

need time to obtain proof to support such contest. No such suggestion was then made by them. No suggestion is yet made that the citizenship of the parties is not, in fact, as is alleged in the amendment. Appellants stand on the proposition that after the judge had announced what his decision was, and what the judgment of the court would be, (for it was not yet entered,) the court could not, under any circumstances, permit the defect in the record to be cured without awarding a new trial. Without reviewing the authorities (which are very numerous) on the subject of the trial judge's discretion to allow amendments of substance, pending a trial, without vacating the submission, we are of opinion that the provision of the statute which says any court of the United States "may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe," is broad enough to warrant the action of the trial judge in allowing the amendment on terms, and proceeding to judgment. This discretion is a legal discretion, and subject to review. The amendment offered was one of vital substance. The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it is most generally not contested,—is virtually admitted when properly pleaded. It is, however, necessary to be proved, unless so virtually admitted, when it is put in issue by proper pleading. It is not now material to inquire what character or amount of proof on that subject is prima facie sufficient. The pleading having been sworn to by the plaintiff's counsel, who was still present in court to be cross-examined if the defendants so desired, and nothing then shown by the defendants, or yet shown by them, to indicate that the discretion was improvidently exercised, we are of opinion that this assignment of error is not well taken. There being, therefore, no error in the judgment which the plaintiffs in error are in a position to urge, the judgment should be affirmed. The writ of error sued out by the plaintiff below, having been consolidated with this case in this court, and the two writs, and the returns thereon, having been treated as one case and one record, is disposed of by our judgment herein. Affirmed.

NEWMAN v. CROWLS et al.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 148.

1. JUDGMENTS—SERVICE OF PROCESS.

Though the judgment of a court of general jurisdiction recites that the defendants were duly cited by publication, as required by law, the presumption in favor of the judgment, thence arising, cannot prevail against the return of the sheriff and the actual publication, where they appear in the record and are insufficient.

2. ESCHEAT—PUBLICATION OF CITATION.

Sayles' St. Tex. art. 1770, provides that all lands of which the owner may die seised, without any devise thereof, and having no heirs, shall escheat to the state. Article 1771 authorizes proceedings to enforce such escheat on behalf of the state; and article 1773, as amended in 1885, pro-

vides that, in such proceedings, "citation shall be published as required in other civil suits." *Held* that, as the object of these proceedings is to determine judicially that the owner died without heirs, the citation must be published for eight weeks, as required by article 1236, relating to claims against property which has vested in unknown heirs.

3. SAME—AMENDMENT OF STATUTE.

Such article 1773, before the amendment of 1885, required that the order of court to "all persons interested in the estate to appear and answer" should be published as required by article 1236. *Held*, that the omission of specific reference to this article in article 1773, as amended, does not warrant the presumption of a legislative intent that publication according to the requirements of that section should no longer be necessary.

4. SAME—JUDGMENT—VARIANCE.

The petition in escheat proceedings alleged that one C. died seised of the land in question, having no heirs, and the citation to unknown heirs, required by the statute, followed the petition. On the hearing the evidence showed that the land was patented to the heirs of C., who died in the military service of the republic of Texas, on a land certificate issued to them 16 years after C.'s death; and the judgment, reciting these facts, and the fact that such heirs had exercised no active ownership within seven years, purported to direct the escheat, and to vest the land in the state. *Held*, that this judgment did not bind such heirs.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action of trespass to try title, brought by William O. Crowls and others against J. F. Newman. There was a judgment for plaintiffs on a verdict directed by the court, and defendant brings error.

This suit was instituted in the United States circuit court for the northern district of Texas by defendants in error, citizens of the state of Louisiana, to recover from plaintiff in error, a citizen of the state of Texas, 640 acres of land situated in Fisher county, Tex., patented by the state of Texas to the heirs of George W. Crowls on June 9, 1890, by virtue of a land certificate issued by the adjutant general of the state of Texas to the heirs of George W. Crowls on February 17, 1852, in accordance with an act of the legislature of Texas approved February 10, 1852. The action was brought in the ordinary form of trespass to try title, as provided by the laws of Texas, plaintiff in error answering by plea of not guilty. Defendants in error (plaintiffs below) proved that they were the only heirs of George W. Crowls, deceased; that he died a soldier in the army of the republic of Texas on November 6, 1836; that a bounty certificate of 640 acres of land was issued to them, as the heirs of George W. Crowls, by the adjutant general of the state of Texas, on February 17, 1852, in accordance with an act of the legislature of Texas approved February 10, 1852, which granted and secured to the heirs of George W. Crowls, deceased, 640 acres of land, "to which they are entitled by virtue of the services and death of said Geo. W. Crowls in the army of the republic of Texas," and authorized the issuance of a bounty warrant for said 640 acres of land to the heirs of said George W. Crowls; that the land in controversy was located by virtue of said bounty certificate, and was patented on June 9, 1890, to the heirs of George W. Crowls, deceased. Plaintiff in error (defendant below) introduced in evidence, and relied upon, a judgment of the district court of Fisher county, Tex., in the cause of *The State of Texas v. The Heirs of Geo. W. Crowls et al.*, (No. 18,) rendered March 14, 1890, (which was a proceeding to escheat the land in controversy,) an order of sale issued in said cause on May 12, 1890, and a deed to plaintiff in error, of date June 3, 1890, from the sheriff of Fisher county, Tex., reciting the judgment and order of sale above mentioned, alleging the due advertisement and sale of the property in controversy thereunder to plaintiff in error for the sum of \$1,920 cash, and purporting to convey to plaintiff in error all of the estate, right, title, and interest which the heirs of George W. Crowls and other defendants (squatters upon the land) and the state of

Texas had in and to the land in controversy. It was shown that plaintiff in error was the highest and best bidder at said sale; that the land was sold to him for \$1,920 cash, which sum he paid the sheriff on receipt of deed to the land; and that the sheriff paid over to the treasurer of the state of Texas \$1,636.40 of this money, that being the balance left after payment of the costs of the escheat proceeding. Defendants in error then introduced in evidence a duly-certified copy of the transcript of the complete proceedings in the said cause of *The State of Texas v. Heirs of Geo. W. Crowls et al.*, (No. 18,) in the district court of Fisher county, Tex. Said transcript shows, among other things, service by publication, as follows:

"The State of Texas to the Sheriff or any Constable of Fisher County, Greeting: Oaths therefor having been made as required by law, you are hereby commanded that you make publication of this citation in some newspaper published in said county once a week, for four consecutive weeks previous to the return day hereof you summon all persons interested in the estate of Geo. W. Crowls, deceased. Defendants to be and appear before the district court to be holden in and for the aforesaid county of Fisher, at the courthouse thereof, in the town of Roby, on the first Monday in September, 1888, then and there to answer the petition of the state of Texas, by R. C. Crane, county attorney of Fisher county, plaintiff, filed in said court on the 8th day of August, 1888, and numbered on the docket of said court 18, against P. A. Williams, a resident of Taylor county, and J. F. Newman, a resident of Nolan county, and the heirs of the said Geo. W. Crowls, deceased, alleging, in substance, as follows: That in the year 1853 a bounty warrant was issued to the said Crowls by the state of Texas, and said bounty warrant was in said year located by him on 640 acres of land situated in Fisher county, Texas, now known and designated as 'Survey No. 325, Block 16, Abstract No. 19,' lying on the south bank of the Clear Fork of the Brazos river; that no patent was ever issued by the state of Texas to the said Geo. W. Crowls upon said land, or to any one claiming under or through him; that said Crowls has departed this life, and left no heirs, or any one having a legal claim to said land; that said P. A. Williams and J. F. Newman are claimants of said land; and that said Newman is now in possession thereof. Plaintiff asks for judgment vesting title to said land in the state of Texas, and for a writ of possession for said land in behalf of the state of Texas, for costs and general and equitable relief. Herein fail not, but have you then and there before said court this writ, with your return thereon, showing how you have executed the same.

"Issued this 6th day of August, A. D. 1888.

"Witness:

W. S. Rector,

"Clerk District Court, Fisher County.

"Given under my hand and the seal of said court, at office, this 8th day of August, A. D. 1888.

[Seal.] "Attest:

W. S. Rector,

"Clerk District Court of Fisher County."

"Sheriff's Return.

"Received this writ on the 8th day of August, A. D. 1888, at 10 o'clock a. m. of said day; and I executed the same by publishing the same in Fisher County Call, a newspaper published in the county of Fisher, once in each week for four consecutive weeks, previous to the return day thereof. Said publication was made on the 9th, 16th, 23d, and 30th days of August, A. D. 1888, and a printed copy thereof herewith accompanies this return.

"Witness my hand, officially.

C. E. Roy.

"Sheriff Fisher County."

Indorsed as follows: "No. 18. In District Court. The State of Texas v. Heirs of Geo. W. Crowls. Citation by publication. Issued this 8th day of August, 1888. W. S. Rector, Clerk."

Said transcript also shows the judgment of the district court of Fisher county, Tex., in favor of the state of Texas, and against the heirs of George W. Crowls and others, as follows:

"On this day came on to be heard the above styled and numbered cause, and the state of Texas appearing by her county attorney, W. W. Beall, and R. C. Crane and F. Kefer, attorneys for the state of Texas, and it appearing to the court that the heirs of G. W. Crowls, though duly cited as required by law, by making publications in the Fisher County Call, a weekly newspaper published in Fisher county, Texas, of the citation issued herein, prior to the return day of the September term, A. D. 1888, of this court, failed to appear and make answer herein, but wholly made default; and it further appearing to the court that Allen Williams and J. F. Newman, defendants herein, though duly cited by law, failed to appear and make answer in the said cause, but wholly made default; and it further appearing to the court that Mrs. P. A. Williams, a defendant herein, having been duly cited, appeared and made answer herein at the September term, A. D. 1889, of this court, and neither the state of Texas nor either of the defendants herein demanding a jury, the court therefore proceeded to hear the evidence and determine the issue upon the pleadings and evidences in said cause. And it appearing to the court that the only claim of the heirs of G. W. Crowls upon the tract of land herein sued for is by virtue of a certificate issued by the state of Texas to the said heirs in the year A. D. 1853, and that the said certificate was by said heirs located upon the tract of land herein sued for, and situated in Fisher county, Texas, and that no patent has ever been issued from the state of Texas to the said heirs of G. W. Crowls, or to any other party, for said tracts of land, and that the title thereto still remains in the state of Texas, and it further appearing to the court that no act of ownership has been exercised by the said heirs of G. W. Crowls, or any person or persons claiming by, through, or under them, for a period of more than seven years preceding the institution of this suit, and that no lawful claim has been asserted within the said time by any party; and it further appearing to the court that no one of said defendants herein has set up any title to said tract of land, or has offered any evidence of title thereto, though duly cited as before stated; and it further appearing to the court that said tract of land is reasonably worth the sum of at least \$3.00 per acre,—it is therefore the opinion of the court that the law and facts are with the plaintiff, and that he have and recover the tract of land herein sued for and hereinafter described. It is therefore ordered, adjudged, and decreed by the court that the state of Texas do have and recover of the defendants, heirs of G. W. Crowls, J. F. Newman, P. A. Williams, and Allen Williams, all that tract or parcel of land situated in Fisher county, Texas, hereinafter more particularly described by metes and bounds as follows."

The court, on the evidence, instructed the jury to return a verdict for defendants in error for the land in controversy, which was accordingly done, and judgment was rendered in accordance with said verdict.

James W. Brown, for plaintiff in error.

Branch K. Miller and T. W. Gregory, for defendants in error.

Before PARDEE, Circuit Judge, and TOULMIN and BOARMAN, District Judges.

PARDEE, Circuit Judge, (after stating the facts.) The only question to be determined in this court is, whether or not the judgment in the escheat proceeding was binding on the defendant in error, (plaintiff in the court below.) All of the assignments of error raise this question, in one form or another, and need not be recapitulated. It is contended that as the judgment in question was rendered by a court of general jurisdiction, and contains a recital that the heirs of George W. Crowls were duly cited as required by law, by making publications, etc., the same is conclusive and binding on all parties as to the sufficiency of the service by publication on the said heirs, and cannot be inquired into, nor attacked collaterally, in that re-

spect, although the return of the sheriff, and the actual publication had, are shown by the record, and are insufficient. In *Galpin v. Page*, 18 Wall. 350, it was held:

"The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. When the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

In *Settlemier v. Sullivan*, 97 U. S. 444, it was contended that the recital in the entry of the default of the defendant in the case in the state court, that, "although duly served with process, he did not come, but made default," was evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission, but the court held that:

"The recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, —the record being complete,—can only be considered as referring to the former."

We further quote from the same:

"We do not question the doctrine that a court of general jurisdiction, acting within the scope of its authority,—that is, within the boundaries which the law assigns to it with respect to subjects and persons,—is presumed to act rightly, and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But, if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred. If, for example, to give an illustration from the case of *Galpin v. Page*, 18 Wall. 350, it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears, in like manner, that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also."

In *Cheely v. Clayton*, 110 U. S. 701-708, 4 Sup. Ct. 328, it is said:

"The notice and return appearing of record in the proceedings for divorce control the general recital in the decree that due service had been made upon the defendant therein."

The whole subject is reviewed by the supreme court in *Guaranty Trust, etc., Co. v. Green Cove, etc., R. Co.*, 139 U. S. 147-148, 11 Sup. Ct. 512, and *Galpin v. Page*, *Settlemier v. Sullivan*, and *Cheely v. Clayton*, *supra*, are approved. These authorities control the question in this court.

