

to receive the actual expenses that earned this mileage. The expenses of the trip constitute the consideration for the payment of all the mileage earned on all the writs in favor of the government served on that trip. The statute simply gives the marshal the option to surrender all claim to this consideration, and to recover the mileage, or to take back the consideration and forego the mileage; but he cannot recover back the consideration, and then successfully claim any part of the mileage. The result is that section 829, Rev. St., does not authorize the marshal to receive upon one writ the actual expense of the trip on which he served several writs in favor of the government upon different persons, and then to recover his mileage upon the others. The receipt of the expenses is a waiver of all right to the mileage, and the refusal to allow this claim must be affirmed.

6. A claim for travel, in going only, to serve subpoenas for the United States upon persons who were in each case served by the marshal on the same trip, and at the same time and place in another cause, and the marshal was allowed and paid for travel upon one subpoena only. Section 829, Rev. St., provides that "when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit." The marshal was clearly entitled, under this provision of the statute, to mileage upon two—and upon only two—subpoenas on each occasion when he served several subpoenas for the government in different cases upon the same person and on the same trip, and to this extent this claim should have been allowed. The judgment below must therefore be reversed and the case remanded, with directions to enter a judgment not inconsistent with the views expressed in this opinion, and it is so ordered.

OWOSSO SAV. BANK v. WALSH.

(Circuit Court, E. D. Pennsylvania. January 8, 1895.)

No. 4.

1. AFFIDAVITS OF DEFENSE—PROMISSORY NOTES—INDORSEMENT—GENUINENESS OF—DENIAL.

In an action against the indorser of certain promissory notes it was alleged in the affidavit of defense that the said indorsements "may have been" obtained by fraud, and without the indorser's knowledge, and that he had no recollection whatsoever of having indorsed them, "and therefore denies that the alleged signature on said notes is his signature, and demands that proof thereof be required upon the trial of the cause." *Held* that, under the rule of court which provides that the genuineness of such indorsements shall be taken to be admitted unless denied by affidavit, these averments were sufficient to entitle the defendant to insist upon the proof which he demanded.

2. SAME — DENIAL OF GENUINENESS OF INDORSEMENT — RULE OF COURT — EFFECT OF.

A rule of court providing that the genuineness of indorsements of promissory notes shall be taken to be admitted unless denied by affidavit, was not intended to fix upon a party the admission of a fact which he does not remember, and therefore asks shall be proved, even though he acknowledges its existence to be possible.

Rule for judgment for want of a sufficient affidavit of defense.

The plaintiff, the Owosso Savings Bank, a corporation doing business in the state of Michigan, claimed of the defendant, a citizen of Pennsylvania, and a resident of the Eastern district of that state, the sum of \$13,007.40, with interest, being the amount alleged to be due by said defendant upon four promissory notes made by the J. H. Mahler Company, by J. H. Mahler, president, to the order of the Second National Bank of Owosso, Mich., and indorsed by the defendant, together with protest fees. The plaintiff averred that it was the holder of said notes, having taken the same in the usual course of business, before maturity. The affidavit of defense averred that the defendant "has no knowledge or recollection whatsoever of signing, executing, or indorsing the four several promissory notes upon which suit has been brought against him, and copies or alleged copies of which have been filed as part of the record of the above case, and therefore denies that the alleged signature on said notes is his signature, and demands that proof thereof be required upon the trial of the cause; that, if the said indorsement upon the notes in question should be proved to be that of this defendant, then he positively declares and testifies that the same was procured by fraud and deceit on the part of J. H. Mahler, the president of J. H. Mahler Company, the maker of said notes." The affidavit further averred that the defendant had been the holder of a number of shares of the stock of the said company, and had been anxious to obtain cash upon the same, said cash being due him as salesman in the employ of the company, and that "in the course of his negotiations in endeavoring to obtain withdrawal of his above-mentioned stock he was requested to sign, and did affix his signature to, a number of papers and documents which were presented to him for his signature by said J. H. Mahler, the said president of the company, and which the said Mahler alleged were necessary parts of said transaction; and this defendant avers that his signature may have been without his knowledge, and by the fraud and connivance of the said J. H. Mahler, obtained upon the notes upon which suit has now been brought, without the knowledge of this defendant." It was further averred that defendant had received no consideration therefor, did not sign them for the purpose of withdrawal of said stock, nor for any purpose, and had no knowledge of their existence until the suit was brought. He also averred that he was informed and believed that the said copies are not full and perfect, and craves that the originals, together with the certificates of protest, be produced, and duly proved upon the trial of the cause.

