to enter his appearance and proceed to trial; otherwise, the cause must be continued. The above decision seems to have been made in 1809. By the rule adopted February Term 1821, 1 Pet. xxiv, Rule XIX, § 1, it was made the duty of the plaintiff to docket the cause or file the record within the first six days of the term, on failure of which the defendant might docket the cause and file the record; and thereupon the cause was to stand for trial as if the record had been filed within the first six days. The defendant had the option, upon a certificate of the clerk of the court where the judgment was rendered, to have the cause continued or dismissed without hearing. *Motion denied.*

Mr. Attorney General and *Mr. J. Hubley Ashton* for plaintiff in error. *Mr. P. Phillips* and *Mr. A. L. Merriman* for defendants in error.

On the denial of this motion the argument of the cause proceeded. The case is reported in 9 Wall. at page 298.

PEYTON *v.* HEINEKIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 127. December Term, 1871. — Decided April 15, 1872.

There is no merit in any of the defences set up here; and, it being apparent that the appeal was taken for the purpose of delay, the judgment below is affirmed with interest and 10 per cent damages.

In a contract between a commission merchant in New York and a person in another State that the latter shall send merchandise to the former to be sold, and that the former shall make advances on it to be repaid with commissions and interest out of the sales, the rate of interest is to be determined by the laws of New York, the place of performance.

A factor who insures goods consigned to him for the benefit of his principal may recover from him the cost of the insurance.

The case is stated in the opinion.

Mr. Justice Strong delivered the opinion of the court.

There is no merit in any of the exceptions which have been taken to this decree. The contract, which was a deed of trust to secure the repayment of future advances, defined with sufficient certainty the property conveyed, and there could have been no difficulty in identifying it even without reference to the deeds of the grantor. These deeds were, however, referred to as parts of the description, and they may, therefore, be called in aid of the description, if it

could be held defective. But no such defence was set up in the court below. It was not there pretended that the contract was void, either for uncertainty of description, or for any other reason.

Nor is there any validity in the objection that the contract was usurious. The complainants were commission merchants in the city of New York, who agreed to advance money to the defendant, from time to time. To reimburse them for such advances, the defendant undertook to send flour to them in New York, which they agreed to sell and, after deducting commissions and legal interest according to the New York rate, to credit him with the balance. Thus the advances were to be made in New York, and they were to be repaid there. That State was the place of performance, and hence it was legitimate to fix the rate of interest there allowed by law.

There is no error in the decree directing a sale. It is sufficiently specific, and the defendant cannot complain that the sale was ordered to be upon credit when it might have been decreed to be for cash.

The exceptions to the report of the master require only slight notice. They are very trivial. The credit of $40 discount on the draft of August 24 was properly disallowed. The draft was paid by the complainants in full when it fell due, and the defendant is charged with interest only from the time of payment.

The charge of money paid by the complainants for insurance was correct. They were factors, and it was their duty to protect the flour with the same care as that which a prudent man would extend to his own. It is a recognized usage, if not the duty, of factors, to insure their principal's goods. Smith Mer. Law, 124, 125.

The calculation of interest by the master was only too favorable for the defendant.

This disposes of the case. It is very obvious to us that this appeal was taken only for the purpose of delay. It is therefore

Affirmed with interest and ten per cent damages.

Mr. Henry Cooper, Mr. Baylie Peyton in person, and *Mr. Caleb Cushing* for appellant. *Mr. Conway Robinson* for appellees.