to his being a stockholder in said company were regularly made, in due course of business, by the proper officers of said company. The court is of opinion that the estate of said Thompson McAllister is liable for the unpaid assessments upon the 40 shares of the capital stock of the said National Express & Transportation Company subscribed for by him, and a decree will be entered accordingly.

KIMBALL *et al. v.* ATCHISON, T. & S. F. R. Co. *et al.*

(*Circuit Court, E. D. Missouri, E. D.* June 6, 1891.)

1. RAILROAD COMPANIES—ACQUISITION OF COMPETING ROAD.
   Rev. St. Mo. § 2569, which prohibits any railroad company within the state from owning, operating, or managing any other parallel or competing railroad within the state, applies only where both the roads are situated within the state, and the competition between the two must be of some practical importance, such as is liable to have an appreciable effect on rates.
2. SAME.
   Two railroads which do not touch at any two common points, and between which for a distance of 40 miles another railroad is interposed, and whose traffic, except an unimportant amount, would in no event pass over the other, are not competing lines, within the meaning of the statute.
3. SAME.
   Section 2569, Rev. St. Mo., was intended to give full effect to section 7, art. 12, Const. Mo., and inasmuch as it did not satisfactorily appear that the legislature had either misconstrued or failed to give full effect to the constitution, *held*, that the court would not grant a preliminary injunction based on a construction of the constitution different from that adopted by the legislature of the state.

In Equity. On motion for preliminary injunction.

Rev. St. Mo. § 2569, provides as follows:

"It shall be unlawful for any railroad company, corporation, or individual owning, operating, or managing any railroad in the state of Missouri, to enter into any contract, combination, or association, or by any manner of means whatever consolidate the stock, property, or franchises of such company, corporation, or individual, or to lease or purchase the works or franchises of, or in any way whatever to any degree exercise control over, any railroad company, corporation, or individual owning or having under his or their control or management a parallel or competing line in this state; but each and every such railroad, whether owned, operated, or managed by a company, corporation, or individual, shall be run, operated, and managed separately by its own officers or agents, and be dependent for its support on its own earnings from its local and through business, in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition." Laws 1887, p. 102.

Const. Mo. art. 12, § 17, provides:

"No railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the

control of a parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues."

Henry Hitchcock, for complainants.
George R. Peck, for Atchison, T. & S. F. R. Co.
E. D. Kenna, for St. Louis & S. F. Ry. Co.

THAYER, J., (*orally.*) The matter that has been under consideration for some days past in this case, is an application for an injunction *pendente lite* to restrain the Atchison, Topeka & Santa Fe Railroad Company, hereafter called the "Atchison Company," from voting certain shares of stock which it has acquired in the St. Louis & San Francisco Railway Company, hereafter called the "Frisco Company." The case in all of its aspects has been very thoroughly argued, and the discussion has embraced some questions, particularly the question as to the meaning of the word "control," as used in the constitution and statutes of this state, which the court deems it unnecessary to decide.

I shall content myself with a brief statement of the conclusions which I have formed on some of the more vital questions involved, and, for want of time, shall be compelled to do so mainly without amplification or argument. The complainants, who are stockholders of the Frisco Company, base their right to relief on the ground that it was unlawful for the Atchison Company to acquire stock in the Frisco Company, or, at least, to acquire a majority of its stock If this contention fails, complainants, as a matter of course, are without right to relief, and all other subsidiary and collateral questions become immaterial.

1. I entertain no doubt of the fact that the Atchison Company had, under its charter and the laws of the state of Kansas, as construed by its highest court, (*Railroad Co.* v. *Fletcher*, 35 Kan. 236, 10 Pac. Rep. 596; *Same* v. *Cochran*, 43 Kan. 225, 23 Pac. Rep. 151; *Venner* v. *Railroad Co.*, 28 Fed. Rep. 581,) the requisite power and authority to make a valid purchase of Frisco stock, either much or little, unless such purchase was prohibited by the laws of the state of Missouri, under which the Frisco Company was incorporated; and it goes without saying that the Atchison Company could not make a valid purchase of the stock of a Missouri corporation in contravention of the laws of the state of Missouri. The question whether the purchase of the stock was *ultra vires* when tested by the laws of Kansas, where the Atchison Company was incorporated, is therefore eliminated from the controversy, and the transaction will be considered in the light of the constitution and laws of the state of Missouri.

