JOYCE v. CHARLESTON ICE MANUF'G CO.

(*Circuit Court, D. South Carolina.* April 30, 1892.)

1. TRIAL—CONFLICT OF EVIDENCE—PROVINCE OF COURT AND JURY.
   When there is a conflict of evidence as to material facts, which conflict can only be solved by determining the credibility of the witnesses, the court has no authority to direct a verdict.
2. NEW TRIAL—MISCONDUCT OF WITNESS.
   The fact that a witness, on an objection to his testimony, intentionally deceived the court as to the statements he was about to make, is not sufficient ground for a new trial when the statements thus introduced were not in fact irrelevant, and had already been given in evidence.
3. SAME—WEIGHT OF EVIDENCE—OPINION OF COURT—THIRD TRIAL.
   Although a federal judge may give his opinion as to the weight of the evidence, yet, after two concurring verdicts opposed to that opinion, he cannot grant a third trial, except for substantial errors of law.

At Law. Action by E. F. Joyce against the Charleston Ice Manufacturing Company to recover damages for an unlawful detention of personal property. Heard on motion for a new trial. Overruled.

Bryan & Bryan, for plaintiff.

Samuel Lord and *J. N. Nathans*, for defendant.

SIMONTON, District Judge. This case has been before two juries. At the first trial, which was had in Greenville, the verdict was for the plaintiff. After hearing argument on motion for a new trial, the verdict was set aside, the court being satisfied that the jury were influenced by prejudice. The second trial was had at the present term in Charleston. The plaintiff again obtained a verdict. A motion for a new trial.

The action is for damages for the unlawful detention of personal property. The plaintiff was under contract with the defendant to dig an artesian well on its premises in the city of Charleston. The location of the proposed well was within the inclosure of the defendant. While the digging of the well was in progress, disputes arose between the plaintiff and the defendant respecting the performance of the contract. This dispute pending, plaintiff desired to remove from the inclosure of the defendant certain 10-inch tools and 10-inch pipe, rope, and some other materials needed by him for a well in Florence, S. C., and, as he alleges, not needed at the well in Charleston. Prior to this he had, at his own pleasure, brought to and removed from the premises of the defendant plant and materials used about the well without seeking the permission or consent of the defendant. On this occasion—13th February, 1890—such consent was asked for the removal of the articles specified. It was not given. The 10-inch plant and other material were not removed. One or more efforts were made by plaintiff with the same result. On 18th March following, a formal demand was addressed to the president of the ice company for the entire plant of the plaintiff of every description on the premises of defendant. This demand was mailed to the president, who was absent from the city. On the 24th March he replied in writing, acceding to the demand. This letter was received by

plaintiff on 28th. The entire plant was removed within two weeks afterwards. The business of plaintiff is to dig wells. He was under contract for wells in Florence, and in Savannah, Ga. The same witnesses, and no others, testified at this trial who gave evidence at the other. The testimony offered by the plaintiff purported to establish these facts: That when his desire to remove the 10-inch plant, etc., was made known to defendant, it was met with such language, attitude, and action upon the part of the agents of defendants as induced those acting on his behalf to believe that the removal of the articles desired would be resisted, even if it involved a breach of the peace. On the other hand, the testimony of the witnesses for the defendant was to the effect that, although the desire to remove these articles did not meet the approval of the defendant, no other mode of resistance was offered or threatened than a resort to legal proceedings to prevent or remedy the removal. The facts on each side were minutely detailed. The issue of fact thus raised, supported by conflicting testimony, was submitted to the jury for solution. They were instructed that there was no necessity whatever requiring the plaintiff to seek the assent of the defendant before or at the time of the removal of the plant and other articles. That, as a necessary result of his contract without any stipulation to that effect, he had free right of ingress to and egress from the premises of the defendant for the purpose of working on the well, and of carrying to it such plant and material as he deemed necessary, and of taking away from it such as he found useless. But if, before exercising his right of removal, he consulted the wishes of defendant, and met a refusal, and if in so refusing there was anything in the language, attitude, or action of the agents of the defendant which would induce a man with ordinary courage to believe that the refusal would be maintained, if need be, by a breach of the peace, the plaintiff need not assert his right by force, but could resort to this action. This issue of fact was presented in these words: "In short, was there an absolute refusal to permit the removal at all events, or was there a notification that an attempt to remove would be met by legal proceedings?" The verdict answered the first question in the affirmative.

The next question was as to damages. The jury were instructed, if they found for the plaintiff upon the issue above stated, that defendant was liable for all actual damages arising to the plaintiff by its act in any delay in or loss of contract thereby occasioned. Besides these, plaintiff sought punitive damages. The facts his witnesses sought to prove were these: That the agents of defendant had full knowledge that they had no right to hold or to refuse or prevent the removal of the property of the plaintiff, and that he had the right to remove it at his own pleasure; that, notwithstanding this, while negotiations were pending between him and defendant respecting the breach of contract, with the purpose of coercing him to their views, they unlawfully took possession of the property of plaintiff, and refused him access to it, accompanying the refusal with conduct indicating violent resistance if he attempted to remove any part of the entire plant. The evidence of the defendant went

to show that it never held or had possession, and that no refusal was made as alleged, and that nothing was done or said indicating any other purpose than an assertion of the rights of defendant within the law. This issue was submitted to the jury in these words:

"If the agents of the defendant acted with the high hand, regardless of the well-known right of the plaintiff, with a view to oppress and harass the plaintiff, you may find, if you find for him, punitive, exemplary, and vindictive damages, not exceeding in the aggregate $5,000. If, however, the defendant had no purpose but to resort for protection of its right to legal proceedings, or if it *bona fide* hesitated, fearing a compromise of its rights, you cannot find such exemplary, punitive, or vindictive damages. And, with no desire to control your verdict, I express to you the opinion that there is not room for such damages here."

The jury found for the plaintiff $2,500, a sum largely in excess of any actual damage proved. The defendant's motion for a new trial is on these grounds:

First. Because C. L. Parker, one of the plaintiff's witnesses, and, by his own testimony, interested in the event of the suit, by a trick upon the court and upon the counsel for the defendant brought out before the jury incompetent testimony, and such incompetent testimony must have influenced the minds of the jury in arriving at their verdict. This refers to an unpleasant incident at the trial. The witness Parker, the manager of the plaintiff, was on the stand. He had, among other things, testified to the conversations had with agents of the defendant. He was asked: "Did you have a conversation with any representative of the ice company on 28th March?" This was excepted to, as no part of the *res gestæ*, but was admitted. He then proceeded to read from a memorandum, purporting to have been made at the time, what he, the witness, said. During this reading the court interrupted him, saying, "We do not wish to know what you said, but what they said." Upon his replying that "you cannot understand what they said until you hear what I said," he was permitted to go on. After reading through his memorandum, he was asked, "What was said by them?" He answered, "Nothing further on this matter." He is a man of unusual intelligence. He must have known that when he was asked as to a conversation the replies of the other party were sought. His answer, when interrupted, distinctly intimates that he did have a reply. He did not have any conversation on the matters in issue, or any reply. His conduct misled the court, and was rebuked, not for what he said, but for resorting to deception gratuitously. All that he read out was in evidence already. Had it not been in evidence, a frank statement of the question would have brought the reply in evidence. No irrelevant testimony, however, came in, and this improper conduct of this witness is not of such character as to require a new trial of the case. The remaining grounds deserve and have received careful consideration.

Second. Because the verdict is excessive and against the evidence.

Third. Because the damages assessed by the jury could have been arrived at only by disregarding the instructions of the court. The jury found punitive damages, against the expressed opinion of the court.

This opinion was given under the sanction of *Lovejoy* v. *U. S.*, 128 U. S. 173, 9 Sup. Ct. Rep. 57; *Rucker* v. *Wheeler*, 127 U. S. 93, 8 Sup. Ct. Rep. 1142. The counsel for the defendant earnestly press the argument that the trial judge should have instructed the jury not to find punitive damages. The judges in courts of the United States have a discretion in the matter of the verdict. They are bound to assist the jury in reaching a conclusion, and may express an opinion upon the facts. At times they must assume the responsibility of instructing them how to find, thus taking the verdict from them. This is a large and dangerous power. The supreme court, in a long series of decisions, has carefully established the rules of its exercise, and have laid down the limits which it cannot pass. "When the evidence given at the trial, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict, the court is not bound to submit the case to the jury, but may direct a verdict." *Randall* v. *Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322. "If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant is proper," (*Kane* v. *Railway Co.*, 128 U. S. 94, 9 Sup. Ct. Rep. 16;) "whilst, on the other hand, the case should be left to the jury, unless the conclusion follows as a matter of law that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish," (*Railroad Co.* v. *Woodson*, 134 U. S. 621, 10 Sup. Ct. Rep. 628.) These cases cite all the authorities, and fix the principle.

The testimony of this case did not permit the court to instruct the jury. There was a grave conflict, to be solved only upon the credibility of the witnesses. According to those of the plaintiff, there was a stubborn disregard of his known right, without any reason assigned, with a view to coerce him to terms, with an apparent intention to maintain the position at all hazards. That of the defendant contradicted all this. The facts, and all inferences from the facts, were left to the jury. Had the judge instructed them, he would have invaded their province. Will the court now set aside their conclusion? In *Henning* v. *Telegraph Co.*, 43 Fed. Rep. 132, this court deduces the following conclusion as the result of authorities cited:

"The right of the court, after verdict, to look into and test the evidence upon which the jury came to their conclusion cannot be doubted. Whenever there is no evidence to sustain the verdict, or when there is evidence, and it is insufficient, or when the preponderance of testimony is so great against the verdict as to raise the presumption that it was rendered through inadvertence or bias or prejudice in favor of or against one of the parties, or through some corruption, misconduct, or objectionable behavior on the part of the jury, the court will and should set it aside. But when there has been competent evidence submitted on both sides, and the result depends upon the credibility which the jury attaches to testimony of the witnesses, without regard to the number of these witnesses, and the jury reach their conclusion, it is not competent for the court to interfere with it. It is not the opinion of the judge as to the credibility of the witnesses which governs such a case, nor his conclusion as to the preponderance of the evidence, based upon his opinion as to their relative credibility, nor what verdict he would find were he a juror. The

jury alone can determine this. It is their exclusive province; and, were judges to interfere with it, the value of a trial by jury would be destroyed."

Every precaution was taken at the second trial to secure a fair verdict. The cause was heard on the first day of the term,—the first case called. The names of the entire panel, drawn from every portion of the state, were put in the hat, and 12 men drawn. The jury was an excellent representative of the people. It will be difficult, perhaps impossible, to get a better jury. Although my own conclusion differs essentially from that reached by them, it is an opinion formed from weighing the evidence and watching the witnesses. I cannot say that the jury were guilty of inadvertence, or were controlled by bias or prejudice, or that they disregarded the law as expounded to them. If the verdict be set aside, it will be simply because, on an issue of fact presenting conflict of testimony, the judge does not agree with the jury. "I confess," says TILGHMAN, C. J., in *Griffith* v. *Willing*, 3 Bin. 317, "that neither at the trial nor since further reflection has it struck me in the same point of view in which it appears to the jury. But that is not sufficient ground for awarding a new trial. I cannot discover any principle of law which the jury have violated, nor will I undertake to say that they have done so decidedly against the evidence as would justify the court in setting aside the verdict." "After two concurring verdicts, the court will not grant a new trial if the questions to be tried depend wholly on matters of fact, and no rule of law be violated, although the verdict be against the weight of the evidence." Grah. & W. New Trials, No. 54. The language of WATIES, J., in *Frost* v. *Brown*, 2 Bay, 139, 140, seems to fit this case:

"A second trial has already been granted, and two juries have concurred in finding the same facts. I think we have no authority to proceed any further, for, although I would never surrender a plain and certain rule of law to the caprice of a jury, or any number of juries, yet in a case where the law is complicated with facts, so that the construction and application of it must depend on the findings of facts, two concurring verdicts, even against the opinion of the judges, ought to be conclusive. As the present case appears to me to be such a one, I think that a third trial ought not to be granted."

