WINCHESTER *v.* HACKLEY. (*a*)

Set-off.

A creditor upon open account, who has assigned his claim to a third person, with the assent of the debtor, is still competent to maintain an action at law in his own name, against the debtor, for the use of the assignee; but the debtor is allowed to set off his claims against the assignee.

The defendant cannot set off a claim for bad debts, made by the misconduct of the plaintiff, in selling the defendant's goods as factor, the plaintiff not having guarantied those debts. But such misconduct is properly to be inquired into, in a suit for that purpose.[1]

ERROR to the Circuit Court for the district of Virginia. The declaration was for money paid and advanced by the defendant in error, for the use of the plaintiff in error.

Upon trial of the issue of *non assumpsit*, two bills of exception were taken by the original defendant. The verdict was for plaintiff, $4155 damages.

The first bill of exceptions stated, that the plaintiff below offered in evi-
*343] dence sundry bills of exchange, drawn *by the defendant upon the plaintiff, to an amount equal to the balance demanded by the plaintiff of the defendant. And also several accounts-current between the defendant, and the mercantile firm of Richard S. Hackley & Co., of the city of New York; of which the plaintiff and Seth B. Wigginton were two; that the said bills of exchange were debited to the defendant in the said accounts, as being due from him to the said Richard S. Hackley & Co., and that the said accounts contained various other articles of debit and credit, to a considerable amount, commenced on the ——— day of ———, and continued until the ——— day of ———, when the firm of Richard S. Hackley was changed into that of Richard S. Hackley & Co., and concluded on the ——— day of ———.

That in these accounts, the balance stated to be due from the defendant to the said Richard S. Hackley, on the ——— day of ———, is transferred, with the consent of the said Richard S. Hackley, to the said Richard S. Hackley & Co., and that the account in which the said balance is so transferred to the said Richard S. Hackley & Co., and the formation of that firm, were communicated by the said Richard S. Hackley himself to the defendant, before the institution of this suit; and that the defendant thereafter made to the said Richard S. Hackley & Co. several remittances in money and commodities, towards the discharge of the said balance, and addressed to them several letters concerning the same, which remittances and letters came to the hands of the said Richard S. Hackley & Co. Whereupon, the defendant moved the court to instruct the jury, that if the balance aforesaid was transferred as aforesaid to Richard S. Hackley & Co., it was not a subsisting debt from the defendant to the plaintiff alone, at the commencement of this suit. But the court (consisting of MARSHALL, Ch. J., and GRIFFIN, District Judge) overruled the motion, being of opinion, that though the debt was in equity transferred to Richard S. Hackley & Co., yet the suit

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(*a*) Present, MARSHALL, Ch. J., CUSHING, PATERSON and WASHINGTON, Justices.

[1] A claim for unliquidated damages, arising out of another transaction, is not the subject of set-off. Armstrong *v.* Brown, 1 W. C. C. 43; Roberts *v.* Gallagher, Id. 156; De Tastet *v.* Crousillat, 2 Id. 132; Thomas *v.* McConnell, 3 McLean 381; United States *v.* Williams, 5 Id. 133; Palmer *v.* Burnside, 1 Woods 179.

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was maintainable for their benefit, in the name of Richard S. Hackley. At the same time, the defendant was permitted to give in evidence any discounts which he might claim against Richard S. Hackley & Co.

The second bill of exceptions stated, that the plaintiff, to support his action, gave in evidence sundry accounts *current between himself and the defendant, in which the plaintiff had credited the defendant, [*344 as being in the plaintiff's hands for collection, for the proceeds of a certain quantity of flour, which he had sold for the defendant, but had afterwards charged to the defendant several sums on account of the alleged insolvency of some of the purchasers of the said flour. It also appeared, that in the account-current, and accounts of sales, the proceeds of sale of the said flour were stated to be outstanding, subject to collection, and the plaintiff did not undertake to guaranty the debts. Whereupon, the defendant, in order to repel that evidence, offered to prove that the sums so charged to the defendant were lost by the mismanagement and misconduct of the plaintiff, in having made the sales to persons known by him to be unworthy of credit; but the court refused to permit such proof to be made to the jury in this action, being of opinion, that such misconduct was properly to be inquired into in a suit for that purpose.

This case being submitted without argument, the judgment was affirmed, with costs.

REILY, appellant, *v.* LAMAR, BEALL and SMITH, appellees.

Citizenship.—Insolvency.—Citation.

The inhabitants of the District of Columbia, by its separation from the states of Virginia and Maryland, ceased to be citizens of those states respectively.

By the insolvent law of Maryland, of the 3d of January 1800, the chancellor of Maryland could not discharge a citizen of Maryland, who resided in the District of Columbia, at the time of its separation from Maryland, unless the person had complied with all requisites of the insolvent law, so as to entitle himself to a discharge, before that separation.

Quære? Whether a person who has neglected at law to plead his discharge under an insolvent act, can avail himself of it in equity.

A citation is not necessary, when the appeal is prayed and allowed in open court.[1]

THIS was an appeal by Reily from a decree of the Circuit Court of the district of Columbia, which dismissed his bill in equity, with costs.

The defendant, Beall, some time in the year 1789 or 1790, had brought suit, in the name of Lamar, for the use of Beall, by Robert Smith, his attorney-at-law, against Reily, the appellant, upon a note for $400, and recovered judgment in the general court of Maryland.

The bill stated, that during the pendency of that suit, the complainant Reily, supposing that Smith was fully authorized to receive payment of the debt in any manuer he should think proper, sold him a tract of 4600 acres of land, in the state of Georgia, for the sum of $1533, for the express purpose of discharging that debt and some others which Reily owed in Baltimore. That in settling with Smith for the purchase-money of the land, the amount *of that debt was deducted and left in the hands of Smith, to be paid to Beall, under a promise from Smith, that he would have the [*345

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[1] Brackett *v.* Brackett, 2 How. 238. And see United States *v.* Gomez, 1 Wall. 690.