

are considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and cannot, by a transfer of the interest of one to the other, defeat this trust.<sup>(l)</sup> A division, however, of partnership property between the partners in proportion to their interests, for the purpose of protecting the property from seizure by the individual creditors of one of the partners, is not unlawful, and cannot be avoided as a fraud upon the individual creditors.<sup>(m)</sup>

Were authority necessary to support an opinion so eminently reasonable as that rendered by the learned judge who decided the principal case, it is believed that the perusal of the cases above cited in this note will convince the reader of the correctness of that decision

M. D. EWELL.

Chicago, May 21, 1883.

(l) In re Cook, 3 Biss. 122.

(m) Atkins v. Saxton, N. Y. 195.

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SCHOOL-DISTRICT No. 13, SHERMAN COUNTY, v. LOVEJOY.

(Circuit Court, D. Nebraska. May, 1882.)

JUDGMENT BY DEFAULT—SERVICE ON PARTY—BILL TO SET ASIDE.

A judgment by default against a party who has been regularly served with summons in the action, will not be set aside after the term, on the ground that such party had a good defense to such action and wrote to an attorney to appear for him, but did not disclose his defense, and that he had no knowledge that such letter was not delivered to the attorney until after the judgment was rendered and the court had adjourned *sine die*

In Equity.

Groff & Montgomery, for complainant.

Mr. Pritchett, for respondent.

McCRARY, J. It may be conceded that the letter to Marquett was mailed as alleged, and that it was lost in the mail by accident, and still there is no sufficient showing of diligence in the defense of the action at law. Litigants are, for reasons of great public importance, required to exercise due diligence in prosecuting or defending suits in which they are parties. Courts cannot make rules to aid or relieve those who are guilty of negligence. If Marquett had received the letter, he would have been under no legal obligation to defend the action. Moreover, it does not appear that he was furnished with the facts constituting the defense, nor with the names of witnesses relied upon to prove them, nor that any fee was paid or tendered him. Under such circumstances, and having received no answer to its communication, the complainant had no right to rely upon Mr. Marquett to

make its defense, and was bound to appear and look after the case. This ruling is abundantly supported by the authorities. See *Freem. Judgm.* §§ 502, 503, and cases cited.

Demurrer sustained.

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WICKHAM, Assignee, etc., v. MOREHOUSE and others.

(Circuit Court, W. D. Pennsylvania. April 13, 1883.)

1. SALE OF REAL ESTATE BY MARSHAL—EQUITABLE JURISDICTION—CLAIMANTS OF PROCEEDS—DISTRIBUTION.

Where, upon a marshal's sale of real estate, he takes for the bid the receipt of the purchaser as the first lien creditor, and exceptions are filed to his special return, a bill on the equity side of the court at the suit of the exceptant will lie to determine the rights of the rival claimants of the proceeds of sale; and this is the proper practice to obtain a review of the decision on the question of distribution, if the amount in controversy brings the case within the appellate jurisdiction of the supreme court.

2. DELIVERY OF DEED AND SECURITY—PRESUMPTION.

The presumption is that a deed for land and the vendor's purchase-money security, of the same date, were delivered simultaneously.

3. PRINCIPAL AND AGENT—AGENT PLEDGING PRINCIPAL'S CREDIT—DUTY TO MAKE INQUIRY AS TO AUTHORITY.

No agent, however general his powers, has implied authority to pledge the credit of his principal for his own private debt, and if he undertake to do so, it is the clear duty of the party dealing with him to make inquiry as to his authority.

4. JUDGMENT SECURITY—ALLEGED FRAUD—PROOF.

To justify a court of equity in striking down a defendant's judgment security for alleged fraud, which the answer denies, the evidence of the fraud should be clear and convincing, and unless so established by the preponderance of proofs, relief will be denied.

In Equity.

*Roger Sherman*, for complainant.

*Wm. H. Armstrong* and *J. L. Meredith*, for defendant.

ACHESON, J. The complainant is the assignee and owner of a judgment for \$2,500, in favor of Hiram C. Johns against Orlando L. Ballou, entered in the court of common pleas of Tioga county, Pennsylvania, September 13, 1876, and which then became a lien upon lands in that county conveyed to Ballou by Mrs. A. M. Morehouse, one of the defendants. On August 28, 1876, Mrs. Morehouse obtained judgment by confession against Ballou in this court for \$16,653, and subsequently caused execution to be issued thereon, and a levy made upon said lands, which the marshal, by virtue of said ex-