Wagner & Cooper, for plaintiff.

Louis Hutt, for defendant.

DALLAS, Circuit Judge. Rule 1 of this court provides that the genuineness of indorsements of promissory notes shall be taken to be admitted unless denied by affidavit. The affidavit of defense in this case concedes that the defendant's indorsement of the notes sued upon "may have been" obtained by fraud, and without his knowledge, but avers that he has no recollection whatsoever of having indorsed them, "and therefore denies that the alleged signature on said notes is his signature, and demands that proof thereof be required upon the trial of the cause." Although this denial is so peculiarly guarded as, perhaps, to justify some hesitancy in

relying upon it, yet it must, for the present purpose, be accepted as made in good faith, and, being so accepted, it is, I think, sufficient to entitle the defendant to insist upon the proof which he demands. The rule of court was not intended to fix upon a party the admission of a fact which he does not remember, and therefore asks shall be proved, even though he acknowledges its existence to be possible. The other matters set up in defense need not be now considered. Judgment for want of sufficient affidavit of defense denied.

LEFAVOUR v. WHITMAN SHOE CO.

(Circuit Court, S. D. New York. December 31, 1894.)

CONTEMPT—INTERFERENCE WITH SHERIFF'S POSSESSION OF ATTACHED PROPERTY.

Plaintiff had been an agent for defendant, conducting business in his own name, and selling goods, on credit, to sundry persons. He commenced an action by attachment, in a state court, against defendant, and caused the attachment to be levied upon the debts due from the persons to whom such goods were sold. The cause was removed to the federal court, and the attached property transferred from the sheriff to the marshal. While the debts were thus in the hands of the sheriff and marshal, plaintiff proceeded to collect the same, and received the proceeds. *Held*, that such conduct was a contempt of court.

Prior to October 30, 1893, plaintiff, Herbert Lefavour, conducted business on his own account at 96 Duane street, New York City. On that day he made a contract with defendant, the Whitman Shoe Company, of Boston, Mass., under which he thereafter conducted business at the same place as its agent, but under his own name; all goods, assets, book accounts, etc., of the business becoming the property of the Whitman Shoe Company. In August, 1894, the Whitman Shoe Company assigned all its property, including the business at 96 Duane street, New York, to William H. Daniels, for the benefit of its creditors. October 31, 1894, Lefavour commenced this action against the Whitman Shoe Company in the supreme court of New York, and caused an attachment to be issued and levied upon the property at 96 Duane street, including the book accounts.

November 10, 1894, the cause was removed to the United States circuit court, and on November 16th, pursuant to an order of that court, the attached property was delivered by the sheriff to the United States marshal. On November 20th an order was made directing the marshal to deliver the attached property to William H. Daniels, who had claimed the same, as assignee, the sureties upon the indemnity bond on such claim having failed to justify, and, under said order, the books, containing the accounts, with persons to whom goods had been sold, were delivered to Daniels. After the levy of the attachment, and both prior and subsequent to November 20th, the plaintiff Lefavour, with the assistance of Abraham A. Joseph, an attorney, collected a number of the book accounts outstanding at the time of the attachment, in some cases by solicitation, and in others by the threat or use of legal process. The defendant and Daniels now move to punish plaintiff and Joseph for contempt in collecting such accounts, alleging that such collection was misconduct by which a right and remedy of defendant and of Daniels was defeated, impaired, impeded, and prejudiced.

Abram Kling, for complainant.

George H. Adams, for defendant.