The judgment of the district court of Fisher county, state of Texas, in the escheat proceeding entitled "*State of Texas v. The Heirs of Geo. W. Crowls*," was rendered in a suit which was com-

menced August 8, 1888. The suit was therefore instituted and prosecuted under the escheat law of Texas, as amended March 24, 1885, and as it now exists, (Sayles' St. Tex. p. 560 et seq.) and we quote therefrom the following:

"Title 36. Escheat.

"Article 1770. Estates shall Escheat, When. If any person die seized of any real or possessed of any personal estate without any devise thereof, and having no heirs, or where the owner of any real or personal estate shall be absent for the term of seven years, and is not known to exist, such estate shall escheat to and vest in the state; provided, that where no will is recorded or probated in the county where such property is situated within seven years after the death of the owner it shall be prima facie evidence that there was no will, and where no lawful claim is asserted to, or lawful acts of ownership exercised in such property for the period of seven years, and this has been proved to the satisfaction of the court, it shall be deemed prima facie evidence of the death of the owner and of the failure of heirs, and the court trying the cause may, if such evidence is not rebutted, find therefrom in favor of the state.

"Article 1771. Petition for Escheat Filed by District or County Attorney, When. When the district or county attorney shall be informed or have reason to believe that an executor under the will of any person who has died without heirs and without having devised his estate, has not accepted the trust, and that no administrator with the will annexed has been appointed; or where such attorney shall discover that no letters of administration on the estate of an intestate who has died without heirs have been granted; or where such attorney finds any estate real or personal, in the condition specified in the next preceding article (1770) he shall file a petition in behalf of the state in the district court of the county where such property or any part thereof lies, which petition shall set forth a description of the estate, the name of the person lawfully seized or possessed of the same, the names of the tenants or persons in actual possession, if any, and the names of the persons claiming the estate, if any such are known to claim, and the facts or circumstances in consequence of which such estate is claimed to have escheated, praying for a writ of possession for the same in behalf of the state.

"Article 1772. Citation Issued as in Other Cases. The clerk of the court shall issue citation as in other civil causes for such of the defendants as shall be alleged in the petition to hold possession of or claim such estate, requiring them to appear and answer at the next term of court.

"Article 1773. Citation for Publication Issued, When, etc. The clerk shall also issue a citation, setting forth briefly the contents of the petition for all persons interested in the estate to appear and answer at the next term of court, which citation shall be published as required in other civil suits."

The last article quoted provides for publication of citation for all persons interested in the estate, "as required in other civil suits." When the proceeding to escheat the estate of Crowls was instituted, two articles of the Revised Statutes of Texas prescribed the manner in which citation shall be published in civil suits, as follows:

"Art. 1235. Citation for Non-Resident Defendants, etc. Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to the affiant, the clerk shall issue a citation for the defendant, addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making publication of the citation in some newspaper published in his county, if there be a newspaper published therein, but if not, then in any newspaper published in the judicial district where the suit is pending. But if there be no newspaper published in such judi-

cial district then it shall be published in the nearest district to the district where the suit is pending. Such citation shall be published once in each week for four successive weeks previous to the return day thereof.

"Art. 1236. For Unknown Heirs. Where any property of any kind in this state may have been granted or may have accrued to the heirs, as such, of any deceased person, any party having a claim against them relative to such property, if their names be unknown to him, may bring his action against them, their heirs or legal representatives, describing them as the heirs of such ancestor, naming him; and if the plaintiff, his agent or attorney, shall, at the time of instituting the suit or any time during its progress, make oath that the names of such heirs are unknown to the affiant, the clerk shall issue a citation for such heirs addressed to the sheriff or any constable of the county in which the suit is pending. Such citation shall contain a brief statement of the cause of action and shall command the sheriff or constable to summon the defendant by making publication of the citation in some newspaper of his county, if there be a newspaper published therein, but if not, then in the nearest county where a newspaper is published, once in each week for eight successive weeks previous to the return day of such citation." Sayles' St. Tex. pp. 418, 419.

