WALLER v. STEWART.

Case No. 17,109.

{4 Cranch, C. C. 532.}[1]

Circuit Court, District of Columbia. March Term, 1835.

PRACTICE—INSPECTION OF BOOKS—COMPETENCY OF WITNESS.

1. It is not too late, after the jury is sworn, to call for the books which the court has ordered to be produced at the trial. If the party calling for the books inspect them, he makes them evidence for the other party.

{Cited in Edison Electric Light Co. v. United States Electric Lighting Co., 45 Fed. 59.}

2. If the witness is protected from liability by the act of limitations, he is a competent witness without a release from the party to whom he was liable.

Assumpsit for $116.30, for lumber sold and delivered. The defendant {Stewart's executrix} had obtained an order of the court upon the plaintiff, to produce, upon the trial, his original book of entries. After the jury was sworn the defendant called for the book. The plaintiff's counsel, Mr. Bradley, refused to produce it, although he had it ready, saying that the call was too late after the jury was sworn, and cited Geyger v. Geyger, 2 Dall. {2 U. S. 332} 332.

Mr. Morfit, contra, cited the judiciary act of 1789, § 15 (1 Stat. 73); Blight v. Ashley {Case No. 1,541}; and Kenney v. Vanhorne, 1 Johns. 394.

THE COURT (nem. con.) was of opinion that the motion for non pros, for not producing the book, was not too late. The book was then produced.

Mr. Bradley then gave notice to the defendant's counsel that if they inspected the books he should claim the right to use them as evidence for the plaintiff, and cited Jordan v. Wilkins {Case No. 7,526}.

THE COURT (CRANCH, Chief Judge, and MORSELL, Circuit Judge, hesitating, and thinking there were contrary decisions on the point) decided that if the defendant's counsel inspected the book he made it evidence for the plaintiff.

Mr. Morfit then refused to inspect it.

Mr. Peter Kurtz was then offered as a witness for the plaintiff, and was about to testify

that he was employed by Stewart, and got the lumber on his credit.

Mr. Brent, for defendant, objected that the witness was interested; but, it appearing that he was protected by the statute of limitations, he was permitted to testify without a release from the plaintiff.

NOTE. Upon the question whether the calling for and inspecting the books of the opposite party authorizes him to read them in evidence, if the party calling for them refuse to use them, see the following cases in this court: Banks v. Miller {Case No. 963} June, 1809; Lindsay v. Riggs {Id. 8,366} Dec., 1811; Clementson v. Williams fid. 2,885} June, 1812; and Coote v. Bank of U. S. {H. 3,203} Dec, 1826.

[1] {Reported by Hon. William Cranch, Chief Judge.}