his equity to the interposition of the court. The day of hearing came, but the petitioner was neither prepared with his proofs nor with any excuse for their non-production, and his petition and the answer thereto being submitted by Evans, under and according to the course of the court, the petition was dismissed.

The petitioner now alleges, that he did not know that Evans' answer had been filed, and consequently did not know what proofs would be required of him. But is this a reason why he was not here, on the 9th of October last, the day fixed upon his own petition, for the hearing of the application? If he had been present and stated sufficient grounds, the court would have given him further time to produce his evidence. This, however, he did not do, and offers as an excuse for not being prepared with his proofs, that he did not know that Evans had filed an answer.

It is quite probable that he did not know that Evans had filed an answer. But he certainly did know that the 9th of October, 1849, was the day fixed for the hearing of his own petition, and I conceive it would be establishing a most loose and inconvenient system of practice, to grant the present application, and open a second time the order of the 26th of July last. It was said by the Court of Appeals, in the case of *Gott & Wilson* vs. *Carr*, 6 *Gill & Johns.*, 309, "that a suitor in court is bound to be present in person, or by attorney, to take care of his rights, and attend to their due prosecution, and cannot make the omission to perform this duty the foundation of an injunction." So here it seems to me especially to have been the duty of this petitioner to have been present on the 9th of October last, to take care of his rights, and that having omitted this duty, he has no right now to call upon the court a second time to relieve him, upon the ground that he was ignorant of the proceedings which had been had in the cause after he filed his petition. If he had been present, he would have known what had been done in the cause, and what steps it was necessary for him to take for the protection of his rights.

There are strong equities upon both sides. The petitioner, as the elder incumbrancer, certainly had the first lien on the fund, and Evans, as a surety, is to be favorably considered.