

bona; and it would seem unjust that in this court, in the same state, and enforcing the same laws, a suitor undertaking to prosecute a decree to final issue should be debarred from resorting to the statutory right given to parties in the state courts. It seems to us that when the supreme court of the United States upholds supplementary proceedings in an action at law to enforce a judgment, they intimate that this proceeding can be resorted to indifferently, whether a legal or an equitable decree is sought to be enforced. Justice MATTHEWS, in *Ex parte Boyd*, 105 U. S. 658, says:

“Whatever logical or historical distinctions separate the jurisdiction of equity and law, and with whatever effect those distinctions may be supposed to be recognized in the constitution, we are not of opinion that the proceeding in question can partake so exclusively of the nature of either that it may not be authorized indefinitely as an instrument of justice in the hands of courts of whatever description.”

I have examined the authorities cited by counsel for defendant, where Judge BLATCHFORD of New York denied the right in an admiralty court to resort to these proceedings. It seems to us there is a distinction in the cases. *The Blanche Page*, 16 Blatchf. 1. The state courts have no jurisdiction whatever in admiralty matters, and supplementary proceedings are given by statute. They belong to legal and equitable rights only. The motion to set aside the original application and order is denied.

CELLULOID MANUF'G CO. v. ARLINGTON MANUF'G CO.

(Circuit Court, D. New Jersey. July 13, 1891.)

DEPOSITION—CROSS-EXAMINATION—DEATH OF WITNESS.

The deposition of a witness on direct examination by plaintiff will not be excluded on the ground that the witness died before he was cross-examined, where defendant procured the cross-examination to be postponed, and the witness died in the mean time.

In Equity.

C. G. F. Wahle, Jr., for the motion.

J. E. H. Hyde, opposed.

GREEN, J. This matter comes before the court upon a motion on behalf of the defendant to strike from the records the deposition of one John J. Ostrom, a witness produced and examined on the part of the complainant, for the reason that he had died after the close of the direct examination, and before there was a cross-examination. The facts, about which there is no dispute, are these: On the 14th of March last past, the solicitors of the complainant caused to be served upon the solicitor of the defendant notice in writing and in due form of the examination of witnesses on the part of the complainant, on the 23d day of that month. At the request of the solicitor of the defendant such examination was

postponed until the 27th day of March, which, however, being Good Friday, by consent of defendant's solicitor the examination was further postponed to March 30th. On that day, at the request of the solicitor of the defendant, the examination was again postponed until the 1st day of April. On that day the examination of the witness Ostrom was proceeded with, the defendant's solicitor being represented by a clerk from his office, he himself being actually engaged in the argument of an important cause in this court. It is alleged by the solicitor of the defendant that consent to the taking of such examination at that time was given by him upon the condition that he should have the privilege of objecting to any part of the testimony, and that the witness should be produced, at some future day to be agreed upon, for cross-examination. The record shows that the direct examination of Ostrom was completed on the 1st day of April, and that the solicitor of the complainant declared that his *prima facie* case was closed. It further appears by the affidavit of Mr. Hyde that the testimony of the witness, who was duly sworn by the examiner, was taken in long-hand, and upon its conclusion was read over to the witness, who, however, did not sign it, as he expected to be cross-examined on some future day. The record further shows that the 4th day of April then following was fixed for the cross-examination of Ostrom; that on that day there was an adjournment at the request of the solicitor of the defendant until the 8th day of April, and again on that day, at the request of the solicitor of the defendant, a further adjournment until the 10th day of April. The witness Ostrom died in the mean time. The rule which governs the admission of depositions at common law, under circumstances similar to those stated, has not been enforced strictly in cases in equity. Unsigned depositions, where an opportunity to cross-examine has not been had, have been received and considered. 1 Greenl. Ev. § 554; *Gass v. Stinson*, 3 Sumn. 98; *Darries v. Otty*, 35 Beav. 208; *Tanswell v. Scurrah*, 11 Law T. (N. S.) 761. This case is much stronger than any cited. Here was an opportunity to cross-examine Ostrom, but for convenience of the solicitor of the defendant, who was to cross-examine, such opportunity was postponed. It was the act of the defendant's solicitor which prevented the cross-examination in the first instance. He cannot now be permitted by that act to deprive the complainant of the benefit of the testimony, which, so far as it went, had been properly taken. It has always been held that when a party against whom evidence is offered had opportunity to cross-examine, his failure to do so in effect operates as if he had availed himself of such opportunity. Under the circumstances of this case, I think the deposition should be received for what it may be worth, and therefore I deny the motion to strike it from the record. I think it proper to add that I shall permit the defendant to interpose any legal objection to the testimony. It is evident that a part of it is hearsay, and as such is not competent. Other objections may suggest themselves upon a critical examination of the record. Such objections may be raised at the final hearing, or at any time previous thereto.

BUCKEYE ENGINE CO. *v.* DONAU BREWING CO. *et al.*

(Circuit Court, D. Washington. July 28, 1891.)

1. CREDITORS' BILL—RETURN OF NULLA BONA.

A creditors' bill cannot be maintained upon a judgment on which execution was issued and returned unsatisfied, when the return does not expressly show that there was no property subject to levy.

2. SAME—JURISDICTION OF FEDERAL COURTS.

Federal courts have jurisdiction to entertain creditors' bills, although the demands are upon judgments rendered by a state court.

3. RECEIVERS—APPOINTMENT.

The fact that property subject to levy under a judgment of a state court is unsalable by reason of its unmarketable condition, though valuable, and the further fact that the sheriff is so situated with reference to the property that he cannot execute the writ, is not sufficient to warrant the appointment of a receiver by a federal court.

In Equity. Creditors' bill.

N. C. Richards and *Holt & Hudson*, for plaintiff.

Campbell & Powell, for defendants.

HANFORD, J. The complainant, a corporation of the state of Ohio, shows by its bill that it is a judgment creditor of the Donau Brewing Company, a corporation of the state of Washington. A judgment in favor of the former and against the latter corporation was rendered by the superior court of Pierce county in this state. An execution was issued thereon, upon which the sheriff of Pierce county has made the following return:

"I received the annexed writ of execution on the 25th day of June, 1891, and by virtue of the same I did on the 25th day of June, 1891, levy upon and attach certain personal property of the defendant herein, the Donau Brewing Company, to-wit, a lot of malt, hops, lager-beer in tanks and kegs and vats and bottles, and also a lot of barrels, kegs, bottles, etc., and put a keeper in charge; and on the 15th day of July, 1891, the same was released by instructions of the attorney for the plaintiff, and the same is returned unsatisfied."

The bill also shows that the Donau Brewing Company is insolvent, and all of its property, real and personal, is incumbered by mortgages; that the sheriff of Pierce county, assuming to act under a statute of this state, has taken possession of the personal property in and about the defendant's brewery, and is proceeding to foreclose a chattel mortgage by the sale of said property, which mortgage the complainant alleges is invalid, and not in fact a lien upon said property. In a supplemental bill the complainant also shows that the defendant T. B. Wallace, a creditor of the brewing company, under an agreement or understanding between himself and the company, claims to have for several months past held possession of the brewery, and conducted its business as a means of security for payment of certain of the defendants' debts. The case has been argued and submitted upon an application for the appointment of a receiver. The defendants resist the application on the grounds that it appears on the face of the bill and supplemental bill that this court is without jurisdiction, and that the complainant is not entitled to relief in