

after a loss by fire, so as to change the risk. They did not do this, but waived their security under this rule by delivery prior to the fire, without insisting on payment under the rule before delivery, as they had often done before. Neither will the defendants, after accepting this waiver by taking the cotton, be permitted to change the risk by refusing a payment which they were under legal obligation to have made on Saturday, before the fire. I do not think either the plaintiffs or defendants had any intention of making the kind of contract the defendants now pretend to have made, by distorting the language of this rule; but if they ever did intend to trade under the rule, they never carried out that intention, so far as this proof shows, and this is a waiver of it. The proposed usage of rule 9 has never become a usage at all as to these two members, and this by their own act.

Judgment for the plaintiffs.

BROWN and others *v.* LEE and others.

(District Court, N. D. Mississippi. March 12, 1884.)

MISJOINDER OF CAUSES OF ACTION—JOINT AND SEVERAL LIABILITY.

Where two or more defendants are sued jointly, a count in the same action against one of them alone upon his several liability cannot be sustained.

Demurrer to Declaration.

Lamar, Mayes & Branham, for plaintiffs.

C. B. Howry, for defendants.

HILL, J. The questions presented for decision arise upon the demurrer of the defendant A. C. Jobes to the second count in the declaration. The declaration in the first count charges that the defendants Lee and C. S. Jobes, under the firm name of Lee & Jobes, drew their bill of exchange upon the bank of Kosciusko, of which said Lee, C. S. Jobes, and A. C. Jobes were the owners and partners, the same being a private and unincorporated banking house, payable 90 days after date, which was delivered to plaintiffs and afterwards presented to the bank for acceptance and accepted, and when due was presented for payment, which was refused, of which the drawers had due notice. The second count charges that afterwards A. C. Jobes, for a valuable consideration, promised in writing that if plaintiffs would send the bill back he would pay it, which was done, but payment was refused. The letter, which is alleged contains this promise, is exhibited with the declaration, and is signed "Cashier." There is no objection to joining the drawers, acceptors, and indorsers liable upon a bill of exchange in an action. This suit is properly brought against Lee and C. S. Jobes, as drawers, and the same parties, with A. C. Jobes, as

partners, under the name of the Kosciusko Bank, as acceptors. The question is, can A. C. Jobes be sued in the same action, in a separate count, upon an individual undertaking in which neither of the other defendants are sought to be made liable. If in writing the letter upon which the promise is based he acted as a member of the banking firm, then he would be liable, if at all, by the promise made in the letter as a partner in the banking firm, and not as an individual. It is true that by the laws of this state all partnership contracts are both joint and several, and an action may be maintained against one partner upon a partnership contract as a several and individual obligation; and if the suit was brought against A. C. Jobes alone, upon the acceptance as a several and individual obligation, then I see no reason why the second count might not be joined in the declaration. But the general rule of pleading stated in *Chit. Pl.*, and all the other elementary works on that subject, is that the joint action must be in favor of all as plaintiff, and against all as defendants, and that there cannot be united in one action a count against two or more, and in the same action a count against one of the defendants; and the high court of errors and appeals of the state, in the case of *Miller v. Northern Bank of Mississippi*, 5 George, (Miss.) 412, announced the same rule, which stands unreversed, so far I am informed. Under this rule I am of opinion that the demurrer to the second count must be sustained, with leave to the plaintiffs to amend their declarations if they shall be so advised.

UNITED STATES *ex rel.* SPINK.¹

UNITED STATES *ex rel.* WILLIAMS.¹

(Circuit Court, E. D. Louisiana. March 3, 1884.)

1. HABEAS CORPUS.

Where parties have a right, under the laws of the United States, to pilot vessels in and out of the Mississippi river to the sea through South pass, although they are not duly licensed and commissioned branch pilots under the laws of Louisiana, to imprison them for exercising this right is to imprison them in violation of the laws of the United States.

2. SAME.

The orders and writs of this court are issued under and by the authority of the laws of the United States, and when the affidavits against the relators were made in contempt of the restraining orders of this court, and the relators are imprisoned by virtue of such affidavits, they are imprisoned in violation of the laws of the United States.

3. SAME—JURISDICTION—REV. ST. 753.

If relators are imprisoned in violation of the laws of the United States, this court, under section 753, Rev. St., has jurisdiction to issue a writ of *habeas corpus* to inquire into the cause of their detention, and upon the hearing it has jurisdiction, and it is its duty to discharge them.

¹Reported by Joseph P. Hornor, Esq., of the New Orleans bar.