LEEDS *et al. v.* MARINE INSURANCE COMPANY.[1]

Equitable set-off.

Application of the law of set-off and lien in equity, under peculiar circumstances.

Where an agent effected two policies of insurance, and gave his own note for the premium, in an action on one policy, the underwriters may set off the amount of the premium on the other policy.

Having been prevented from doing so, by injunction, equity will compel the principal to allow the amount to be deducted from the judgment.

APPEAL from the Circuit Court for the District of Columbia. This was a suit in equity, commenced in the court below, by the respondents against the appellants, in which the injunction obtained on the filing of the bill was made perpetual. The facts are stated in the opinion of the court.

March 9th, 1821. This cause was argued by *Swann* and *Jones*, for the appellant, and by the *Attorney-General* and *Lee*, for the respondents.

*March 10th. JOHNSON, Justice, delivered the opinion of the court.—This case involves a great many questions, both of law and [*566 fact, but we will consider it as it is affected by those circumstances, concerning which there is no dispute.

Leeds and Straas being engaged in commercial enterprizes, Straas employed Hodgson to effect insurance on the Sophia and her cargo. A note of Hodgson, with Patton and Dykes as indorsers, is taken for the premium. Another adventure on the brig Hope, grows out of the first, on the Sophia; and the same agent, at the request of the same principal, effects insurance upon this also, with the same company. The Sophia arrives in safety, but though one of the indorsers is unquestionably sufficient, the premium note remains unpaid. The Hope is lost, and Hodgson, professedly suing for the use of Straas and Leeds, has recovered judgment against the underwriters for the amount of the policy. From this amount, the premium note connected with that policy was discounted, but that growing out of the insurance on the Sophia, was not pleaded, notwithstanding the identity of the legal plaintiff in that action, with the debtor to the company in the transaction on the Sophia. The note taken for the insurance on the Sophia, is now set up against the policy on the Hope, in a different form. This bill is filed to compel the parties in interest, Hodgson, Leeds and Straas, to discount it from the judgment against the underwriters. The equity of this demand is now to be tested.

*The right to the discount, considered with reference to identity [*567 of parties, was clearly a legal one. And had not the company been enjoined in the chancery of Virginia, during the pendency of the suit upon the policy, they must have lost all claim to the interposition of this court, by failing to assert their legal rights in the court to which they properly belonged. But the chancery of Virginia might have considered the company in contempt, had they set up in discount a claim then pending, and then enjoined in the courts of that state. And therefore, we may now be justified in considering the legal rights of the company, against the policy on the Hope, as derived through the premium note on the Sophia, under all

[1] See 5 Cranch 100; 7 Id. 333; 9 Id. 104; 2 Wheat. 380.

the advantages that it would have possessed, if pleaded as a set-off to the action at law. The bill, it is true, does not explicitly rest on this, as the ground of its equity, but the facts are so set out, and may be properly considered as making up the case.

What was the state of right, as it stood at law? Hodgson, as holder of the policy which he had effected, was, to the amount of his commissions, advances, or even liability incurred in the transaction, a privileged creditor, and that possession could not be violated, until he was indemnified or compensated. If he be considered as the legal plaintiff, in the action on the policy, and, in fact, the legal owner of the money recovered for the use of others, the law would not suffer him to be deprived, by transactions between
*568] Straas and Leeds, to which he never assented, of any *legal advantage derived from possession of that money.

Suppose, to come up to the very case before us, the company had pleaded this note as a set-off to the suit on the policy, and Hodgson, the legal plaintiff, had tendered a replication, admitting the plea, in what manner could the company or himself have been deprived of the benefit of its being thus disposed of? That Hodgson was entitled to indemnity for Straas, at least, against this note, is unquestionable; and he would, as against Straas, have, under any circumstances, been entitled to retain a sufficient sum to cover his liability. Then, how could he, by the act of Straas, either by assigning away his interest, or by impeding, by an injunction, that act in a third person, which would have secured him in its consequences, be deprived of the benefit of compelling the admission of this set-off? The case in equity, as it now stands, is precisely that which would have arisen at law, upon the state of things supposed. For, Hodgson, in his answer to this bill, admits this set-off, and solicits the court to enforce the admission of it by Leeds, who, in the right of Straas, is thus endeavoring to deprive him of his legal right to indemnity. The case in no part contests the reality of this state of facts, but the defendant, Leeds, in every part of it, rests his defence upon the ground, that Straas has succeeded in defeating the claims of Hodgson, and deprived the company of the benefit incident to the assertion of those claims; first, by tying the hands of the company in a court of chancery, in a suit in
*569] which he finally failed, and then by a transfer of a *chattel interest, the evidence of which, or the contract itself, was in the hands of Hodgson, and legally subject to his control, until the money due on it was reduced into possession.

It is true, that had this set-off been pleaded at law to Hodgson's suit upon the policy, and the equitable interest of others been set up against such plea, or against Hodgson's admission of it, the court of common pleas must, according to modern practice, have heard the parties on affidavit, before it determined to admit Hodgson's replication on its files. But supposing the case to have been presented on affidavit, such as it now appears to this court, that court would not have taken upon itself to deprive the legal plaintiff of a legal advantage, in favor of an assignee of a *chose in action*, where the equity of the case was so strong in the favor of the legal plaintiff.

