

ing he has instituted. It lies with the defendant, therefore, to present some controlling reason to the judicial discretion for denying to the plaintiff the right which he had secured, and of which he could not be deprived except by a removal of the suit. That both parties have deemed this proceeding an important one is obvious from the tenacity with which the right to pursue it has been contested.

It appears by the record and moving papers that the defendant has been defeated in efforts to vacate the order for his examination by the supreme court at special term and at general term, and by the court of appeals; and that, although for a period of 18 months he was willing to submit his rights to the state courts, he invoked the jurisdiction of this court when there was no other resource left by which he could escape an examination. Certainly, there are no equities which should induce this court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful purpose to the plaintiff, undoubtedly the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But although the defendant's testimony, when obtained, may not be of service to the plaintiff to the full extent it would be in the state courts, it may, nevertheless, be of some value. If it cannot be used on the trial of this action as a substitute for the oral examination of the defendant, it can be as the declarations of a party; and it can also be used in other suits in the courts of this state between the same parties, or their privies, pursuant to section 881 of the Code. There seems to be no reason, therefore, for dissolving or modifying the order of the state court, or for denying to the plaintiff the benefit of the proceeding which was pending when the defendant removed the suit.

The motion is granted.

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ASHUELOT SAVINGS BANK v. FROST.

(Circuit Court, D. New Hampshire. 1884.)

CONVEYANCE IN LIEU OF ATTACHMENT HELD NOT IN FRAUD OF CREDITORS.

Where a bank levied an attachment upon lands owned by its treasurer who was under liabilities to it far exceeding in amount the value of the land, and in order to save the trouble of legal proceedings he made a deed of the land to the bank in lieu of the attachment, *held*, that creditors of his who afterwards attached the land could not avoid the conveyance to the bank.

At Law.

*Batchelder & Faulkner*, for plaintiff.

*A. S. Waite*, for defendant.

LOWELL, J. In this writ of entry the plaintiff corporation demands several parcels of land in the county of Cheshire and state of New

Hampshire, said to be worth about \$10,000. The parties have waived trial by jury. The evidence is that Ellery Albee had been treasurer of the savings bank for many years, and in March, 1881, it was discovered that he had embezzled the money or property of the bank to an amount which was believed to be, and which has proved to be, not less than \$80,000. March 16, 1881, he made to the bank a deed of the land in question in the usual form of an unconditional conveyance. The defendant was a creditor of Albee, and attached the lands after the deed had been made and recorded, and having obtained judgment caused them to be duly set off to him on the execution. The single question in this case is whether the deed to the bank was in fact a mortgage. It is agreed by counsel that the law of New Hampshire makes every deed which is given upon a secret condition voidable by the creditors of the grantor, however honest the transaction may be, and though the condition is merely a parol defeasance. *Coolidge v. Melvin*, 42 N. H. 510, and cases; *Winkley v. Hill*, 9 N. H. 31; *Ladd v. Wiggin*, 35 N. H. 421.

The grantor, Albee, testifies for the defendant by deposition: "I do not understand that there was any consideration, except that they were, as I understand, given as collateral security to secure my bondsmen." By "they" he means the deed; for, though there was but one, he had before testified that he did not remember how many there were. The deposition of this witness is not very satisfactory, because he remembers but little with any positiveness, and speaks of "impressions" chiefly. He further says that he did not know the amount of his indebtedness to the bank at the time, and that no valuation was agreed on at which the land was to be taken. On the other side, the evidence is that the bank had laid a first attachment on the land; that the amount of defalcation was approximately known, and far exceeded the value of the property; that Albee himself, knowing of the attachment, offered to give the deed to save the plaintiff bank the trouble and expense of legal proceedings; and that, accordingly, the deed was given and taken without any condition of any sort. If such was the transaction, the inference is that the deed was given, instead of the attachment, as a payment so far as it would go, for the debt. The plaintiff might be required to account in some form of action for the full value if Albee or his sureties should be ready to pay the remainder, but it would be as payment, and not as security, that the credit would be due.

I consider the plaintiff's case to be made out by a decided preponderance of the evidence. Verdict for the plaintiff.

TEXAS & ST. L. RY. CO., in Missouri and Arkansas, v. RUST and another.

(Circuit Court, E. D. Arkansas. October Term, 1883.)

1. CONTRACT—STIPULATED DAMAGES FOR FAILURE TO PERFORM.

A provision in a contract to build a railroad bridge that, in case of non-completion of the bridge or providing a crossing for trains by a given date, the sum of \$1,000 per week should be deducted from the contract price of the bridge for the time its completion or provision for crossing trains is delayed beyond that date, is a stipulation for liquidated damages.

2. SAME—DELAY—GOOD FAITH.

In such case, if the contractors act in good faith, and the delay results from causes beyond their control, they will not be liable for damages in excess of the stipulated amount.

3. SAME—ASSUMING RISKS—EXCUSE.

The fact that the contractors were retarded in the work by high water, sickness of hands, and sunken logs encountered in sinking piers, does not excuse them from performance of their contract. They assumed these risks when they executed the contract, without a provision exempting them from the consequences of such casualties.

4. SAME—CONSTRUCTION OF CONTRACT—PROVINCE OF COURT AND JURY.

It is the duty of the court to determine the construction of a contract. But where it has relation to a trade, profession, or business of a technical character, and is expressed in terms of art, or in words having a technical or peculiar sense in such trade, profession, or business, resort must be had to the testimony of experts, or those acquainted with the particular art or business to which the words relate; and when such testimony is conflicting, the question of the meaning of such terms and words must be referred to the jury.

5. SAME—WAIVER—SILENCE.

A waiver is not to be implied from the silence of one who is under no obligation to speak. The intention to waive a right must be established by language or conduct, and not by mere conjecture or speculation.

6. SAME—ADDITIONAL WORK—EXTENDING TIME.

If, after a contract is made for building a bridge by a given day, the owner of the bridge directs the contractor to make additions or changes, or do work on the bridge not covered by the contract, which will require longer time to complete the bridge, the time necessary to do such extra work must be added to the contract time allowed for the completion of the work.

At Law.

John McClure, H. K. & N. T. White, and Phillips & Stewart, for plaintiff.

U. M. & G. B. Rose and M. L. Bell, for defendants.

CALDWELL, J., (charging jury.) On the twenty-second day of April, 1882, the parties entered into a written contract for the construction, by the defendants for the plaintiff, of a railroad bridge across the Arkansas river, at the price of \$305,000. Differences arose between them as to their relative rights, duties, and obligations under the contract, which resulted in the institution of this suit. The matters in controversy between them can best be brought to your attention by stating the defendant's claims first, which may be stated thus: