No. 13921

Supreme Court of Illinois

March

vs.

Mayers et al.

STATE OF ILLINOIS.

SUPREME COURT.

CENTRAL GRAND DIVISION.

JANUARY TERM, A. D. 1876.

OLIVER MARCH,
Appellant,
vs.
JOHN MAYERS, and others,
Appellees.

In Chancery.

Bill to Foreclose a Mortgage.

STATEMENT OF FACTS.

On the 20th day of Feb., 1856, John Mayers, Wm. J. Mayers and Linus Graves executed and delivered to Oliver March their joint and several note for $858, due on or before the 4th day of the next December, with interest after due at ten per cent. per annum, for borrowed money. The money was borrowed and used by John Mayers, and as to him, Wm. J. Mayers and Linus Graves were sureties. To secure themselves as such sureties the said Graves and Wm. J. Mayers took from John Mayers a mortgage upon certain real estate in the city of Bloomington, which was duly acknowledged, delivered, filed for record and recorded, and to cure an error in the first record was re-recorded. There was a slight discrep-

ancy between the note and its description in the mortgage, in the time at which it was made payable. The note being "payable on or before the 4th day of December next," and in the mortgage it is "payable on or before December next," the words "the 4th day of" being left out by a clerical error.

John Mayers and Linus Graves both became insolvent and availed themselves of the bankrupt law to cure their financial disease. The mortgaged premises were not taken into the assets of John Mayers in and by the bankrupt court, on account of this prior mortgage to their full value, and the claim of Oliver March, the note in question, was not proven up against either bankrupt.

On Feb. 29th, 1868, nothing having been paid on the note Wm. J. Mayers was likely to follow the footsteps of John Mayers and Linus Graves into and through the bankrupt court, and threatened March to do so unless he, March, would release him, (Wm. J. Mayers) personally from the note, which March consented to do, retaining the right to make what he could out of the mortgaged premises. Thereupon, March accepted from William $150 on the note, and gave him the paper set out in the record and abstract, the agreement being as is plain to be seen from its terms, not to sue William upon the note, but to have recourse only upon the mortgaged premises for his pay. On the 29th day of July, 1872, Wm. J. Mayers and Linus Graves filed their bill in chancery in the McLean Circuit Court, of Illinois, to subject the mortgaged premises to the payment of the note.

John Mayers demurred to the bill, which was sustained because March was not a party. Complainants amended their bill by making March a party and filed the same May 26th, 1873. On the next day, May 27th, 1873, there was a motion to dismiss by defendants as to complainant Wm. J. Mayers, which motion was, on argument, denied. Then on June 7th, 1873, Wm. J. Mayers filed his disclaimer, and the court on motion of defendants entered an order allowing suit to progress in name of other complainants, against the protest of complainants. Defendants then filed their demurrer to amended bill, which was overruled, and court ruled defendants to answer by 15th of August, with leave to complainants to reply, and cause was continued.

Defendant's answer to amended bill was filed Aug. 12th, 1873, and replication filed to answer, Aug. 19th, 1873.

On Feb. 19, 1874, defendants asked leave to amend their answer. The cause was then submitted for trial; but on account of the discrepancy between the note and its description in the mortgage, and the want of an averment in the bill of that fact, in order to let in the proof, the trial was abandoned, order of submission set aside, leave given complainants to amend their bill, and make new parties, and cause continued.

March 26, 1874, at same term, order of continuance was set aside, and Linus Graves dismissed from the bill as complainant—and continued:

On May 11, 1874, complainant, March, filed his "further amended" bill, making William J. Mayers and Linus Graves defendants, with John Mayers and Emanuel Ensminger. Defendants filed their motion to strike "further amended bill" from files. Also, motion for leave to withdraw answer to "amended bill" from files, and demur to same. And the court by his decree granted both motions and sustained the demurrer to the first amended bill after having allowed the answer thereto to be withdrawn *after replication*, and after a demurrer had been overruled by the court to the same amended bill.

From this ruling, and the decree of the court dismissing the bill, Oliver March, the complainant, appeals, and assigns errors.

To sustain the errors assigned, we respectfully submit the following points and brief:

POINT I.

