EDGELL, STEPHEN M v TUCKER, CHARLES L., INTERPLEADER AND BUCKLAND, THOMAS A., GARNISHEE

MARCH 1967

COUNTY OF ST. LOUIS

584/6

FOLDER 1 OF 2

OLD REVERSED AND REMANDED

661/4

INVOLVED:

CONTRACT - DEBT - ASSIGNMENT - NOVATION

OPINION: VOL. 40 REPORTS p. 523

In the Sup Ct Mo
March T. 1867.

S M Edgell Res
vs
Chas L Tucker Applt } Appeal from St Louis Circuit Court

Opinion of the Court

Stephen M Edgell sued the firm of Smith & Bullens by attachment and Buckland was summoned as garnishee; in his answer to interrogatories filed, Buckland admitted ~~in his answer~~ that he had in his hands the sum of $2102, 21, which he owed Smith & Bullens for the purchase of wheat, on the day of the service of the garnishment, but stated that before he received notice of the garnishment, the debt was assigned and transferred to Charles L Tucker, and that therefore he owed Smith & Bullens nothing. The facts shewn upon the trial are briefly as follows;
On the 13th day of December 1864 Buckland and Smith of the firm

of Smith & Bullens, met upon the street in the City of St Louis, and Smith requested of Buckland a check for the balance, for which he was indebted to the firm, the parties not recollecting the precise amount of the indebtedness the demand was made for $2000. At that time Tucker came up, and Smith at the instance of Tucker, requested Buckland to pay the balance in his hands to him, Buckland told Smith, in the presence of Tucker he would do so, if when he got to his office he did not find a notice of attachment which would hold the money. Smith then left the parties, and Buckland told Tucker, that he had better get a written order from Smith & Bullens on him for the money in his hands, as he did not want to pay except on a written order from them. Tucker said he would see them and the two parties. Buckland proceeded to his office, and on

his arrival there, he found no legal process had been left, but in about a half an hour, the sheriff ~~served~~ garnished him as a debtor of Smith & Bullens, and in about one hour thereafter Tucker presented to him the written order of S & B requesting him to pay Tucker, the amount in his hands due and owing them. It is conceded that Smith & Bullens owed Tucker about $2800, a sum considerably in excess, of the amount which Bucklands was indebted to them. By order of the Court Tucker, was brought in to interplead, and the real contest is, whether the attaching creditor or Tucker is entitled to the money which has been permitted to lie in Bucklands possession, awaiting the final determination of a court of competent jurisdiction. The cause was tried before the court, without the intervention of a jury and judgment was given

for the plaintiff the attaching creditor,

It is insisted here for the appellant that the declarations of law given by the court are erroneous and inconsistent with themselves, and that for this reason the judgment should be reversed. But the only question is, the true interpretation of the agreement entered into between Smith, Buckland and Tucker, and if this is arrived at, it is decisive of the case and the instructions need not be noticed. There is no dispute about facts, and the controversy is exclusively one of law. It is strongly urged, that when Smith requested Buckland to buy the debt to Tucker, and Buckland assented thereto, although he coupled the assent with the condition, that if there was no notice of attachment when he reached his office, that this amounted to a novation, and operated to make

Buckland the debtor of Tucker, instead of Smith & Bullen; whilst on the other hand it is asserted that a novation to be good ~~must~~ against subsequent attaching creditors must be completely, absolutely, unconditional and mutually binding on all three parties and not depend on any condition or contingency. The term novation is borrowed from the civil law, and until a comparatively late period, has been little used ~~used~~ in our law. It is introducing new parties to a transaction by substitution, as where a debtor is discharged from his liability to his original creditor, by contracting a new obligation in favor of a new creditor, by the order of his original creditor. Professor Parsons in his work on Contracts, gives this illustration. "Thus, A. owes B. one thousand dollars; B owes C the same sum, and at the request of B. orders A to pay that sum, when it shall fall due to C. So

this A consents, and B discharges A from all obligation to him, A thus contracts a new obligation to C, and his original obligation to B is at an end" (1 Parsons Contr. 217). It will be seen here is a new contract formed and a former contract dissolved and the consideration attaches to the whole transaction. To give full and complete legal efficacy to the new contract the original liabilities must be wholly extinguished. For unless the former debt is discharged there is no consideration to support the latter promise and nothing can spring out of it to ~~support~~ maintain an action. Its validity rests upon a present transference of a legal right, by which the debt is entirely extinguished as regards one party and absolutely vested in a third party at his request. To produce this result there must be mutual con

concurrence and assent in all the parties at the same time. Buller J. in Pattock vs Harris (3 Term R 174) puts this case: "Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100, B's debt is extinguished, and C may recover that sum against A" The case cited from New Hampshire, Heaton vs Angier, is illustrative of the same principle, and to the same point.

But will the annexation of a condition to the agreement defeat its validity, though the condition be subsequently performed? Pothier in his work on obligations discusses this question at large, and he says that where there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted. Also, if the conditional debt, of which it is intended to make a novation

by a new agreement, is a specific thing, which has been destroyed or perishes, before the condition is accomplished, there will be no novation even if the condition should exist; for, since the accomplishment of the condition cannot confirm the debt of a thing which has no existence, there is no original debt to which the new one can be substituted, And on the other hand, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement before the first debt is extinct, Therefore a novation will be prevented from taking place, not only upon failure of the condition, but also upon the extinction of the original debt, before the condition is accomplished, But a term for payment is said to be different from a

condition; the debt exists though the term of credit is not expired; therefore, a novation may be made of a debt payable at a future day, by a pure and simple engagement; or of a pure and simple engagement by another engagement allowing a term of credit; and in either case, the novation takes effect from the first, without waiting for the expiration of the term, (See 1 Pothier on Obl. by Evans p 382)

This principle has been frequently acted upon both in the courts of common law and in chancery.

The agreement between Smith, Bucklands and Tucker was complete, only conditioned that if when Bucklands went to his office, he should find legal process there which would hold the money he should not be required to pay. It is fair to presume that Smith & Bullens were in failing circumstances, and Bucklands was apprehension that some action had

already been taken, which would make him liable, But if when he reached his office his apprehensions were not realized, the condition was performed, the engagement took effect, and from that instant he became the debtor of Tucker.

The subsequent understanding that a written order should be procured, in no wise altered or affected the contract previously entered into between all three of the parties, Smith was not privy to it, and it was suggested by Buckland, out of abundant caution, as furnishing better and more convenient evidence of the transaction, There is nothing wrong or inequitable in the arrangement, The firm of S & B were indebted to both Tucker and the attaching creditor, and while they possessed free and unrestrained control over their own assets, they had the right to buy any one of

their creditors in preference to another, and if the attaching creditor was behind in point of time it was his misfortune. This case is not like Kimbal vs Donald (20 Mo 577) and which was followed in Ford vs Anderson, the only point there was whether a bill of Exchange drawn by a merchant on his factor though not accepted, amounted to an equitable assignment of the funds. The Court held that it did not, and at the very onset of the opinion the judge places it on the ground that it was a bill of Exchange and not a mere order to pay over a particular fund. In law in order to constitute an assignment of a debt or a novation so as to enable the transferee to bring an action in his own name, the assent of the debtor to the transfer is essential, in equity the rule has always been different, and no promise by the

debtor is necessary to enable the assignee to sue in his own name. The rule in this State is now fixed upon the doctrine prevailing in courts of equity. As illustrative of this question we will cite two cases having a direct bearing on the subject in controversy, one at common law, the other in chancery. In the case of Crowfoot vs Gurney (9 Bing 372) one Streather being indebted to Isaac Solly & Sons, addressed a letter to Gurney who was his debtor, requesting Gurney to pay to Solly & Sons whatever balance might be due him. This order was forwarded to Gurney by Solly & Sons, and Gurney consented to pay the debt to them as soon as the amount was ascertained. After the amount was ascertained, but before the money was paid, Streather became bankrupt and his effects all passed into the hands of assignees, who claimed the

money. It was held that notwithstanding the bankruptcy of Streather, Solly & Sons might sue and recover of Gurney the amount of the debt. Tindal C.J. after referring to the facts, saying: "These circumstances amount to an equitable assignment of the debt due from Gurney to Streather; for Solly might have gone into a court of equity to compel a formal assignment, and no answer could have been given to such an application."

In Clark v Maurau (3 Paige Ch 373). Hodges a merchant, residing at Providence, Rhode Island, was indebted to Maurau, who was in business in New York. Upon being applied to by Maurau for payment, Hodges informed him that he had ordered the balance of his funds in the West Indies to be forwarded to him, and directed him to place those funds to his credit, on account, when received.

The agents of Hodges, in the West Indies shipped the funds, consisting of a quantity of doubloons, on board of a general ship, consigned to Marsan at New York; and forwarded to him the bill of lading, in which bill the doubloons were stated to be for the account and at the risk of Hodges. Previous to the arrival of the ship at New York, Hodges failed, and assigned all his property to trustees, for the benefit of certain other creditors; and upon the arrival of the vessel at New York, both Marsan and the assignees claimed the doubloons. On a bill of interpleader filed by the master of the ship; Halsworth, Chancellor held, that Marsan had obtained a specific lien, upon the doubloons, for the payment of his debt; which lien was not affected by the general assignment of Hodges, for the benefit of other creditors.

When the agreement or contract

was made between the parties no lien had attached on the money in the hands of Buckland, and there was nothing to prohibit Smith & Bullen from disposing of it. The only qualification that was annexed to the contract, in reference to notice of attachment, was destroyed and ~~annulled~~ annulled, when Buckland found on his arrival at his office, that no such notice was there. From that period, then, the transfer must be considered unconditional and absolute, and the subsequent service of garnishment could not impair the rights of Pickens.

The judgment must be reversed and the cause remanded. The other judges concur.