Two juries have found from these facts that punitive damages should be awarded. The motion for a new trial is refused.

ASPLEY *v.* MURPHY *et al.*

(*Circuit Court, N. D. Texas.* February 21, 1892.)

1. PROBATE COURTS—JURISDICTION—SPECIFIC PERFORMANCE—REPEAL OF STATUTE.
Act Tex. 1846, entitled "An act to organize probate courts," which in section 27 (Hart. Dig. art. 1108) expressly repeals "all laws relative to the duties of probate courts and the settlement of successions," was applicable only to laws conferring general probate jurisdiction, and not to Act 1844, § 2, (Hart. Dig. art. 1070,) which vests in those courts the special power of enforcing specific performance of contracts to convey lands.

2. COURTS—JURISDICTION—REPEALING ACTS—CONSTRUCTION.
Where jurisdiction in special cases is conferred upon a court by legislative act, and its exercise in a particular instance is questioned after the lapse of 45 years, on the ground that the act was subsequently repealed, the court will resolve any doubts as to the scope of the repealing statute in favor of the jurisdiction.

At Law. Action by R. F. Aspley against J. P. Murphy *et al.* to recover an undivided two-ninths interest in and to block 77, in the city of Dallas, Tex. Heard on a question as to the admissibility in evidence of certain records of the probate court.

Chas. I. Evans, *G. J. Gooch*, and *Bassett, Seay & Muse*, for plaintiff.

E. J. Simkins and *Simkins & Morrow*, for defendants.

MAXEY, District Judge, (*orally*.) The question in this case arises upon the offer on the part of defendants to introduce in evidence a transcript of certain orders and proceedings of the probate court of Houston county, passed in 1847. From an inspection of the transcript, it appears that a petition was filed by the administrator of John Grigsby's estate, one Edens, praying for authority to execute a deed to the heirs of Crawford Grigsby for 1,000 acres of the John Grigsby league and labor. That petition was filed and granted by the probate court on the 29th day of March, 1847. On the same day, as a basis for the petition, an affidavit was filed by William Grigsby, in which he deposed to the execution of a contract entered into between John Grigsby and his son, Crawford, in 1840 or 1841, by the terms of which the father agreed to convey to his son, Crawford, 1,000 acres of the league and labor, in consideration of services to be rendered by the latter in locating the land, etc.; the affiant further deposing that Crawford fully complied with his part of the agreement. The order of court granting the application, it appears, was filed on September 28, 1847. The deed of the administrator was executed in pursuance of the order on July 17, 1847.

While counsel for the plaintiff object to the validity of all the papers embodied in the transcript, their particular objection goes to the order of the court; they insisting that the probate court of Houston county was without authority or jurisdiction in 1847 to pass the order in question. On the other hand, counsel for the defendants maintain—*First*, that the court had jurisdiction under the act of 1844, which they say was then in force; or, *secondly*, if repealed, the probate court had jurisdiction, under the general power granted by the constitution of 1845

and the act of 1846, construed in connection therewith, to make the order; or, if mistaken in the positions assumed, they further maintain, *third*, that the recognition of the claim for land, under the thirteenth section of the act of 1846, is a judgment which cannot be collaterally attacked.

