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8FED.CAS.—60  
Case No. 4,601.

FABER v. BARNEY.

{6 Blatchf. 305.}<sup>1</sup>

Circuit Court, S. D. New York.

March 2, 1869.

CUSTOMS DUTIES—JUDGMENT AGAINST  
COLLECTOR—EXECUTION—CERTIFICATE UNDER ACT MARCH 8, 1863.

1. Under the act of March 3, 1863 (12 Stat. 741), the certificate therein provided for must be applied for in proper season.
2. Where, in a suit against a collector of customs, to recover back duties alleged to have been illegally exacted by him, a judgment was recovered against the defendant, and no application for such a certificate was made at the trial, nor until the expiration of nearly two years thereafter, and after a motion was noticed by the plaintiff for execution on the judgment, and such application was then made, on affidavits, before a judge who took no part in the trial: *Held*, that the application ought not to be granted.

This case came before the court on a motion for an execution to enforce the payment of a judgment. The action was assumpsit for money had and received, brought against [Hiram Barney] the collector of the port of New York, to recover back certain duties alleged to have been illegally exacted by him. It was tried in February, 1867, and a verdict was rendered for the plaintiff [Gustavus W. Faber], on which a judgment was duly entered against the defendant in April, 1867. Since that time no steps whatever had been taken toward moving for a new trial, or bringing a writ of error, nor had the judgment been paid. No certificate of probable cause, or that the moneys in question had been exacted by direction of the secretary of the treasury, was given or applied for at the trial, nor had any such application been since made to a judge who was present at the trial. After the motion for execution was made, the defendant coupled with his opposition to the motion an application for a certificate, under the 12th section of the act of March 3, 1863 (12 Stat. 741), which application was opposed by the plaintiff. The judge now holding the court was not present at the trial.

Webster & Craig, for plaintiff.

Simon Towle, for defendant.

BENEDICT, District Judge. Of the many propositions which were discussed upon the hearing of these motions, I deem it necessary to consider but a single one.

It is conceded that the plaintiff is entitled to his execution, unless the certificate provided for by the 12th section of the act of March 3, 1863 (12 Stat. 741), be granted; but it is insisted, on the part of the defendant, that the act of 1863 is mandatory on the court to grant the certificate whenever applied for, whether the application be made before a judge who tried the cause, or some other judge holding the court at the time of the ap-

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plication, and that such certificate, when granted, is a final bar to any execution. To this doctrine I do not assent. The act of March 3, 1863, although, no doubt, intended to afford a means of protecting a collector from loss, by reason of liabilities assumed by him under the direction of the secretary of the treasury, must, if it confers upon a collector an absolute right to a certificate in every case where he has acted under the direction of the secretary, be considered as implying that the application therefor is to be duly made, and at a proper time.

In the present case, no application for the certificate was made at the trial, nor until the expiration of nearly two years, and after a special motion for execution is noticed; and it is then made before a judge who took no part in the trial, and upon affidavits. An application for a certificate, under such circumstances,

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comes too late. The defendant must be deemed to have waived his right to the entry of a certificate, by delaying his application for the space of nearly two years, and until after a motion for execution is noticed, and when the certificate, if it can be granted at all, must be ordered by a judge who took no part in the trial of the cause.

The application of the defendant must, therefore, be dismissed, and, consequently, the application of the plaintiff for an execution is granted.

<sup>1</sup> [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]