2. The view that the court entertains of section 17, art. 12, of the constitution of Missouri, and of section 2569 of the Revised Statutes of the state, which, as it is claimed, rendered the purchase of stock in the Frisco Company unlawful, may be substantially stated as follows: The prohibition contained in the statute (section 2569) is clearly aimed at railroad companies "owning, operating, or managing a railroad in the state of Missouri." If a railroad company owns, operates, or manages a rail-

road in this state, it is prohibited, among other things, from leasing, purchasing, or exercising any control over any other railroad in the state that is substantially parallel to, or a competitor of, the road so owned, operated, or managed. This is, in substance, the extent of the statutory inhibition. Now, while conceding, for the purposes of the present decision, that the Atchison Company at the time of its purchase managed and operated two railroads in this state, namely, one from Kansas City northeastwardly through the state to Chicago, and one from St. Louis to Union, in Franklin county, Mo., a distance of about 60 miles, yet the court concludes that neither of these roads was, in the statutory sense, parallel to, or a competitor of, the Frisco. It appears to the court obvious that the road from Kansas City to Chicago cannot, in any just sense, be said to be a competing line; and in explanation of my ruling that the St. Louis, Kansas City & Colorado Railroad, extending from St. Louis to Union, hereafter called the Colorado Company, was not in the statutory sense a competitor of the Frisco, I will say, that when the statute speaks of competing roads it evidently means roads that are substantial competitors for business; it refers to competition of some practical importance, such as is liable to have an appreciable effect on rates, and in that sense the road to Union was not, in my judgment, a competing line.

The evidence before me discloses the fact that the Atchison Company had abandoned its purpose of constructing the Colorado road beyond Union before it purchased or determined to purchase the Frisco stock. It shows that the Colorado road and the Frisco do not touch any two common points; that between the two roads, for more than 40 miles, the Missouri Pacific Railroad is interposed; that the Colorado road is in reality a suburban road; and that not more than 1 per cent. of its traffic, which is, in the aggregate, infinitesimal, when compared with the traffic over the Frisco, would, in any event, pass over the Frisco. All of these considerations lead me to the conclusion that the Colorado road was not a competing line, within the meaning of the statute, and that the Atchison Company was not disqualified from purchasing the Frisco stock, even though it be conceded that it operated and managed the Colorado road at the time of the purchase.

3. The next question that I have considered, and with a due appreciation of its importance, is whether the constitutional inhibition contained in section 17, art. 12, is any more comprehensive than the statutory prohibition last considered. According to the view that the court takes of the case it cannot, or at least it ought not, to grant an injunction, unless it clearly appears that the general assembly has failed to give full effect to the constitutional prohibition, nor unless it appears that the purchase of the Frisco stock is in violation of the constitution, though not in violation of the statute. It is sufficient to say on this point that the court is not prepared to hold that the general assembly has either misconstrued section 17, art. 12, of the constitution, or that it intentionally failed to give it full effect when it enacted section 2569 of the Revised Statutes. On the contrary, I have no doubt that the