A comparison of these two articles shows a marked difference between them. Article 1235 prescribes the method for serving a defendant whose name is known; for his name must be known before an oath can be made that he is a nonresident of the state, or that he is absent from the state, or that he is a transient person, or that his residence is unknown to affiant. Article 1236 prescribes a method for serving unknown heirs, and is applicable when property is sought to be affected which may have been granted or may have accrued to the heirs, as such, of any deceased person, and their names are unknown to the plaintiff. In such event, they may be sued as the heirs of such deceased ancestor. Under article 1235, the citation must be published for four weeks, and, under article 1236, for eight weeks; the reason for the distinction being that where parties are known and named the publication is much more likely to attract and call attention than where the parties are unknown, unnamed, and can only be indefinitely described as the heirs of so and so, deceased. In the present case, the citation is directed to the sheriff or any constable of Fisher county, and commands him to summon all persons interested in the estate of George W. Crowls, deceased. It recites that plaintiff has filed a suit against certain persons by name, and the heirs of George W. Crowls, deceased. It further recites, as alleged in the petition, that the said Crowls has departed this life, and left no heirs, or any one having a legal claim to said lands. Article 1770 of the escheat act, supra, shows clearly that the ground for the escheat proceeding is that the last owner died without issue, etc.; that this proceeding is brought to judicially determine that fact; and that the heirs of such deceased owner must be cited, and given an opportunity to contest. It would seem, in the case made, that the article 1235 could not apply, because the names of the heirs are unknown. In fact, the entire proceeding seems to be based on the averment that no such persons exist. And it is to be noted that the service on the heirs of Crowls by publication was not obtained on the ground that they were nonresidents of the state, or absent from the state, or transient persons, or that their residence was unknown. Article 1236 prescribes the method

for publishing citations for unknown heirs when any property of any kind in the state may have been granted, or may have accrued to the heirs, as such, of any deceased person. The record shows that the land in this case was granted to the heirs, as such, of a deceased person, to wit, George W. Crowls. Article 1236 applies when the names of such heirs are unknown, in which event they may be sued as the heirs of such ancestor, naming him. They were sued, in the case in hand, not by name, but as the heirs of George W. Crowls, deceased, and in relation to property which had been granted or accrued to them as heirs of George W. Crowls.

It is argued on behalf of the plaintiff in error that because article 1773, prior to the amendment of 1885, provided that the order of court requiring "all persons interested in the estate to appear and show cause," etc., should be published as required by article 1236, and, when said article was amended, provision was made that a citation shall issue "for all persons interested in the estate to appear and answer at the next term of court, which citation shall be published as required in other civil suits," a legislative intention is to be inferred that the publication under the existing law shall not be under article 1236, but may be for the shorter term provided in article 1235. If the amendments of the escheat law had been restricted solely to article 1773, and with reference to the time of publication of notice summoning all persons interested in the estate to be escheated, there would be strong reason to hold that the legislative intention was to permit publication under article 1235. An examination, however, of the amendments, as made, shows that the purpose of the amendments was to substitute citations as in other civil suits for scire facias and orders of court as to publications, and to enable the clerk to issue the citations in vacation without an order of court. In making these changes, it was natural that the provision with regard to publication of the citations should be (like the citations) "as required in other civil suits;" but from this change of language a legislative intent cannot be inferred that article 1236 was to be ignored in escheat cases, when unknown heirs were to be cited, because, if for no other reason, article 1236 provides the method "required in other civil suits" for service of citation by publication on unknown heirs, when impleaded in reference to the property of their ancestor.

The trial judge ruled that in proceedings under the escheat law in question, and construing article 1773, supra, the publication of the citation, in order to bar unknown heirs, should be made under article 1236, as "required in other civil suits," to reach that class of defendants. In our opinion this ruling was correct.

And we are inclined to the opinion that the ruling that the judgment in the case of State of Texas v. The Heirs of Geo. W. Crowls was no bar to the defendants in the court below can be sustained upon another ground. Article 1773 of the act provides that "the clerk shall issue a citation setting forth briefly the contents of the petition for all persons interested in the estate to appear and answer," etc. By the term "estate" is meant the estate sought to be escheated. Articles 1770 and 1771, supra, show clearly that an

