

But chapter 314 of the Laws of 1858 of New York, as amended by chapter 245 of the Laws of 1880, § 1, provides that "any executor \* \* \* may, for the benefit of creditors or others interested in the estate, \* \* \* disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of creditors. \* \* \*" This seems to give the orator the full right to attack the conveyances and judgment.

Much and repeated consideration of the evidence leads to the conclusion that the testator was too much broken and too weak for the transaction of such business, and was overpersuaded, while in that condition, to execute the mortgage and assignment, unfairly to the other creditors; and that these instruments are for that reason invalid. The judgment appears to have been entered in the regular course of judicial proceedings for the recovery of a valid and just debt. Under such circumstances the lack of capacity would not avoid it, especially in a collateral proceeding. If the assignment should stand, the judgment might be avoided, as a part of it, to the extent that it would create too large a preference under the statutes of New York, limiting preferences in general assignments. Laws 1887, c. 503, § 30; *Berger v. Varrelmann*, (N. Y. App.) 27 N. E. Rep. 1065. But, as the assignment fails, this statute does not apply to the judgment; and it is left to stand as at common law, wherein the collection of a just debt is lawful, although other creditors may be left. *White v. Cotzhausen*, 129 U. S. 329, 9 Sup. Ct. Rep. 309. Upon these views the mortgage and assignment should be set aside, and the bill dismissed as to the judgment. As the defendants, who are plaintiffs in the judgment, and who are the real parties in interest, prevail as to part, the costs, which are discretionary in equity, should be to some extent apportioned. Let a decree be entered, setting aside the mortgage and assignment, and dismissing the bill of complaint as to the judgment, with two-thirds of his costs to the orator.

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### BRUNGER v. SMITH.

(Circuit Court, D. Massachusetts. January 6, 1892.)

#### 1. ATTORNEYS—PRIVILEGED COMMUNICATIONS.

The doctrine of privileged communications does not apply to testimony of a solicitor of patents who is not an attorney at law.

#### 2. SAME—SOLICITOR OF PATENTS.

A solicitor of patents, who is not an attorney at law, is not privileged from testifying under Rev. St. § 4908, which provided that a witness on the trial of an interference need not "disclose any secret invention or discovery made or owned by himself."

#### 3. WITNESS—REFUSAL TO TESTIFY—ATTACHMENT.

In the case of the refusal to testify of a witness subpoenaed on the trial of an interference, the remedy is by petition for an attachment for contempt, and not for an order to compel the witness to answer the questions put to him.

At Law.

Petition of Herman Brunger for an order of court directing the witness, Charles F. Brown, to answer certain questions put to such witness

on the trial of the interference No. 14,195, between the applications Nos. 349,621, 349,622, and 349,623, of Herman Brungger, filed April 26, 1890, and the application No. 307,277, of Sidney Smith, filed March 7, 1889. Brown refused to answer the questions put to him on the ground that the facts and matter inquired about were privileged as communications between client and counsel. In the answer to the petition it was alleged:

"*First.* That said Brown is a solicitor of patents in good standing, and recognized as such by the commissioner of patents, and acts in a professional capacity when employed as such solicitor by claimants and applicants for patents before the United States patent-office. His relations to his client are precisely the same as those between a regular practitioner before the courts and his client, inasmuch as the nature of his employment requires professional skill, integrity, and secrecy; and he is therefore privileged from disclosing any professional matters, information, or conversations within the scope of such employment. *Second.* That said witness, acting in a professional capacity as solicitor of patents, employed by Sidney Smith, the party to this interference, as such, cannot be compelled to disclose any secret invention wherein his client is protected by Rev. St. U. S. § 4908. *Third.* That this respondent has not waived, or in any manner has he intended to waive, his privilege herein, as alleged by the counsel for Brungger. *Fourth.* This respondent denies that said questions are material in this case, or proper rebuttal, but charges and says that the examination of this witness is for the sole purpose of probing into the contents of a certain application for patent of this respondent now pending, not in this interference, and in which said witness is the solicitor, attorney, and legal adviser. *Fifth.* The very nature or character or scope of the question which the witness refused to answer is within the rule of privileged communications, though it calls for a fact."