legislature intended to make the statute as broad as the constitution, and good reasons, no doubt, exist for holding that it accomplished its purpose. It is certainly a reasonable view, and one justified by the language employed, that the constitutional inhibition, like the statutory, was aimed at railroad corporations which might at any time own, operate, manage, or secure the right to run trains over roads located in this state, and that the purpose was to prevent such a corporation from purchasing, leasing, or controlling another road of the state, that was parallel to, or that competed with, the road so owned, operated, or managed. Such an inhibition would certainly preserve the independence of, and secure competition between, rival lines of railroad crossing the state in all directions, and connecting important commercial centers within the state; and it may fairly be urged that this was the purpose had in view by those who framed the present constitution. On the other hand, it may well be doubted whether the constitutional prohibition in question was intended to have the effect of preventing a great railroad system like the Atchison, occupying, as it does, an extensive area of country to the westward of this state, from obtaining access to the city of St. Louis by the purchase of, or by consolidation with, one of the four or five trunk lines crossing the state from east to west, merely because the road so purchased touches some points in Kansas which the Atchison system also reaches. The preservation of reasonable rates was the great object in view, and, as the proof in this case abundantly shows, the acquisition by the Atchison Company of the Frisco stock has had no effect upon rates between points in this state and those points in Kansas which are reached by the Frisco; and it must be apparent to any one familiar with the railroad situation in this state and Kansas that it cannot have any tendency in the future to increase such rates. In what I have thus said on the point now under consideration I would not be understood as deciding definitely that the prohibitions contained in the constitution and in the statute are in all respects identical. It is unnecessary to decide that question at this stage of the case. I do mean to say, however, that complainants have not succeeded in showing to my satisfaction, that section 17, art. 12, is any more comprehensive than the statute, (section 2569,) or that the legislature has misconceived or misconstrued the constitution.

From the views which I have thus outlined, it follows that I must decline to grant an injunction, because the purchase of the Frisco stock was not, in my judgment, in contravention of the statute, and because it is by no means certain that such purchase was prohibited by the constitution. In a case of this character it can hardly be expected that the court will allow an injunction, thereby jeopardizing great interests, upon a construction of the constitution that is certainly doubtful, and that is at the same time contrary to the construction that has been adopted, and, as it would seem, deliberately, by the general assembly of this state.

The motion for an injunction is accordingly overruled.

PATTEN *v.* CILLEY.

(*Circuit Court, D. New Hampshire.* July 8, 1891.)

WILLS—CONTEST—UNDUE INFLUENCE—BURDEN OF PROOF.

In proceedings to establish a will, contestant, if he admits in his pleadings all the requisites of a statutory will, and contests solely on the ground of undue influence, has the burden of proof, and is entitled to open and close.

Proceeding to establish the will of Matilda P. Jenness, removed from the state court. In the issues which are made up under the direction of the court, the executor alleges that Matilda P. Jenness died leaving a will. The appellant does not expressly put in issue any question as to the mental condition of the testatrix, the fact of the will, or its due execution. His only allegation is undue influence, and upon this the executor joins issue. Upon this state of the pleadings the appellant claims the right to open and close, and, by motion in writing, asks that the question be determined by June 3d, the trial by jury having been assigned for June 9th.

Harvey D. Hadlock, *W. L. Foster*, and *Daniel Barnard*, for appellant.

Harry Bingham, *John M. Mitchell*, and *Frank S. Streeter*, for executor.

Before ALDRICH and CARPENTER, JJ.

ALDRICH, J., (*after stating the facts as above.*) Upon the pleadings as they now stand, the primary burden is upon the executor, and consequently the right to open and close is with him. The executor alleges the death of Mrs. Jenness, and the existence of a will. Upon these allegations, he holds the affirmative, and is therefore entitled to the open and close. It is claimed by the defendant that this question should be determined by federal rules, rather than any rule of practice in the state courts. In the absence of an express federal rule on the subject, if the right to open and close is purely a question of practice, (and I think it is,) relating to the order of trial and the manner in which it shall proceed, it should be given to the party to whom it would belong under the state practice. It seems to be pretty generally agreed that uniformity in a practical way is desirable. Uniformity would render trials less troublesome to courts as well as the bar. Again, proceedings to establish wills involve title to lands in a statutory and local sense, and for that reason the law of the state should probably govern in a contest of this character. *Sanford* v. *Town of Portsmouth*, 2 Flip. 105; *Swift* v *Tyson*, 16 Pet. 1; *Delmas* v. *Insurance Co.*, 14 Wall. 661.