David Hagner

87 C

Copy instruction

Edgell
v
Tucker

Opinion of the Court
Hagner

Filed May 6th 1867
C. J. Fishback Clk
per E. McCarty Dep

Reversed & Remanded

1 State of Missouri }
County of St Louis } Be it remembered that at the February Term of the Circuit Court for the year 1864 within and for said County a Petition & Bond were filed upon which the following Summons & writ of Attachment issued, to wit:-

Attachment

The State of Missouri

To the Sheriff of St Louis County Greeting: We Command you to attach Herman K. Smith & Edward R. Bullens by all and singular their lands and tenements, goods chattels, moneys credits and effects, or so much thereof as shall be sufficient to secure the sum of twenty eight hundred forty five Dollars and 41 cents with interest and costs of suit, in whose hands or possession soever the same may be found in your bailiwick and that you Summon the said Smith & Bullens to appear at the next term of the St Louis Circuit Court, before the judge thereof on the first day of the said term, to be holden at the city of St Louis, within and for the County of St Louis on the first Monday of February next then and there to answer the complaint of Stephen M. Edgell as set forth in the annexed petition: and also that you might summon all and every person, in whose hand or possession soever any such lands, tenements, goods chattels, moneys, credits, or effects may be found and particularly that they be and appear before the Judge

of our said Court, on the first day of the term aforesaid, then and there to answer unto what may be objected against them and have you then and there this writ

Witness F. A. H. Schneider clerk of our said Court with the seal thereof hereunto affixed at Office in the City of St Louis this 13th day of Dec. in the year of Our Lord eighteen hundred and Sixty four

(Seal) U.S. Stamps 50 cents

F. A. H. Schneider, Clerk

Sheriff's Return

Upon which Attachment was endorsed the following return, to wit:-

No other property goods Chattels or real estate belonging to the within named defendants found in my County (except what had been levied on under Attachments No.s 52 & 53 to February Term 1865 St Louis Circuit Court) whereon to levy this writ. By order of Plaintiffs Attorney I summoned Thomas A. Buckland agent December 13th 1864 at 1½ O'clock P. M. of that day E. Traube & E. Traube & Co December 14th at 9½ O'clock A. M. of that day, Chouteau & Edward December 14. at 12 O'clock M. of that day R. P. Ober & Co. December 14th 1864 at 12½ P. M. of that day, J. C. Hart December 14. 1864 at 3¼ O'clock P. M. of that day and Ladue, Tousey & Co, December 15. 1864 at 9½ O'clock A. M.

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of that day to appear at the return term of this writ to answer the interrogations that might be exhibited by the Plaintiff touching their indebtedness to the defendants.

I further declare to them that I attached in their hands (and summoned them as Garnishees) any goods chattels moneys or evidences of debt which they might have belonging to said defendants, and further that I attached in their hands all debts due from them to said defendants, or so much thereof as would be sufficient to satisfy the debt interest and cost in the above case.

I further executed this writ in the County of St Louis on the 16th day of December 1864 by delivering a copy of the writ & petition as furnished by the Clerk to Herman K. Smith by delivering a copy of the writ & furnished by the Clerk to Edward R Bullens John C. Vogel Sheriff

N. B 1.00 By J. S. Wilkins D.
7 gar. 7.00
Sff. 2.00
levy 1.00
$11.00

Further Executed this writ in the County of St Louis on the 14th day of December 1864 at 5 minutes before 3 o'clock P. M. of that day by attaching the Leasehold interest of the defendants Herman K. Smith and Edward R. Bullens in the following described property, to wit: a lot of ground situate in Block No. Fifty eight (58) of the city of St Louis, containing a front of Fifty (50) feet and

nine (9) inches more or less on Walnut Street by one hundred and four feet and 7½ inches deep to a private alley. Bounded North by said Walnut Street, East by the lot of —— South by said private alley and West by Third Street, and being the same premises leased by Daniel D Page to Anton Weseman April 1st 1856 for the Term of ten years, expiring on the 1st day of April 1866, being a renewed Lease of said Page made ten years previous, pursuant to the terms of said original Lease John C. Vogel Sheriff

1.00 Bryan Cross D.

And afterwards, to wit on February 8th 1865

Interrogatories the following interrogatories were filed, to wit:

Stephen M. Edgell
Vs.
Thomas A Buckland
Garnee of Smith, Bullens & Co.

In the St Louis Circuit Court February Term 1865

According to the form of the Statute in this behalf made and provided, the Sheriff of St Louis County has Summoned, as garnishee in the above case, the following named person to wit:-

Thomas A. Buckland, and thereupon the Plaintiff Comes and alleges that said Garnishee has, and at the time he was summoned as such garnishee, had in his possession, custody and charge, divers goods, chattels, moneys, credits and effects of the said defendants of the Value of three thousand

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dollars, and also at the same time was and now is indebted to the defendant in divers sums of money, to wit: three thousand dollars

And the plaintiff exhibits the following interrogatories, to be answered by said Thomas A Buckland said garnishee according to law, to wit:-

1st. At the time you were summoned as garnishee had you, or have you since that time had, or have you now in your possession, custody or charge any grain sacks, goods, chattels, moneys, credits, or effects, belonging to the defendants, or either of them. If yea state what they were, or are, and their value; if goods chattels, moneys, credits, or effects, how they came into your possession custody or charge.

2d. At said time were you, or have you since become or are you now in any wise indebted to the defendant personally or as an agent or otherwise. If yea. State to what amount, in what manner the debt accrued any instrument of writing by which it was evidenced what has become of such instrument, and whether, to your knowledge, it was in the possession or under the control of the defendants, or either of them or of his or their agent at the time, or after you were summoned as garnishee, and all facts in your knowledge in regard to the subject of this inquiry.

3d. At said time, were you, or have you since become or are you now bound in any contract to pay the defendants money which is not yet due?

If yea, State the nature of such Contract, the amount thereof, and when the money to be paid under it was or is to become due and payable

W. Currier
Plff's atty.

And afterwards, to wit on February 18th 1865 the following Answer of Garnishee was filed to wit:

Answer of Garnishee

Stephen M. Edgell and A.C. Anderson Plaintiffs vs. Thomas A. Buckland, Garnishee of Herman K Smith and Edwin R. Bullens	In St Louis Circuit Court February Term 1865

Thomas A. Buckland who was summoned as garnishee herein for answer to the first interrogatory of Plaintiffs Exhibited and filed herein states that at the time this respondent was summoned as garnishee in this cause he had not nor has he since had in his possession charge or control any personal property money rights credits bonds, bills notes, drafts, checks or other choses in action belonging to the said defendants Herman K. Smith and Edwin R. Bullens or either of them.

For answer to the second interrogatory of the plaintiff exhibited and filed herein this respondent says: that at the time he was summoned as garnishee in this cause he was not indebted, nor has he since become indebted, nor is he now indebted to said defendants,

7 Herman R. Smith and Edwin R. Bullens or either of them, unless the following facts under the law render this respondent liable or indebted to said defendants Herman R. Smith and Edwin R. Bullens, to wit:- This respondent says that prior to and on the 13th day of December A.D. 1864 he was agent and acting as such for Jesse Weller who was and is the owner of the Park Mills in the city of St Louis, that prior to 13th December 1864, this respondent as such agent had purchased wheat of said Smith and Bullens, and on said 13th December 1864 said Weller owed said Smith & Bullens, two thousand one hundred and two 26/100 dollars for wheat sold by them to this respondent as agent for the proprietor of said Park Mills. This respondent had full authority from the proprietor of said Park Mills to buy wheat for said mills, to pay bills or liabilities incurred on account of the running of said mills About one o'clock on the 13th day of December 1864 (and before this respondent was summoned as garnishee herein) Herman R. Smith one of said defendants verbally requested and directed, this respondent to pay over to Charles L. Tucker who was present the said sum of two thousand one hundred and two 26/100 dollars due for wheat as aforesaid and this respondent then and at the time in response to said request and direction of said Smith consented in the presence of said Tucker to pay to him said sum, the said Smith

and Bullens being then as this respondent understood from them and said Tucker indebted to the latter in a sum exceeding said Two thousand one hundred and two 26/100 dollars. After the said Smith had made said request to pay said sum to said Tucker And this respondent had consented to pay said sum to said Tucker as aforesaid before this respondent was summoned as Garnishee herein, this respondent requested said Tucker to obtain from Smith and Bullens a written order from them for said sum of money, when this respondent requested said Tucker to obtain such written order said Smith & Bullens were not nor were either of them present. On the same day, to wit, on the 13th December 1864, the said Tucker in pursuance of the request aforesaid of this respondent brought to this respondent a written order from said Smith & Bullens directing this respondent to pay said sum of two thousand one hundred and two 26/100 dollars to said Tucker which order said Tucker left in the possession of this respondent and the same is exhibited and filed herewith. The said written order did not come to the possession of this respondent until after this respondent was summoned as garnishee herein, but it did come to his possession the same day"

In answer to third interrogatory of the plaintiffs exhibited and filed herein this respondent says that at the time he was summoned as garnishee in this cause, he was not bound by any contract to pay

9 the defendants Herman K. Smith & Edwin R Bullens or either of them any money or property which will become due and payable to defendants or either of them after the time when he answers these interrogatories. Wherefore and by reason of the premises as aforesaid this respondent asks the Court to make such suitable order and decree in the premises as may be just and proper, and to protect this respondent from paying said sum of money as aforesaid twice, and for such reasonable allowance for costs and expenses incurred herein by this respondent as may be right and proper

Lackland, Cline & Jamison
Attorneys for Garnishee

Thomas A. Buckland, the above named respondent being duly sworn on his oath says that the matters and facts set forth in the foregoing answer he believes to be true T. A. Buckland Ally

