"Sec. 836. The last three sections apply to any examination of a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto." Laws N. Y. 1893, c. 295.

But even in their present form the two sections (835 and 836), taken together, seem not to be applicable to the cause at bar, provided the testimony sought to be elicited from counsel is strictly confined to a statement of the contents of a document which ceased to be confidential when it was executed. The execution of the document, however, does not make the transactions and conversations between counsel and client which led up to its execution any the less confidential, and as to such transactions and conversations there is no express, or even any implied, waiver. The privilege covers also all conversations and transactions with the client's agent or intermediary.

The witness, therefore, should answer, if he knows, as to whether or not a paper prepared by himself as counsel was in fact signed by deceased in the presence of attesting witnesses, in the form and manner required to constitute a valid publication of such paper as a testamentary document; and if he knows, or as far as he knows, he should state the contents of such published document, if he testify that the document was in fact thus published. The objections to all other questions inquiring as to conversations and transactions with his client or his client's agent, leading up to the preparation and execution of such document, are sustained. The case of Glover v. Patten, 165 U. S. 394, 17 Sup. Ct. 411, has not been overlooked, but it does not seem to be controlling to a contrary decision.

TYLER MIN. CO. et al. v. LAST CHANCE MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 429.

1. INJUNCTION BOND—POWER OF COURT ON DISSOLUTION—JUDGMENT AGAINST SURETIES.

A court of equity, on the dissolution of an injunction, may under its general powers, and in the absence of statutory provisions, have the damages occasioned by its issuance assessed under its own direction, and may render judgment therefor against the sureties as an incident to the principal suit.

2. SAME—RELEASE OF SURETIES—MODIFICATION OF INJUNCTION.

Under the rule that the liability of a surety cannot be extended by implication beyond the express terms of his contract, sureties on a bond given to procure a restraining order, which order required the defendants to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, cannot be held liable for damages accruing to defendants after a subsequent order, which continued such restraining order in force, but modified and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court.

8. SAME—DAMAGES RECOVERABLE.

In a suit to enjoin defendant from the further working of a mine beyond the alleged limits of its claim, in which a temporary injunction was allowed, and by a subsequent order the court required the defendant to pump the water from its workings to permit an inspection by complainant's engineers, the complainant is liable on its bond, on a final determination of the suit in favor of defendant, for the cost of such pumping, though continued much longer than was necessary for the making of the inspection, where such continuance was solely by reason of the order, and the complainant itself delayed its examination, and took no steps to have the work stopped.

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

This was a suit in equity to restrain the defendants from working certain mines within the alleged boundary of complainant's claim, and for an accounting for the ore taken therefrom. There was a decree for defendants, and a judgment for damages against complainant and the sureties on its injunction bond, from which they appeal.

John R. McBride, for appellants.

W. B. Heyburn, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The Last Chance Mining Company, having discovered a vein of mineral bearing rock in place in the Shoshone mining district of the state of Idaho, for the purpose of acquiring it, located, under the laws of the United States, a claim thereon, in the form of a parallelogram, 1,500 feet in length and 600 feet in width. Shortly thereafter the Tyler Mining Company, finding a vein of mineral bearing rock in place in a northwesterly direction from the Last Chance location, made a location thereon, in the form of a parallelogram, 1,500 feet in length and 600 feet in width, the southeasterly corner of which overlapped the Last Chance location. Thereafter a piece of mining ground adjoining the Tyler on the southwest, and lying between it and the Last Chance, was located as the Republican Fraction; and adjoining that, and in part overlapping it, were located the Last Chance Fraction and Skookum Fraction claims. The Tyler Company having applied for a patent for its claim, a contest was initiated by the Last Chance Company in the United States land office, resulting in a suit in one of the courts of the state in which the claims are situated, and which culminated in a judgment establishing the right of the Last Chance Company to that part of the Tyler location that overlapped the prior location of the Last Chance Company. Thereupon the Tyler drew in its southeasterly end line so as to avoid the conflict, and its claim as so changed was subsequently patented by the government. Both the Tyler and Last Chance claims were extensively mined. The Tyler Company, claiming that its right in and to the vein having its apex within its surface lines, in its dip southerly beyond its side line, was being impinged upon by the underground working and mining thereof by the Last

Chance Company, and by the owners of the Republican, Skookum, and Last Chance Fraction claims, commenced an action of ejectment in the court below against the Last Chance Company, the Idaho Mining Company (owner of the Skookum and Last Chance Fraction claims), the Republican Mining Company (owner of the Republican Fraction claim), and several individual defendants, to recover the possession of the vein so claimed by it, together with damages in the sum of $200,000, the alleged value of the ore therefrom averred to have been unlawfully extracted and appropriated by the defendants to the action. The action was subsequently dismissed as to the individual defendants. In aid of that action at law, the Tyler Company at the same time, or immediately thereafter, filed in the same court the present bill in equity against the same defendants, alleging the same rights on its part, and similar unlawful acts on the part of the defendants to the bill, and, alleging the threats of the defendants to continue the mining and appropriation of the ore from the vein to which the complainant alleged title, prayed, among other things, the equitable interposition of the court restraining the defendants from mining and appropriating that ore, and a decree establishing the alleged rights of the complainant against the defendants.