The bill was properly filed upon the theory laid down in the books on equity principles and practice, "That the surety " holds all securities in trust, not only for the other sureties, " but for the creditor also, until the debt is paid."

See 1 Stor. Eq. Jurisp., pp. 502, 503 and 504; also pages 633–4, Sec. 638.

See also, 1 Eq. Cas. Abr., 93; 9 Paige, 432; 11 Vesey, 22; 18 Johns., 505; 4 Kent, 307.

Vail *vs.* Foster, 4 Comst. (N. Y.), 612.

POINT II.

It is difficult to perceive upon what ground the court, after overruling a demurrer to the amended bill, and requiring an answer, permitted the defendant to withdraw that answer, after replication filed; and again demur to it, and sustained the second demurrer. Having been unable to find a parallel case in the books, we can cite no authorities upon the question. It seems to us erroneous, irregular and unprecedented.

POINT III.

The further amendment was ordered by the court after the commencement of the trial, upon finding new parties were necessary; and the simple averment, also, that four words were left out of the mortgage in the description of the note. These amendments were merely formal and not "material" in the sense that requires the withdrawal of a replication.

See Moshier *vs.* Knox College, 32 Ill., 155.

Such amendments are within the discretion of the court, and when allowed, cannot be complained of.

See Martin *vs.* Russell *et ux.*, 3 Scam., 342.
See also, 1 Dan. Ch. Pr., pp. 420, 421, 422, 423, and note.

Amendments in chancery cases in this state are "peculiarly within the discretion of the Court," and have usually been allowed in furtherance of justice, after replication filed, and even on the hearing, where the bill is not sworn to, as in the case at bar.

See Cregg *vs.* Brown, 67 Ill., R. p. 330.
Jefferson Co., *vs.* Ferguson, 13 Ills., 33.
Martin *vs.* Eversol, 39 Ills., 222.
Mason *vs.* Blair, 36 Ills., 195.
Farwell *vs.* Meyer *et al*, 35 Ills., 40.
Marble *vs.* Bouholtee, 35 Ills., 240.
Moshier *vs.* Knox College, 32 Ills., 155 before cited. See also Sec. 35, "Chancery act" chap. 21, R. S. 1845.

POINT IV.

The statute of limitations cannot apply in this case. The original bill was filed July 29th, 1872; the note was due Dec.

4th, 1872. The object of the original bill, and both amendments, was, to foreclose this mortgage, upon the mortgaged property, and for no other purpose whatever, and the amendments presented no new material facts, except the payment of $150 by Wm. J. Mayers, to March, upon the note, and the receipt and "release" by March to said Mayers therefor.

No additional claim and no additional lands were brought into the case by *either* amendment, and neither amendment therefore falls within the rule laid down in I. C. R. R., *vs.* Cobb, Christy & Co., 64 Ill., 140.

These amendments were for the sole purpose of "re-stating the cause of action in the pending suit" and were therefore allowable, according to the same authority. The amendments were also necessitated, mostly, by the *acts* and pleadings of the defendants. But were it even true that the *note* alone was barred, the payment by Wm. Mayers of $150, on the note to March on February 29th, 1868, *before* the statute had run against it, extended the time of the beginning of the statute, to run to the latter date, and the same is not yet barred.

POINT V.

The receipt and release of March to Wm. J. Mayers was simply an agreement of March not to sue him on the note, but at the same time to reserve the right to the security offered by the mortgage, as expressed in terms. Wm. J. Mayers gave no new consideration for it; he was legally bound to pay not only the $150, but the whole note. The paper given could not release the mortgage, even had it pretended to do so, it was not under seal. But, by its terms it reserved the right to the mortgage security. According to the authorities cited to support point ~~third~~ first, March was entitled to the benefit of the mortgage security as soon as it was given; the reservation in the release gave him no new right, but its language showed the intention of the parties not to release that security, and the intention of the parties will govern.

POINT VI.