The defendant relies on rule 6, which is a standing rule for the government of trials in the first circuit. This rule provides that the party holding the affirmative shall open and close before the jury. I understand this to be the rule in the New Hampshire state courts; and by the term "holding the affirmative" is intended the primary affirmative. True, the defendant says in argument he has relieved the executor from the statutory burden, and the necessity of maintaining his allegation of

death and will, because he has made no denial; and what is well alleged is admitted, unless denied. The right to open and close should not shift to the defendant upon situations that are debatable, nor upon any presumption of sanity which might be overcome upon an issue made upon the evidence. Under the statute, the issues are to be framed under the direction of the court. The party objecting to the will may narrow the controversy by waiving such of the statutory requirements as he pleases, or by assigning his causes, he may put the executor to affirmative proof of all the statutory prerequisites. On the several issues of due execution, insanity, and undue influence, the usage in New Hampshire is to require the executor, before reading the will, to go forward and call the subscribing witnesses on all the conditions named in section 6, c. 193, Gen. Laws N. H. *Whitman* v. *Morey*, 63 N. H. 455. 2 Atl. Rep. 899. This statute, and the rule requiring the executor to call all the subscribing witnesses at the outset, as to age, death, mental condition, and execution, are to prevent fraud, and are in the interest of the party objecting to the will. It being a burden placed upon the executor for the contestant's benefit, the contestant may relieve him of the burden by waiver. He may waive a part or all of the statutory essentials. When he has determined what he wants to put in controversy, he must so adjust the pleadings that the limit of his complaint will not be uncertain. Is there to be any claim or argument made that the testatrix was not of sound mind? Is there to be any question as to age, death, or execution? If not, the defendant has until June 3d to amend his issue, by admitting the primary statutory essentials. Upon such confession or admission, with the single affirmative issue of undue influence, the open and close is with the contestant.

I have reached this conclusion reluctantly. But, upon principle and reason, it seems to me that, under such circumstances, the burden is upon the contestant, and that he is consequently entitled to the open and close. The importance of the case, the fact that the question is a new one in this court, together with the result which may give the open and close to the defendant, and therefore appear to be contrary to the practice obtaining in the state courts in will proceedings, have induced me to state the reasons for such holding at considerable length. It will be observed that, under the statute, absence of undue influence is not a primary essential. So no primary burden rests with the executor in this respect. If the statutory essentials are admitted by the defendant in his pleadings, the executor would be entitled to a verdict, if no evidence were offered.

The rule seems unquestioned that the party against whom the verdict would go, in the absence of all evidence other than the admissions contained in the pleadings, takes the burden, and with it the open and close. So it follows upon such confession, unless the defendant goes forward with his evidence of undue influence, the executor gets the verdict, and, if the conscience of the court is satisfied, a decree is entered establishing the will. The executor is relieved from the burden of taking any primary step in the trial before the jury. He need not show

that Mrs. Jenness lived, was 21 years of age, and of sound mind, or that she is dead, because this is admitted. He need not put in the will, for the fact is admitted. He need not call the subscribing witnesses, because the contestant has waived that rule. From the very nature of this issue, with the defendant going forward, the trial will be more convenient and orderly, there will be less confusion, and the result would ordinarily be more intelligent and satisfactory.

