not to be held liable in such case."[1] And it is to be inferred from other portions of the opinion in the case just cited, that, where notices are posted in compliance with such a statute, the consent of the conductor to the act of the passenger in riding in an improper and dangerous place would not exonerate the latter from the imputation of contributory negligence. It has been held in New York that the company must strictly comply with the terms of such a statute in order to secure its benefit.[2] A notice that "passengers are forbidden to get on or off the car while in motion; or on or off the front platform; or on or off the side, except nearest the sidewalk,"—manifestly does not exempt the company from liability to a passenger for an injury sustained while merely riding upon the front platform.[3]

SEYMOUR D. THOMPSON.

*St. Louis.*

[1] Higgins v. Hannibal, etc., R. Co. 36 Mo. 418, 435.

[2] Carroll v. New York, etc., R. Co. 1 Duer, 571; Clark v. Eighth Ave. R. Co. 32 Barb. 657; S. C. 36 N. Y. 135; Colgrove v. Harlem, etc., R. Co 6 Duer, 382; S. C. 20 N. Y. 492.

[3] Nolan v. Brooklyn City, etc., R. Co. 87 N. Y. 63.

---

## *In re* CADWELL and others, Bankrupts.

(*District Court, N. D. New York.* 1883.)

CREDITOR PROVING CLAIM — FRAUDULENT PREFERENCE — ACTUAL AND CONSTRUCTIVE FRAUD.

A creditor who is guilty of no actual fraud is not debarred from proving his debt for the reason that his preference has been set aside by the judgment of the court for constructive fraud only.

In Bankruptcy.

*George W. Adams*, for assignee.

*John Lansing*, for creditor.

COXE, J. This is an appeal from an order of the register expunging the proof of debt filed by the Jefferson County National Bank, founded upon three judgments which had previously been declared preferential and void for constructive fraud only. *Brown* v. *Jefferson Co. Nat. Bank*, 19 Blatchf. 315; S. C. 9 FED. REP. 258.

The sole question is whether a creditor, who is guilty of no actual fraud, is debarred from proving his debt for the reason that his preference has been set aside by the judgment of the court.

In August, 1877, the district court for the southern district of New York decided that there was no conflict between section 5084 of the Revised Statutes and section 12 of the act of June 22, 1874; that a person who surrenders his preference under section 5084 may, even then, under section 12, be prevented from proving more than a moiety of his debt, if guilty of actual fraud; that section 12 placed another limitation upon the proof of debts, and did nothing more. In other words, that the amendment, instead of relaxing, made still harsher the terms of the original act. *In re Stein*, 16 N. B. R. 569.

The register rests his decision wholly upon this authority. I find but one case decided subsequently in which a similar view is taken. *In re Graves*, 9 FED. REP. 816, (district court of Delaware, 1881.) See, also, *In re Cramer*, 13 N. B. R. 225, (district court of Minnesota, 1876.) On the contrary, the following authorities—two of them circuit court decisions—hold that it was the intention of congress, by the amendment of 1874, to distinguish between actual and constructive fraud, and remove the existing limitation upon the proof of debts by honest creditors. *Burr* v. *Hopkins*, 12 N. B. R. 211, (circuit court of Wisconsin;) *In re Black*, 17 N. B. R. 399, (district court of Massachusetts, 1878;) *In re Newcomer*, 18 N. B. R. 85, (district court of Illinois, 1878;) *In re Kaufman*, 19 N. B. R. 283, (district court of New Jersey, 1879;) *In re Reed*, 3 FED. REP. 798, (circuit court of Massachusetts, 1880.)

