

Julius H. Heyward, for plaintiff.
H. A. De Saussure, Asst. U. S. Dist. Atty.

SIMONTON, J. The plaintiff is a commissioner of the courts of the United States in this district. He brings his action for docket fees for the period beginning 12th March, 1886, and ending 23d June, 1888; in all, \$517. Upon his account it appears that between 12th March, 1886, and 1st August, 1886, he charged 19 docket fees, to-wit 16 at \$3, \$48; and 3 at \$1, \$3; in all, \$51. He presented in his accounts forwarded to the department claim for these last-mentioned docket fees in due form. The department disallowed all docket fees anterior to July 1, 1886, and allowed all docket fees charged between July 1, 1886, and August 4, 1886. The amount thus disallowed is \$39. The other items of docket fees were never included in his accounts, and the claim has never been made upon or disallowed by the department, and has never been, until now, presented to the court.

In the case of *Calvert v. U. S.*, ante, 762, (decided this day,) it has been held that the provision inserted in the deficiency act of August 4, 1886, depriving commissioners of docket fees, was not a condition annexed to the special provision then made, and was not confined to that act; but that it was permanent in its character, and operated as an amendment to section 847, Rev. St. U. S. If this is so, the section remained the law until thus amended, and commissioners are entitled to the fees provided in it. When the amendment was passed, this plaintiff had performed certain services anterior to its passage, payment of which the section provides for, and has earned his money. The government then owed it to him. Let him have a decree for \$39. The rest of the account comes within the ruling in *Calvert's Case*, and must be disallowed. Since August 4, 1886, commissioners have lost the right to docket fees. It is unnecessary to decide whether a suit can be maintained in this court on a claim not passed upon by the treasury department.

SWAIN v. BOYLSTON INS. CO.¹

(Circuit Court, E. D. New York. February 12, 1889.)

PLEADING—AMENDMENT OF ANSWER—NEW DEFENSE—MATERIALITY.

In an action on a policy of marine insurance, on application to amend the answer by the insertion of a clause in the application for insurance warranting the vessel to be commanded by a certified captain, held, that if the clause operated as an inducement to the defendant to accept the risk, defendant was at liberty to avail himself of such defense under an amendment made since the trial. If the statement was one not material to the risk, defendant should not now be allowed to set it up as a bar in a case where his amendment as to representation gave him opportunity to prove in defense whatever fact he selected for a defense when he made his contract. Hence the motion was denied.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

At Law.

On motion for reargument of a motion to amend the answer by setting up as a defense a clause in the application for insurance that the vessel on which the policy sued on was issued was to be commanded by a certified captain.

Wing, Shoudy & Putnam, for plaintiff.

Lester W. Clark, for defendant.

LACOMBE, J. 1. Upon the trial it was held that the clause in the application for insurance on the *Altavelia* could not be considered a warranty because it was not carried into the policy. The defendant's contention then was (and still is) that, the policy being an open one, not in fact completed as to the *Altavelia* until the application for that particular vessel was put in, the application is to be considered a part of the policy or contract of obligation between the parties. If the contention of the defendant is sound, it will avail him under his original answer, which contains a denial that the plaintiff has duly fulfilled all the conditions of the policy.

2. If the clause warranting the *Altavelia* to be commanded by a certified captain, which is contained in the application for insurance on that vessel, operated as an inducement to accept the risk, the fact warranted being deemed by the insurer material to the risk, the defendant should in all fairness be allowed to avail of such a defense. But he is at liberty to do so now, under the amendment made since the trial.

3. If the statement as to the certificate of the captain was one not material to the risk, and of no effect as an inducement to the insurer to accept the plaintiff's offer,—in other words, if it is an after-thought,—then the defendant should not now be allowed to set it up as a flat bar in a case where his amendment as to representation gives him every opportunity to prove in defense whatever fact he selected for a defense when he made his contract.

CARRINGTON v. POTTER *et al.*

(Circuit Court, E. D. Missouri, E. D. February 16, 1889.)

1. EVIDENCE—DOCUMENTARY—PUBLIC RECORDS.

In the absence of statute authorizing entries in a book termed the "Record of the Register of Swamp Lands," relating to the disposition of such lands belonging to a county, certified copies of such entries are not admissible in evidence as public records.

2. SAME—DEED—SEAL.

A certified copy of a deed is admissible, though it shows no seal opposite the grantor's signature, when the attestation clause recites that the deed was executed "under the hand and seal" of the grantor. Following *McCoy v. Cassidy*, 9 S. W. Rep. 926.

3. PUBLIC LANDS—SWAMP LANDS—CONVEYANCE BY DEED OF COMMISSIONER.

Under Sess. Laws Mo. 1868, p. 67, declaring that deeds for county swamp lands, theretofore executed by commissioners, should be "deemed and held to