estate is escheated only when the person seised of said estate has died without any devise thereof, and leaving no heirs. The undisputed evidence in this case shows that the certificate or warrant for the land in controversy was issued to the heirs of George W. Crowls in 1852, 16 years after his death, in accordance with a special act of the legislature passed the same year, in which it was recited that the heirs were entitled to it by virtue of the services and death of George W. Crowls in the army of the republic of Texas. George W. Crowls, therefore, did not die seised of any estate in this land, was never in possession of the certificate, or seised of the land itself; and from the time the certificate issued up to the time the land was located, the certificate which evidenced the right to the land, and afterwards the land itself, have been the property of Amanda C. Foster et al., the heirs of George W. Crowls, and plaintiffs in the court below. Now, the petition in the suit in Fisher county seeks the escheat of the estate of George W. Crowls, deceased. It recites that the bounty warrant was issued to the said Crowls by the state of Texas, and was located by him on the land in controversy; that the said Crowls was the last person lawfully seised of said land; and that said Crowls was dead, and left no heirs, etc.; and the citation contains the same recitals. The judgment in the case, however, recites that the certificate was issued to the heirs of George W. Crowls, that it was located by the said heirs on the land in controversy, and that the heirs of George W. Crowls have exercised no active ownership over the land for more than seven years. In other words, the suit and the citation look to the escheat of the estate of George W. Crowls, and make persons interested in the estate of George W. Crowls parties, while the judgment actually rendered escheats the estate of the heirs of George W. Crowls. The plaintiffs in the court below could have had no interest in defending a suit to escheat the estate of George W. Crowls in the land in controversy; and to escheat any other estate, they were not brought into court by any sort of publication or other service of citation. We find no error in the judgment of the circuit court, and it is affirmed, with costs.

TELFENER v. RUSS.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1894.)

No. 183.

1. TEXAS LANDS—RIGHT ACQUIRED BY APPLICATION TO PURCHASE—ASSIGNABILITY.

The right to purchase lands from the state of Texas, which is acquired by making application therefor to the county surveyor, and the acceptance and filing thereof by him, in accordance with the requirements of the statute, (Act Tex. July 14, 1879.) is a valuable right, which may be lawfully assigned. 57 Fed. 973, affirmed.

2. BREACH OF CONTRACT—DAMAGES.

Plaintiff, having made applications, which were accepted and filed by the county surveyor, to purchase certain lands from the state of Texas, (under the act of July 14, 1879,) contracted to sell all his rights therein to defendant, who was to have until November 15, 1882, and no longer, to make the payments. On the same day the parties made another con-

tract, whereby plaintiff, for a new consideration, became bound, in case the sale and transfer were completed as agreed, to make, at his own expense, all surveys, maps, etc., and file them with the county surveyor, and in the general land office of the state, within the 60 days required by the act. Defendant, however, failed to complete the purchase on the date named, or at any subsequent time. *Held*, that the right of plaintiff to damages for the breach of contract became fixed on that date, and it was immaterial whether he made the surveys, etc., according to the second contract, or ever made them at all.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was an action by George W. Russ against Count Joseph Telfener to recover damages for breach of a contract to purchase certain rights acquired by plaintiff in lands belonging to the state of Texas. There was a verdict and judgment for plaintiff, which, on a writ of error, was reversed by the supreme court of the United States, and the case remanded for a new trial. See 12 Sup. Ct. 930. Verdict and judgment have again been rendered in favor of plaintiff, (see 57 Fed. 973, for the court's charge to the jury,) and defendant now brings the case on error to this court.

The following statement of the facts was made by Mr. Justice Field when the case was before the supreme court:

On the 14th of July, 1879, the legislature of Texas passed an act "to provide for the sale of a portion of the unappropriated public lands of the state," and the investment of the proceeds. The following are the sections of the act which bear upon this case: "Sec. 2. That any person, firm, or corporation, desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm, or corporation desires to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated. Sec. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and, within sixty days after said survey, to certify and record a map and field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in the other cases. * * * Sec. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map, and field notes of the land desired to be purchased, it shall be the right of the person, firm, or corporation who has had the same surveyed to pay, or cause to be paid, into the treasury of the state, the purchase money therefor at the rate of fifty cents per acre, and, upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, said commissioner shall issue to said person, firm, or corporation a patent for the tract or tracts of land so conveyed and paid for." "Sec. 7. It shall be the duty of the commissioner of the general land office to give such general and specific instructions to the surveyors in relation to the survey of the public lands under the provisions of this act as may best subserve all interests of this state, and carry into force and effect the intent and purposes of this act. Sec. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void. Sec. 9. Should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the commissioner of the general land office to any other person, firm, or corporation who shall pay into the treasury the purchase money therefor." An amendment of the act in 1881 extended its provisions to unappropriated land in other counties than those originally mentioned. On the 22d of January, 1883, both acts were re-