The action at law was tried several times. At the first trial, in the circuit court, judgment was rendered in favor of the Last Chance Company, and against the Republican and Idaho Mining Companies, neither of which sued out a writ of error therefrom. The Tyler Company sued out a writ of error to this court, and the judgment in favor of the Last Chance Company was reversed. Tyler Min. Co. v. Last Chance Min. Co., 4 C. C. A. 329, 54 Fed. 284, and 7 U. S. App. 463. Upon the second trial in the court below, judgment was rendered in favor of the Tyler Company against all of the defendants to the action. The Last Chance Company then sued out a writ of error to this court, and the judgment of the circuit court was affirmed. Last Chance Min. Co. v. Tyler Min. Co., 9 C. C. A. 613, 61 Fed. 557. The case was then taken, on the application of the Last Chance Company, upon writ of certiorari, to the supreme court, where the judgments of this court and of the circuit court were reversed, and the cause remanded to the latter court, with instructions to grant a new trial. 157 U. S. 683, 15 Sup. Ct. 733. The judgment of this court was reversed solely upon the ground that it did not give the proper effect to the judgment of the state court of Idaho establishing priority in favor of the Last Chance location. Upon the third trial of the law case in the circuit court, judgment was rendered in favor of the Last Chance Company for its costs. Writs of error were sued out of this court both by the plaintiff and the defendant Republican Mining Company to have that judgment reviewed, and resulted in its affirmance. Mining Co. v. Sweeney, 24 C. C. A. 578, 79 Fed. 277. Both the district and circuit judges being absent from the district at the time of the filing of the bill in equity, it, together with certain affidavits, was presented by the complainant to Justice Field, of the supreme court, who thereupon made an order that the

defendants appear before the court at its court room in Boise City, Idaho, on the 5th day of October, 1891, at 10 o'clock a. m. of that day, and then and there show cause why the preliminary injunction prayed for should not issue; and further granting the complainant's application for a restraining order pending such hearing, upon its giving a bond, with two good and sufficient sureties, to be approved by the clerk of the court, in the penal sum of $20,000, securing the defendants to the suit against all loss or damage which might result from the issuing of the restraining order, if it should be finally determined that the same was improperly issued, or that might be awarded to them by reason of the granting of the restraining order. The bond thus required was executed by the Tyler Mining Company, and by H. B. Eastman, Alf. Eoff, James A. Pinney, and George Ainslie as sureties, and, being approved by the clerk of the court, the restraining order went into effect.

At the time designated in the order to show cause the parties appeared before the court,—the district judge presiding,—with their counsel, and, after a hearing of the matter, the court, on the 9th day of October, 1891, ordered:

That the restraining order "be continued against said Last Chance Mining Company as a temporary injunction pending the trial of the cause, or until otherwise ordered by the court or judge, with the following modifications, to wit: The said Last Chance Mining Company may resume and continue work upon its said Last Chance Mine, and at any place within the limits of its boundary lines projected vertically downward; that all such work shall be done in the usual and ordinary course of mining, in an economical and miner like manner, keeping in view the proper development, the benefit, and preservation of the property; that all ores extracted by such workings shall be stored at some convenient place upon the mine, or they may, as fast as extracted to the amount of the ordinary shipping lot, be shipped and sold, and the proceeds thereof deposited in the First National Bank at Spokane Falls, state of Washington, subject to the regulations hereinafter defined; that, for the purpose of assisting in the enforcement of this order, a competent person shall be appointed as an officer and agent of this court, whose duty it shall be to make such frequent visits to said Last Chance Mine as he shall deem necessary to keep himself fully advised of all the working operations thereof, and observe and report to the court any violation of this order in such operations, and examine all the accounts covering the expenditures and the receipts of such mining operations; that he shall make such arrangements with said defendant concerning the shipping and sale of the ores as he deems necessary to preserve the proceeds thereof as directed by this order, and to that end may require the ores to be shipped jointly in his and defendant's (Last Chance Mining Co.'s) names, and the proceeds deposited in said bank in their joint names; that he shall make arrangements by which, under his supervision, sufficient of such proceeds may be drawn from said bank, from time to time, to meet and pay the actual and necessary working expenses of such mining operations, and all remaining proceeds shall remain in said bank until the court or judge thereof shall direct such officer in the disposition to be made thereof; that said Last Chance Mining Company shall at all times permit such court, officer, or agent to visit and inspect all parts of said mine and its workings, to examine all the accounts, books, and all transactions, as fully as though he had full charge of all such mining operations, and furnish him a copy of all such accounts when he shall demand them."

The order named F. R. Culbertson as such officer of the court; and further provided that the Last Chance Company should within 15 days, or within such time as the parties may agree upon, or the