The question then is, did the probate court have jurisdiction—was it clothed with power—in 1847 to entertain the application of the administrator, and pass the order prayed for by him? It is clear that, if the court was without jurisdiction, every order passed in the proceeding was a nullity; for orders, judgments, and decrees cannot be rendered by a court in the absence of power to make them. Jurisdiction is the power to hear and determine a cause, and, when the power is wanting, acts performed by the court are without validity. If, then, there was no jurisdiction, the order was void; and if the jurisdiction depended alone upon the act of 1844, and that act was repealed when the order was made, then was also the order a nullity. I say if the jurisdiction depended alone upon the act of 1844, and that act had been repealed by the statute of 1846, then the order passed in 1847 was without validity. That position is clearly sustained by the supreme court of the United States in the case of *Bank* v. *Dudley*, 2 Pet. 523, 524, and so it is held by the same court in the case of *Insurance Co.* v. *Ritchie*, 5 Wall. 541. See, also, *Houston* v. *Killough*, (Tex. Sup.) 16 S.W. Rep. 57. Was the act of 1844, then, repealed by the act of 1846? By reference to the early laws of Texas, it will be seen that the first act conferring jurisdiction upon the probate courts generally in reference to the estates of decedents was passed in 1840, beginning with article 995 of Hartley's Digest. The caption of that act reads as follows: "An act regulating the duties of probate courts and the settlement of successions." Without consuming time to call attention to all of the intervening acts directly relating to the settlement of successions, we pass to the consideration of the act claimed to have been repealed, the act of 1844, with this caption, "An act to define and fix the practice of probate courts in certain cases." The second section of that act (article 1070 of Hartley's Digest) vests in courts of probate the power to enforce specific performance of contracts to convey land. Then follows the act of 1846, the caption of which employs these words: "An act to organize probate courts." The repealing clause of that act will be found in section 27 or article 1108 of Hartley's Digest, and is in the following language: "That all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of successions be, and the same are hereby, repealed."

It is not claimed in this case, as I understand the argument of counsel, that the act of 1846 repeals by implication the act of 1844. There seems to be no irreconcilable conflict or repugnancy between the two acts, and it could not be successfully claimed that the one, by implication merely, repeals the other. *U. S.* v. *Railway Co.*, 40 Fed. Rep. 769, and authorities there cited. Does the repealing clause of the act of 1846 expressly repeal section 2 of the act of 1844? In the construction of statutes courts discover, if possible, the legislative intent. See *Oates* v.

Bank, 100 U. S. 244. In support of that view, reference is also made to the case of *Ellis* v. *Batts*, 26 Tex. 706.

The question, then, as I have said, which presents itself to the court in all cases of this kind, is this: What was the intention of the lawmakers? Courts carry out the intention of the lawmaking power without reference to the policy of statutes. Did the legislature, by the words employed in the clause repealing all laws and parts of laws relative to "the settlement of successions," intend to embrace laws conferring the power to enforce performance of executory contracts for the conveyance of title to lands? This is the first proposition to be considered.

It is clear, by reference to the authorities, that it did not so intend, and in support of that view reference is again made to the case of *Bank* v. *Dudley*, reported in 2 Pet. 524; also to *Kegans* v. *Allcorn*, 9 Tex. 25, and the case of *Houston* v. *Killough*, reported in 16 S. W. Rep., decided by the supreme court of this state. It is evident that the words embodied in the repealing clause of the act of 1846—that is, those words which repeal all laws and parts of laws relative "to the settlement of successions"—cannot be construed to include a statute which confers jurisdiction on a probate court to enforce the performance of an executory contract to convey land. That is clearly decided by both the supreme court of the United States and the supreme court of Texas. What then, in reference to the particular point before the court, is the source of the power to enforce performance of an executory contract to convey title to land? Whence does it originate? Out of what does it grow? The supreme court of Texas leaves no doubt upon that point. Proceeding, in the case of *Houston* v. *Killough*, Chief Justice STAYTON, delivering the opinion, says:

"In *Booth* v. *Todd*, 8 Tex. 137, it was held that the general grant of probate powers would not confer on county courts the power to decide litigated accounts between the representatives of partners, and it was said that there was perhaps but one case in which litigation on a claim against the deceased is conducted before the probate court, and that is for the enforcement of an executory contract to convey title to lands. The source of this power was not in the general grant of probate jurisdiction, but in the statute which specifically gave it."

