

## WENHAM v. SWITZER.

(Circuit Court, D. Montana. November 23, 1891.)

## DEPOSITIONS—STRIKING FROM FILES—TIME OF TAKING.

Under Equity Rule 69, providing that "three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time," a deposition not taken within three months will be stricken from the files when no motion has been made to file it *nunc pro tunc*, and no extenuating circumstances are shown.

In Equity. Suit by A. A. Wenham against William S. Switzer. Heard on motion to strike depositions from the files. Motion granted. Robinson & Stapleton and Word & Smith, for complainant. Aaron H. Nelson, for defendant.

KNOWLES, J. The defendant moves to strike from the files the depositions taken on the part of complainant in the above cause, because not taken within three months after issue was joined therein. There seems to be no dispute but that the deposition was not taken within three months after that date. The cause is one in equity. A portion of rule 69 in equity, prescribed by the supreme court, reads:

"Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing."

It seems under the decision of *Fischer v. Hayes*, 19 Blatchf. 25, 6 Fed. Rep. 76, when proofs are not taken in proper time they may be filed under certain conditions *nunc pro tunc*. But no motion of that kind has been made in this case, and I do not know that the extenuating causes which would allow this exist. Under the above rule there seems no discretion in this court but to grant the motion of defendant. It is therefore granted, and said depositions are hereby stricken from the files.

## WAKELEE v. DAVIS.

(Circuit Court, S. D. New York. January 8, 1892.)

## INJUNCTION—ACTION AT LAW—APPEAL—STAY OF PROCEEDINGS.

The defendant in an action upon a judgment which was void for want of service was enjoined from setting up the invalidity thereof, because, while procuring a discharge in bankruptcy, he obtained substantial benefits by contending that the judgment was valid. *Held*, that he was not entitled to a suspension of the injunction or to a stay of proceedings in that action pending an appeal from the injunction decree, since, in case of reversal, the court would so mould its judgment, should the plaintiff obtain one, in the action at law commenced by her as to allow defendant the full advantage of his defense.

In Equity. On motion by defendant to suspend the operation of an injunction granted herein (44 Fed. Rep. 532) pending appeal to the supreme court.

*Joseph H. Choate and Thaddeus D. Kenneson, for the motion.*

*Anson Mallby, opposed.*

COXE, J. I have read all the papers and briefs. A large portion of defendant's brief is devoted to the discussion of propositions which have, heretofore, been decided adversely to him. Debate on these questions is closed, so far as this court is concerned. The situation does not seem complicated. If the decree herein is reversed, on the merits, the complainant cannot recover at law; if affirmed, it is probable that she can recover. In view of the possibility of an affirmance she should be in a position to enforce her rights speedily. The defendant, by refusing to enter into a stipulation by which all the questions in controversy could be determined in one action, has made the suit at law necessary. There can be no reason why that suit should not progress, at least, so far that the complainant will be secure if she finally succeeds. The defendant is apprehensive lest he may lose the right to assert the invalidity of the California judgment in case the appellate court holds that he is not estopped. Of this there is no danger. The court will see that the defendant is protected. Even if the action at law should proceed to trial, judgment will be permitted only on terms which will fully guard the defendant's rights. At present there is no reason for suspending the operation of the ordinary machinery of the law. This court has held that the defendant shall not assert the invalidity of the California judgment. It would be an inconsistent if not an absurd proceeding to permit the defendant to do what it has solemnly adjudged he should not do. When the decree of this court is reversed, and not till then, can the defendant assert that the judgment "is not valid and does not still stand of record?" A stay may never be necessary. When it is it will be granted, but in such a way as to protect the complainant. The defendant in asking for a suspension or even for a stay is making an extraordinary request of the court. If this unusual favor is granted now it must be on conditions. If her proceedings at law are stayed the least the complainant has a right to ask is that the defendant speed this cause or give security for the future. The orders signed are calculated, I think, to make these views operative.

## THOMSON v. BEAL.

(Circuit Court, D. Massachusetts. January 14, 1892.)

**EVIDENCE—WRITTEN CONTRACT—CONTEMPORANEOUS WRITING.**

A person depositing money in a bank accepted from the cashier a certificate of deposit, which made no mention of interest, but with a verbal agreement that interest should be paid. The cashier at the same time indorsed a memorandum of the rate of interest on the stub from which the certificate was taken. *Held*, that the stub should be read with the certificate, as evidence of the entire contract.

In Equity. Suit by Elihu Thomson against Thomas P. Beal, as receiver of the Maverick National Bank, to recover interest on a certificate of deposit. Heard on demurrer to the complaint. Overruled.

*Simon Davis*, for complainant.

*Hutchins & Wheeler*, for defendant.

COLT, J. This demurrer raises the question whether the defendant shall pay the complainant interest upon a certain certificate of deposit. From the allegations in the bill, it appears that the complainant, on September 16, 1886, deposited in the Maverick National Bank, of which the defendant is receiver, the sum of \$4,800, and received a certificate of deposit as follows:

## MAVERICK NATIONAL BANK.

\$4,800.00.

BOSTON, Sept. 16, 1886.

Elihu Thomson has deposited in this bank forty-eight hundred dollars, payable to the order of himself on return of this certificate properly indorsed.

A. C. JORDAN, Teller.

E. H. LOWELL, Asst. Cashier.

No. 33,455.

At the time of the deposit and receipt of the certificate, the cashier agreed verbally to pay the complainant interest at the rate of 2½ per cent. per annum upon the return of the certificate properly indorsed, and at the same time the cashier made a memorandum of the agreement on the stub or margin of the book from which the certificate was taken, as follows:

Date,

\$4,800.00.

Deposited by Elihu Thomson.

Sept. 16, 1886.

Order of

2½%.

No. 33,455.

The general legal proposition advanced by the defendant in support of the demurrer, that parol evidence cannot be introduced to contradict or vary the terms of a written agreement, is well settled, and requires no citation of authority.

But the question here presented is whether the certificate of deposit, which does not in express terms mention any interest, is to be considered as alone representing the entire contract in writing, or whether such certificate should not be taken in connection with the written memorandum made at the time on the stub of the bank's book from which the certificate was taken. In taking both writings together as constituting one contract, we are not seeking to add to or vary the terms of a written