Sworn to and subscribed before me this 18th day of February A.D. 1865 (Seal) Witness my hand and seal of office

T. A. H. Schneider clk

order of Smith Bullens & Co

Mr. T. A. Buckland Agent. You will please pay Col. Tucker such amount as you may owe us & oblige, Smith Bullen & Co. St Louis Mo Dec 13/64

And afterwards, to wit on April 10th 1865 the following order of Court was made to wit :- "On motion leave is given plaintiff to file an amended denial of Garnishees answer and on his motion it is ordered by the court that Charles L. Tucker of Saint Louis County came into Court on the sixth day of next term and interplead for the fund disclosed in the Garnishee's Answer filed herein."

order of Court on C. L. Tucker

{And on Sept 15th 1865 the following amended denial of Plaintiff was filed herein

Pltf's amended Denial

Stephen M Edgell
vs.
Thomas A. Buckland, Garnishee
of Herman K Smith etal

Circuit Court, Feby Term, 1865

And now the Plaintiff comes into Court and by leave thereof files here this his amended denial of the answer of said Garnishee, and says it is not true that said Buckland on the 13th day of December 1864 in response to an alleged verbal request and direction of said Smith consented to pay over to Charles L. Tucker the sum of two thousand one hundred and two 26/100 dollars for and on account of that sum due from said Buckland or Jesse Weller to said Smith and Edwin R. Bullens; and the Plaintiff denies that said sum so due by said Buckland personally or as agent for said Weller to said Smith and Bullens at the time of the service of the Garnishment in this cause had been in any manner assigned or transferred to said Tucker or any other party.

The Plaintiff alleges that said Buckland at the time of the service of the Garnishment in this cause, was and for a considerable time prior, thereto, had been carrying on and operating the Park Mills so called in Saint Louis, for his own use and benefit, but in the name of said Weller; that said Weller is and was during that period a resident of the State of Iowa and took no part in the business of operating said Mills, or buying grain therefor, but the same was under the sole and exclusive management and control of said Buckland: that prior to said 13th day of December 1864, said Buckland purchased of said Smith

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and Bullens a quantity of grain for the use of said Mills which had been delivered to him in pursuance of such purchase, prior to the 13th day of December 1864, and said Buckland, at the date last aforesaid and at the time of the service of said Garnishment was indebted to said Smith and Bullens in the sum of twenty one hundred and two 26/100 dollars and had at that time in his hands and possession that sum of money to be used and applied in the payment of said debt due said Smith and Bullens and which was then subject to Garnishment by their Creditors.

And the Plaintiff avers that at the time of the service of said Garnishment said Smith and Bullens had made no assignment or transfer of said claim or fund in the hands of said Buckland and that no notice of any such assignment or transfer had then been given to said Buckland. Wherefore plaintiff prays judgment against said Buckland for said sum of twenty one hundred and two 26/100 dollars.

W. Currier, Pltff's, atty

Rejoinder of Buckland

And afterwards, to wit on Oct. 2d 1865 the following Rejoinder of Buckland was filed to wit:-

Stephen M. Edgell Pltff
vs.
Thomas A. Buckland Garnisher of Smith et al. Deft

In the Circuit Court of St Louis County
Sept Term 1865

State of Missouri
County of St Louis } Garnishee, Thomas A. Buck-

land for his reply to the said Plaintiff's denial to said Garnishee's answer, reiterates and states that it is true as stated in his answer; that he the said Buckland did on the 13th day of December 1864 and before the service of the garnishee in this case in response to a verbal request as stated in his said answer, consent to pay over to Charles L. Tucker the said sum of two thousand one hundred and two dollars, and twenty six cents, for and on account of Smith and Bullens, in manner and form under the circumstances mentioned and set forth in said respondents answer, and that it was all of the money in his hand by any right on any account or under any circumstances whatever Said Garnishee moreover states that said money was assigned transfered and set over ~~to said~~ to said Tucker of the facts and circumstances as set forth in said answer of this respondent shall in the law make constitute and amount to an assignment, & it is these facts upon which the Court is called decide and as said Plaintiff has denied that it was assigned, this respondent will allege and declare that it was lawfully assigned in the manner as stated in said answer of Garnishee to said Charles L. Tucker, and this respondent believes that said Tucker is entitled to said money and not the Plaintiff in this case. Yet this Garnishee is not willing to pay over the money to any one until released by this Court or directed so to do. Said garnishee moreover states that he

13 was conducting, managing and controlling the "Park Mills" for Jesse Weller as alleged in his said answer, and not for himself as is alleged by said Plaintiff, in his said denial, and as to whether or not said Weller was a resident of the State of Iowa as alleged by said Plaintiff, this respondent is unable to see its relevancy to this issue.

This respondent again states and admits that he had in his hands as agent of said Jesse Weller on account of said "Park Mills," a balance due said "Smith and Bullens" on account of wheat purchased in manner and form stated in his answer prior to the service of the Garnishment in this case as stated, which said balance was 2102 $\frac{26}{100}$ and not otherwise or on his own account, but as agent of said Weller in the conduct and management of said Park Mills and that on the day of the service of the garnishment in this case, and prior thereto said Smith & Bullens requested this respondent to pay the whole of said balance to said Tucker, and which this respondent agreed to do and would have done long since had it not been for this and the other garnishments set forth in his answer to the interrogatories filed by plaintiff in this cause, and said respondent again states, that on his judgment said balance and sum was assigned and so believes the fact to be and again asks the Court to make said Chas. L. Tucker, a party to this suit so that persons interested may be bound by

the decree and orders that may be entered herein and for such other and further relief as may be meet and proper in the cause first again repeating the full facts and circumstances in this cause as they at the time occurred and are set forth in said answer heretofore filed, and which is as follows to wit:- "Said respondent states that at the time he was summoned as garnishee in this this cause, he was not indebted, nor has he since become indebted nor is he now indebted to said defendants Herman K Smith and Edwin R. Bullens or either of them unless the following facts under the law render this respondent liable or indebted to said defendants Herman K. Smith and Edwin R. Bullens, to wit: this respondent says that prior to and on the 13th day of December A. D 1864, he was agent and acting as such for Jesse Weller who was and is the owner of the Park Mills in the city of St Louis. That prior to the 13th December 1864 this Respondent as such agent had purchased wheat of said "Smith & Bullens" and on said 13th December 1864 and said Weller owed said Smith & Bullens two thousand one hundred and two 26/100 dollars for wheat sold by them to this respondent as agent for the proprietor of said "Park Mills" to buy wheat for said Mills to pay bills or liabilities incurred on account of the running of said Mills, about one o'clock on the 13th day of December 1864 (and before this Respondent was

15 summoned as garnishee herein) Herman K Smith one of said defendants verbally requested and directed this respondent to pay over to Charles L Tucker who was present the said sum of two thousand one hundred and two 26/100 Dollars due for wheat as aforesaid, and this respondent then and at the time in response to said request and direction of said Smith consented to in the presence of said Tucker to pay to him the said sum, the said Smith & Bullens being then as this respondent understands from them and said Tucker indebted to the latter in a sum exceeding said two thousand one hundred and two 26/100 dollars After the said Smith had made said request to pay said sum to said Tucker and this respondent consented to pay said sum to said ~~to said~~ Tucker as aforesaid and before this respondent was summoned as garnishee herein, this respondent requested said Tucker to obtain from Smith & Bullens a written order from them for said sum of money, when this respondent requested said Tucker to obtain such written order, said Smith and Bullens were not, nor were either of them present On the same day, to wit, on the 13th. day of December 1864, the said Tucker in pursuance of the request aforesaid of this respondendent, brought to this respondent a written order from said Smith & Bullens directing, this respondent to pay this sum of two thousand one hundred and two 26/100 dollars to said Tucker, which order said Tucker left in

the possession of this respondent, and the same is exhibited and filed herewith. The said written order did not come to the possession of this respondent, until after the respondent was summoned as garnishee herein, but it did come to his possession the same day.

Thos. A. Buckland being duly sworn states that the matters in fact contained in the foregoing reply to be true as therein stated to the best of his knowledge and belief T. A. Buckland.

Seal Subscribed and sworn to before me the 2d. Oct 1865 Luther Babcock, Notary Public

And afterwards to wit February 10th 1866 the following proceedings were had, to wit:—

"The motion of Tucker to vacate order of Court filed herein being heard and fully considered by the Court is overruled and one week's additional time is given Tucker to file petition and claim". ~~which claim is in the words and figures following, to wit:~~

Claim of Tucker

~~Stephen M. Edgell, Plaintiff~~
~~vs.~~
~~Thomas A Buckland, defendant~~ } ~~In the Circuit Court~~

~~And now comes Charles L. Tucker who has been ordered to appear and file his claim herein by leave of Court presents this his claim to the moneys in the hands of said Buckland garnishee and states that heretofore, to wit: on the 9th day of December~~

16 1/4

And afterwards, to wit February 6th 1866 the fallowing Mation was filed to wit:-

Stephen M. Edgell Plaintiff
vs.
Thomas A Buckland, defendant } In the Circuit Court

174 Febry T. 1865

Mation to Vacate order of Court

And now Comes Charles L. Tucker in obedience to the order of this Honorable Court made on the 4th day of October at the September Term 1865 thereof whereby it was ordered on the motion of the said plaintiff that this respondent should come into Court on the sixth day of this February Term 1866 and interplead for the fund disclosed in the garnishees answer.