*H. T. Munson*, for petitioner.

*R. A. Sprague*, opposed.

COLT, Circuit Judge. The doctrine of privileged communication is confined to cases of counsel, solicitor, and attorney. The witness in the present case testifies that he is not an attorney at law; and therefore, under well-settled rules, he cannot invoke this privilege. This witness is not privileged from answering under the last paragraph of section 4908, Rev. St., because he does not come within the description therein set forth.

The proper form of application to enforce obedience to a subpoena issued under section 4906, Rev. St., is a petition for an attachment for contempt. Upon the pleadings, as here presented, the court will not enter a formal order. The motion and answer in this case disclose to the court the existing facts on the examination of the witness before a commissioner of this court, and this rescript will inform the parties and the witness as to the views of the court upon the questions presented.

**BLEWETT v. FRONT-STREET CABLE RY. CO.***(Circuit Court, D. Washington, N. D. December 7, 1891.)***1. BONDS—ACTIONS—MEASURE OF DAMAGES—PENALTY.**

Plaintiff conveyed property to a trustee for defendant as part of a bonus to aid in the construction of a cable road of which defendant was a promoter, and took from it a bond in a penalty equal to the value of the land conveyed, conditioned for the construction of the road. The road was not constructed, and plaintiff sued on the bond. *Held*, that he was entitled to recover the whole of the penalty, as the value of the property is a proper measure of damages for the breach of the contract in consideration of which it was conveyed.

**2. DEEDS—DELIVERY—ESCROWS—PAROL EVIDENCE.**

Where the deed was duly delivered to such trustee, and purported to vest the title unconditionally, parol evidence is not admissible to show that it was delivered in escrow, and was not to take effect unless defendant secured an additional bonus, but was to be returned to plaintiff, and the bond thereupon to be void, if the road was not constructed on account of failure to secure such additional bonus.

**3. BONDS—ACTIONS—EVIDENCE—HARMLESS ERROR.**

The admission of evidence on the part of plaintiff that the land was conveyed in consideration of the bond, and for no other consideration, is without prejudice to defendant, since it in no manner varies the terms of the transaction as they appear on the face of the bond.

**ON REHEARING.****4. SAME—DAMAGES—INTEREST.**

Although the damages allowed were measured by the amount of the penalty, they must be considered as unliquidated until fixed by the judgment, and hence plaintiff was not entitled to interest either from the date of the breach of the condition, or from the commencement of the action; especially as the land was unimproved and yielding no income.

**At Law.** Action by Edward Blewett against the Front-Street Cable Railway Company. A jury was waived, and the trial was by the court.

*Burke, Shepard & Woods*, for plaintiff.

*J. C. Haines*, for defendant.

**HANFORD**, District Judge. This is an action at law to recover damages upon a penal bond containing the following recital and conditions:

"The condition of the foregoing obligation is such that whereas, the said Edward Blewett has granted and conveyed to Jacob Furth, assignee [trustee] of the said Front-Street Cable Railway Company, the following described property, \* \* \* as a part of a bonus given to secure the building of a cable road hereinafter mentioned: Now, therefore, if the North Seattle Cable Railway Company, a corporation organized and existing under the laws of the state of Washington, its successors and assigns, shall, within ten (10) months from the date of these presents, construct, ready for operation, a double-track cable railway of the same gauge as the railway of the said Front-Street Cable Railway Company, and operate cars both ways thereon, from the present terminus of the said Front-Street Cable Railway \* \* \* to a point near the outlet of Lake Union, in the Denny & Hoyt addition to Seattle, then this obligation shall be void; otherwise to be and remain in full force and virtue."

The defendant admits the execution of the bond, and admits the breach of it. The only controversy is as to the amount of damages recoverable. Plaintiff alleges in his complaint that the property described in the bond was in fact conveyed to the trustee named by valid deeds