claimed to own goods which had been taken in execution as the property of the execution debtor.

The execution debtor has not, that I can perceive, the slightest right to be heard in the interpleader suit, the result of which can establish nothing to affect his interest, or that of any one but the parties to it.

As this is the defendant's application, it must, I think, as to all relating to the interpleader suit, be discharged.

It need hardly be said that the authority given to others to use the defendant's name to make the application, will not either extend his right in the matter or enable Stedman and Kelso to move for their own relief in a cause to which they are no parties.

I disclaim all idea of treating this as the application of any one but the defendant, or as enabling other questions to be raised, excepting such as it is competent for him to raise.

Moreover, if I felt at liberty to deal with the application in reference to the interests of Stedman and Kelso, which I do not, I should hold that the application must fail; because it is found by the jury that the flour in question was not theirs; and it is sworn by W. S. Bowes that the grain of which this flour was made was bought from one Woodward by the plaintiff (*qu.*, if defendant be not meant), and that it was out of this lot of grain that the flour was made, and not out of any grain of Stedman and Kelso.

It remains, therefore, for me to consider the first branch of the summons.

The judgment was for £213 5s. The chattel mortgage was for £244 9s. 1d. The affidavits of R. P. Jellett and of the plaintiff explain this difference by stating in substance that the mortgage was for the same debt as the judgment, with interest and costs, and $100 which plaintiff paid Mr. Jellett on defendant's account. The fifth paragraph of Mr. Jellett's affidavit, though confusedly expressed, leaves no doubt in my mind on this subject. The plaintiff's affidavit throws no light on the subject. It appears that the plaintiff went to Europe in the spring of 1859, as he says, soon after the giving of the chattel mortgage. I think he must mean, after the giving of the discharge, which is dated 12th January, 1859; whereas the chattel mortgage bears date 31st March, 1858. The conclusion I draw from these facts is, that the plaintiff, in January, 1859, was content to rely for security on the chattel mortgage, and thereupon gave the discharge of the judgment; and if the matter rested there, I think the plaintiff could not resist successfully the application to set aside all or any executions subsequently issued to enforce payment of the judgment. But in the seventh paragraph of Mr. Jellett's affidavit, he swears that some months after the plaintiff's departure from Canada, he had a conversation with the defendant as to the chattel mortgage running out, and as to the impracticability of renewing it in the plaintiff's absence, and as to it not covering cordwood, which was constantly replacing that mentioned in the mortgage (the mill being driven by steam as well as by water power), when defendant said, "Why not issue an execution on the judgment? I have never discharged it and it is still in force." Whereupon, with the full knowledge and consent of the defendant, he (R. P. Jellett) did, on the 8th September, 1859, issue on the said judgment an *alias fi. fa.* against defendant's goods, and caused it to be placed in the sheriff's hands, and he allowed the chattel mortgage to run out. In the ninth and tenth paragraphs of Mr. Jellett's affidavit, he states, upon information, certain declarations of the defendant, quite inconsistent with his present contention. I do not accept this as proof that the defendant made such declarations; but the defendant, in his affidavit in reply, passes the statement without notice: nor does he deny the conversation stated by Mr. Jellett, further than by swearing that he never gave Morgan Jellett or any one else authority to seize on or sell the goods or any part thereof in dispute in the interpleader suit, nor to seize or sell any goods under the writ of execution under which said goods were seized and sold. If this be taken, as I think it must be, as an admission that the plaintiff was at liberty to proceed to recover on the judgment, and to abandon the chattel mortgage, there is an end of the defendant's case, which rests on the written discharge of the judgment alone. Again, in the defendant's letter of the 14th December, 1863, written to plaintiff's brother, defendant, while asserting that the judgment was satisfied, never once alludes to the chattel mortgage.

But the defendant further swears, as already set out, that early in 1859 he got his brother-in-law, William Gould, to give the plaintiff a mortgage; and he says that the money then advanced by plaintiff to him, together with his previous indebtedness, amounted to a sum between £400 and £500, which mortgage "he believes the plaintiff has foreclosed." In reply the plaintiff swears that when he took the Gould mortgage, which seems to have been early in 1859, he advanced £200 in addition to the defendant's previous indebtedness, and as a security for this advance, and an additional security for the other sums due, and not as a payment or discharge of the securities on defendant's chattels; that the Gould mortgage contained no covenants, and it was agreed that on sale of the mortgaged property plaintiff was to account to defendant for the amount realized, and no more. that the defendant continued to pay interest half-yearly on the whole debt, up to August 1862, in the latter part of which year he left Canada.

There are statements in the affidavits which are well calculated to give rise to a suspicion that the defendant, besides giving security to the plaintiff, had in view the covering his property from other creditors. The conversation sworn to by Mr. Jellett, and not denied by the defendant, and some expressions in defendant's letter to the plaintiff's brother, tend strongly that way.

If it were so, it would not help the defendant's present application, nor indeed any application having his relief in view.

But I feel it unnecessary to enter into a closer consideration of such statements, as, after all, the defendant's claim to the relief sought by the first part of the summons rests upon the efficacy of the discharge. There can be no doubt the defendant might waive it, and, according to Mr. Jellett's statement, he did waive it. He never registered it nor advanced it till quite recently, and even now he furnishes it as a weapon for others to use in his name, rather than set it up on his own behalf. Though he professes to have paid the amount of the chattel mortgage, he does not say either how or when. *If before he absconded, why did he continue* to pay the interest up to the end of the last half-year prior to his leaving? If since, he could not have forgotten by what channel he remitted the money. Added to which, his letter of the 14th December, 1863, shows pretty clearly he had no means of payment after he left.

To my mind the *primâ facie* cases of the discharge of the judgment is so far met and displaced that I ought not to act upon it; and so far as, by a comparison of the different and conflicting statements, it is possible to arrive at a conclusion, I think the weight of the testimony is in favor of holding that the chattel mortgage never was paid, but lapsed or expired, and the judgment remained as security in lieu of it.

I am of opinion, on the whole, that this summons must be discharged with costs.

I have omitted to notice one part of the summons, which asks that the interpleader bond given by Stedman and Kelso (and, as I gather, to the plaintiff) should be declared part and parcel of the assets of the defendant Baker. This would be an extension of the equitable jurisdiction of a common law judge, not only unprecedented, but, it appears to me, utterly unwarrantable

Summons discharged, with costs.

CHANCERY.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-Law.*)

AUSTIN v. STORY.

Mortgagor and mortgagee—Destruction of buildings by fire—Application of insurance money.

As between mortgagor and mortgagee, where buildings on mortgaged premises covered by insurance are destroyed by fire, and the insurance money is paid to the mortgagee with the consent of the mortgagor (there being no provision in the mortgage as to its application) *before* the principal money becomes due (and in this case after some interest had accrued due) the mortgagee is not bound to apply this money on the mortgage, as of the time he receives it, but may expend it on the property or may hold it in lien of so much of the security as it covers, being, however, in the latter case, bound to apply it eventually on the money found due on the mortgage.

On the 13th April, 1864, the plaintiff filed a bill for the foreclosure or sale of certain property, setting out two several mortgages made by the defendant to the plaintiff. It appeared from the bill that the buildings on the premises were insured for $1200, and the