And the respondent moves the Court to Vacate said order and set the same aside and that the Respondent may be discharged with his costs for the reasons that said order is irregular, informal and without warrant or authority of Law Krum Decker & Krum for Tucker

And afterwards to wit on February 10th 1866, the fallowing proceedings were had, to wit:-

mation overruled

"The mation of Tucker to Vacate order of Court filed herein being heard and fully considered by the Court is overruled and one week's additional time is given Tucker to file petition and claim"

which said claim is in the words and figures following, to wit

Claim of Tucker

Stephen M. Edgell, Plaintiff
vs.
Thomas A. Buckland, defendant } In the Circuit Court

And now comes Charles L. Tucker who has been ordered to appear and file his claim herein by leave of Court presents this his claim to the moneys in the hands of said Buckland Garnishee and states that heretofore, to wit, on the 9th day of December

17 1864 Messrs Smith & Bullens became and were indebted to the said claimant Charles L. Tucker in a large sum of money, to wit: in the sum of two thousand eight hundred and fifty dollars for and on account of three hundred and eighty barrels of fine flour theretofore sold and delivered by said claimant Tucker to said defendants Smith & Bullens and being so indebted said Smith and Bullen, afterwards, to wit, on the thirteenth day of December 1864 and before the service of the Garnishment in this case did transfer assign and set over to this claimant Charles L. Tucker the moneys in the hands of said Buckland amounting to the sum of two thousand one hundred & two dollars and twenty six cents for and on account of said debt, and said Buckland was notified of said transfer and consented and promised to pay the same to said Tucker.

Wherefore claimant prays judgment for the said sum of money in the hands of said Garnishee

Chas. L. Tucker

Subscribed and sworn to before me this 13th day of February 1866.

Seal William Kreiter Notary Public
St Louis County Mo.

And afterwards at the February Term of the Circuit Court aforesaid, to wit, on Tuesday March 20th 1866, the following proceedings were had, to wit

18

Stephen M. Edgell
vs.
Thomas A Buckland Garnishee of Herman K Smith and Edward R T Bullens
Charles L. Tucker, Interpleader

Judgment

Now come the parties by their respective attorneys and waiving a jury submit this cause to the Court on the pleadings and proof, and the Court having duly heard and considered the same doth find the issues herein joined between the plaintiff and the interpleader in favor of the plaintiff. It is therefore considered by the Court that the plaintiff recover of the interpleader his costs occasioned by the interplea herein and have execution therefor. And it appearing from the answer of the garnishee herein that he has in his hands the sum of twenty one hundred and two dollars and twenty six cents. It is ordered that Thomas A. T Buckland, the garnishee herein pay into this Court for the plaintiff, within five days, the said sum as confessed in his hands, less the sum of fifty dollars allowed him for answering herein. All other costs to be paid out of fund paid in to Court

And afterwards, to wit, on March 24th 1866 the following further proceedings were had, to wit:-

Motion for a New trial overruled — Appeal allowed

"The Motion for a New trial being submitted to the Court and the Court being fully advised of and concerning the premises doth order that the same be overruled, whereupon the interpleader prays for an appeal to the General Term, from the ruling of the Court

herein which is allowed

And afterwards at General Term, to wit on Friday March 30th 1866 the following proceedings were had to wit:-

Judgment of Spec. T. affirmed

Stephen M. Edgell
vs.
Thomas A. Buckland
Chas. L. Tucker, Interpleader

"Now come the parties by their respective attorneys and the Court, being sufficiently advised of and concerning the premises doth consider and adjudge that the judgment rendered herein by the Circuit Court of Saint Louis County at Special Term, be in all things affirmed and stand in full force and effect, and that the interpleader pay the costs of this appeal and that execution issue therefor."

And afterwards, to wit on Saturday March 31st 1866, the following further proceedings were had to wit:-

Bill of Exceptions &c. filed Appeal allowed

"Now comes the interpleader by his Attorney and files a Bill of Exceptions and also an affidavit for an appeal and on his motion an appeal is allowed him to the Supreme Court from the decision herein rendered, he thereupon files an appeal bond which is approved by the Court."

which affidavit for appeal and appeal Bond are in the words and figures following, to wit:-

20

affidavit for appeal

Stephen M. Edgell
Vs.
Thomas A. Buckland
Garnishee &c

St Louis County ss
Chas. L. Tucker Interpleader

Charles L. Tucker, being duly sworn says that his appeal in this case is not made for Vexation or delay, but because he believes that he is aggrieved by the judgment and decision of the Court in this case

Chas. L. Tucker

Subscribed and sworn to before me this 31st of March 1866 F. A. H. Schneider, Clk

appeal Bond

Appeal Bond

Know all men by these presents, That we Charles L. Tucker as principal, and Edward Chase and John M. Krum as Sureties are held and firmly bound unto Stephen M. Edgell in the sum of Five hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated at St Louis this 31" day of March A. D. 1866.

The Condition of the above obligation is such that whereas Charles L. Tucker Interpleader has appealed from the judgment rendered against him, and in favor of Stephen M. Edgell in the St Louis Circuit Court for costs. Now, if the said

appellant will prosecute his appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment as shall be given by the Supreme Court such as the Supreme Court may direct the St Louis Circuit Court to give; and if the judgment or any part thereof be affirmed, will comply with and perform the same so far as it may be affirmed and pay all damages and costs which may be awarded against him by the Supreme Court then this obligation shall be void, otherwise it shall remain in full force and effect

Chas. L. Tucker (seal)
Edward Chase (seal)
John M. Krum (seal)

Approved in open Court March 31st 1866
F. A. H. Schneider, Clk

The Bill of Exceptions at Special Term filed March 24th 1866 is in the words and figures

20½

Bill of Exceptions

following, to wit:-

Stephen M. Edgell
Vs.
Thomas A. Buckland
Garnishee of Smith & Bullens

Be it remembered that on the trial of the issues between the plaintiff in the above entitled cause and Charles L. Tucker interpleader, the said Charles L. Tucker, to sustain his interpleader and claim gave evidence tending to prove that on or about the 9th day of December 1864 the firm of Smith and Bullens were indebted to him in the sum of $2850 for flour sold to them

Testimony of Thomas A. Buckland

Thomas A. Buckland a witness called by said Tucker testified as follows:- On the 13th day of December 1864, I was passing along Third Street, toward & near the Post Office in St Louis when I met Smith of the firm of Smith & Bullens. Smith asked me if I would give him a check for the balance I had in my hands due to Smith & Bullens. I replied that I did not recollect the exact amount; nor did he state the amount. He asked me, if I would give him a check for $2000. Just that moment Chas. L. Tucker stepped up where Smith and myself were talking and Smith, at the instance of Tucker directed me to pay the balance in my hands due Smith and Bullens to Col. Tucker. I told Tucker in the presence of Smith that I would do so, if when I got to my office I did not find a notice of attachment which would hold the money in

21 my hands. Smith then went away along down Third Street and Col. Tucker and myself went towards the Post Office, Just as we got to the Post Office I said to Tucker "you had best get a written order from Smith & Bullens on me for the Money in my hands, for I dont want to pay the money except on a written order from them" Tucker said he would see them and we parted. The meeting between Smith. Tucker and myself on Third street where Smith directed me to pay the money in my hands to Tucker, took place about 12½ to one o'clock P. M. on the 13th Dec. 1864 just after "Change hours." At that time I held in my hands a balance of $2102 21/100 as agent of Weller as stated in my Answer in this case due and owing to Smith & Bullens. After going into the Post Office I went directly to my office at the Park Mills on Market Street near 13th Street when I got there I did not find any notice of attachment there. I had been at my office about half an hour before I was garnished in this case. It was nearly two o'clock on the 13th Dec. 1864. When the Sheriff served the notice on me within an hour after I was served with the Notice of Garnishment Col. Tucker brought me the written order from Smith & Bullens which is attached to my Answer in this case.

On Cross Examination by Counsel of Pltffs witness stated: W. Sayre who represented the Plaintiff came with the Sheriff to my office at the time

the notice was served on me. Witness was here asked if he had said any thing to R. W. Sayre when his recallection was fresh as to what occurred between himself Smith & Tucker at the time they met to which witness said:- I told Sayre that I did not know whether he was in time or not - that Smith at the instance of Tucker had directed me to pay the money in my hands to Tucker and that I had agreed to do so if I did not on going to my office find a Notice of attachment there. That I had told Tucker to get a written order on me from Smith & Bullens for the balance in my hands that I had told Tucker after Smith left us that I would not pay without a written order. I told Sayre I did not care to whom I paid the money I only wanted to be protected. and I did not know whether a Verbal order would protect me or not

Charles L. Tucker the interpleader at the time objected to all of the Statements, made by the witness aforesaid to Sayre. But the Court, notwithstanding the objection admitted said Statements & said Interpleader at the time duly excepted to the decision of the Court. It was here admitted by Interpleader & garnishee that Buckland personally ~~used~~ owed said debt of $2102 21/100 just before and up to the time of the meeting between Smith, Buckland & Tucker, spoken of by Tucker.

The foregoing was all the evidence offered or heard on

23 the trial of said issues

The Court on its own motion and at the instance of the Plaintiff in the attachment gave the following instructions:-

Plaintiff's Instructions Given

1 If the Court finds from the evidence that before said Buckland was summoned as garnishee in the suit of Edgell against Smith Bullens & Co - Charles L. Tucker and Smith of the firm of Smith Bullens & Co. had applied to said Buckland to pay to said Tucker the amount due from said Buckland to Smith Bullens & Co. and that while the said persons were so together said Buckland agreed that unless a garnishment had been left at his office that would hold the money he would pay it to Tucker. That the amount that was due from said Buckland to Smith Bullens & Co. was not then known to either of said parties. That after said Smith had left said Buckland & Tucker. Buckland told Tucker that he should not pay him the said Tucker the said sum without a written order from said Smith Bullens & Co. upon him, and that before any such written order was shown to said Buckland or ~~any~~ any other communication with him by either of the other parties he was summoned as such Garnishee in said suit then said Tucker cannot recover upon his Interplea

2. If the evidence shews that Buckland Garnishee owed Smith & Bullen $2102.26 and Smith & Bullen owed

Tucker $2850, and before the service of the garnishment the three parties met, and Smith & Bullen at the request of Tucker, ordered Buckland to pay to Tucker the amount he owed ~~to pay~~ them, and Buckland agreed to do so, provided that no notice of garnishment had then been left at his Office which would hold the fund, and if before the parties met again, or any other interview or communication was had by either of the others with Buckland, he was summoned herein as garnishee, then the fund is held by the Garnishment, and the interpleader can not recover.