The mortgage given by John Mayers to Wm. J. Mayers and Linus Graves, to secure them, as his securities, if we cite

the law correctly, was a mortgage to secure the payment of the debt to March at its inception. It was of too long standing to be interfered with by the bankrupt court. That court did nothing whatever with the mortgaged premises. They were mortgaged for their full value, and were not disturbed. Had there been a surplus over the mortgage debt, that court might have ordered the premises sold, paid off the mortgage debt out of the proceeds of sale, and applied the surplus to the payment of the other indebtedness of John Mayers. But this was not done. March was not before the court with his claim. He relied upon the mortgage security, and not upon the general assets of John Mayers, to pay his debt. If it were true, as is claimed by John Mayers, through his counsel, (which we utterly deny,) that the bankrupt court set off these premises to Mayers "as, and for his homestead," it was, and must have been subject to all other liens. That court had no jurisdiction over March or his claim.

The release of the bankrupt court to John Mayers and Linus Graves, or either of them, did not and could not affect this mortgage security.

For the reasons given we ask that the decree of the Circuit Court be reversed, and the cause remanded for trial.

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M. W. PACKARD,
Attorneys for Appellant.

No. 176.

STATE OF ILLINOIS.

SUPREME COURT,

CENTRAL GRAND DIVISION.

January Term, A. D. 1876.

OLIVER MARCH, *Appellant*,

—*vs*—

JOHN MAYERS, *et al. Appellees.*

IN CHANCERY. BILL TO FORECLOSE A MORTGAGE.

Statement of the Case.

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STATE OF ILLINOIS.

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JANUARY TERM, A. D. 1876.

OLIVER MARCH, *Appellant*,
vs.
JOHN MAYERS, *et al.*, *Appellees.*

In Chancery.
Bill to Foreclose Mortgage.

POINTS AND AUTHORITIES.

BRIEF STATEMENT OF THE CASE.

On the 20th of February, 1856, John Mayers borrowed from Oliver March $858, for which he gave his note payable "on or before the 4th day of December next, with interest after date," at 10 per cent. Wm. J. Mayers and Linus Graves signed the note as sureties only. On the 29th of July, 1856, and without the knowledge of March, John Mayers executed and delivered to said sureties a mortgage for the express object of securing said sureties from the payment of said note, and "*to save and keep said sureties, their heirs, &c., harmless from said note.*" (Abs. 3.)

Soon after the enactment of the present United States bankrupt law, John Mayers and Linus Graves filed their petitions, and each received a discharge from all his debts.

This left Wm. J. Mayers alone liable on the note. On the 29th of February, 1868, he obtained from March a release from all obligation "on said note, in consideration of $150 paid" to March. (Ab. 6.)

On June 29, 1872, a bill was filed in the name of Wm. J. Mayers and Linus Graves, to foreclose said mortgage, making John Mayers and one Ensminger, defendants. This was done *after* John Mayers and Graves had been discharged in bankruptcy; and the bill alleged the discharge of both of them. It was four years and five months *after* Wm. J. Mayers had been specially released by March from "all obligation" on the note, though the original bill was entirely silent as to that release. (Ab. 1, 6.) March was not a party at all, and they sought to foreclose, as appears by the bill, for their personal benefit. They say in their prayer, "inasmuch as complainants are in equity bound to pay said note," &c. (Ab. 3.)

To this bill a demurrer was sustained by the court, not for want of parties, but because it contained no equity. (Abstract, 4.)

May 14, 1873, Wm. J. Mayers filed a paper in the case, ordering the suit dismissed *as to him*, saying that he never ordered the suit to be commenced.

On the 19th of May, 1873, Wm. J. Mayers filed his motion to dismiss said suit as to time, which was denied.

May 26th, amended bill was filed with name of Wm. J. Mayers as one of the complainants, notwithstanding his protest and order that his name should not be used. In this amended bill the name of March is first used as a party.

June 12th, Wm. J. Mayers filed a disclaimer, and suit was ordered to progress in name of other complainants. (Ab. 5.)

This amended bill was filed for the benefit of March alone. It sets up the bankruptcy and discharge of John Mayers and Graves, and the release of Wm. J. Mayers by March, and avers that the release by March was an equitable assignment by Wm. J. Mayers of the mortgage, or that it is a subrogation of March to all the rights of Wm. J. Mayers in the mortgage.

(Ab. 6.) To this amended bill there was a demurrer, which was overruled. (Ab. 7.)

