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Loomis v. Farnum.

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allowance in this State, he would, probably, have been entitled to be allowed only the balance. But when he presented his claim, as we have said, the whole sum claimed was due, and we are of opinion that he is entitled to have his claim allowed as of the time when it was presented to the commissioners. He cannot receive, however, any payment which will make his total receipts from the several jurisdictions in which he may have proved his claim amount to a larger sum than the full amount of his claim.

*Claim allowed.*

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SHAW vs. LYFORD.

Where a defendant has filed his petition in bankruptcy since the action was commenced, the plaintiff will, on motion, be allowed to discontinue the action without costs.

But if the defendant should file an affidavit that the plaintiff had no cause of action, together with a plea to the merits, and security for any sum which may be recovered, *it seems* that such motion would not be granted.

ASSUMPSIT. Since the commencement of the action, the defendant had filed his petition in the district court, and been declared a bankrupt under the act of Congress passed August 19, 1841. The plaintiff now moves for leave to discontinue the action, without costs.

*Phelps*, for the plaintiff.

*W. C. Thompson*, for the defendant.

PARKER, C. J. We are of opinion that this motion is reasonable, and it is supported by authority. 8 *Cowen R.* 121, *Honeywell vs. Burns*, is a case directly in point.

The defendant has by his own act deprived the plaintiff

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 Shaw v. Lyford.
 

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of any remedy against his property, if he had any; and, by his petition in the district court, he has declared himself unable to pay his debts. A discharge in bankruptcy, (if he has obtained or shall obtain one,) may be pleaded in bar of the farther maintenance of the present action; but, should such a plea be filed, the defence would thereafter proceed, not upon the ground that the plaintiff had not good cause of action when he commenced his suit, but upon the ground that the defendant, being unable to pay, had been exonerated therefrom for that reason. Surely, this is not a good reason why the plaintiff should be compelled to proceed against him; nor, if he declines to do so, why he should be subjected to costs.

Perhaps an affidavit, on the part of the defendant, that the plaintiff had no cause of action, together with a plea to the merits, and proper security for the payment of any sum which the plaintiff should recover, would alter the case.

*Motion granted.*

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### DOWNER vs. HOLLISTER.

A brother to a surety in a poor debtor's bond may act as a magistrate in discharging the debtor.

If a party be summoned to appear at a given hour, he will be in season if he appear when or before the next hour is struck.

A party who attends at a given hour, pursuant to notice, and finds that the magistrate is not arrived, is bound to wait until the expiration of the hour.

If the other party is not present, he is bound to wait the same time before taking any steps that may prejudice the rights of his opponent.

In all cases, the party giving the notice is bound to wait until the expiration of the hour for his opponent to appear.

A creditor was notified that a hearing upon a poor debtor's application to be admitted to take the oath, would be had at a certain place at 3 o'clock, P. M. The debtor appeared at the time and place, took the oath, and went away. In a few minutes after he was gone, after three, but before four o'clock, the creditor's attorney appeared with his witnesses, and requested the magistrates to