3 A Novation to be good against subsequent attaching creditors must be complete, absolute, unconditional and mutually binding on all three parties and must not depend on any condition; not even one based on a mistake of law, or misapprehension of legal liability

4 Unless the Court shall find from the evidence that at the time of the interview between Charles L. Tucker, Buckland and Smith of the firm of Smith Bullens & Co as testified to by the witness Buckland, the said Tucker discharged the firm of Smith Bullens & Co. from all liability to him for a portion of their debt to him equal in amount to the amount of the indebtedness of Buckland to Smith Bullens & Co. & accepted the said Buckland as his debtor for the amount of such indebtedness so due from Buckland then said Tucker cannot recover upon his interplea

The Interpleader at the time duly objected & excepted to the giving of said instructions

Interpleader's instruction Refused

The Interpleader asked the following instruction

1 "If the Court finds from the evidence that the firm of Smith Bullen & Co before or at the time Thos. A. Buckland was garnished in this case was indebted to Charles L. Tucker the interpleader in the sum of $2850. that said Buckland at the same time had in his hands a balance of $2102.26 due and belonging to said Smith Bullens & Co that one of said firm before said Buckland was garnished, ordered or directed him in the presence and at the request of said Tucker to pay said balance to the latter and that said Buckland said he would do so if on going to his office he should find no notice there of an attachment which would hold said balance and if the Court further finds from the evidence that no notice of attachment or garnishment was at the office of said Buckland when he returned there after said order was given and before the service of the garnishment on him, then the Court should find for the interpleader"

Which the Court refused to give and the interpleader at the time duly excepted. The Interpleader in proper time filed the following motion for a New trial

Motion for a New trial

S. M. Edgell plaintiff
vs.
Charles L. Tucker
Interpleader
Thos A Buckland Garnisher
} Circuit Court

Now comes the said Charles L. Tucker interpleader and prays the Court to set aside the Verdict and finding upon the issues between the plaintiff and the interpleader for the reasons:-

1 That the Court erred in admitting improper and illegal evidence on the part of the Plaintiff

2 That the Verdict and finding is against the law and the evidence

3 That the Court erred in giving improper & illegal instructions on the part of the plaintiff

4 That the Court erred in refusing proper instructions asked by interpleader

5 The issue & finding ought to have been for the interpleader Krum Decker & Krum for interpleader which the Court overruled, and the Interpleader at the time duly excepted and prayed an appeal to the General term which was allowed. Now that all the matters aforesaid may become of record the said interpleader tenders this his bill of Exceptions & prays that same may be signed & made a part of the record which is done James C. Moody, Judge.

And afterwards at General Term, to wit on March 31st 1866, the following Bill of Exceptions was filed, to wit:-

Bill of Exceptions at Genl. Term

Stephen M Edgell
vs.
Thomas A P. Buckland, Garnishee of Smith & Bullens
Chas. L. Tucker, interpleader

27

In the St Louis Circuit Court Feb. Term. 1866
Saint Louis County ss.

Be it remembered that said cause having come before said St Louis Circuit Court in General Term, on appeal from Court Room No 1 in Special Term, and the said cause having been duly heard by said Court in General Term on the twenty eighth day of March 1866, it was determined by said Court that the decision of said lower Court be affirmed, to which decision the said interpleader duly excepted, Now that the same may be of record in this cause the said interpleader presents this his Bill of Exceptions and prays that the same be signed and made part of the record in the cause which is done

C. B. Lord, presiding Judge

State of Missouri
County of St Louis } ss I F. A. H. Schneider Clerk of the Circuit Court within and for said County Certify that the foregoing is a true and Complete Transcript of the records & proceedings in the above entitled cause as fully as the same remain on file and of Record in my office

Witness my hand and the seal of said Court at Office in the city of St Louis this 17th day of May A. D. 1866

F A H Schneider Clk.

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1866 Oct 15th Assgmts of Error filed
1867 April 30 Arg & Sub Stmt & brief of Ap & Stmt of Res filed
" " " Brief of Res filed
" May 6. Revised & Remanded

74 ~~xxx~~ (4) 74
March ~~8th~~ Term 1867
Stephen M Edgell
Respondents
vs. Transcripts
Chas. L. Tucker
interpleader
and Thos. A. Buckland
Gamishee
Appellants
Appeal from St Louis
Circuit Court
Filed Sept 29 1866
C. T. Fletcher
CCR
W. Currier atty for
Respondents
Krum Decker & Krum
appellants
Ass $17.00 [illegible]

S M Edgell
Respondent

v

Charles L. Tucker
appellant

IN SUPREME COURT,
Oct TERM, 1866

AND now come the said appellant and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellant assign the following, to-wit:

1. That said Court admitted improper and illegal testimony offered by ~~app~~ respondent.
2. That said Court rejected proper and legal testimony offered by appellant.
3. That the Court gave ~~to the Jury~~ improper and illegal instructions.
4. That the Court refused to give ~~to the Jury~~ proper and legal instructions offered by appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the respondent — when it should have been rendered for the appellant —

That said Court overruled the motion for a new trial, made by appellant

That the Court at general term erred in affirming the judgment at special term.

Krum Decker & Krum
for appelt

And now come the Respondent and, for joinder in error, say that there is no error in the record and proceedings of said Circuit Court in said cause as assigned by said appellant

J. Kinnier
Respondent's Atty

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Edgell
Report
v
Tucker
appelt

Apt errors

Rum D & K
for aplt

Filed Oct. 15. 1866
O. T. Fishback
Cl'k

Stephen M. Edgell
Respondent
vs
Charles L. Tucker
interpleader and
Thomas A. Buckland
Garnishee
Appellants.

In the
Supreme Court.
March Term
1867.

Appellants' Points & Argument.

I. The Court below erred in admitting as evidence, the declarations of the witness Thos A. Buckland, which he made to one Sayre after the interview with Smith & Tucker at the Custom House.

In this case, when the Court below admitted these declarations in evidence, the Court was sitting to determine the effect of the agreement which had been entered into by Smith, Buckland & Tucker at the Post Office. The question was, did the agreement qualified by Buckland's condition give Tucker a complete title to the funds in the hands of Buckland. This was the question before the

Court and the only question. The evidence should have been confined to a determination of this question. The agreement was completed at the Post Office. It was proposed there, accepted and entered into there by all of the parties. After the interview at the Post Office, beyond answering his condition by going himself to his office and finding no notice of garnishment, Buckland does nothing which does affect, change or restrict the agreement made at the Post Office. It was a present and irrevocable reality. Buckland's undertaking was complete — he does not withdraw from it; he does not depart from it by word or deed. What he said after the agreement had been made at the Post Office was wholly immaterial to the determination of the question before the Court. Hence Buckland's declarations to Sayre should have been excluded — they were res inter alios acta — they were

incompetent and irrelevant testimony. That this evidence influenced the Court, or had a tendency to influence the Court to decide against the appellant is a fair presumption. The ruling of the Court upon the admissibility of this evidence was manifestly improper, and it being a fair presumption that the evidence thence admitted influenced the Court to render the judgment which is of record here, that judgment should be reversed.

II. The Court below erred in giving for plaintiff the first and second instructions found in the record.

These instructions are manifestly inconsistent. The first proceeds upon the theory, that the interpleader cannot recover, because after the agreement had been made at the Post Office, Buckland demanded from the interpleader a written order, which was not delivered until after the service of the notice of garnishment. The second proceeds upon the theory, that the interpleader's recovery is prevented by the condition imposed by Buckland at the time he entered into the agreement. In other words, the first instruction defeats the interpleader's recovery, because he did not obtain a written order in his favor from the original creditor and upon the debtor. The second instruction determines, that the agreement at the Post Office was intended to be a novation, but that on

account of the condition im-
-posed by Buckland, it did
not amount to a novation.
Here are two inconsistent
instructions involving two
theories of Law. By one, a
condition imposed after the
agreement defeated the
interpleader's recovery; by the
other, his recovery is defeated
by a condition imposed at
the time of entering into the
agreement. This is error.
A Court must arrive at its
judgment upon one theory
of law. There cannot be two.
A Court' instructions must
be given upon one theory of
Law. If they favor a plaintiff,
they must yet be consistent.
If they favor a defendant,
they must still be consistent.
It does not matter for which
side they are given; instructions
must be consistent and
based upon the same theory
of law. There is no other
way of determining which
the Court followed in ren-
-dering its judgment.

Both of the instructions in question cannot be right and if one is right and the other wrong, then it was error to give both. There may be two hypotheses of fact, but only one theory of Law.

State to use Southern Bank, vs Armstrong #18 March T. 1867. Supreme Court of Mo.