John Mayers alone answered. (Ab. 7, 8, 9). Replication was filed, cause set down for hearing and came on to be heard. March was fully examined and cross-examined as a witness. The note was offered in evidence, but an objection made was rejected by the court, because it was not properly described in the mortgage.

Order of submission was then was then on appellant's motion, set aside, and leave given to complainants to amend and make new parties. (Ab. 9.) Replication was not withdrawn.

May 11, 1875, March filed his amended bill, and makes the original complainants defendants, he being the only complainant. This "further amended bill," as it is called, is like the first amendment, except as to the change of parties, and the statement that the note is not properly described in the mortgage, the words "the fourth day of" being left out of the mortgage; but it is not framed for the purpose of reforming the mortgage, and contains no prayer that the mortgage be amended so as to describe the note. (Ab. 10.)

June 4, 1874, motion was filed to strike "further amended bill" from files for reasons on page 11 of abstract.

May 29, 1875, notice and motion filed by John Mayers for leave to withdraw his answer to amended bill from files, and to strike amended bill from files.

After leave was given to defendant, John Mayers, to withdraw his answer by leave of court, he obtained leave and filed a demurrer to the amended bill, these several motions being heard at once. The motion to strike "further amended bill" from the files, was granted. Also leave to J. Mayers to withdraw his answer, and a demurrer was sustained to the "amended bill."

POINT I.

Our chancery practice must be according to the statute, so far as it speaks; and where no provision is made by the act, according "to the general usage and practice of courts of equity," in this country and in England.

R. S. 1874, Cap, 12, Sec. 1.
Mohor *vs.* O'Hara, 4 Gil. 424, 427.

POINT II.

By Sec. 29, Art. 6, Constitution of 1870, the jurisdiction, powers, proceedings and practice of our courts of the same grade are required to be uniform.

POINT III.

As the chancery act gives no specific rules for amending bills, except the general discretion in Sec. 37, that discretion must be held to be *within* "the general usage and practice of courts of equity," and not *without* it. In other words, that discretion is a legal one, bounded and controlled by law; and that law is the general usage and practice of courts of equity. In that way only can uniformity be secured.

This court has construed Sec. 29, Art. 6, of the Constitution, to be an abrogation of all special statutes, and all special discretionary rules relative to practice, except such as tend "to facilitate the administration of the law."

O'Connor *vs.* Leddy, 64 Ill., 301.
The People *ex rel. vs.* Rumsey, 64 Ill., 44.

To know the law then relative to amending bills in chancery, we must know what is "the general usage and practice of courts of equity." In that regard, it will be found as follows:

POINT IV.

When a plea or demurrer to the *whole* bill is allowed upon argument, the bill is out of court, and no amendment will be permitted.

Lube's Eq. Pledg. p. 90.
1 Daniel's Chy. P. & P., p. 469, Sec. 8, subject "Of Amended Bills."
Logan & Brockaway *vs.* Talmadge, 1 John. Chy. 183.
Puterbaugh *vs.* Elliott, 22 Ill,, 157.

POINT V.

It is fundamental that amendments will *only* be granted when the bill is defective in parties, or in prayer for relief, or

in omission or mistake of a fact, or circumstance connected with the substance, *but not forming the substance itself nor repayment thereto.* Lube's Chancery Pleading, p. 87, n. 1, under Sec 1, Cap. 7; 1 Daniels Chy. Pl., n. 1, subject amending bill, Sec. 8, p. 469. Verplank *vs.* the Mercantile Ins. Co., 1 Edw. Chy. R. 46. Hence—

POINT VI.

When an amendment makes a new case, or when it is inconsistent with the original bill, it will not be allowed.

Pratt *vs.* Bacon, 10 Pick, 123, 127.
Larkins *et al. vs.* Biddle *et al.*, 21 Ala. 252.
McKinley *vs.* Irvine, 13 Ala. 681.
Rogers *vs.* Atkinson, 14 Ga., 321.
Goodyear *vs.* Baum *et al.*, 3 Blatch. 266.
Sneed *vs.* McCoull, 12 How., 409, 421–2, side paging.
Shields *vs.* Barrow, 17 How., 137, 143, side paging.

