

was duly sworn; and when the affiant subscribes, or should subscribe, the oath, it must appear that he did subscribe it. The evidence of these three essentials is the language of the officer, and its credibility and authority depend wholly upon his official position and character, and the responsibility thereto belonging. In the present instance we have nothing of the kind. Some one else than the clerk states that the affiant came before the clerk, and was sworn, presumably by him, and subscribed the oath. This statement cannot bind the clerk, and is but secondary evidence of the facts stated. In fact, the most probable conclusions are that the affiant did not come before the clerk, was not sworn by the clerk, and that the affiant did not subscribe the oath before the clerk; that all these were done before the deputy. But the certificate does not say so. We are left to conjecture, and this is not sufficient.

This conclusion renders unnecessary the discussion of the last ground. The motion is refused.

BECKER v. BALTIMORE & O. R. CO.

(Circuit Court, D. Indiana. July 19, 1893.)

No. 8,749.

1. MASTER AND SERVANT—FELLOW SERVANTS—CONDUCTOR AND BAGGAGE MASTER.

In Indiana a brakeman on a freight train is considered the coservant of the conductor of another train, through whose negligence a collision occurs. *Kerlin v. Railroad Co.*, 50 Fed. Rep. 185, followed.

2. SAME—FEDERAL COURTS—FOLLOWING STATE DECISION.

The control of the relation of master and servant is reserved to the states, and federal courts, when administering state law upon this subject, should follow the decisions of the state courts. *Kerlin v. Railroad Co.*, 50 Fed. Rep. 185, followed.

At Law. Action by John P. Becker, administrator, against the Baltimore & Ohio Railroad Company, to recover damages for the alleged wrongful death of his intestate while in its employment. On demurrer to the complaint. Demurrer sustained.

L. W. Welker and Wm. L. Taylor, for plaintiff

J. H. Collins, for defendant.

BAKER, District Judge. The defendant demurs to the second and third paragraphs of complaint for the reason that neither of them states facts sufficient to constitute a cause of action. The plaintiff's intestate was employed by defendant as a brakeman on one of its freight trains, and was killed by the carelessness and negligence of the conductor and other employes of defendant in charge of and operating one of its passenger trains, which, by their carelessness, came into collision with the former. This case presents the precise question raised and decided in *Kerlin v. Railroad Co.*, 50 Fed. Rep.

185. On the authority of that case, and for the reasons therein stated, the demurrer to each paragraph of the complaint must be sustained, and it is so ordered.

In re MARQUAND.

(Circuit Court of Appeals, Second Circuit. May 24, 1893.)

CUSTOMS ADMINISTRATIVE ACT OF JUNE 10, 1890—UNITED STATES CIRCUIT COURT OF APPEALS—REMISSION OF DUTIES—NEW TRIAL.

In a case arising under the customs administrative act of June 10, 1890, (26 Stat. 131,) it is not within the province of a United States circuit court of appeals to grant to or withhold from an importer leave to apply to an officer of customs for a remission of duties levied upon merchandise imported by him, and made the subject of such case; or, if a judgment rendered in such case by a United States circuit court be affirmed by such circuit court of appeals, to direct or suggest the action of such circuit court in regard to a new trial upon newly-discovered evidence or newly-ascertained facts.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Statement by SHIPMAN, Circuit Judge:

At Law. Henry G. Marquand purchased in a foreign country, and on October 13, 1890, imported therefrom into the United States at the port of New York, an antique bronze statuette of Eros, for the purpose of adding the same to, and making it a part of, a collection of antique bronzes which he had been gathering for years, and then had in his house. This statuette was classified by the collector of customs at that port as a manufacture of metal, under paragraph 215 of the tariff act of October 1, 1890, (26 Stat. 582.) The said Marquand, as provided in section 14 of the customs administrative act of June 10, 1890, (26 Stat. 137,) protested, claiming—First, that this statuette was free of duty, under the provision for collections of antiquities, contained in paragraph 524; and, second, that, if not so free of duty, it was dutiable as statutory wrought, etc., under paragraph 465 of the aforesaid tariff act. The board of United States general appraisers, to whom, pursuant to section 14 of the customs administrative act, the collector transmitted the invoice of this statuette, reversed the action of the collector, and decided that this statuette was free of duty, under the paragraph specified in the first claim of the protest. The United States circuit court, to which, pursuant to section 15 of the customs administrative act, the collector appealed, reversed the decision of the board, and adjudged that this statuette was dutiable under the paragraph specified in the second claim of the protest. The United States circuit court of appeals for the second circuit, to which the said Marquand appealed, affirmed the judgment of the circuit court. 55 Fed. Rep. 642. Thereafter, and before the circuit court of appeals had issued its mandate, the said Marquand, upon an affidavit setting forth new facts, moved this court for leave to present this affidavit to the collector of customs, the United States appraiser, the board of general appraisers, or other officer of the customs, as the court might direct, and for leave to petition the collector or other proper officer to remit the duties assessed upon the Eros upon the facts stated in said affidavit, or upon oral proof to the effect stated; and, in case such relief should be denied, then that the mandate of the court affirming the judgment of the circuit court should contain the language: "Without prejudice to such application, or to an application of the said Marquand for a new trial from the circuit court upon said facts."

Frederic H. Betts, for the motion.