Hence it becomes apparent that the source of this power will not be discovered in the general grant of jurisdiction to the probate courts; it is not to be found there, and, if it exists at all, it must be found in the statute which specifically gives it. It must be presumed that the legislature, in passing the act of 1846, had in view this distinction; that they passed the act with the understanding and with the knowledge that the power to enforce the specific performance of contracts to convey lands did not originate in the general grant of jurisdiction to the probate courts as such. If that be true, does the language "repeal all laws and parts of laws in force relative to the duties of probate courts and the settlement of successions" operate to repeal all prior laws, both general and special, prescribing duties of probate courts, etc., or only those general laws relating to the settlement of successions and the general duties of

probate courts as purely courts of probate? If the intention had been to repeal all laws, was not the act of 1841, relating to deceased soldiers' estates, obliterated? That act, which is embodied in articles 1053 and 1054 of Hartley's Digest, passed in 1841, relates to estates of deceased persons, and confers upon the probate courts certain powers and duties in reference to the administration of those estates. In *Duncan* v. *Veal*, 49 Tex. 613, the question was directly presented to the supreme court of this state whether the act of 1846 repealed the act of 1841. Chief Justice MOORE, or, rather, Mr. Associate Justice MOORE, at that time, in holding that the act of 1841 was not repealed, uses this language:

"Evidently to hold the act of January 14, 1841, enacted for the special purpose of protecting the estates of volunteer soldiers from foreign countries who had fallen in battle, or otherwise died in the republic, repealed by the repealing clause of this general act of 1846, organizing probate courts, would do violence to the well-established canons for the construction of special and general laws, and their proper relation and bearing to each other."

That decision is referred to with approval by the supreme court in the late case of *Cattle Co.* v. *Boon*, reported in 73 Tex. 554, 11 S. W. Rep. 544. The supreme court then, as late as the time when the opinion in 73 Tex., 11 S. W. Rep., was rendered, cited with approval the rule announced in the case of *Duncan* v. *Veal*. If the act, then, of 1841 was not repealed, the question arises, why was it not? Mr. Justice MOORE replies that, under the well-recognized canons of construction, the act of 1846 could not be held to repeal it. The act of 1846 was "to organize probate courts," and in that act the general duties of the court and of administrators and executors were prescribed; it was a law general in its nature. The act of 1841, while a general law, was special in its character, and the court evidently held that a law general in its nature, prescribing the general duties of probate courts, would not be held to repeal a statute prescribing special duties in certain cases. See, also, *Ellis* v. *Batts*, 26 Tex. 708. If we look to the act of 1841, we find that it has reference to estates of deceased persons; there can be no escape from that conclusion. We find, also, that it prescribes the duties of the court. Now, the language of the repealing clause of the act of 1846, as I have already said, provides for the repeal of "all laws and parts of laws heretofore in force relative to the duties of probate courts and the settlement of successions." It would seem that the act of 1841 was embraced within that provision, but, under the accepted canons of construction, the supreme court of this state has held otherwise; that the act was not affected, but was in force after the act of 1846 was passed.

What is the act of 1844? We have seen, and it has been repeatedly held by the supreme court in the authorities referred to by counsel, that the probate courts had no jurisdiction to enforce the specific performance of a contract to convey title to land, until the act of 1844 was passed. We have seen that the general grant of jurisdiction to the probate courts, as such courts, did not include the power to enforce the performance of such a contract. Then, the act of 1844 was what? By its caption it was an act "to define and fix the practice of probate courts in certain

cases." It was an act to confer jurisdiction upon the probate courts in cases, among others, in which they, before that time, had no jurisdiction; it was a new law, originating a special jurisdiction, conferring special powers and special duties.

The act of 1846, as has been shown, did not repeal all laws relating to the duties of probate courts and the settlement of successions, and, as I have said, the law of 1841 embraced both of these subjects. What, then, did the legislature mean, in employing the words of the repealing act of 1846, "all laws and parts of laws heretofore in force relative to the duties of probate courts?" The meaning was to repeal all general laws relative to the settlement of successions, and all such laws relative to the general powers and duties of the probate courts as courts of probate. The intention was not to repeal a statute prescribing duties in special cases, touching the settlement of successions, as in effect held in *Duncan* v. *Veal*, nor a statute which conferred jurisdiction in special cases, where such jurisdiction was not embraced in the general grant of jurisdiction to probate courts. As has been seen, the power to enforce performance of an executory contract to convey title to land was not included in the general grant of powers and jurisdiction of the probate court, and the repealing clause, therefore, of the act of 1846 did not affect section 2 of the act of 1844. As indicative of the legislative intent, it may be pertinent to add that the repealing clause of the act of 1846 employs the words used in the caption of the act of 1840, thus evidencing the purpose to repeal that act and statutes of a similar nature. But no reference is made to the act of 1844, nor to the jurisdiction conferred by its second section. It follows from what has been said that the second section was in force in 1847, when the order of the probate court of Houston county was passed.