It is obvious, that the principal difficulties in this case arise from the inverted and peculiar state of the parties. Hodgson (and with him his indorser) who is really the party to be relieved, appears in the character of defendant, and the question presents itself, why should the underwriters be

at liberty to quit their hold upon their note for indemnity, and come upon the judgment holder on the policy, for satisfaction in the first instance? But to this several answers present themselves.

Why, if the underwriters had several remedies, should they, by the act of the opposite party, be deprived of any one of them? Why, if they might *legally have availed themselves of their remedy by discount, should they now be deprived of it, because they were prevented, uncon- [*570 scientiously, by their antagonist, from asserting it in its proper place? And why, if they can in this way certainly save their money, should they be put to the risk and labor of prosecuting a recovery upon their note?

But the case affords another answer, of a more general nature. Notwithstanding Hodgson's insolvency, his claims upon this policy remain unpaid, if it be only for the purpose of shielding his indorsers; and notwithstanding his appearance here as a co-defendant, it is obvious, that dismissing this bill must give rise to new suits between the persons liable to pay this note, and the assignee of Straas's interest under the policy. This consideration affords the additional reason, that entertaining this suit terminates litigation, and the reverse would be the consequence of dismissing this bill. If having been deprived by his antagonist of his remedy at law, is a sufficient ground for entertaining the suit of the complainant, it is certainly no objection to it, that relief is at the same extended to one who, though nominally a co-defendant, is essentially a co-plaintiff, and might have been made such.

Had he been made such, the case would have presented fewer difficulties. If Straas himself could not have demanded of Hodgson this policy, or the money recovered on it, without securing him against the premium note, neither can his assignee. Even the courts of law have recognised the lien of a broker *on a *chose in action*, for a general balance of account, [*571 and much more so ought a court of equity, in the application of a principle so peculiarly its own, as that which gives effect to a transfer by assignment of a *chose in action*, not in its nature negotiable.

The parties in this case sue only to be restored to their legal advantages; as that cannot be done specifically, they certainly have a claim on this court to secure to them all the beneficial consequences that would have resulted from them. And as Straas's interest in the Hope would have been amply sufficient to enable Hodgson to pay this premium note, had the money on the policy come into his hands, there is nothing unreasonable in making it, in the hands of the officer of this court, subject to be disposed of in the same manner.

Let it be distinctly understood, that the court does not, in this decision, countenance the idea, that a separate debt may be set off to a joint action. The debtor and creditor at law are the same. And upon Hodgson's reducing the money into possession, the same identity of parties would exist. For Leeds and Straas do not appear in the case at all, in the relation of copartners in trade, but Leeds himself represents them, as holding distinct interests, although in the same subject. Leeds's defence rests altogether on Straas's assignment, not on their blended rights; nor does he pretend to ignorance of the off-set now contended for, when he took the assignment, but only observes, with a view, it is presumed, to show he had no reason to believe it to be a subsisting debt, *that it was at that time enjoined [*572

before the chancellor of Virginia. This is setting up a wrong in Straas, to support a right in his assignee.

Decree affirmed.

Union Bank *v.* Hyde.

Promissory note.— Waiver of demand and notice.—Parol evidence.

A protest of an inland bill, or promissory note, is not necessary ; nor is it evidence of the facts stated in it.

The following undertaking of the indorser of a promissory note, " I do request that hereafter any notes that may fall due in the Union Bank, in which I am, or may be, indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been, or should be, legally protested," held to be ambiguous, as to whether it amounted to a waiver of demand and notice ; and parol proof admitted, to show that it was the understanding of the parties, that the demand and notice required by law to charge the indorser should be dispensed with.

Error to the Circuit Court for the District of Columbia.

March 14th, 1821. This cause was argued by *Jones*, for the plaintiff in error, and by *Swann* and *Key*, for the defendant in error.

March 16th. Johnson, Justice, delivered the opinion of the court.—This
*573] cause turns upon the construction of a written *instrument, in these words :

"I do request that hereafter any notes that may fall due in the Union Bank, on which I am, or may be indorser, shall not be protested, as I will consider myself bound, in the same manner, as if the said notes had been, or should be, legally protested.

(Signed) Thomas Hyde."

Two constructions have been contended for: the one, literal, formal, vernacular ; the other, resting on the spirit and meaning, as a mercantile and bank transaction. The former has been sustained in the court below, and the correctness of that opinion is now to be examined.

The defendant, it appears, became indorser to one Foyles, and the note was discounted in the Union Bank : on its falling due, it is admitted, that no demand was made on the maker, or notice given to the indorser.

The case presents the right of the plaintiffs under two aspects : 1st. Upon the just construction of the written instrument : 2d. The practical exposition of it by the defendant himself : and it might also have presented a third—the specific waiver of demand and notice on the note in suit. By some assumed analogy, or mistaken notion of law, this practice of protesting inland bills, has now become very generally prevalent ; and since the inundation of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon notes, a
*574] solemnity, cogency *and legal effect have been given to such protests, in public opinion, which certainly has no foundation in the law-merchant. The nullity of a protest on the legal obligations of the parties to an inland bill, is tested by the consideration, that independently of statutory provision (if any exists anywhere) or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser, into an