pealed. While the first of these acts was in force the plaintiff below, the defendant in error here, claimed to have acquired a valuable and transferable interest in a large body of these lands, exceeding in extent a million of acres, and to have sold the lands to the defendant below, Count Joseph Telfener, at 25 cents an acre. To recover damages for breach of this alleged contract, and a supplementary contract of the same date accompanying it, the present action was brought in a state court of Texas. The petition of the plaintiff, the first pleading in the action, alleges that the plaintiff is a resident of Texas, and that the defendant is not a resident of the state, but a transient person then temporarily in the state of New York; that on the 1st day of November the plaintiff was the sole owner of a certain valuable, valid, and transferable interest in the whole of a certain body of land containing, as subsequently ascertained by survey, 1,813 tracts of 640 acres each, being an aggregate of 1,160,320 acres, situated in the county of El Paso, in the state of Texas, and forming part of what is known as the "Pacific Reservation;" and that he had become such owner by complying with the requirements of the act of July 14, 1879, mentioned above, and of the amendatory act of March 11, 1881. The petition then details the mode in which the plaintiff became such owner, namely, that during the month of October, 1882, being a responsible party, and intending to purchase the said body of land which was subject to sale under the terms of the acts mentioned, he applied to the surveyor of the county of El Paso for the purchase and survey of the 1,813 tracts, describing them by metes and bounds as a whole; that he made the application pursuant to the instructions of the commissioner of the general land office of the state to the surveyors of the counties and land districts containing lands subject to sale; that the application was filed and recorded in the office of the surveyor in October, 1882; that, having thus made due application for the purchase and survey of said lands, he was, on the 1st day of November, 1882, about to have them surveyed into tracts of 640 acres each, when the defendant, by his duly-authorized agents, applied to him to purchase his interest in the lands thus acquired; and that thereupon the plaintiff, not yet having paid to the state of Texas the 50 cents per acre to which the state was entitled, and the defendant offering to assume such payment, and desiring simply to contract with the plaintiff for the purchase and assignment of his right to purchase from the state, they entered into the contracts contained in the exhibits annexed, marked "M" and "N," which are as follows:

"Exhibit M.

"The State of Texas, County of Dallas—ss.: This contract and agreement entered into by and between George W. Russ, of Dallas county, Texas, party of the first part, and Count J. Telfener, party of the second part, this first day of November, A. D. 1882, witnesseth as follows: Whereas, said Russ claims to have made application in due form for the purchase of about one million acres of land, more or less, in El Paso county, Texas, from the state of Texas, under and by virtue of an act of the legislature of Texas, approved July 14, 1879, providing for a sale of a portion of the public lands of Texas at 50 cents per acre, and the amendments to said act, said application having been made in October, 1882, and duly filed in the surveyor's office of El Paso county, at Ysleta; and whereas, the said Count Telfener is desirous of purchasing from said Russ all his rights, titles, and interest under and by reason of such application, provided it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the state of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by his said application, and the said Russ has agreed and bound himself, in consideration of said price and sum to be paid to him, to sell, transfer, and assign unto the said Count Telfener all his rights, titles, and interest in said lands acquired by his application and files; In order, then, that the said contract of purchase and sale and assignment may be effected, the said parties agree as follows: The said Count Telfener, for the purpose of ascertaining whether the said application for purchase has been regularly

and properly made as aforesaid, and according to the provisions of said law and the amount of land covered by or embraced within such application, shall proceed at once and inspect the records and files of the surveyor's office of El Paso county, at Ysleta, and the map of said county in said office. If it shall be there shown that the said application and files thereof have been regularly and properly made, in such manner as under the terms of said law would entitle the said Russ to become the purchaser of said lands from the state of Texas, the said parties shall ascertain by reference to said application and files and the maps of said county in said surveyor's office, and in the office of the commissioner of the general land office of the state at Austin, the number of acres approximately embraced in or covered by said application and files. The number of acres being ascertained by approximation in manner aforesaid, and said application having been found good and regular as aforesaid, the said Count Telfener agrees to pay to the said Russ in cash, in the city of Dallas or the city of Austin, Texas, as said Russ shall prefer, ninety per centum of the said purchase price so agreed upon as aforesaid for the number of acres so ascertained approximately as aforesaid; and the said Russ agrees and binds himself that upon such payment being made he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary, conveying, transferring, and assigning unto the said Count Telfener all and singular the rights, titles, and interests that the said Russ now has or may be entitled to in and to said lands, by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same, or any part thereof, by, through, or under him. It is understood, however, that the said inspection, ascertainment of regularity of files, and of the amount of land by approximation shall be completed on or before the 15th day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid. After the transfer and assignment as aforesaid shall have been made by the said Russ, the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted, and the field notes thereof returned and filed according to the provisions of said law. Upon the completion of said surveys and field notes, the number of acres embraced in said lands so sold and transferred shall be ascertained, and, if the said sum so paid as aforesaid by said Count Telfener shall not amount to the full purchase price of twenty-five cents per acre for each and every acre of said land, the deficit shall be paid at once in cash to said Russ by the said Count Telfener in the city of Dallas, Texas, or at Austin, Texas, as the said Russ may prefer.

