

Scott v. Shreeve.

of favor, and not as matter pleadable in bar. In certain cases, even a formal surrender has not been required, where the principal was still living, and capable of being surrendered, and an *exoneretur* would be entered, and the principal discharged, immediately upon the surrender. But the rule has never been applied to cases where the principal dies before the return of the *scire facias*. In such a case, the bail is considered as fixed by the return of the *ca. sa.*, and his death afterwards, and before the return of the *scire facias*, does not entitle the bail to an *exoneretur*. The plea is, therefore, bad ; and the judgment is affirmed, and six per centum damages and costs.

Judgment affirmed.

*605] *SCOTT and others, Appellants, v. SHREEVE and others, Respondents.

Relief against judgment at law.

Relief in equity against a judgment at law, upon certain bonds given for the indemnity of the obligee, as indorsee of notes drawn by the obligor, the consideration having failed.

The assignee of such bonds takes them subject to all equities existing between the original parties.

APPEAL from the Circuit Court for the District of Columbia.

January 13th, 1827. This cause was argued by *Swann*, for the appellants ; and by *Taylor*, for the respondents.

January 20th. THOMPSON, Justice, delivered the opinion of the court.— This case comes up by appeal from the circuit court of the district of Columbia, for the county of Alexandria. The object of the bill filed in the court below, was to obtain relief against a judgment at law, recovered against Shreeve, the appellee, upon certain bonds given by him to Elisha Janney, and which bonds had been assigned to the appellant, Scott, as his trustee, for the benefit of his creditors. In the progress of the cause, it was deemed necessary by the court, that the Bank of Potomac should be made a party defendant. A supplemental bill for that purpose was accordingly filed, and the bank made a party.

The first inquiry that seems naturally to arise is, how the case stood as between Shreeve and Janney, the original parties to the bonds. The material facts upon which the complainant in the court below relied for relief, are not denied by the answer of Scott. From the bill and answer, and exhibits in the cause, accompanied by a written agreement between the solicitors of the parties, before the cause was set down for argument, the leading facts in the case appear to be—that some time in the year 1808, Shreeve failed in business, being indebted to the Bank of Potomac in the sum of \$6300, upon *606] a note discounted at the bank, *and upon which Janney was the indorser ; for whose security Shreeve transferred to him and John Roberts, who was also his indorser upon other notes, certain property, at a valuation, but which, upon settlement of accounts between them, fell short of Janney's responsibility to the bank upon his indorsement, \$1980.88 ; for which, by agreement between the parties, Shreeve gave to Janney five bonds, payable in five annual instalments, and Janney was to pay the note to the bank, upon which he was the indorser. The note, however, was con-

Scott v. Shreeve.

tinued running in the bank in its original form, Janney appearing responsible as indorser only. This note was renewed, from time to time, until the 19th of May 1809, when, by the payment which had been made by Janney out of the property assigned by Shreeve, it was reduced to the sum of \$3306; and Janney himself having failed about this time, no further payments were made upon this note, until the month of June 1818, when Shreeve, after a long absence, returned to Alexandria, and was called upon by the bank for payment of his note, upon which he paid the sum of \$3355.29, being the amount of principal and interest due upon the five bonds which he had given to Janney.

Upon this brief statement of the facts as between Shreeve and Janney, it will be seen, that Shreeve was exposed to a double responsibility for the same debt. He was liable on his note held by the bank (unless the bank may be considered as having assented to the arrangement, and accepted Janney as solely responsible on the note, which will be hereafter considered), and he was also liable to Janney on the bonds which he had given him. For the purpose of indemnifying Shreeve against his responsibility to the bank, Janney gave him the instrument bearing date the 1st of March 1809, acknowledging that Shreeve had satisfied him by his bonds of the 28th of February 1809, for all demands against him as security at bank, and for all other accounts; and that the note above referred to, although originally discounted for the use of Shreeve, was continued in his name, but for the convenience of him, Janney, and engaging to save Shreeve harmless from said note, and and in due time to take it up.

*An objection is here made to sustaining this bill in equity, because there was a complete and adequate remedy at law. But this [*607 objection cannot be sustained. The bonds given by Shreeve to Janney were simply for the payment of money, and although the consideration for which they were given had failed, by Janney's neglect to pay up the note in the Bank of Potomac, according to his engagement, this could not have been set up at law, as a defence in the suit upon the bonds; nor could he, in that suit, have set off the amount paid to the bank upon his note. The engagement of Janney, on assuming the payment of the note to the bank, was a contract of indemnity only, and rested in damages, and could never form the subject of a set-off at law; and although an action of law might be maintained against Janney, upon this indemnity, it would be going too far, even if Janney was solvent, to say, that a court of equity could not interpose and stay a recovery upon the bonds, but that the party must be turned round to his remedy at law upon his indemnity. But in the present case, it would be gross injustice, and a certain denial of all remedy, to refuse relief on this ground, Janney having become insolvent. There was, then, no defence at law, which Shreeve could have set up against these bonds, nor had he any other remedy at law to which he was bound to resort.