POINT VII.

An amendment will not be allowed when the facts sought to be set up in the amendment were known to the complainant when he filed his original bill, without showing a good excuse for omitting them from the original bill.

Prescott *et al. vs.* Hubbell *et al.* 1 Hill (S. C.) R. 210, 217, side paging.
Whitmarsh *vs.* Campbell *et al.*, 2 Paige 67.
Rodgers *et. al. vs.* Rodgers *et al.*, 1 Paige 424.
McComas *et al. vs.* Minor *et al.*, 1 Walker (Miss.) 514.
Rodgers *vs.* Atkinson, 14 Ga., 320.
Bowen *vs.* Cross, 4 John Ch'y., 376. (The point does not appear in the head notes.)
Thorn *vs.* Germand, Id. 363.
Brown *vs.* Ricketts, 2 John Ch'y, 425.
Rule 29 of the United States Courts in Equity.

POINT VIII.

When the original bill was filed, March had no subsisting claim against either the principal or sureties on the note. That bill avers that John Mayers and Graves had been discharged

by proceedings in bankruptcy, and both amendments show that Wm. J. Mayers had been fully discharged by an instrument in writing, signed by March four years and five months before the original bill was filed.

POINT IX.

March has been guilty of inexcusable laches in asserting his claim, and could receive no favor from this court, for that, if for no other reason. The note had been due 16 years, 5 months and 19 days, before he appears in the case all. Then he comes after the note had been absolutely barred 5 months and 19 days, and after all its makers had been absolutely absolved from all obligation to pay it, and asks the court to recognize a supposed equitable assignment of a supposed equity, to aid him in collecting a claim which *nobody owed!*

POINT X.

The mortgage needs to be reformed before it can be enforced, and the bill should have been framed for that purpose, but was not; nor was the last amendment sufficient for that purpose.

Cunningham *vs.* Wren *et al.*, 23 Ill., 64.
Carter *vs.* Barnes, 26 Ill., 454.

POINT XI.

When a note or other monied obligation, secured by mortgage, is paid, or the makers are discharged therefrom, the mortgage ceases to have any vitality. The debt is the substance, the mortgage the shadow; and when the note is barred in law it is barred in equity, and cannot be foreclosed.

Harris *vs.* Hills, *et. al.*, 28 Ill., 44.
Pollock *et. al.*, *vs.* Maison, 41 Ill., 517.
Lucas *vs.* Harris, 20 Ill., 165.

The note was barred before March became a party, or made any attempt to foreclose the mortgage.

POINT XII.

Before amendment will be allowed, complainant must get leave to withdraw his replication.

1 Atk., 51. (Anon.)
Brown *vs.* Ricketts, 2 John Ch'y, 425.
Thorn *vs.* German, 4 John Ch'y, 363.
Rule 29 of the U. S. Courts of Equity. Unless the amendment is merely formal, or trivial.
Moshier *vs.* Knox College, 32 Ill., 155.

POINT XIII.

Our theory, announced under the 5th and 6th points is not confined to sworn pleadings. We are expressly told in Verplank *vs.* Mercantile Ins. Co., Edwards' Chy. 52, that it "applies to all bills and pleadings in general in this Court," and the Supreme Court of the U. S., in Shields *vs.* Barrow, 17 How. 144, quote the holding in that case and say, "it is the true rule." The 29th rule of the U. S. Court of Equity applies equally to sworn and unsworn bills, and requires good excuse to be shown why the substance of the amendment was not set up in the original bill. March knew all the facts in the case from the time he released Wm. J. Mayers, and he should have acted promptly and made his true case in the original bill. Proper respect for the Court, and good faith towards an opponent, demands that the complainant state the true theory and substance of his case in his original bill.

POINT XIV.

This mortgage cannot be reformed or corrected at the request of March. He is not a party nor privy to it. The parties are satisfied with it.

POINT XV.

In preparing and filing his original bill complainant mistook the law of his case, and will not be aided by a court of equity.

Jacobs *vs.* Morange, 47 N. Y., 57.
Shields *vs.* Barrow, 17 How., 137.
Goodyear *vs.* Chaffee, *et al.*, 3 Blatch., 266.

