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lant may have leave to amend the libel, so as to meet his proofs. In suits for adultery the party is not bound to the contents of his original libel, but it has been constantly held that fresh acts of adultery may be *pleaded supplementarily*, and that a sentence may be obtained on facts not existing at the commencement of the suit. Shel-
ford on Marriage 399; *Middleton v. Middleton*, 2 Hag. Ec. R. 136.

Leave to amend granted.

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If one receive goods under color of a sale, but with a secret trust to deliver them to the vendor, and he deliver them accordingly, he is not liable as trustee in a process afterwards commenced.

Where one receives property under such circumstances, he has not a lien upon any portion thereof remaining in his hands for a claim against the vendor, but may be charged therefor in a process of foreign attachment.

FOREIGN ATTACHMENT. The facts shown by the trustee in his disclosure are as follows: On the 21st of November, 1847, the trustee purchased of Ross a lot of beer bottles, and articles used in the making of beer, at the price of twenty-five dollars, their full value, in good faith, without any trust or understanding that it was to prevent attachment. He took a bill of parcels of them, but in this bill were enumerated also certain other articles, to wit: sugar, and vinegar, and soap, and soap-making apparatus, which the trustee did not purchase. Ross added these articles, and said he wished the trustee to keep them a few days, and then send them to him at Boston, and said

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that one Elkins had an unjust claim against him, and he wished to keep those articles from him. The price put in the bill for the whole of the articles was one hundred dollars, as the trustee says to aid him in the sale of the articles he purchased. The articles not purchased were after a few days sent to Ross at Boston, as agreed, except the vinegar, which is of little or no value, and the sugar, which was worth two or three dollars only, and which the trustee says were not to be so sent, and are not enough to compensate him for his trouble in regard to the other articles. The plaintiff's writ is dated March 28, 1848.

The trustee is to be discharged or charged for such sum as the court may adjudge.

It was ordered that the questions arising on the foregoing case be reserved and assigned for the decision of the justices of the Superior Court.

Cross, for the plaintiff.

W. C. Clarke, for the trustee.

WILCOX, J. There seems no sufficient ground to charge the trustee with any improper conduct or motive in regard to the bottles and other articles used in the making of beer. They were purchased for a purpose perfectly lawful, for anything that appears, and paid for.

There was a secret trust with respect to the other things, which rendered the sale void as against creditors, and would have subjected them to process had they been found under the cover of such a sale; or the party in possession might have been charged as trustee of the pretended vendor. But he has parted with most of them in a manner that wholly discharges him, according to the authority of the cases. He has delivered them to the fraudulent debtor himself. *Hutchins v. Sprague*, 4 N. H. 469.

As to the small articles remaining in his hands, however,

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he is chargeable, and it is no defence that he has a claim upon the principal defendant for a larger sum than the value of them. *Allen v. Maguire*, 15 Mass. 490.

Trustee charged in the sum of \$3.

 JOHNSON v. KENDALL.

In assumpsit, for not paying over money received by the defendant as a trustee, the plaintiff cannot introduce evidence of a loss of a part of the money through the neglect of the trustee to collect it seasonably.

Upon the question of such imputed negligence the trustee may show that before the plaintiff acquired an interest, the others beneficially interested directed him to pursue the course of delay which was attributed as negligence.

The person who causes a suit to be brought for his own benefit is the party in interest, though not nominally a party; and though he may not have the interest which he supposes he has in the subject of the suit, he is not a competent witness.

Evidence relating to the competency of a witness is addressed in the first instance to the court, but may in doubtful cases be ultimately submitted to the jury, and ought therefore to be competent evidence.

ASSUMPSIT. The declaration was as follows: In a plea of the case for that said defendant, on the 21st day of July, A. D. 1838, at Nashua, in said county of Hillsborough, by his agreement in writing, under his hand of that date, admitted himself to be the holder of a note of two thousand dollars against the Second Baptist Society in Nashua, and payable to said defendant, on demand, with interest annually, bearing date February 23, A. D. 1837, with interest thereon paid until the 23d of February, A. D. 1838; and that said note was the property of certain persons, among