Was there, then, any defence which he could have set up against a suit upon his note, if he had permitted the bank to prosecute him? None is perceived by the court. He stood upon the note as maker, and was liable to the bank as such; and although, by the agreement between him and Janney, the note was continued in that form, for the convenience of Janney, yet the bank was no party to that arrangement, and could not be bound by it. Even admitting the knowledge of that agreement by the bank, it certainly could

Scott v. Shreeve.

not have been set up as a defence to the note, unless it could be shown, that there was an express or implied agreement to accept Janney as the debtor, and to discharge Shreeve.

It has been urged, however, on the part of the appellants, that the statute of limitations had run against the note, and that Shreeve might and ought *608] to have availed himself of it. *If the statute of limitations had run against this note, and might have been pleaded, we should be very unwilling to say, that Shreeve was bound to plead it. It is a defence which a party may often avail himself of with great justice and propriety. But whether he will or not, must be left to his own election. It is, however, unnecessary to inquire into the duty or obligation of Shreeve to have pleaded the statute, under the circumstances of the case, because we do not think it could have been set up as a defence to the action. The letter of license given by the bank to Shreeve bears date on the 12th January 1809, and was for the term of seven years, which, of course, expired in January 1816. It certainly cannot be pretended, that the statute ran during the continuance of this letter of license. Payment of the note was demanded by the bank, and made by Shreeve, in June 1818, about two years and five months after the expiration of the letter of license, a period much within the time necessary to bar the action.

The next inquiry is, whether Scott, the assignee of Janney, has acquired any greater right or interest in these bonds, than Janney himself had. So far as relates to the question, whether the consideration had failed, the assignee stands precisely in the situation of the original party. He took the bonds subject to all existing equities. This is the settled rule in chancery, and that which is recognised by the laws of Virginia, which are in force in Alexandria. Nor has anything occurred, since the assignment, to give to Scott, or the creditors of Janney, any additional rights. These bonds were assigned by Janney, as his own property, and for the benefit of his own creditors, which was a violation of the trust and confidence reposed in him by Shreeve. They were given expressly, according to the agreement of the parties, to provide for the payment of the note to the Bank of Potomac; and it is admitted, that no part of this note has been paid out of the funds of Janney. The note had been reduced from \$6300 to \$3306, at the time Janney failed, in the spring of 1809; but these payments were made out of Shreeve's funds, assigned by Janney to Roberts, by the deed of the 11th of *609] August 1808. And it is also admitted, that Scott, the assignee, *has made no payments upon this note, since the assignment to him. The creditors of Janney have, therefore, been deprived of none of his funds, nor can they have any right to claim the benefit of those bonds, which must be deemed to have been held by Janney, in trust for the bank, and not as his own property.

The only remaining inquiry is, whether the bank, by any express or implied agreement, accepted Janney as their debtor, and discharged Shreeve from his responsibility? The answer of the appellant, Scott, alleges, that Janney considered himself as having assumed the payment of the note in question, and that he was considered debtor to the bank for the same, and was solely relied upon by the bank for the payment of the note. That he believed the bank had full knowledge of the deed of the 11th of August 1808, by which provision was made for the payment of the note, and were satisfied with it.

Scott v. Shreeve.

And he further alleges, that the bank was so well satisfied with this provision, that it considered neither Janney nor Shreeve liable for it. If these allegations were supported by proof, they would go far, if not conclusively, to show, that the bank had adopted Janney as solely responsible for the note, and had discharged Shreeve. If so, the payment by Shreeve would be considered voluntary, and without any legal obligation, and would form no objection to the recovery on the bonds. The bank, however, denies, it was a party to the arrangement made by the deed of the 11th of August 1808, or that it made any stipulation or agreement with Shreeve or Janney, in any manner connected with that deed, unless the order of the 12th of January 1809 (the letter of license), be considered as connected with it. The answer further denies, that the bank ever did release, or agree to release, Shreeve, or that it ever did look solely to Janney, or the trust-estate created by the deed of the 11th of August 1808. It admits, that when this deed was executed, Janney and Roberts were both directors of the bank, but avers, that no proposition in relation to it ever came before the board, previous to the 12th of January 1809, when the letter of license was granted to Shreeve, with the concurrence of Janney and Roberts, sitting and acting as directors of the bank.