The defendant holds an affirmative proposition. He goes forward, and introduces his evidence, affirmative, descriptive, and circumstantial. The executor answers by evidence of a negative, contradictory, and explanatory character. The executor cannot do this in advance. He must first hear the complaint. A rule which would give the opening and close to the executor upon an issue of this kind would either require him to go forward, and put in his whole case, or as much as he fairly could, upon the questions of mental strength, situations of parties, etc., or permit him to open nominally, and reserve the substantial part of his case, upon the evidence, for the close. Trials, under the first view of such a rule, would be troublesome, for the reason that there would always be questions as to how far the executor ought to be required to go, and what was fairly in rebuttal; and, under the second view, the order of trial would give an undue balance to the executor, because he would not only hold the closing argument, but the substantial close upon the evidence; while, under the order of trial requiring the defendant upon such an issue to put in his whole case at the outset, (which, from the nature of the issue, the executor could not do,) and giving the executor the opportunity to follow with his substantial case upon the evidence, preserves the balance and equilibrium usual in jury trials. To one side is ordinarily given the advantage of the substantial close upon the evidence; to the other is given the substantial advantage of the close upon argument. A practice which would give both advantages to one party would not be fair.

It is urged that usage in New Hampshire gives the open and close to the executor in proceedings to establish wills. This is probably true, as a general rule, in New Hampshire and elsewhere. I am not, however, aware of a practice, in any jurisdiction, which would give the open and close to the executor upon pleadings which relieve him from all the primary burdens, and contain only the single affirmative issue of undue influence tendered by the contestant. It is not known that any such question has ever been presented to the courts of New Hampshire, and hence it cannot be assumed that there is a practice upon the subject. A practice which would give the open and close to the party on whom a single primary burden rests would not necessarily give such privilege to a party relieved of all primary burden. It is said in *Hilliard* v. *Beattie*, 59 N. H. 464: "As a general rule, it is desirable, in determining who shall have the opening and close, to follow the rules of pleadings, and give that right to the party upon whom, by those rules, the burden of proof is placed." It is also a rule quite as generally accepted that the burden rests upon the party holding the affirmative upon the issue to be

tried. Upon the single issue of undue influence, (all other questions having been waived,) the contestant holds the affirmative, and can naturally go forward with his evidence; while the executor holds the negative, and cannot naturally or easily go forward with his evidence. By reasons of general principle and convenience, the defendant should put in his substantial case at the outset. The analogy between undue influence, as an objection to a will, and duress, as an objection to a note or contract, is very close. Each is a special and affirmative defense, going to the merits. The character of the evidence is much the same. The order of trial and the convenience of laying the situation before a jury are the same. So far as I know, it is the general, if not the uniform, rule, under the single issue of duress, to place the burden upon the defendant, and he consequently takes the open and close. Bailey, Onus Probandi, 111, 588, & 607; Proff. Jury, 214; Best, Right, Begin & Reply, 91; *Patton* v. *Hamilton*, 12 Ind. 256; *Baldwin* v. *Parker*, 99 Mass. 86; *Hoxie* v. *Green*, 37 How. Pr. 97; *Huntington* v. *Conkey*, 33 Barb. 218.

The New Hampshire cases, commencing with *Judge of Probate* v. *Stone*, 44 N. H. 593, and ending with *Hardy* v. *Merrill*, 56 N. H. 227, only go so far as to hold that, if the burden is upon the executor upon one of several issues, he shall hold the burden throughout the trial. For instance, in *Hardy* v. *Merrill*, issue was joined on mental condition and undue influence. Under such issues, the primary burden is upon the proponent, as mental soundness is a statutory requisite. The same reasoning applies to *Boardman* v. *Woodman*, 47 N. H. 120. The conclusion reached in this case in no way involves a criticism of the New Hampshire state practice.

In the cases cited the proponent had something to prove at the outset to make his paper a statutory will. In the case at bar everything is admitted necessary to make it a statutory will, and a verdict would go for the proponent, unless the contestant, upon an affirmative issue, makes such a case upon affirmative matter as will satisfy the jury that the verdict should be the other way. I am not aware of any rule of public policy applicable to wills which would justify an arbitrary practice of giving the right to open and close to the proponent at the expense of convenience, reason, and the generally accepted rules of pleading and evidence. The idea is expressed by good authority that will proceedings are an exception to the general rules as to burden and open and close, for the reason that the real question is whether the deceased person died testate or intestate, and that the subscribing witnesses, therefore, are in a sense the witnesses of the law; and I agree that this reasoning applies with great force to such proceedings in the preliminary stages. Doubtless at preliminary stages, where all interested parties may not be present, the true rule is to require all the statutory essentials to be affirmatively shown by the propounder, and, upon proceedings to prove the will in solemn form, to require all the subscribing witnesses (unless dead, insane, or beyond the jurisdiction) to be called before admitting the will. These provisions are for the prevention of fraud, and for the protection of all per-

