JACQUES v. COLLINS et al.

Case No. 7,167.
{2 Blatchf. 23.}[1]

Circuit Court, S. D. New York. May 25, 1846.

DISCOVERY—STATUTORY PROCEEDINGS—ACT OF SEPTEMBER 24, 1789—FORM OF PETITION.

1. In a proceeding in this court under section 15 of the judiciary act of September 24, 1789 (1 Stat. 82), to obtain a discovery, in an action at law, of documents in the possession of the adverse party, it is only requisite that the cause should he at issue, and that the court should be satisfied that the evidence required to be disclosed will be pertinent to such issue, and that the circumstances, should be those in which a discovery would be decreed in chancery.

{Cited in U. S. v. Youngs, Case No. 16,783; Paine v. Warren, 33 Fed. 358; Kirkpatrick v. Pope Manuf'g Co., 61 Fed. 48; Exchange Nat. Bank v. Washita Cattle Co., Id. 191.}

2. It is not necessary that the petition for the discovery should contain the formalities of a bill of discovery in chancery; but it is enough if it contains a notice to the opposite party of the time and place of making the application, and a plain designation of the documents sought for.

{Cited in Gregory v. Chicago, M. & St. P. R. R., 10 Fed. 531.}

This was an action at law to recover damages for alleged false representations made by the defendants {Edward K. Collins and others} concerning the character and condition of divers goods shipped at New-York by one De Goer on board a vessel for England, the plaintiff {John Jacques} averring that, by reason of those representations, he was induced to advance a large sum of money to De Goer, by way of loan, on the goods as security, which money was entirely lost. The defendants now presented a petition to the court, setting forth that the cause was at issue; that, prior to the making of the loan, a correspondence took place between the plaintiff and De Goer, in which the special motives and reasons for the loan were set forth, the reverse of those averred in the declaration; that the loan was made on certain bills of lading, invoices, and other documents, transferred to or deposited with the plaintiff by De Goer, as security for the loan; that De Goer had absconded, and his testimony as a witness could not be obtained; that the defendants had served a written notice on the plaintiff to deposit the correspondence and the other papers with the clerk of this court, so that the defendants might take copies of them, or to serve copies of them, duly verified, on or before a day named, but the notice had not been complied with; that the papers in question were not in the possession or under the control of the defendants; and that the discovery of them was necessary to enable the defendants to prepare for trial. The petition prayed a discovery either by a deposit with the clerk, or by the service of sworn copies, and was verified by one of the defendants, to the effect that the papers were not in their possession or under their control, and that the affiant was advised by counsel and believed that the discovery was necessary to enable

the defendants to prepare for trial. There was added a certificate of counsel that he had given such advice.

Francis B. Cutting, for plaintiff.

Seth P. Staples and John Anthon, for defendants.

BETTS, District Judge. The petition now presented conforms to the course of practice in the state courts (Grab. Pr. bk. 3, c. 6), but an objection is taken to its sufficiency, on the ground that, if it were filed in chancery to compel a discovery of the same papers, it would be bad on general demurrer, and that the present proceeding is substantially of the same character as if it were had in equity.

The supreme court of New York seems to regard the state statute as transferring to the law courts the jurisdiction and practice of chancery in relation to this subject of discovery, to be exercised conformably to standing rules of court. Townsend v. Lawrence, 9 Wend. 458. There is a difference, however, in the terms of the state and United States statutes, which may perhaps require some diversity of proceeding in executing them. 2 Rev. St. 199, §§ 21, 22; Act Sept. 24, 1789, § 15 (1 Stat. 82). The act of congress requires that the circumstances shall be those in which a discovery would be decreed in chancery, but it in no respect designates the chancery practice as the mode by which the law courts shall execute the power. It also differs from the state statute in limiting the proceeding to cases in which issue is joined, and in which it is made to appear satisfactorily to the court that the evidence required to be disclosed will be pertinent to such issue.

No method of proceeding being prescribed by congress, this court has always considered the purpose of the act best fulfilled by adopting the most simple and expeditious course of procedure, and avoiding the formalities of a bill of discovery in chancery. A mere notice to the opposite party of the time and place of application, and a plain designation of the documents or pieces of evidence sought for, have been acted upon in this court as sufficiently fulfilling the terms of the law.

The standing rules of this court make no direct provision for this proceeding, and the adoption by them of the state rules, to apply in cases where none are specifically established by this court, may very well embrace the regulations of the supreme court of the state governing these applications. The petition in this case, whether considered in that view, or only in relation to its constituent parts, is sufficient in

substance, and adequate notice has been given to the plaintiff. The objection, therefore, that the petition is defective as a bill of discovery, cannot avail, and the plaintiff must produce and leave with the clerk the papers called for by the petition, or, at his election, serve copies of them on the defendants' attorney.

{Upon the trial the verdict was in favor of the defendants. Case No. 7,168.}

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