III. The Court erred in giving the third and fourth instructions for plaintiff, which are found in the Record.

The third instruction declares, that a novation to be good against attaching creditors must be complete, absolute, unconditional and mutually binding upon all the parties. The idea, that a novation cannot be conditional is erroneous. The doctrine of nova-

tion was obtained from the Civil Law. Under the Civil Law, an engagement could be annulled or diminished by the substitution of a second engagement in its place. This constituted a Novation, -a substitution of a new for an old debt. The old was extin-guished by the new debt. This could be accomplished in two ways:
First, without a change of the persons, by changing only the nature of the obligation, and Secondly, by a change of the debtor and this whether the first obligation subsisted, the second debtor charging himself therewith, instead of the former who was discharged, or whether the new debtor made a new obligation. The second method of extinguishing engagements was also termed delegation. But both Domat and Pothier consider it a kind of novation and we apprehend, that by a proper and logical Division, the

second and first modes must be classed in the same genus. The generic term is novation. But we have been unable to find in the dicta of the Civil Jurists, or in the reason or analogies of the Law itself, that a condition can defeat a novation. On the contrary, a novation may be conditional – the only question being, has the condition been satisfied or fulfilled. If it has been satisfied, the novation is complete.

This case comes within the second species of novation – the extinguishment of an existing obligation by a change of debtors. In order to make the agreement of Smith Buckland & Tucker a novation there must have been a concurrence of the party making the change, of the party substituted or delegated and of the creditor. The evidence shows, that the agreement in question possessed these requisites. Tucker the creditor suggested the change

of debtors; the original debtor directed his own debtor to assume the obligation and the party delegated gave his assent and did assume the obligation. Here was a complete novation. It was made in good faith. It resulted from the concurrence of all of the interested parties. The objection which is urged by the fourth instruction for the plaintiff, that because in terms, Tucker did not discharge Smith & Bullens from their liability to him, he cannot recover as upon a novation is ill-founded and cannot be maintained. The instruction is erroneous. The act of the parties extinguished the original liability. Nothing more was needed. The original liability was extinguished in fact and no words or agreement further than that entered into was needed in the premises.

Healon, Mercier & Chase, being together, it was agreed between them, that

that the plaintiff should take Chase as his debtor for the sum due from the defendant. The debt due to the plaintiff from the defendant was thus extinguished. It was an accord executed.

Heaton v Angier. 7 N. H. 397.
Crowfoot v Gurney. 9 Bing. 372.

But the party delegated imposes a condition, and the theory of the instruction upon this point is, that the condition prevented the agreement from amounting to a novation.

In the case of Hyde et al v Boream 16 Pet 169. 180, the Court held, that a novation will, indeed, if it be absolute and unconditional, amount to a direct extinguishment of the original debt by substituting the new contract in its place. But no extinguishment is wrought if the arrangement is conditional and the conditions are not fully complied with.

So Pothier 550. 551, declares, that there can be no novation without two debts being contracted, one of which is extinguished by the substitution of the other. Hence, he says, it follows, that if the debt of which it is proposed to make a novation by another engagement is conditional, the novation cannot take effect until the condition is accomplished. Vice versa, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the new engagement before the first debt is extinct.

Here then is the rule, that a conditional agreement, with the condition unperformed, cannot constitute a novation. There is the rule, that the agreement must be absolute and unconditional. There is no such rule. There is no reason for such a rule. The agreement may be conditional

and if the condition is not performed, there is no novation, but if it is satisfied, there is a novation. So, in the case at bar, the novation depended upon the performance of a condition. Buckland, the party delegated, agreed to assume the new obligation, if when he returned to his office, he found no notice of garnishment. He did return to his office and found no notice of garnishment. Ipso facto, the condition was satisfied - the novation became complete. Buckland's liability to Smith Bullen & Co was changed into a liability to Tucker and the original debt of Smith Bullen & Co ~~was~~ to Tucker was extinguished. The novation was complete, the original debt extinguished and the new obligation assumed before Buckland was summoned as garnishee. The time may have been short, but it answered Buckland's requirement. The consideration for the new obligation, the extin-

-quishment of the old, became complete, when Buckland returned to his office and did not find a notice of garnishment. Nothing which he might have done after his return could affect his undertaking. His assent had been given to the new undertaking and his qualification had been satisfied. The transfer was present and irrevocable. Buckland could not withdraw from the agreement and the transfer cuts off the subsequent attaching creditor.

Kimball v Donald 20 Mo. 579. 580.

IV. The Court below erred in refusing the instruction asked by the interpleader.

Whatever view the Court may take of the preceding propositions, we submit that the agreement made at the Post Office was at least an equitable assignment of the funds in Buckland's hands and that the instruction asked by the interpleader should have been given. At Common Law choses in action, (except bills & notes,) are not assignable - hence at Common Law, there could be no transfer of a debt like the one in question. In Equity, however, an assignment of a chose in action is as good and as valid as the sale of a chattel. In this State, choses in action are assignable and transferable like chattels - the only qualification being that the debtor shall have notice of the assignment. His assent to the assignment is entirely

unnecessary. And it is not essential, that the transfer should be in writing.

Tibbetts v George 5 Ad & El. 115.
Ex parte Smith. 3 Swanst. 392.
Boeka v. Mulla 28 Mo. 180.

It is not necessary, that the notice should be by any particular instrument, or in any particular form.

Ashby v Winston 34 Mo. 315.
Burr v Carvalho. 4 Myl & C. #702.

It is immaterial also, that the precise amount of money in Buckland's hands was unknown when he was ordered to pay to the appellant.

Clark v Marian. 3 Paige. 373.
Crowfoot v Gurney. 9 Bing. 372.

This being a mere race between creditors, the doctrine qui prior est tempore, potior est jure, applies.

Zucker had a complete equitable title to the funds before the attachment, a title which did not depend upon the assent of Buckland.

It is sufficient, that Bucklaw had notice of the transfer - which is not denied. The title of Tucker, by the direction and assignment of Smith & Bullen, was such that he could have maintained an action against Bucklaw and would have recovered without having shown the latter's assent.

Kimball v Donald. 20 Mo. 580.
Tieman v Jackson 5 Pet 580. 595

87.

Supreme Court
March 7. 1867.

Stephen M. Edgell
Res-
vs
Olive L. Zucke
App.

Points & Argument
For Appellant
Krum D & K
for Appt

Filed April 30. 1867
O. T. Fishback Clk
per E. P. McCarty Dep

Edgell
v.
Tucker.
Buckland

In the Supreme Court

The plaintiff submits the following points & authorities

II. These facts in the case do not show any novation but on the contrary show conclusively that there was no novation for

1st In order to be a novation the transaction must be instant = absolute - a present change by which a debt is lifted from the shoulders of one party & placed upon those of the other.

1. Parsons on Contracts pages 217. 18
Heaton vs Hagger 7 New Hamp. 397

Now there was no present lifting of the debt. That is admitted on all hands. It was in the beginning connected with the condition imposed that he Buckland should pay Tucker of whom he got to his mill he did not find he had been garnished there was no idea in the minds of either of the parties at that time that there was any thing

said or done that was then in any way operative in any way to change the relation of the parties

2°. In order to be operative it must be upon no contingency

Butterfield vs Hartshorn. 7 N. H 345.

The idea of novation under our law is that there must be a present accord & satisfaction. If that is not done there is no consideration for the promise and the party making it can revoke the promise at his pleasure. There has nothing been done that bends him in any way. It all rest upon a verbal conditional promise without consideration. If Buckland had before he reached his mill died on the road, then there had been nothing done of any bending obligation upon any one. No authority can be found ~~at~~ in any decision at common law. That a conditional promise can be maintained as a novation It has sometimes been sustained when there was a present instant transfer but the amount was uncertain or rather such cases as 9. Bing 372 & 3 B&C 842 have been supposed to hold such a doctrine

though those decisions depend upon different principles

3d. It must have operated to instantly release Smith Bullens & Co from the debt they owed Tucker.

Cuxon v Chadley 3 Barn & Co. 591.
Butterfield v Hartshorn 7 N H 345.

4

It is perfectly clear that there was no discharge for 1st. The amount of the indebtedness of Buckland to Smith Bullens & Co was not known to either of the three parties.

2d. There was no conversation about Smith Bullens & Co's debt to Tucker & no agreement for credit & nothing said about payment pro tanto. for the reason that until it could be determined whether there was a lifting of the debt. no credit was to have been given.

3. If Bucklands mill had burned down before he reached it so that he was bankrupt, then. clearly no change of the indebtedness from Smith Bullens & Co to Tucker & Tucker could still hold Smith Bullens & Co

4th Unless there was a present instant change by which Buckland became the debtor to Tucker. there was no perfected agreement ~~and~~ under any view of the case until Buckland had reached his mill & he was in a position that at any time before he reached his mill he could make new terms. which he did & which were

not complied with until after he was summoned as garnishee. Until he reached his mill it all rested in a verbal agreement which Buckland could at any time revoke - and before he did reach his mill he annexed another condition to his agreement and that was that Tucker should procure a written order from Swetts Bullens & Co upon him & it is admitted that this was not done until after the garnishment. This shows also that neither Tucker nor Buckland considered that anything that took place at the Post office was of any binding obligation upon any one.

5th Unless at the time Buckland had contracted a new debt of his own which they, the three parties, were together. the transaction is simply an agreement conditionally to pay the debt of another and therefore within the Statute of Frauds.

have been supposed to hold such a doctrine
Though they depend upon different principles

II II. ~~There was to~~ no equitable assign-
= ment of the debt by Smith Bullens
to Tucker pr

1st It is purely verbal and unless ~~there~~
it is such a transaction as makes it
a novation. then there is no assignment
& cannot be pr there is no consideration
Kimball vs Donald 20 Mo. 577
affirmed in Ford vs Angelrodt. 37 Mo. 577

2d. There was no release of the debt
due by Smith Bullens & Co to Tucker.

III. The evidence of Buckland as to what he told Sayer was admissible

It was only asked of him in order to bring back to his recollection what was said at and done at the time of these transactions between Smith Bullens & Tucker & Buckland. He was asked what he said when these transactions were fresh in his recollection - This was all that he was required about

Supreme Court

Edgell

v

Tucker

Brief for respondents

Glover & Shepley

for Edgell

Filed April 30. 1867

O. T. Fishback Clk

per E. M. Carty Dep

Stephen M. Edgell
Respondent
vs
Charles L. Tucker
Appellant.

