

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a proceeding brought by the United States against Daniel A. Camfield and William Drury, under the act of February 25, 1885 (23 Stat. 321), to compel the removal of an inclosure of public lands. In the circuit court an exception to the answer was sustained, and, defendants having failed to plead further, a decree was entered against them. 59 Fed. 562. Defendants thereupon appealed to this court, and upon February 20, 1895, the decree was affirmed. 66 Fed. 101. Defendants have now moved for a rehearing.

James W. McCreery, A. C. Patton, H. E. Churchill, and Charles W. Bates, for appellants.

Henry V. Johnson, U. S. Atty., for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A motion for a rehearing has been filed in this case, based on two grounds: First, that this court has no jurisdiction of the case on appeal, because the case involved the constitutionality of an act of congress; and, second, because the case is one of great importance. With reference to the first point, it may be said that the record lodged in this court did not disclose any constitutional question. In the circuit court the government excepted to the sufficiency of a certain defense which was pleaded in the answer. The exception was sustained, whereupon, for failure on the part of the defendants to plead further, a decree was entered in favor of the United States. The defendants then prayed an appeal to this court, and assigned for error that the circuit court erred in sustaining the exceptions to the answer. The validity of the act of congress of February 25, 1885 (23 Stat. 321 c. 149), was not challenged by the assignments of error, nor by counsel for the appellants, either in their oral or written argument. With reference to the second point of the motion, it will suffice to say that while the case may be, and doubtless is, one of much importance to the appellants, yet it is not suggested that the court has overlooked any consideration or authority which should have had weight in the decision of the cause. Inasmuch as the case arises under the constitution and laws of the United States, and the decision thereof by this court is not made final by section 6 of the act of March 3, 1891 (26 Stat. 826, c. 517), no reason is perceived why a rehearing should be granted, and the motion in that behalf is therefore denied.

LUCKER v. PHOENIX ASSUR. CO. OF LONDON.

(Circuit Court, D. South Carolina. April 6, 1895.)

PRACTICE IN CIVIL CASES—PRODUCTION OF BOOKS AND PAPERS.

The right given by Rev. St. § 724, to compel the production of books and papers in action at law, is not limited to requiring their production at the trial, but the court may, in its discretion, grant an order for inspection, with permission to copy, prior to the date of the trial.

This was an action by Minnie Lucker against the Phoenix Assurance Company of London, a corporation under the laws of Great Britain. The case was removed to this court from a court of the state of South Carolina, and a motion to remand was heretofore denied. 66 Fed. 161. The case is now heard upon a rule obtained by plaintiff to require defendant to produce certain papers for inspection, with permission to copy the same.

Bryan & Bryan, for motion.
Trenholm, Rhett & Miller, contra.

SIMONTON, Circuit Judge. A suit at law is pending in this court between the parties named in the caption. The case being on the docket, and the day of trial approaching, the plaintiff, on affidavit, states that there were in the hands of defendant certain writings, which contain evidence pertinent to the issue in the cause; obtained a rule on it to show cause why they should not be produced and lodged with the clerk of this court, or allow plaintiff to inspect and take copies of them. The defendant has made return to the rule, expressing its full consent and readiness to produce the writings in question at the trial, but not before. The motion is made under section 724, Rev. St., which reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

This section controls the practice, notwithstanding any state practice in the premises. *Gregory v. Railroad Co.*, 10 Fed. 529. There is conflict of opinion on this question among the circuit courts, and no authoritative decision by the supreme court, or any of the circuit courts of appeals. Judge Curtis in *Iasigi v. Brown*, 1 Curt. 401, Fed. Cas. No. 6,993, granted an order in such a case for production of the papers at the trial. "This is the whole extent of the law. It does not enable parties to compel the production of papers before trial." The circuit court (Clifford and Lowell, JJ.), in *Merchants' Nat. Bank v. State Nat. Bank*, Fed. Cas. No. 9,448, say, "Perhaps the order must be that the books and papers must be produced at the trial." In *Triplett v. Bank*, 3 Cranch, C. C. 646,¹ a party was not allowed to examine books before trial to see if they contained pertinent evidence. On the other hand, in *Central Bank v. Tayloe*, 2 Cranch, C. C. 427, Fed. Cas. No. 2,548, the court ordered the papers to be produced before trial. And in *New York* the court pursued the same course. *Jacques v. Collins*, 2 Blatchf. 25, Fed. Cas. No. 7,167. In *Gregory v. Railroad Co.*, 3 McCrary, 374, 10 Fed. 529, the order was made for inspec-

¹ Fed. Cas. No. 14,178.

tion of books before the trial. The practice cannot be said to be settled. The language of the section, strictly construed, may not seem to contemplate production before trial. And the imposition of the penalty of a nonsuit in one case, and judgment by default in the other, for the nonproduction of papers,—a penalty which cannot be incurred or be enforced until the coming on of the trial,—would seem to confirm this conclusion. But undoubtedly the power conferred on the court is a discretionary power. And the court, in the exercise of it, may direct production before trial. *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201, Fed. Cas. No. 9,448. It seems, however, to be a narrow construction of section 724 to limit its operation to the actual trial. Its purpose, clearly, is to provide a substitute for a bill of discovery, and to secure at law the purposes which such a bill would subserve. All the cases recognize this. On a bill for discovery, necessarily, the facts sought would be discovered before trial. Besides this, the section says that this order for the production of papers can be made "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." The proceedings in chancery require the deposit of the papers called for with the clerk, who, upon notice, produces them in court, or before the examiner. 2 Daniell, Ch. Prac. 1388, 1389.