In this connection I go one step further, and I trust that counsel will not misunderstand the court in what it will now say. The act of 1844, if not repealed by the act of 1846, clearly conferred upon the probate court the power to make the order complained of; that I believe is admitted, or, at least, is not denied, by counsel on either side. There then is plainly the existence of a special power and jurisdiction affirmatively granted by a general statute. Now, if a fair doubt existed in my mind as to the true construction of the repealing clause of the act of 1846, such doubt, in my judgment, after the lapse of 45 years, should be resolved in favor of the jurisdiction. I do not say that jurisdiction will be presumed. That is not the law; I do not so hold. What I do say is simply this: That where jurisdiction in special cases is clearly granted by an act duly passed by the legislature, and, after 45 years have intervened, the jurisdiction is challenged, on the ground that it was withdrawn by a subsequent repealing statute, if a doubt fairly exists as to the proper construction which the repealing statute should receive, such a doubt should be given in favor of sustaining rather than in defeating the jurisdiction.

There are other important and interesting questions in this case raised and discussed by counsel on both sides with great ability. Whether,

under the act of 1846, particularly the thirteenth section of that act, the probate court of Houston county had the power to approve a land claim, and order the execution of a deed by the administrator, is a question of much nicety. It is not essential to the disposition of this case for the court to pass directly upon that question. It will, however, be observed that the section last mentioned authorizes probate courts to approve claims not only for money and personal property, but also for land. Would it not seem that, having the power to approve a claim for land, the court, by necessary implication, had all necessary power to render effective and operative the power expressly granted? If that be true, then the court had the power to make the decree, and order the execution of the deed. But a decision of that question is deemed unnecessary, and is not passed upon.

My conclusion is that the probate court of Houston county had jurisdiction to pass the order in question, and that the administrator had the power to execute the deed conveying 1,000 acres of the Grigsby league and labor. If there existed any irregularities in the proceedings affecting either the order of the court or subsequent execution of the deed, under thoroughly established principles, they could not be inquired into in a collateral proceeding of this kind, and they may well be deemed healed and cured by the half century which has since elapsed. The objections of the plaintiff will be overruled, and exceptions noted.

The record being admitted in evidence, the court instructed the jury to return a verdict for the defendants. Motion for new trial presented, argued, and refused.

UNITED STATES v. FITZSIMMONS *et al.*

(*Circuit Court, N. D. Georgia.* March 28, 1892.)

1. UNITED STATES MARSHALS—LIABILITY ON BOND—FEES—INTEREST.
   In a suit upon the official bond of a United States marshal for sums due on his fee and emolument account, interest should be allowed from the date when a balance was stated against him by the treasury officials, although the amount found to be due is less than this balance.
2. SAME—ALLOWANCES TO DEPUTIES—ACCOUNTS—WAIVER.
   Rev. St. U. S. § 841, providing that the allowances to any deputy marshal shall in no case exceed three fourths of the fees and emoluments received for the services rendered by him, does not make it unlawful for the marshal to allow three fourths of the gross fees, without first deducting the expenses incurred in earning the fees; and where during his whole term of office a marshal adopted this basis of settlement, both with his deputies and with the treasury department, and no objection was made thereto, he cannot, in an action on his bond, claim that the settlement should have been on the basis of three fourths of the net fees.
3. SAME—FEES—EXPENSES.
   A marshal is not entitled to the actual expenses incurred in earning a fee, in addition to the statutory allowance.
4. SAME.
   There is no law or practice entitling a deputy marshal to all the fees earned in individual cases.
5. SAME—EMPLOYMENT OF AUCTIONEER.
   A marshal has no authority to employ an auctioneer to sell property and is not entitled to any allowance for the expense thereof.