sons interested in the estate. But when, upon proper statutory notice, these preliminary steps have been taken, and the controversy limited upon appeal to a contest between the executor and a party who admits the existence of a statutory will, but tenders a single issue in avoidance, (to the whole will or some specific legacy,) upon which he takes the affirmative, no reason is seen why the ordinary rules governing the trial of issues by jury should not be observed. Indeed, it has been often held that, upon the single issue of undue influence, the contestant takes the burden. In *Baldwin* v. *Parker*, 99 Mass. 85, HOAR, J., says:

"But when all is proved that the statute requires; when a testator of sound mind has intentionally made and published a will according to the forms of law,—his will is as much a legal conveyance and disposition of his property as any other lawful instrument of conveyance. It may be impeached or made invalid by proof of fraud, duress, or undue influence, which have caused it to contain provisions which he has been wrongfully induced to insert in it; but so may a deed or other contract be impeached for the like reason."

Again he says, (page 87:)

"The whole result of the reasoning would seem to be that upon the separate issue of undue influence the burden of proof is upon the party alleging it."

Brooke v. *Townshend*, 7 Gill, 26, was a case where the fact of the will was assumed by the issues; and the question was whether the proponent should introduce the subscribing witnesses. The court says, (page 26:)

"The introduction of evidence to establish a conceded fact was an act of supererogation, and therefore to be treated as irrelevant and inadmissible. * * * It was proposed to prove, by the testimony of the attesting witnesses, the *factum* of a paper, the execution of which was admitted by the pleadings and issues in the cause. This could not be done."

The effect of this reasoning was to require the contestant, who admitted the due execution of the paper, to introduce the will in evidence as a part of his case. See, also, *Davis* v. *Davis*, 123 Mass. 590; *Tyler* v. *Gardiner*, 35 N. Y. 559; *Armstrong* v. *Armstrong*, 63 Wis. 162, 23 N. W. Rep. 407; *Chandler* v. *Ferris*, 1 Har. (Del.) 461; *Edelen* v. *Edelen*, 6 Md. 293; *Stocksdale* v. *Cullison*, 35 Md. 324; *McClintock* v. *Curd*, 32 Mo. 411; *Vancleave* v. *Beam*, 2 Dana, 155; *Boyse* v. *Rossborough*, 6 H. L. Cas. 2, 49; *Hutley* v. *Grimstone*, 41 Law T. (N. S.) 531; 9 Reporter, 224.

It must be understood that this condition of the pleadings narrows the issues upon the evidence. Under such an issue, it will not be open to the defendant to show that the essential primary condition of mental soundness did not exist. At most, he can only show the influence of a stronger mind upon a weaker sound mental condition.

CARPENTER, J., (*concurring.*) This motion was first heard by my Brother ALDRICH, who intimated his opinion as above. Afterwards the appellant amended his answer so that it specifically admits all the other requirements of a valid will, and alleges that the supposed will of Matilda P. Jenness ought not to be proved, because the said Jenness was induced to execute the same by undue influence, overpersuasion, and artful misrepresentations. On these amended pleadings the motion was

reargued before my Brother ALDRICH, with whom I sat at his request and by consent of the counsel. I entirely concur in his conclusion.