There is another point of view of this matter. The object of a motion of this character is to enable a party, in advance of the submission of the issue, to ascertain the strength or weakness of his case. An inspection of the papers may end the case. It is better to reach this result in this short way than in the middle of a trial.

Having regard to the special circumstances of this case, it seems best to grant the order in question. All the papers whose inspection is sought are part of the case of the plaintiff, pertinent to the issue, and essential in sustaining her complaint. They are documents furnished by her to the defendant to secure her loss under a policy of insurance. They were prepared and submitted before the counsel now managing the case were retained. The inspection desired may have a material bearing on the future of the cause.

It is ordered that the defendant, at the mutual convenience of the counsel in this cause, submit to the counsel for the plaintiff for inspection, without parting with the possession of them, and with the privilege to plaintiff's counsel of copying them, or any of them, as he may be advised, the following papers, to wit: Proofs of the loss of Minnie Lucker, dated March 7, 1894, and also dated May 4, 1894, and also affidavits of Minnie Lucker, dated 1894; certificates of loss by Elias Venning, trial justice, J. W. Polite, notary public, and P. M. Pepper, notary public; plans and specifications of the buildings insured, by Simons & Holmes, architects; written examination by Minnie Lucker, 6th July, 1894; letters from Minnie Lucker, J. C. Mehrtens, and C. W. Lucker, from the 3d of February, 1894, to the 1st of June, 1894, to L. R. Warren and F. M. Butt, agents of the defendant insurance company.

PORTER et al. v. JAMES et al.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1895.)

No. 251.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—FRAUD.

Where an assignment purports to convey all the debtor's property to be equally distributed among all his creditors, and the same is accepted by the assignee and by a majority in number, if not in amount, of all the creditors, it cannot be held fraudulent on its face, although it contains provisions which might be objectionable if the assignment were one granting preferences; nor can such assignment be set aside because of the fraudulent intent of the assignor, not shown to have been participated in by the assignee and the accepting creditors.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This was a suit by D. T. Porter and G. W. Macrae, partners under the firm name of Porter & Macrae, against I. L. James and J. E. Penney, to cancel an assignment for benefit of creditors, and procure the application of certain moneys to a judgment obtained by complainants against defendants. The circuit court entered a decree dismissing the cause, and complainants appealed.

I. L. James was doing a mercantile business at Hillsboro, Ala., and Porter & Macrae, of Memphis, Tenn., were his commission merchants. As such they furnished him money and goods; and on the 1st of December, 1891, he owed them something over \$8,000. At this juncture, W. J. Booker, agent for Porter & Macrae, visited James, to get a settlement or security for the debt. James proposed to sell certain property to Booker in payment of the debt, but, his authority being limited, he asked time to go to Memphis, and lay the matter before his firm, and answer, and was to telegraph to James on the 2d of December, and return and close the matter if acceptable to the firm. While Booker was on this mission, on the said 2d of December, 1891, and after he had sent the telegram, James made an assignment purporting to convey all of his property; at least, pretended to assign it all. J. E. Penney was named as assignee, and on Booker's return he learned of what had happened. Attachment was afterwards sued out and levied on all the property, and the personalty was sold under attachment, and the realty was being advertised by the assignee when this bill was filed. The appellants claim that the assignment is void upon its face, because its provisions impress it as fraudulent in law; also, that it was fraudulent in fact, as shown by the facts proven at the trial. The facts relied upon to support the latter contention were, among others, that while the assignment purported to convey all the property and assets of the assignor, particularly set out and described in the schedule annexed thereto, yet, in fact, it did not convey all of the debtor's property, and that various items of real estate, personal property, and credits were not included therein, and that this property constituted so large a proportion of his assets as to preclude any assumption that the omission was unintentional; that, after the attachment was served, the assignor, with the consent of the assignee, took from the property, presumably in the possession of the assignee, \$1,000 worth of property, the same not having been theretofore selected and set apart from the other property as exempt, contrary to the law of Alabama; that the assignee is peremptorily directed in the deed to pay the creditors the amounts stated in the schedule, while the proofs show that \$692.60 of this amount was fictitious and not due, for which reason this direction would operate to divert this much property from the creditors; that over \$3,000 of creditors was wholly omitted from the schedule; and that the claims of creditors who were named were cut down to the extent of nearly \$2,500 less than was actually due them. It was further contended that the proofs showed that