1878. But to this suggestion there are several answers. Nothing of the kind is alleged in the bill, and the evidence was not directed to the inquiry whether the defendant was thus in default, and the facts in this regard are not sufficiently clear. But if in default, it is not shown that the bankrupt or his estate has sustained any injury thereby; and, finally, the appropriate remedy for such injury is an action at law.

Upon the whole I have reached the conclusion that the substantial justice of the case is with the defendant, and that the plaintiff has failed to establish any ground for equitable relief. This court, sitting in bankruptcy, will, of course, see to it that the defendant makes no inequitable use of his cumulative securities.

Let a decree be drawn dismissing the plaintiff's bill, with costs, to be paid out of the bankrupt's estate.

ROGERS *v.* MARSHALL and others.

(*Circuit Court, D. Colorado.* 1882.)

1. ATTORNEY AND CLIENT—PURCHASE OF PROPERTY IN LITIGATION.
   An attorney at law cannot purchase from his client the subject-matter of litigation in which he is employed and acting, if, as a part of his negotiations for the purchase, he advises his client as to the probable outcome of the litigation, and its effect upon the value of the property he is seeking to purchase.

2. PLEADING—ALLEGATIONS—TO BE PROVED.
   In cases where the answer neither admits nor denies some of the material allegations of the bill, they must be proved upon the final hearing.

3. REHEARING—APPLICATION, WHEN DENIED.
   An application for a rehearing, upon the ground of newly-discovered evidence, where the affidavits filed in support of the motion show that the newly-discovered evidence is merely cumulative, will be denied.

Luther S. Dixon and *W. B. Felker*, for complainant.

John F. Dillon, J. B. Henderson, Geo. W. Kretzinger, and *N. A. Cowdrey*, for respondents.

MCCRARY, C. J. This important case has been exhaustively reargued by eminent counsel upon a petition for rehearing, based (1) upon the record as it stood at the former hearing, and (2) upon alleged newly-discovered evidence. The questions raised, some of them now for the first time, have been carefully considered, and the conclusions reached are as follows;

1. On the former hearing it was held, as will be seen by the opinion then announced, that an attorney at law cannot purchase from his client the subject-matter of litigation in which he is employed and acting, if, as a part of his negotiations for the purchase, he advises his client as to the probable outcome of the litigation, and its effect upon the value of the property he is seeking to purchase. Counsel for respondents, both upon the former hearing and upon the reargument, have insisted that such is not the law, and that if under such circumstances the attorney can show that he gave honest and sound advice concerning the pending litigation, and otherwise discharged the duties imposed upon him by fully disclosing all his knowledge of the value, etc., the sale is valid. There are certainly some respectable authorities holding that a purchase by an attorney from his client of the subject-matter of the litigation *pendente lite* is void not only for champerty, but also on grounds of public policy. *West* v. *Raymond*, 21 Ind. 305; 4 Kent, Comm. (10th Ed.) 530; *Simpson* v. *Lamb*, 17 Com. B. 306; *Hall* v. *Hallett*, 1 Cox. 134; *Wood* v. *Downes*, 18 Ves. 120. I will assume, however, (without deciding,) that the rule is the other way, and that an attorney may purchase from his client the subject-matter of the suit in which he is employed and acting, provided before the negotiations are opened the relation of attorney and client is ended, or at least for the time being suspended, and the client placed in a position to deal with the attorney upon terms of perfect equality. It may be conceded that such is the rule, and still the doctrine heretofore announced in this case may be perfectly sound.

According to all the authorities, it is, at all events, clear that in order to uphold such a transaction the client must be placed in a position such as to enable him to deal with the attorney at arm's length, and upon terms of perfect equality. The relation of attorney and client must be, so far as the transaction of purchase and sale is concerned, dissolved and ended. In that transaction the attorney cannot act as such. If it becomes necessary or desirable for the client to be advised as to the nature of the pending litigation, and the danger to his title to be apprehended therefrom, as a means of determining the question of selling or of fixing the price, the attorney must decline to give him advice upon those points, and the client must employ other counsel, or act upon his own judgment. There is a plain and necessary distinction between the right of the attorney under such circumstances to give the client information touching the value of the property in the market, and his right to advise him upon