*The answer of Scott is not evidence against the bank, and his allegations with respect to the bank's having accepted Janney as the sole debtor for this note, are entirely unsupported by proofs, and must be laid out of view, as they are positively denied by the answer of the bank, and which answer is strongly supported by the order for the letter of license, which was granted subsequent to the arrangement between Shreeve and Janney. For, if the bank had considered Shreeve exonerated from the payment of the note, there could have been no necessity for, or propriety in, giving him a letter of license. Indeed, it would have been absurd, to give a letter of license to a man who was not a debtor to the bank. The order for this purpose is cautiously drawn, so as to retain the responsibility of both maker and indorser. The indulgence is granted expressly upon the condition that it is sanctioned by Janney, and without lessening the right of the bank against him. [*610]

Nor is the bank chargeable with negligence that can in any manner prejudice its rights, or of which the appellant has any right to complain. The indulgence was granted, with the concurrence of Janney, and under an impression, no doubt, by all parties, that the trust fund created by the deed of the 11th of August 1808, would be sufficient to satisfy this note. And it was upon this supposition, no doubt, that the letter of license for seven years was granted to Shreeve. No steps would be taken against him, until the expiration of that time, and demand of payment was made as soon thereafter as he returned to Alexandria. The utmost, then, that can be alleged against the bank is, that it had full knowledge of the provision made by the deed of the 11th of August 1808, for the payment of this note. And admitting that provision to have been amply sufficient, it would not bind the bank, without its assent, to resort to that fund alone, and discharge the parties to the note. The bank could have no objection to the provision made by that deed for the payment of the note, as it would add to its security, if the maker and indorser were also held responsible. And the proceedings in relation to the letter of license are conclusive to show, that it was the understanding of

Ramsay v. Allegre.

all parties, that the bank had not, at that *time, relinquished its claims upon Janney and Shreeve for the payment of the note.

We are, accordingly, of opinion, that the decree of the court below, granting a perpetual injunction against the appellant, and a dismissal of the bill as to the bank, be affirmed, with costs.

Decree affirmed.

RAMSAY v. ALLEGRE.

Jurisdiction of the admiralty.

Quære ? Whether a suit *in personam* in the admiralty may be maintained against the owner of a ship, by material-men furnishing supplies for the ship, in her home port, where the local law gives no specific lien upon the ship which can be enforced by a proceeding *in rem* ?

However this may be, in general, such suit cannot be maintained, where the owner has given a negotiable promissory note for the debt, which is not tendered to be given up, or actually surrendered, at the hearing.

APPEAL from the Circuit Court of Maryland. This was a libel filed in the district court, by the appellant, Ramsey, against the respondent, Allegre, alleging that the appellant, at the special instance and request of the respondent, owner, ship's husband, or consignee of the schooner Dorothea, had performed various work and labor, and found and provided various materials for the use of the said schooner, to equip and prepare her for a voyage on the high seas, amounting to the sum of \$2428.84 ; that the appellant had often applied to the respondent for payment, and been refused ; and praying process according to the course of the admiralty, &c.

A plea was filed by the respondent, alleging, among other things, that he had given the libellant his negotiable promissory note for the debt. It appeared, at the hearing, that the appellant had furnished the materials in *612] question, at the respondent's request, and *that the latter had given his negotiable promissory note for the same, which the appellant accepted, giving the following receipt therefor : "Received a note, at four months, which, when paid, will be in full for the above amount." The note not having been paid, this suit was brought. The district court dismissed the libel, upon the ground, that the jurisdiction of that court, as an instance court of admiralty, in the cause, was waived, by the acceptance of the promissory note ; and the decree having been affirmed in the circuit court, upon the same ground, the cause was brought by appeal to this court.

February 19th. The *Attorney-General* and *Meredith*, for the appellant, argued, that the district courts, proceeding as courts of admiralty and maritime jurisdiction, might take cognisance of material suits by material-men, either in *personam* or *in rem*. *The General Smith*, 4 Wheat. 438. The only question here was, whether the jurisdiction was waived, by the appellant's taking the note as conditional payment. The note did not extinguish the debt, and, consequently, could not affect the jurisdiction which originally attached on account of the nature of the debt. Without some special agreement to consider the note as payment, it could not be so regarded. It only operated as a suspension of the remedy, during the time allowed for its payment. If unpaid the party might resort to his original right of action, as if no note had been given. *Chit. on Bills* (5th ed.) 123, 130 ; 6 Cranch 253 ; 2 H. Bl. 317 ; 5 T. R. 141 ; 1 Evans' Pothier 380 a.