All of these decisions, with the exception of the first named, were rendered after the decision in the *Stein Case*. The reasoning of the learned judge in that case is referred to, reviewed, and disapproved. The construction contended for by the assignee, is, with great unanimity, rejected. It would hardly be profitable to restate the arguments upon this subject *pro* and *con;* they are very clearly and ably reviewed in the opinions referred to. The question is not free from doubt; each interpretation is surrounded with difficulties; but I am inclined to concur in the views expressed by Judges DRUMMOND, LOWELL, BLODGETT, NIXON, and CLIFFORD, as giving the most reasonable construction of the law. If the amendment had been stated affirmatively,—"and such person, if a creditor, shall, 'except' in cases of actual fraud on his part, be allowed to prove * * * his debt,"—there would be little difficulty in giving it force and effect, even though in conflict with some of the earlier provisions of the act. But is not the meaning the same, though the proposition is stated negatively? The law says that a guilty party shall "not be allowed to prove for more than" half his debt; is not the implication well-nigh conclusive that an innocent party may prove his entire debt? If this is not the meaning of the amendment, it is indeed difficult to imagine what the intention of congress was in adopting it.

The order of the register should be reversed and the expunged proof reinstated.

## LIVERPOOL & GREAT WESTERN STEAM CO. *v.* SUITTER and others.[1]

(*District Court, E. D. New York.* June 7, 1883.)

1. COMMON CARRIER—WAREHOUSEMAN—DELIVERY—PERISHABLE CARGO.
The steamer W. arrived at New York on Friday, December 30, 1881, having on board various consignments of fruit, which, on the following day, were discharged on a covered pier, except part of the defendant's consignment, and were all removed on that day, except the defendant's consignment. Sunday being the first of January, and Monday kept as a holiday, it remained in the custody of the steamer till Tuesday, when the fruit which had remained on the pier during Sunday and Monday was found to be injured by frost, owing to the severity of the weather, although the steamer had covered it up and protected it against frost as well as could be reasonably expected. In an action against the consignees to recover the freight on the fruit, the defendants set up by way of recoupment the damage to the fruit caused by frost. The evidence showed that on the arrival of fruit cargoes, it was usual for consignees to sell the same at auction at 12 o'clock on the day of its discharge before it was removed from the pier, and by a certain firm of auctioneers; that such a sale took place of nearly all the fruit brought by the W. on December 30th, at which all was sold except that in question; and that all that arrived by the W. was removed from the pier on that day, except the defendants' consignment, which was not removed because the defendants did not learn that their fruit was in the W. till too late to get it advertised for the sale of that day. *Held*, that the contention of the defendants that they were not bound to receive their fruit on Saturday, because the weather on that day was so cold as to render it an unsuitable day, was untenable, because other fruit was discharged and removed on that day without being injured by frost; that, even if the defendants learned of the arrival too late to put their fruit into that day's sale, still that fact did not give them the right to compel the ship-owner to retain the fruit in his custody as common carrier over the two ensuing holidays, and that the ship-owner's responsibility as common carrier terminated when the fruit was discharged, with notice to the consignee in time to remove it on that day; and that in the absence of proof showing neglect on the part of the ship-owner as warehouseman, he could not be held liable for the damage by frost.

2. SAME—USAGE.
A usage in respect to cargoes of fruit to delay the delivery until a day when the consignee should be able to have it sold on the pier, by a certain single firm of auctioneers, could not be upheld, even if shown to exist, it being unreasonable and contrary to public policy to permit the time of a vessel's discharging her cargo to depend upon the ability of a single auction house, in the accumulation of business and other engagements, to effect a sale of such cargo.

In Admiralty.

*Beebe, Wilcox & Hobbs*, for libelant.

*Charles E. Crowell*, for respondents.

BENEDICT, J. This action is brought to recover freight, amounting to $879.75, alleged to be due for the transportation, in the steam-ship Wyoming, of a shipment of oranges and lemons consigned to the defendants.

Against the demand for freight the defendants set up, by way of recoupment, damage to the fruit, caused by frost while on the pier, after it had been landed from the steamer, exceeding the freight in amount. Whether the ship-owner is liable for the damage referred to is the question to be determined.

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.