Supreme Court
March Term
1867.

Appellant's Statement.

The respondent instituted a suit by attachment against Smith, Bullens & Co, which was returnable to the February Term 1865 of the St Louis Circuit Court. The writ was issued on December 13. 1864 and served on the sixteenth of that month. On the thirteenth of December 1864, Thomas A. Buckland was summoned as garnishee. The respondent exhibited interrogatories, which were answered by the garnishee and the parties filed respectively a denial and a rejoinder. The Court ordered Charles L. Tucker to interplead for funds disclosed by the garnishee's answer. Tucker moved the Court to vacate this order, but the motion was overruled and in the February Term 1866, Tucker filed his interplea.

In support of the issue ten-

-duced by this interplea, the appellant called as a witness Thomas A. Buckland who testified as follows:

On the 13th day of December 1864, I was passing along Third street, towards & near the Post Office in St Louis, when I met Smith of the firm of Smith & Bullens. Smith asked me, if I would give him a check for the balance I had in my hands due to Smith & Bullens. I replied, that I did not recollect the exact amount, nor did he state the amount. He asked me, if I would give him a check for $2000. Just that moment, Charles L. Tucker stepped up where Smith & myself were talking and Smith, at the instance of Tucker, directs me to pay the balance in my hands due Smith & Bullens to Col Tucker. I told Tucker in the presence of Smith, that I would do so, if when I got to my office, I did not find a notice of attachment which would show the money in my hands. Smith then went away along down Third street and Col Tucker and myself went towards the Post Office

Just as we got to the Post Office, I said to Tucker, "You had best get a written order from Smith & Bullens on me for the money in my hands, for I don't want to pay the money, except on a written order from them." Tucker said he would see them & be parted. The meeting between Smith, Tucker & myself on Third Street, where Smith directed me to pay the money in my hands to Tucker took place about 12½ to one o'clock P. M, on the 13th Dec 1864, just after "Change hours! At that time, I had in my hands a balance of $2102 21/100 as agent of Keller as stated in my answer in this case due & owing to Smith & Bullens. After going into the Post Office, I went directly to my office at the Park Mills on Market Street near 13th Street. When I got there, I did not find any notice of attachment there. I had been at my office about half an hour before I was garnished in this case. It was nearly two o'clock on the 13th Dec 1864, when the Sheriff served the notice on me. Within an hour after, I was served with the notice of garnishment, bad

Tucker brought me the written order from Smith & Bullens which is attached to my answer in this case."
On cross-examination, the witness stated: "W Sayre, who represented the plaintiff came with the Sheriff to my office at the time the notice was served on me."
The witness was asked if he had said anything to R W. Sayres when his recollection was fresh as to what occurred between himself, Smith & Tucker at the time they met and, in reply, the witness stated: "I told Sayre, that I did not know whether he was in time or not - that Smith at the instance of Tucker had directed me to pay the money in my hands to Tucker and that I had agreed to do so, if I did not on going to my office find a notice of attachment there. That I had told Tucker to get a written order on me from Smith & Bullens, for the balance in my hands. That I had told Tucker after Smith left us, that I would not pay without a written order. I told Sayre, I did not care to whom I paid the money. I only wanted to be protected and I

did not know whether a verbal order would probate me. To the admission of these statements, to Sayre, the appellant objected, but the Court overruled the objection & appellant duly excepted. It was admitted, that Buckland personally owed the debt of $2102 21/100 just before & up to the time of the meeting between Smith, Tucker & Buckland. This was all of the evidence.

The Court on its own motion and at the instance of the plaintiff gave the following instructions:

If the Court finds from the evidence, that before said Buckland was summoned as garnishee in the suit of Edgell against Smith Bullens & Co - Charles L. Tucker and Smith, of the firm of Smith, Bullens & Co, had applied to said Buckland to pay to said Tucker the amount due from said Buckland to Smith Bullens & Co, and that while the said persons were so together said Buckland agreed, that unless a garnishment had been left at his office, that would hold the money, he would pay it to Tucker, that the amount that was

due from said Buckland to Smith Bullen & Co was not then known to either of said parties, that after said Smith had left said Buckland and Tucker, Buckland told Tucker that he should not pay him, the said Tucker the said sum without a written order from said Smith, Bullen & Co upon him and that before any such written order was shown to said Buckland, or any other communication with him by either of the other parties, he was summoned as such garnishee in said suit, then said Tucker cannot recover upon his interplea.

If the evidence shows, that Buckland garnishee owed Smith & Bullen $202.56 and Smith & Bullen owed Tucker $2850, and before the service of the garnishment, the three parties met and Smith & Bullen at the request of Tucker, ordered Buckland to pay to Tucker the amount he owed them and Buckland agreed to do so, provided that no notice of garnishment had then been left at his office, which owed held the fund & if before the parties met again, or

any other interview or communication was had by either of the others with Buckland, he was summoned herein as garnishee, then the fund is held by the garnishment and the interpleader cannot recover.

A novation, to be good against subsequent creditors must be complete, absolute, unconditional and mutually binding on all three parties, and must not depend on any condition; not even one based on a mistake of law, or misapprehension of legal liability.

Unless the Court shall find from the evidence, that at the time of the interview between Charles L. Tucker, Buckland and Smith, of the firm of Smith Bullen & Co, as testified to by the witness Buckland, the said Tucker discharged the firm of Smith Bullen & Co from all liability to him for a portion of their debt to him equal in amount to the amount of the indebtedness of Buckland to Smith, Bullen & Co and accepted the said Buckland as his debtor for the amount of such

indebtedness so due from Bucklaw then said Tucker cannot recover upon his interplea.
The appellant at the time duly objected and excepted to the giving of these instructions.

The appellant asked the Court to give the following instruction, which was refused:

If the Court finds from the evidence, that the firm of Smith, Bullen & Co., before or at the time the A. Bucklaud was garnished in this case, was indebted to Charles L. Tucker, the interpleader, in the sum of $2850; that said Bucklaw, at the same time had in his possession a balance of $2102.26 due & belonging to said Smith, Bullen & Co; that one of said firm, before said Bucklaw was garnished, ordered or directed him in the presence and at the request of Tucker to pay said balance to the latter, and that said Buck-land said he would do so, if on going to his office he should find no notice there of an attachment which would hold said balance,

and if the Court farther finds from the evidence, that no notice of attachment or garnishment was at the office of said Bucklaw when he returned there after said order was given and before the service of the garnishment on him, then the Court should find for the interpleader.

The Court below rendered judgment against the interpleader, whereupon he filed a motion for a new trial and, this having been overruled, he appealed to Circuit Court in General Term, whence, the judgment at Special Term having been affirmed, the case now comes by appeal.

Krum Decker & Krum
Attys for Appellant.

No. 87.

Supreme Court

March T. 1867

Stephen M. Edgell
Res

v

Chas L. Tucker
appt -

Statement of
Appellant.

Krum D & K
for appt

Filed April 30. 1867
C. J. Fistbart Alt
per E. B. McCarty Dep

Stephen M. Edgell
Respondent
v.
Chs. L. Tucker
Interpleader & Appellant

Supreme Court
March Term 1867

Respondent's Brief
By W. Curried of
counsel for pef.

II The interpleader's case rests on the facts disclosed in the testimony of Buckland, the garnishee. There is no error in the proceedings of the circuit court unless the facts sworn to by Buckland show a transfer or substitution of debts between him, Tucker (the claimant) and Smith Bullens & Co., (the judgment debtors) technically called novation.

A novation is the substitution of a new debt for an old one. From its nature it must be absolute, unconditional and mutually binding on the parties. Simultaneously one

debt is discharged and another created. ~~They mutually produce, the one the disch~~ The discharge of the old debt creates the new, and the creation of the new debt discharges the old one; thus if the transaction between Buckland, Tucker and Smith amounted to anything it operated an immediate discharge of Buckland from further liability to Smith Bullens & Co., and made him debtor to Tucker for $2102.26, and at the same moment discharged Smith Bullens & Co. for so much of their liability to Tucker. But the transaction did not have this effect.

1. Because there was no adjustment of the account between Buckland & Smith Bullens & Co., the balance against Buckland not being ascertained, and of course there could be no definite credit to Smith Bullens & Co. by Tucker.

2. Because the entire parol understanding was abandoned by the parties, and the written order substituted, Buckland

at the time refusing to pay otherwise than on a written order.

3. Because this understanding was executory and conditional. It was not executed and on a certain contingency was not to be executed. There was therefore no discharge at the time of any subsisting liability, or the imposition of any new obligation. Buckland's liability to Smith Bullock, in the meantime, continued unimpaired, and was so to continue by the terms of the understanding; and so of the liability of Smith Bullock to Tucker. No debt was thereby released or created, and there was therefore no novation.

Pothier on Obligations 550-1.

1 Parsons on Contracts 190 (see note y.) 1 Ed 217 (5th Ed.)

[redacted]

7 N.H. 345-397.

3 Burr. Obes. 591

[redacted]

4. But by the very terms of the arrangement Buckland was to pay Tucker only in case he should fail to "find a notice of attachment" xx. "when he got to his office". After reaching his office and before he left it he did" find a notice of attachment", and thus the event occurred upon the happening of which he was not to pay Tucker.

Buckland was anxious to protect himself and avoid an "attachment" entanglement. It would be a narrow and unwarranted construction of the words "when he got to his office" to interpret them as meaning strictly and literally the first moment he should reach his office door. The obvious sense of the language, is interpreted in the light of surrounding circumstances, is that he would pay Tucker what he owed Smith & Bullins &c. in case he should find on going to his office that he could do so without being involved in the

defence of a garnishment suit. Whether he "found an notice of attachment when he got to his office" ~~he was to judge~~ in the sense intended he was to judge. His acts show that, in his understanding of the matter, he did so find the notice of attachment, and accordingly refused to pay Tucker even on the written order of Smith, Pullen & Co.

