

## PERLEY v. MASON &amp; Trs., WILLARD, Claimant.

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The insolvent law of one state has no effect in another state against the citizens of the latter holding claims that follow the person of the creditor, unless they place themselves under the jurisdiction of the law by voluntarily becoming parties to the insolvency proceedings.

It is the citizenship of the creditor, and not the place where the debt was contracted or made payable, that determines the question of jurisdiction; and the creditor's objection to the jurisdiction, on the ground of his citizenship in another state, is waived by voluntarily proving any part of his claims in the insolvency proceedings.

FOREIGN ATTACHMENT. Issue between the plaintiff and the claimant. The plaintiff, trustees, and claimant are citizens of this state; the defendant is a citizen of Vermont. The action was begun January 31, 1885, and is founded on a note for \$100, dated Fairlee, Vt., November 8, 1883, signed by the defendant, and payable to the plaintiff, or bearer, on demand with interest annually. January 21, 1885, the trustee was indebted to the defendant for flour and grain sold and delivered at Fairlee, Vt. On that day the defendant filed his petition in insolvency under the Vermont insolvent law, and was thereupon duly adjudged an insolvent debtor by the insolvency court of Vermont. February 9, 1885, the claimant, Willard, was elected assignee, and an assignment issued to him by the court. The same day the plaintiff proved against the estate two other promissory notes which he held against Mason, and he, or his attorney for him, voted for assignee. By the terms of the Vermont statute, all debts due the debtor are vested by the assignment in the assignee. The Vermont court has decided that the assignment takes effect from the date of the filing of the petition. Willard claims the funds in the hands of the trustees as assignee.

*Chapman & Lang*, for the plaintiff.

*Farnham & Chamberlin* (of Vermont), for the defendant.

*John H. Watson* (of Vermont), for the claimant.

CLARK, J. The plaintiff's right of action and attachment in this case is not affected by the insolvency proceedings in Vermont, unless he has in some way become a party to them. The insolvent law of one state has no effect against the citizens of another state holding claims that follow the person of the creditor, no matter where the debt was contracted, or where it is made payable, unless they place themselves under the jurisdiction of the law by voluntarily becoming parties to the insolvency proceedings. *Dun-*

*lap v. Rogers*, 47 N. H. 281, 288; *Bank v. Butler*, 45 N. H. 236; *Baldwin v. Hale*, 1 Wall. 223.

The plaintiff voluntarily became a party to the insolvency proceedings in Vermont by proving a portion of his claims against the defendant's estate in insolvency, and voting for assignee personally, or by his attorney. By proving two of his notes, and participating in the choice of assignee, he recognized the validity of the assignment; and under the law of Vermont the assignment vested in the assignee (who is the claimant in this case) all the property and estate of the debtor from the date of the petition, including that portion of the estate which the plaintiff seeks to hold under his attachment. His ratification of the assignment, by voluntarily proving a part of his claim in Vermont and acting in the choice of assignee, precludes him from enforcing his attachment in this action. The two positions which he assumes are antagonistic and inconsistent. As to two of his notes he recognizes the insolvent law of Vermont, and voluntarily subjects himself to its operation, affirming the validity and claiming the benefit of the assignment, which vests the funds in the hands of the trustees in the assignee in insolvency for the benefit of all the creditors. As to the third note, he insists that the assignment is inoperative as against him, and claims to hold the funds in the hands of the trustees for his sole and exclusive benefit, upon the ground that the insolvency law of Vermont has no jurisdiction over him. The plaintiff cannot occupy these inconsistent positions, denying the validity of the assignment for the purpose of securing full payment of a part of his claim from the debtor's estate in New Hampshire to the exclusion of the other creditors, and asserting its validity to enable him to share with them in the distribution of the estate in Vermont as to the residue of his claim. He cannot avail himself of the benefits of the insolvency law without submitting to its conditions. He was not compelled to place himself within its jurisdiction. He had his election, and, having voluntarily exercised it, he is governed by its provisions.

It is the citizenship of the creditor, and not the place where the debt was contracted or where it is payable, that determines the question of jurisdiction; and the plaintiff has waived his right to object to the jurisdiction on the ground of his citizenship in New Hampshire by voluntarily becoming a party to the insolvency proceedings. In *Jones v. Horsey*, 4 Md. 306, it was ruled that a foreign creditor, uniting with a domestic creditor in recommending a trustee for an insolvent debtor, places both creditors on the same level, and both share alike in the assets. In that case the plaintiffs, citizens of New York, brought an action against Wiggins & Co., citizens of Maryland, as principal defendants, and Horsey, trustee. The trustee, Horsey, was trustee or assignee of Wiggins in insolvency, and pleaded Wiggins's discharge. The plaintiffs' attorney had joined in recommending Horsey's appointment as assignee; and

it was held that this barred the plaintiffs from recovering. *Clay v. Smith*, 3 Pet. 411; *Bodley v. Goodrich*, 7 How. 276; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Chafee v. Bank*, 71 Me. 514; *Adlum v. Yard*, 1 Rawle 163; *Rapalee v. Stewart*, 27 N. Y. 310; *McConnell Trustee Process*, s. 329.

*Trustees discharged.*

SMITH, J., did not sit: the others concurred.

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LEBANON v. MEAD & a.

A notice to a third person to come in and assume the defence of a pending suit, which does not state the cause or nature of the action, nor show in what way he may be interested in the result, is not sufficient.

CASE, to recover a sum which the plaintiffs were compelled to pay Eaton as damages for an injury caused by an obstruction placed in a highway by the defendants.

March 19, 1884, while the suit Eaton against the plaintiffs was pending, the following notice was served upon the defendants:

“Grafton ss. Supreme Court, March Term, 1884.

“Albert S. Eaton v. Town of Lebanon.

“It being suggested that Charles Mead (and others, naming all the defendants) may be interested in the defence of the above named action, it is ordered that they be notified to appear at said court, on Monday, March 24, 1884, at four o'clock in the afternoon, and take upon themselves the defence of said action.

“Attest: Chas. B. Griswold, *Clerk.*”

At the same March term the cause was tried by the court, and judgment rendered for the plaintiffs. Two of the seven defendants, at the request of the town, testified as witnesses at the trial; but none of them appeared in response to the notice.

*Spring & Spring*, for the plaintiffs.

*Shirley & Stone* and *W. H. Cotton*, for the defendants.

CARPENTER, J. If by operation of law, a third person is answerable to a defendant for whatever the plaintiff may justly recover, and has due notice of the suit, the judgment obtained without fraud against the defendant is, in an action brought by him against such third person to enforce his liability, conclusive