularity rests solely on the want of an affidavit; but this, though it is frequently, and perhaps, generally, the mode of proceeding, is not, in my opinion, the only one. In the very case now before the court, the evidence of the power of attorney, operating effectually as a transfer of the property, is certainly stronger evidence than an affidavit of the interested party. With respect to the delay, it is sworn to have happened through inadvertence and mistake; and no evidence of a wilful procrastination has appeared in the course of the discussion. On the contrary, an overture has been made to bring the merits to a hearing, as expeditiously as can be devised. It is to be considered, likewise, that if the injunction is dissolved, the court put it out of their power to do effectual justice; but, if it is continued, justice can be done, eventually, to the injured party; whether the complainant, the defendant, or Messrs. Pollocks, shall establish a title to the property.

The motion refused.