

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.

ARNOLD *et al.* v. CHESEBROUGH.

(Circuit Court, E. D. New York. April 10, 1888.)

EQUITY—PRACTICE—TAKING TESTIMONY.

The power of the circuit court to appoint special examiners, under the sixty-seventh rule in equity, to take testimony outside of its territorial jurisdiction, is not free from doubt, and the practice is objectionable.

In Equity. On application for the appointment of a special examiner to take testimony.

J. H. V. Arnold, for complainants.

W. S. Logan, for defendant.

LACOMBE, J. This is an application for the appointment of a special examiner at Los Angeles, Cal., to take testimony under the sixty-seventh rule in equity. The power of a circuit court to appoint an examiner to act outside of its territorial jurisdiction is not free from doubt. Mr. Justice BRADLEY, sitting at circuit, has held that it has such power. *Railroad Co. v. Drew*, 3 Woods, 697. Mr. Justice BLATCHFORD, sitting in this circuit, has repeatedly refused to make such orders as the one now applied for, on the expressed ground of lack of power. Orders appointing special examiners have no doubt since been made here when both parties assented, or where some exceptional and peculiar state of facts was disclosed, but it is not a practice which should be encouraged. No case should come to trial upon evidence as to which there is the slightest doubt that the manner of its taking would sustain a conviction of perjury, if willful false swearing were proved. Where witnesses reside in the district, or within 100 miles of the place of holding the court, their attendance may be compelled before the regular examiner. If they are sick, or live beyond the 100-mile limit, they may be examined by commission; or if an oral examination is deemed more satisfactory, or notice has been given by either party that he desires the evidence to be taken orally, the Revised Statutes (section 863 *et seq.*) provide a simple and efficient mode for taking their testimony. *Bischoffsheim v. Baltzer*, 10 Fed. 1. To proceed to take testimony before special examiners, sitting, perhaps, in half a dozen different states, under general notices which do not give the names of the witnesses, thus compelling opposing counsel to attend in person, is alike expensive and unnecessary, and should for that reason be discountenanced, even if there were no doubts as to the power of the court to order the proofs to be taken in that manner. The motion is denied.