

MCCRARY, J. This is a petition filed by J. Weil & Bro. praying an order against the assignee of John Walrup, bankrupt, directing him to return to petitioners certain dry goods sold and delivered by them to the bankrupt prior to the commencement of the bankruptcy proceedings. This order is asked upon the ground that the goods in question were obtained by the bankrupt from the petitioners by means of false representations as to his financial condition. There is some doubt upon the question whether the proof shows that the bankrupt obtained the goods, not intending to pay for them, and this, according to the ruling of the supreme court in *Donaldson, Assignee, v. Farwell*, 93 U. S. 631, must appear. It is not, however, necessary to go into the proof upon that question, for the case may well be determined upon another point. It is very clear that the vendor, who has been induced by fraudulent and false representations to part with the goods, must, upon discovering the fraud, promptly disaffirm the contract in order to be entitled to a return of the property. In this case it appears, from the report of the register, that the petitioners not only did not comply with this requirement of the law, but that they failed to take back the goods when the bankrupt offered to return them. The register, in his report, says:

"The facts appear to be that on receiving notice from the debtor of the proposed meeting of creditors for the purpose of securing an extension, as heretofore stated, one of the members of petitioners' firm called in person upon the debtor, *who then made a proposal to return the goods*, they then being, as now, in unbroken packages; and after some parley between the parties no final action was taken."

The character of this parley we may gather from the further facts stated by the register, that "there is some evidence tending to show that at the time of this interview the petitioners endeavored to secure from the debtor some arrangement by which their claim would be protected," etc. I have no doubt that an attempt to secure the debt, or to obtain a preference, after knowledge of the fraud, would amount to an affirmation of the sale, even if not accompanied by a refusal

to take back the goods. It is apparent, that when this offer to return the goods was made, the petitioners knew that the bankrupt had misrepresented his financial condition in order to obtain them. The fact of his offering to return the goods, in connection with his calling a meeting of his creditors and acknowledging his insolvency, was enough to advise the petitioners that the representations he had made to them were false. It was their duty, therefore, to accept the offer when made, and they failed to do so at their peril. If they failed to accept them for any reason except ignorance of the facts it was an affirmance of the sale, and, *a fortiori*, it was an affirmance if they refused in order to continue negotiations for securing a preference.

The judgment of the district court, denying the prayer of the petition, is affirmed.

GREEN v. BETTS and another.

(Circuit Court, E. D. Missouri. March 24, 1880.)

VENDOR'S LIEN—ASSIGNMENT—FAILURE OF CONSIDERATION—SPECIFIC PERFORMANCE.—A partial failure of consideration does not render the assignment of a vendor's lien void, and the assignor cannot subsequently seek to enforce the lien by a suit for specific performance before such assignment has been duly avoided.

Suit to enforce vendor's lien upon specific real estate.

Wagner, Dyer & Emmons, for complainant.

W. B. Homer, for defendant.

McCrary, J. This is a bill in chancery, brought to enforce a vendor's lien upon certain real estate described in the petition. The following are the material facts: On the twelfth day of September, 1873, the plaintiff and defendant Betts entered into a written agreement for an exchange of real estate, by the terms of which plaintiff agreed to convey to said defendant his farm in Carroll county, Missouri, on which he then resided; and the defendant Betts, on his part, agreed

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to convey to plaintiff several designated tracts of real estate, including one which is averred to be with no other description—"160 acres of Missouri land, with perfect title."

It is averred in the bill that defendant Brewster was a party to the transaction, although not signing the contract, and that the farm in Carroll county, Missouri, above named, was, by consent, conveyed to him instead of Betts, and that he had notice of plaintiff's claim. It is conceded that the contract has been complied with in all respects, except as to the conveyance of the 160 acres of Missouri land. Concerning this latter, which is the subject of this controversy, the facts, so far as they need now to be determined, are as follows: The plaintiff, by an instrument in writing which is not dated, but which was executed prior to January 7, 1874, assigned his claim for the said 160 acres of Missouri land to one J. S. Winfrey. This assignment was in the form of an order, addressed to defendant Betts, directing him to make the deed for said land to Winfrey, and signed by the plaintiff. On the seventh of January, 1874, it was assigned by Winfrey to John Dickinson, and on the fourteenth of March, 1874, it was presented to and duly accepted by defendant Betts. Thus the matter stood when, on the thirty-first of December, 1878, this suit was brought. On the first of August, 1879, seven months after the filing of the bill in this case, the order was assigned by Dickinson to the plaintiff.

It is insisted for the defence that these facts show that plaintiff did not own the cause of action at the time he brought the suit, and that therefore he cannot recover, in view of the well settled rule that the plaintiff in a suit must recover, if at all, upon the facts as they existed when he commenced proceedings. *Reppy v. Reppy*, 46 Mo. 571; *McDowell v. Morgan*, 33 Mo. 555; *Waterman on Set-Off*, 414. But it is insisted by the counsel for plaintiff that the case does not fall within this rule, because the assignment from Green to Winfrey was fraudulent and void. The proof upon this subject is that the consignment was executed in assideration of the purchase by plaintiff from Winfrey of the right to use and sell a certain patented article within a specified territory.