POINT XVI.

When the new case was made by the first amended bill the note was barred at law, and barred in equity. See authorities under eleventh point.

POINT XVII.

The homestead right is not released in the mortgage. (Abs. 3 Record, 10, 11, 12, 13.) Hence John Mayers received the assignment of said lots 9 and 10 as a homestead from the bankrupt court, free from the morgage lien, even as against Graves and Wm. J. Mayers.

POINT XVIII.

The lien or claim of March is not such as the court of bankruptcy will recognize or protect. If it amounted to anything, it was not a vested lien. It required a court of equity to decree its existence, and March's right to it.

A few words regarding appellant's points.

As to his 1st; It is not true as there stated that "The bill (original bill) was properly filed upon the theory laid down in the books on equitable principles and practice," as there stated. The original bill has nothing of the kind in it, and that is one trouble with the case. The amended bill, and the further amended bill, each makes a case entirely new, different and inconsistent with the original. They are framed on theories totally different from that of the original, and cannot stand with it.

All the cases cited under my 6th and 7th points, are examples of cases made by amendments which were new or inconsistent with the original bill, and were not allowed to stand with it. In Rogers *vs.* Atkins, 14 Ga., 321, the complainant asked leave to amend, and filed an affidavit, in which he stated as an excuse for not embodying the substance of the amendment in the original, that he had been advised by his counsel that the doctrine set up in the amendment was not involved in his case. The Court rejected the amendment, saying, "That is no reason at all. Parties must know what doctrines are involved in their cases, at their peril."

His second point presents no difficulties.

The overruling of the demurrer, ordering answer, giving leave to withdraw answer, allowing demurrer, are all interlocutory orders.

Knapp *et al.* vs. Marshall *et al.*, 26 Ill., 63.

As long as the case is before the court and not disposed of by final decree, all such orders, as well as the final decree, are before the court, subject to revision or entire vacation for the promotion of justice.

Hawkins *vs.* Tarber *et al.*, 47 Ill., 459.
Fanniquet *vs.* Perkins, 16 Howard, 82.
Gibson *et al. vs.* Rus *et al.*, 50 Ill., 383.

Third point. The "further amended" bill was permitted by the court after the trial was entered upon, not "because new parties were necessary, but because the mortgage needed to be reformed. It did not describe the note. If these amendments were "merely formal and not material," complainant did not need to set aside the hearing and continue the case, he might have done it instanter and proceeded. But he filed a full bill covering all that was in the former amendment, and the statement that the note was not properly described in the mortgage. The reform of a mortgage, so as to show that it was intended to describe a certain note, I should think was very "material" if relied on to collect the note.

No new parties were made. The original complainants were transposed—made defendants instead of plaintiffs.

True, this court has been liberal in allowing amendments. But it has been as strenuous as any other court, that the harmony between the original and its amendments, should be maintained; that the frame and purpose of the bill should be sustained to the end. Beach *vs.* Shaw, 57 Ill., 19, is a well considered example.

In that case, complainant attempted to change the theory of his case, and was not permitted. It was much like the case at bar. In his bill he claimed to be the beneficiary. Subquently he insisted on sustaining the suit, *because*, as it clearly appeared, others were the beneficiaries. The court did not tolerate it. See also, Chaffin *vs.* Heirs of Kimball, 23 Ill., 36.

The $150 paid by Wm. J. Mayers, was not a payment "on the note," as is claimed. (Abs. 6.) But suppose it had been.

The paper signed by March and called a release, says: "I hereby release him, the said Wm. J. Mayers, from all ob-

ligation on one certain promissory note," (describing it.) From this payment it is insisted a promise to pay the balance is legally presumed, and the note thereby taken out of the statute of limitations. But will some one explain how an express release from all obligation is to be tortured into a promise to pay the claim from which a party is released? And by what legerdemain can that new promise be made binding on the two other makers of the note who were not parties to the new promise, and knew nothing of it, and are declared in the original and both amendments to have been discharged from it by proceeding in bankruptcy?

A new promise by one, would not take the note out of the statute as to the others.