I do not find that the question here raised has ever been decided by the supreme court of New Hampshire. The uniform practice in that court, as I understand from the cases, has been that on appeal from the probate of a will the issues in the first instance to be tried are whether the testator was of lawful age, of sane mind, whether the alleged will was duly executed, and, in case the question is raised, whether there was undue influence, or fraud, or whatever other thing may be alleged. These issues are tried by the court, unless one or more of them be put in dispute by the appeal. In the latter case the issues are sent to a jury; and on trial, although the appellant may offer evidence only on those issues which he has put in dispute, still the proponent of the will must establish, by proof which the trial judge shall deem competent, all the allegations of fact which go to establish the existence of a valid will. This being the case, it is evident that the proponent, who stands in the position of plaintiff, has always the affirmative of some of the issues, and hence, according to the universal rule in all our courts, has the right to open and close. These issues having been determined, the court in the light of those findings, and from an inspection of the alleged will, determines the main issue in the case, and thereupon makes the final decree. The issue whether the propounded instrument is or is not the last will of the person deceased is therefore for the court alone.

In the present case the appellant admits on the record that every issue shall be found for the proponent, excepting only the issue of undue influence. Upon that issue he evidently has the affirmative, and, as that is the sole issue for the jury, he ought to open and close. It has, indeed, been argued that it is contrary to the policy of the law to allow the appellant to admit any of the allegations which go to establish the validity of the will, and that they are public questions to be found by inquisition of the court. On this question I can add little to the lucid observations of the foregoing opinion. The requirements of the law and of public policy have been fully met by the inquisition heretofore had in the probate court. The decree of that court is in full force, and is itself competent evidence to this court of the facts thereby determined. Gen. Laws N. H. p. 484, § 12. And, as to the rights of the appellant, it is doubtless competent for him to waive them.

UNITED STATES *v.* ENGEMAN *et al.*[1]

(*District Court, E. D. New York.* July 7, 1891.)

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—INTEREST ON AWARD.
After the commissioners have reported the value of land condemned to the use of the United States, under Act Cong. Aug. 18, 1890, (26 St. at Large, 316,) the owner of the land is entitled to interest on the amount reported, from the time when the right of the government to take the same attaches to the time when payment for the land is made.

2. SAME—COSTS—ALLOWANCE.
In such proceeding, the owner of the property condemned is entitled to costs and an allowance, in accordance with the provisions of the laws relating to the condemnation of property of the state wherein the property is situated.

At Law. See 45 Fed. Rep. 546, and 46 Fed. Rep. 176.

Jesse Johnson, U. S. Dist. Atty.

Thomas E. Pearsall, (*R. D. Benedict*, of counsel,) for defendants.

BENEDICT, J. The report of the commissioners appointed to ascertain the compensation to be made to the above-named owners for property at Plum island, to be taken for the use of the United States, having been filed, the district attorney now moves for its confirmation. No opposition being made, an order will be entered confirming the report. The owners of the property at the same time apply for the insertion in the order of confirmation of a provision for the payment of interest from the date of the confirmation of the report. The district attorney opposes the allowance of interest. In my opinion, however, interest should be allowed from the date of the confirmation of the report. The commissioners have ascertained the present value of the land to be taken, and the owners of the land should have interest on the present value of the land from the time when the right of the United States to take the same attaches to the time when payment for the land is made. The owners of the property likewise apply for costs under the provision in the statute of the state of New York, in accordance with which this proceeding is, by the statute of the United States, required to be prosecuted. The district attorney objects upon the ground that, in proceedings in the courts of the United States, only the costs provided by the statute of the United States can be allowed. My opinion, however, is that the rule applied in ordinary suits does not apply to a proceeding like this, which is required by the statute "to be prosecuted in accordance with the laws relating to condemnation of property of the states (*sic*) wherein the property may be situated." 26 St. at Large, p. 316. This statute requires the present proceeding to be in accord with the general condemnation act of the state of New York, passed in 1890. That act provides as follows:

"If the compensation awarded shall exceed the amount of the offer, with interest from the time it was made, or, if no offer was made, the court shall,

[1] Reported by E. G. Benedict, Esq., of the New York bar.