III. The doctrine of equitable assignments does not apply to the case.

An account cannot be assigned by delivery, as in case of written evidences of debt, so as to vest in the assignee an equitable right to it (Drake on Attachment § 617) The transfer must be actual, not constructive merely. What is sometimes spoken of in the books as an equitable assignment of a claim, as in Black v. Paul 10 Mo. 103, cited in Drake

or attachment § 624, presents simply a case of novation. Such is the case put by Bullerd. in Tattock v. Harris 3 Drew. & East 180.

Mr. Drake (§617) says that a "verbal assignment (of an account) will be sufficient if assented to by the debtor". That is, if the debtor assents to the cancellation of his debt to one party by becoming debtor to another - the three parties concurring - which is novation pure and simple.

1 Parsons on Cont. 220 (5th Ed.)

But Buckland in the case at bar did not thus consent - he simply agreed to do so & so, provided, on going to his mill, he found things so and so. Nothing was done. The doing was wholly in the hereafter. 20 Mo. 577 Kimball v. Donald et al.

In equity, as well as at law an assignment of a book account to be effectual must be sustained by a consideration moving from the assignee to the assignor. In the transaction between Buckland

Smith & Tucker, Smith, Burns
& co. were discharged
from no part of their
indebtedness to Tucker,
and there was therefore
no consideration
for an assignment
by them to Tucker of
their claim against
Rockland
See 1 Parsons Cont. 219 + 220
(5th Edn.)

C

J. M. Edgell
Respondent
v.
Chas. L. Tucker
Interpleader &
Appellant

Supreme Court
March Term 1867.

Filed April 30. 1867
O. T. Fishback Clk
per E. McCarty Dep

W. Currier, atty.

Stephen W. Ellzell
v. Respondent
Charles L. Tucker
Interpleader and
appellant

Supreme Court
March Term 1867.

Plaintiff's Statement of the case By Glover & Shepley & Currier

This is a garnishment suit brought by the Plf. Ellzell against Thomas A. Buckland as garnishee of the firm of Smith Bullins & Co. The garnishee in his answers to interrogatories propounded to him, stated that he ~~owed~~ as the agent of Lessee Miller owed Smith Bullins & Co. the sum of $2402.26, unless the debt as between him and that firm had been cancelled by an arrangement with Charles L. Tucker. The question in the case arises between the Plf. and Tucker on the latter's interplea in which it is alleged

That "on the 9th day of

Dec. 1864 Miss. Smith & Bullens & Co. became and were indebted to the said claimant in a large sum of money, to wit, the sum of $2850. for and on account of three hundred and eighty barrels of fine flour theretofore sold and delivered by said claimant Tucker to said Smith & Bullens, and being so indebted said Smith and Bullens, afterwards, to wit, on the 13th day of Dec. 1864 & before the service of the garnishment in this cause did transfer, assign and set over to the claimant Charles L. Tucker the moneys in the hands of said Buckland amounting to the sum of $2102.26 for and on account of said debt, and said Buckland was notified of said transfer and consented and promised to pay the same to said Tucker"

Recd p. 16/4

It was conceded on the trial both by the garnishee and claimant that the fund

in Buckland's hands was due by him personally to Smith Bullens & Co. just before and at the time of the meeting of Smith, Tucker & Buckland mentioned in the latter's testimony.

Record p. 22 (bottom of page)

Thomas A. Buckland, garnishee, was examined as a witness in behalf of the claimant and testified as follows:—

On the 18th day of Dec. 1864 I was passing along 3rd Street towards and near the Post office in St. Louis, when I met Smith of the firm of Smith & Bullens, Smith asked me if I would give him a check for the balance I had in my hands due to Smith & Bullens. I replied that I did not recollect the exact amount, nor did he state the amt. He asked me if I would give him a check for $2000. Just that moment Charles L. Tucker stepped up where Smith & I were talking, and Smith at the instance of Tucker directed

me to pay the balance in my hands ~~to Col. Tucker~~ due Smith & Bullen to Col. Tucker. I told Tucker in the presence of Smith that I would do so, if when I got to my office, I did not find a notice of attachment which would hold the money in my hands. Smith then went away along down 3rd street, and Col. Tucker and myself went towards the post office. Just as we got to the post office I said to Tucker, "you had best get a written order from Smith & Bullen on me for the money in my hands, for I don't want to pay the money except on a written order from them." Tucker said he would see them and we parted. The meeting between Smith Tucker & myself on 3rd street when Smith directed me to pay the money in my hands to Tucker took place about 12½ o'clock P.M. on the 13th day of Dec. 1864 just after "change hours." At that time I held in my hands a balance of $2102 24/100

dollars as agent of Weller as stated in my answer in this case due and owing to Smith & Bullens. After going into the post office I went directly to my office at the Park mills on Market street, near 18th street. When I got there I did not find any notice of attachment there. I had been at my office about half an hour before I was garnished in this case. It was nearly 2 o'clock on the 13th Dec. 1864. When the sheriff served the notice on me. Within an hour after I was served with notice of garnishment Col. Tucker brought me the written order from Smith & Bullens which is attached to my answer in this case".

On cross-examination by counsel of Plf. the witness stated:—

"Mr. Sayers who represented the Plf. came with the sheriff to my office at the time the notice was served on me". Witness was then asked if he had

said anything to R.W. Sayers when his recollection was fresh as to what occurred between himself, Smith & Tucker at the time they met. To which witness said:- I told Sayers that I did not know whether he was in time or not - that Smith at the instance of Tucker had directed me to pay the money in my hands to Tucker, and that I had agreed to do so, if I did not on going to my office find a notice of attachment there. That I had told Tucker to get a written order on me from Smith & Bullens for the balance in my hands; that I had told Tucker after Smith left us that I would not pay without a written order. I told Sayers I did not care to whom I paid the money. I only wanted to be protected & I did not know whether a verbal order would protect me or not"

Recd p. 70 1/2

Tucker at the time objected to all the statements made by witness to Sayers.

The order drawn by Smith & Bullers on Buckland, referred to in the latter's testimony is in these words: —

"Mr. T. A. Buckland agent
"You will please pay Col.
"Tucker such amount as you
"may owe us and oblige.
"St. Louis Mo. Dec 13/64 — Smith & Bullers"
Recd for 9

This was all the testimony given in the case. The case was tried by the court sitting as a jury. For the plf. the following instructions were given.

1 — If the court finds from the evidence that before said Buckland was summoned as garnishee in the suit of Ellgell against Smith Bullers & Co. Charles L. Tucker & Smith of the firm of Smith & Bullers & Co. had applied

to said Buckland to pay to said Tucker the amount due from said Buckland to Smith, Bullens & Co., and that while the said persons were so together said Buckland agreed that unless a garnishment had been left at his office that would hold the money, he would pay it to Tucker; that the amount that was due from said Buckland to Smith Bullens & Co. was not then known to either of the parties; that after said Smith had left said Buckland & Tucker, Buckland told Tucker that he should not pay him, said Tucker, the said ~~[illegible]~~ demand without a written order from said Smith, Bullens & Co. upon him, and that before any written order was shown to said Buckland, or any other communication with him by either of the other parties, he was summoned as such garnishee in said suit, the said Tucker cannot recover upon his interplea.

2. If the evidence shows that Rucklend, garnishee, owed Smith & Bullens $2102.26, and Smith & Bullens owed Tucker $2850., and before the service of the garnishment, the three parties met, and Smith & Bullens at the request of Tucker or and Rucklend to pay to Tucker the amt. he owed them, and Rucklend agreed to do so, provided that no notice of garnishment had then been left at his office which would be old the fund, and if, before the parties met again, or any other interview or communication was had by either of the others with Rucklend, he was summoned herein as garnishee, then the fund is held by the garnishment and the interpleader cannot recover.

3. A novation to be good against subsequent attaching creditors must be complete, absolute, unconditional

and mutually binding on all the third parties, and must not depend on any condition; not even one based on a mistake of law, or misapprehension of legal liability.

4. Unless the court shall find from the evidence that at the time of the interview between Charles L. Tucker, ~~Smith~~ & Buckland & Smith of the firm of Smith, Bullens & Co. as testified to by the witness Buckland, the said Tucker discharged the firm of Smith Bullens & Co. from all liability to him for a portion of their debt to him equal in amount to the amount of the indebtedness of Buckland to Smith Bullens & Co., and accepted the said Buckland as his debtor for the amount of such indebtedness so due from Buckland, then said Tucker cannot recover upon his interplea.

The interpleader asked the following instruction which was refused.

If the court finds from the evidence that Smith Bullen & Co. before or at the time Thomas A. Buckland was garnished in this case was indebted to Chas. S. Tucker, the interpleader, in the sum of $2850.; that said Buckland at the same time had in his hands a balance of $2502.46 due and belonging to said Smith, Bullen & Co.; that one of said firm before said Buckland was garnished, ordered or directed him in the presence and at the request of said Tucker to pay said balance to the latter, and that said Buckland said he would do so, if on going to his office he should find no notice there of an attachment which would hold said balance; and if the court further finds from the evidence, that no notice of attachment or garnishment was at the office of said Buckland

when he returned there after said order was given, and before the service of the garnishment on him, then the court should find for the interpleader -

Stephen M. Edgell
Respondent
v.
Chr. L. Tucker
Interpleader &
Appellant
Supreme Court
March Term 1867

Pltf. Statement of the case
By Glover & Shepley & Currier

Filed April 30 1867
O. F. Fishbacker
per E. M. Gay Dep