Exiter Bank *vs.* Sullivan, 6 N. H., 124.
Evans *vs.* Bradley, 17 Wend., 422.

I respectfully insist that the amendments were not a restatement of the case, but were an entire abandonment of the theory and case made by the original bill. The first amendment especially, was "necessitated," not "by the acts and pleadings of the defendants," but on account of appellant's ignorance or inexcusable disregard of the doctrines involved in his case, whenhe filed his original bill. From this he can have no relief.

Broom's Legal Maxims, 190.
Rogers *vs.* Atkinson, 14 Ga., 321.
Goodyear *vs.* Bown, *et al*, 3 Blatch, 266.

The last case is very similar to the one at bar. Complainant in his original bill set up that he owned certain patented rights and interests, which defendant had infringed. Afterwards he moved for leave to amend, by setting up that four corporations, and not himself, were the exclusive owners of the rights and interests described in the original, and that defendants knew of the rights of such corporations *before* they infringed.

The amendments were not permitted because they, as the Court held, made a new case.

The New York authorities referred to by appellant in his 1st point, are based on the statute of that state, and are not necessarily binding upon this Court.

See Curtis *vs.* Taylor, 9, page 436.

His other references under that point are tracable chiefly if not exclusively, to 11 Vesey, 22.

The bill admits that part of said premises (lots 9 and 10 in B. 7) were formerly occupied by John Mayers as a homestead. (Ab. 6). It will be seen that the homestead right was not released in the mortgage. (Record 10, 11, 12 13, Ab. 4). It is also admitted in the bill and both amendments, that John Mayers and Graves had been discharged in bankruptcy. (Ab. 8, 6, 2.) This admission carries with it the legal deduction that this property was in the custody of the law—in the Bankrupt Court. What became of it? Is that Court chargeable with neglect of duty? The answer sets up that said lots 9 and 10 were set off to John Mayers, as and for a homestead by that Court, (Ab. 8), and the bill does not deny it, though appellant's argument does. Having been attorney for John Mayers in that proceeding, I know personally that those lots were so set off by that Court, and he stands so invested of record by that Court.

Every lawyer is supposed to know that a homestead right to the extent of $1000, is not subject to a mortgage lien, unless that right is released in the mortgage.

Viewed in the light most favorable to appellant, and without regard to the question of pleading, there is no equity in his case. In every case that can be found where the principal has been allowed to hold the security of his surety, or where the security having paid the debt, has been allowed to realize from the security held by the principal, there has been a debt subsisting in full force and from which the party had not been released or discharged. In the case at bar there was no debt due from any of the signers of the note to appellant when the original bill was filed. It is familiar doctrine that the debt is the principal and the mortgage is the incident. The discharge of the debt is the discharge of the mortgage. It requires no writing even, much less a seal, as appellant supposes.

Jackson, ex dem., *vs.* Willard, 4 John., 42.
Lucas *vs.* Harris, 20 Ill., 169.

"The mortgage interest as distinct from the debt, is not a fit subject of assignment. It has no determinate value." *Id.* When

the debt ceased to exist, the vitality of the mortgage was gone. Webster says: "Lien" means "the right by which the possessor of property holds it against the owner in satisfaction of a *demand.*" Here it stands confessed that there is no demand for which any one was liable. Appellant asked a court of chancery to breathe life into a claim twice dead (1st by the act of bankruptcy and by appellants release, 2nd by the statute of limitations,) and then enforce it by means of a supposed lien which expired with the life of the claim, if it ever existed

Appellant lays much stress on the discretion given to the Circuit Court in matters of amendments. The Court has exercised its discretion in this case, and with it I am content.

Confidently expecting an affirmance of the decree, I submit the case.

WALTER M. HATCH,

Counsel for Appellees.

STATE OF ILLINOIS.

SUPREME COURT,

CENTRAL GRAND DIVISION.

January Term, A. D. 1876.

OLIVER MARCH, *Appellant,*

—*vs.*—

JOHN MAYERS, *et al. Appellees.*

IN CHANCERY. BILL TO FORECLOSE A MORTGAGE.

BRIEF AND ARGUMENT.

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Counsel for Appellees.

Leader Steam Print, Bloomington, Ill.