

been done out of the fees and emoluments earned for the years during which the expenses were incurred, and not otherwise. These, as stated, exceeded the limit of compensation allowed by law.

The result is that I find in favor of the government, and against claimant, on every item in the claim. The petition will therefore be dismissed, with costs. Ordered accordingly.

UNITED STATES v. McGLASHEN et al.

(Circuit Court, E. D. Wisconsin. March 23, 1895.)

ACTION ON FORFEITED RECOGNIZANCE—DEFENSE.

In an action on a forfeited recognizance, only a legal defense can be heard; and the fact that there was an appearance or discontinuance after forfeiture is not a legal defense, though it would constitute matter for application, under Rev. St. § 1020, to the court which adjudged the forfeiture, to have the penalty remitted.

Action by the United States against Guy S. McGlashen and others.

This is an action at law upon a forfeited recognizance, in which Guy S. McGlashen is the alleged principal, and R. E. McGlashen and J. W. Surfis the sureties. R. E. McGlashen is the only defendant found in this district, and the only one before the court. A jury was waived, and the cause submitted to the court upon stipulated facts to the effect that the allegations of the complaint are true; that an indictment for subornation of perjury, and transmitting and presenting a false and forged affidavit, with intent to defraud the United States, was found and filed at a term of the United States district court for the district of Kansas, on September 14, 1889; that the recognizance alleged was duly entered into by the defendants for the appearance of said principal at the next term of said court; that at such next term, for September, 1890, the said principal failed to appear, and on September 6, 1890, it was thereupon adjudged by said court "that said recognizance be forfeited against said principal and sureties, and that the obligation and security be prosecuted." It is further stipulated that the records of said court show subsequent entries in the cause against Guy S. McGlashen as follows: Of continuances to the next term, on motion of the district attorney, October 5, 1891, March 14, 1892, and September 12, 1892, respectively; and on March 6, 1893, that a nolle prosequi was entered, and the defendant discharged. There is no showing or pretense that any application was made to that court, or action had, to remit the penalty or forfeiture, under section 1020, Rev. St.

J. H. M. Wigman, U. S. Atty.

H. L. Eaton, for defendant R. E. McGlashen.

SEAMAN, District Judge (after stating the facts). The facts which are material for determination of liability in this case are all undisputed and conceded, and the only question presented is whether the surety can or must be relieved because of the proceedings subsequent to default and forfeiture. It is insisted in behalf of the surety who is defendant here that the entries of continuance which followed the forfeiture import that the principal was present and ready for trial at the subsequent terms, and the nolle prosequi deprived the sureties of a right to further produce the person of the principal, and rendered performance of their obligation impossible; that the sureties are therefore absolved from liability. This

contention is without force for a defense at law against a forfeiture of the recognizance, even if it be assumed that the principal was in attendance at the subsequent terms. It would constitute matter for an application, under section 1020, Rev. St., to have the penalty remitted, in whole or in part; but that must be addressed to the court which adjudged the forfeiture, and where alone is lodged a discretion to grant relief when it appears that "there has been no wilful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." This court can only hear a legal defense. The inquiry is not open upon this issue, and in this forum, to ascertain whether the prosecution was actually prevented, and discontinuance made necessary, by the absence of the principal at the time appointed, or whether the principal was produced at a later term, and, if so, whether the prosecution was then enabled to proceed. The fact that there was an appearance or a discontinuance after forfeiture is not a legal defense. The recognizance is "a contract between the cognizors and the government that if the latter would release the principal cognizor from custody the former would undertake that he should personally appear at the specified time and place to answer the indictment." *U. S. v. Van Fossen*, 1 Dill. 406, Fed. Cas. No. 16,607. The obligation is peremptory, and the penalty accrues on the failure to appear according to its condition. The parties become absolute debtors to the obligee for the amount, and "must be held liable to pay the same, unless they can show some matter legally sufficient to excuse the failure." *Id.* The opinion in the *Van Fossen* Case is by Judge Dillon, concurred in by Judge Delahay; and the report shows (page 412) that a subsequent application was made, upon showing that the principal died after the forfeiture, and while imprisoned upon charge for another offense, committed prior to the date of the recognizance in suit, and Mr. Justice Miller thereupon concurs in holding that the sureties were not exonerated. I think the authorities are uniform in thus placing liability, and the following citations are well in point, in addition to the *Van Fossen* Case: *Taylor v. Taintor*, 16 Wall. 366; *State v. Traphagen*, 45 N. J. Law, 134; *State v. Scott*, 20 Iowa, 63; *People v. Anable*, 7 Hill, 33. Those cited in behalf of the defendant are not applicable to a forfeited recognizance, except the Louisiana cases; and the latter can only be reconciled with the rule of absolute liability above stated by the assumption that there was some discretion vested in the courts of that state by statute. The adjudication of forfeiture here shown must be accepted in this forum as conclusive against any matters asserted in the defense. *U. S. v. Ambrose*, 7 Fed. 554. I am therefore constrained to hold that this court is without power to grant relief under section 1020, Rev. St., and that there is failure to show any legal defense. Findings must be given in favor of the plaintiff, and judgment accordingly, but binding only the defendant served, *R. E. McGlashen*, as provided by section 737, Rev. St. So ordered.

LOWREY v. KUSWORM.

(Circuit Court, N. D. Illinois. March 27, 1895.)

DEPOSITIONS DE BENE ESSE—RIGHT TO EXAMINE ADVERSARY.

Under Rev. St. § 863, authorizing the examination of witnesses de bene esse when they reside out of the district in which the cause is to be tried, and at a greater distance than 100 miles from the place of trial, and section 858, making parties to civil actions competent witnesses therein, in an action on promissory notes, defendant may examine plaintiff de bene esse, even before issue joined, where plaintiff resides out of the district and more than 100 miles from the place of trial. Ex parte Fisk, 5 Sup. Ct. 724, 113 U. S. 713, distinguished.

Action by William J. Lowrey against Mollie Kusworm on promissory notes. Plaintiff was examined de bene esse before issue joined, but refused to produce the notes on which the action was brought, on the ground that such examination was unauthorized. Defendant applied for an order to compel production of the notes.

Hamline, Scott & Lord, for Lowrey.

Moran, Kraus & Meyer and J. P. Langworthy, for Kusworm.

JENKINS, Circuit Judge. The plaintiff brought suit in the United States circuit court for the Southern district of Ohio to recover of the defendant upon certain promissory notes alleged to have been made by her. Before answer to the declaration, the defendant undertook to examine the plaintiff as a witness de bene esse at the city of Chicago, the residence of the plaintiff, under Rev. St. § 863, upon the ground that the plaintiff resided out of the district in which the cause is to be tried, and at a greater distance than 100 miles from the place of trial. The plaintiff appeared before the commissioner in obedience to the process, and submitted to examination, in the progress of which he was required by counsel for the defendant to produce the notes upon which the suit was brought, and which were under his control. This, under advice of counsel, he declined to do, and application is now made to compel the witness to comply with the demand.

It is objected that the proceeding is wholly unauthorized, and that there is no provision of law authorizing the examination of an opposite party, and especially before issue joined. The statute under which the proceeding is had authorizes the taking of the testimony of any witness in any civil cause, under the circumstances stated in the statute. This act was passed in 1789, and at a time when parties and persons interested in the event of a suit were disqualified as witnesses in the cause. In 1864 an act was passed, incorporated in the Revised Statutes as section 858, providing that in the courts of the United States no witnesses shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried, with certain exceptions in respect of actions by or against executors, administrators, or guardians. The question whether, under this statute, a party could be required to testify by the other party, received solution in the