Case No. 13,651.

SUTTON v. MANDEVILLE.

{1 Cranch, C. C. 187.}[1]

Circuit Court, District of Columbia. Nov. Term, 1804.

TRIAL—RIGHT TO OPEN AND CLOSE—BANKRUPTCY—BOND—MALICE.

1. The defendant has not a right to open the cause in all cases where he holds the affirmative of the issue.
2. Malice may be given in evidence in aggravation of damages in an action upon a bond conditioned to prove the plaintiff a bankrupt.
3. Evidence cannot be given to show that the commissioners of bankruptcy erred in their judgment.

Debt on bond conditioned to prove plaintiff a bankrupt. Plea, conditions performed. Replication. Breach, that defendant {Joseph Mandeville} did not prove plaintiff to be a bankrupt. Rejoinder, that he did prove him to be a bankrupt. Surrejoinder, that he did not; and tenders issue Rebutter, joins the issue.

Mr. Swann, for defendant, contended that he had a right to open the cause, because he held the affirmative, to wit: that he did prove plaintiff a bankrupt.

THE COURT, however, refused to permit him, because the replication is in nature of a new declaration; and the rejoinder is only a denial of the fact charged in the replication.

CRANCH, Circuit Judge, contrà, because the defendant is entitled to show that he did prove the plaintiff to be a bankrupt, and it is only upon the supposition that he has failed to support the issue on his part, that the plaintiff can consistently introduce evidence of the damages sustained by him.

C. Lee, for defendant, as this was not an action for a malicious prosecution, prayed the opinion of the court

whether the plaintiff had a right to give evidence of malice in aggravation of damages.

THE COURT said that the question was premature, until evidence of malice should be offered, when it might come properly before the court on an objection to the evidence. But THE COURT permitted the plaintiff to give evidence of fatigue, trouble, vexation and expenses occasioned by the attempt to prove him a bankrupt. And afterwards permitted the plaintiff to go into evidence of malice in aggravation of damages.

THE COURT also permitted the defendant to give evidence of the circumstances and conduct of John Sutton, which would have 472 amounted to acts of bankruptcy, if he had been a proper subject of the bankrupt law, in mitigation of damages and to repel the suggestion of malice. But refused to admit evidence that the commissioners of bankruptcy had erred in their judgment.

{See Cases Nos. 13,648–13,650.}

[1] {Reported by Hon. William Cranch, Chief Judge.}