

CAMPBELL v. CITY OF NEW YORK.

(Circuit Court, S. D. New York. May 22, 1888.)

EQUITY—PLEADING—SUPPLEMENTAL BILL.

Where the complainant in an original bill has, since bringing the suit, parted with his whole interest in the subject-matter, and those for whom he was trustee have transferred their whole interest in the subject-matter to A, and the title to any sum of money which may be recovered in the suit has by these transfers become vested in A., the remedy of A. is by an original bill in the nature of a supplemental bill, and not by a supplemental bill.

In Equity. On demurrer to supplemental bill. For hearing on pleas to supplemental bill, see 33 Fed. Rep. 795.

James B. Lockwood, (Marcus P. Norton, of counsel,) for complainant.

Henry D. Hadlock, for Philbrook.

George Bliss and Sherman M. Rogers, for Green and Murphy.

WALLACE, J. The theory upon which this supplemental bill proceeds is that Campbell, the complainant in the original bill, since bringing the suit, has parted with his whole interest in the subject-matter, and that those for whom Campbell was trustee have transferred their whole interest in the subject-matter to Philbrook, or to Philbrook and Knibbs, and that the title to any sum of money which may be recovered in the suit has by these transfers become vested in Philbrook, or in Philbrook and Knibbs. Upon such a state of facts the remedy of Philbrook is by an original bill in the nature of a supplemental bill, and not by a supplemental bill. This was distinctly stated in the opinion announced upon the hearing of the motion in which Philbrook applied for leave to be made a co-complainant. Although the distinction between supplemental bills and original bills seems to rest upon purely artificial reasons, it is well recognized, and is attended in practice with consequences which affect the substantial rights of parties. If the *cestuis que trust* had not transferred all their interest in the subject-matter, and there had been simply a change of trustees by operation at law, or if there had been only a partial alienation of the title of Campbell, a supplemental bill might lie. As it is, the demurrer must be sustained. Mitf. Eq. Pl. 65, 98; 1 Barb. Ch. Pr. 66, 84; Story, Eq. Pl. 349; *Tappan v. Smith*, 5 Bis. 73. The third ground of objection assigned in the demurrer sufficiently raises the point.

HENRY v. TRAVELERS' INS. CO.

(Circuit Court, D. Colorado. May 16, 1888.)

1. EQUITY—PRACTICE — BOOKS AND PAPERS — RECORDS OF CORPORATION NOT A PARTY.

The court will not grant a motion to compel the opening of the records of a corporation not a party to the suit, but whose records it is claimed would disclose something of importance to the litigation.

2. SET-OFF AND COUNTER-CLAIM—JUDGMENTS FOR COSTS.

Where A. has judgment for costs against B., and B. has a like judgment in another case against A., one may be equitably set off against the other *pro tanto*; particularly where one of the parties is insolvent.

In Equity. On motions.

Wolcott & Vaile, for complainant.

J. P. Brockway and Patterson & Thomas, for defendant.

BREWER, J. In *Henry v. Insurance Co.* are two or three motions which were, partially at least, submitted to me during the vacation. One is a motion to compel the opening of certain records of a corporation not a party to the suit, but whose records it is claimed would disclose something of importance to the litigation. I overruled that motion temporarily during vacation, and after hearing fuller statements of counsel the other day, I am strengthened in the opinion that I then had, not merely by the fact that this is the record of an independent corporation not a party to this suit, but also by the fact of the manner in which this title has passed from one to another, and has finally come to be in the corporation. That motion will remain overruled as heretofore. In reference to the costs, there being an interlocutory decree in favor of complainant for costs up to date, the draft of the decree prepared by each counsel containing the same provision, I accepted that prepared by the complainant, and after making some changes, signed it. It would be an extreme case that would call upon the court to change a decree thus prepared and entered, and I see no reason why it should be changed. The complainant is entitled to the payment of his costs. The second motion in reference to those costs is that there be ordered an equitable set-off of costs adjudged in another case between the same parties. The matter of set-off depends upon purely equitable principles, and I do not see any reason why it is not equitable that there should be such a set-off. If A. has a judgment in his favor against B., and B. has a judgment in his favor against A., there is no wrong in setting off one against the other *pro tanto*. If each party is solvent, of course it makes no difference, and if one is not, the equitable reasons for the set-off are only stronger. The motion, therefore, in respect to that set-off *pro tanto* is sustained. The third motion is in reference to some garnishee proceedings. I do not think a judgment for costs can be subjected to such garnishee proceedings, and that motion will be overruled.