"Witness our hands this 1st day of November, 1882.

"Geo. W. Russ.

"J. Telfener, by C. Baccarisse, Agt.

"Witness:

"Chas. Fred. Tucker.

"Wm. McGrain."

"Exhibit N.

"This contract and agreement entered into this 1st day of November, 1882, by and between Count J. Telfener and G. W. Russ, witnesseth as follows: Whereas, the said parties have this day entered into a contract providing for the sale and transfer by the said Russ to the said Count Telfener of all the right, title, and interest of the said Russ in a certain tract of about one million acres of land in El Paso county, Texas, for the purchase of which the said Russ has made application under and by virtue of the act of the legislature of Texas approved July 14, 1879, known as the '50-Cent Act;' and whereas, if said sale and transfer shall be made as provided for by said contract, it will be necessary to complete the surveys of said land, and file the field notes and maps thereof in the surveyor's office of El Paso county, Texas, and in the general land office at Austin, within the time required by the said law: Now, therefore, it is agreed by the said Russ that if the sale and transfer shall be made under the said contract as aforesaid, he will, at his own proper cost and expense, make all the surveys, field notes, and maps of the said lands, and file them in the office of the surveyor of El Paso county, and

in the general land office of the state, at Austin, in the manner and within the time required by the provisions of the said law, and that he will pay all the fees required to be paid for such patents as shall be issued by the commissioner of the general land office for said lands to said Count Telfener, his heirs or assigns, the said surveys, field notes, and maps to be correct; and in consideration of said services and payments to be rendered and paid by said Russ the said Count Telfener agrees and binds himself to pay to said Russ in cash, at the city of Dallas or Austin, Texas, the sum of five (5) cents per acre for each and every acre so surveyed, platted, and returned by him as aforesaid, said payment to be made as follows, viz.: Three (3) cents per acre when the survey and field notes shall be completed, and one (1) cent per acre when the field notes shall be filed in the land office, and the balance when the patents shall issue.

"Witness our hands this 1st day of November, 1882.

"Geo. W. Russ.

"J. Telfener, by C. Baccarisse, Agt."

The petition alleges that by the contracts set forth the plaintiff sold and agreed to assign to the defendant, and the defendant purchased and agreed to accept from the plaintiff, at the price of 25 cents an acre, a conveyance of plaintiff's application to purchase of the state 1,813 tracts of land, being part of the Pacific reservation, and that at the time the plaintiff was able and authorized to make the contracts, and to execute and deliver a proper and valid assignment and transfer of his said application, and of all his rights, titles, and interests thereunder, to the defendant. The petition also contains various allegations as to arrangements made by the parties for ascertaining whether or not the application of the plaintiff for the purchase of the lands had been regularly and properly made, and according to the provisions of the laws of Texas, and, among others, that such conformity being shown as would entitle the plaintiff to become the purchaser, the defendant agreed to pay him 90 per cent. of the purchase price stipulated. It also alleges the readiness of the plaintiff to fully comply with the contract, and the failure of the defendant in all things to comply with the same on his part, to the damage of the plaintiff of \$400,000. The plaintiff, therefore, prayed judgment for the sum of 25 cents per acre alleged to be due to him for said 1,160,320 acres, and also for the sum of \$58,016, alleged to be due him on the supplementary contract contained in Exhibit N, together with legal interest on both sums, and for such further judgment and decree as on the hearing might seem equitable and just. The defendant appeared to the action, and for answer said—First, that the petition was insufficient in law, wherefore he prayed judgment; second, that he denied all and singular the allegations of the petition; and, third, that he denied that he executed, by himself or agent, the instruments, or either of them, annexed to the petition. The case was subsequently, on application of the defendant, removed from the state court to the circuit court of the United States for the western district of Texas, and there the defendant had leave to file an amended answer, which averred (1) that the petition was insufficient in law to require him to answer it, upon which the judgment of the court was prayed; (2) that the so-called Pacific reservation was not subject to sale by the state of Texas; and (3) that if Baccarisse, mentioned in the petition as the agent of the defendant, ever had any authority to negotiate in regard to the purchase of lands in Texas, it was merely as an employe under one Westcott, and his employment was merely to inquire and ascertain whether options or conditional contracts could be obtained by which parties would agree to sell lands in that state subject to the inspection and approval of an expert or inspector sent out by a London syndicate for that purpose, such contract not to be final and binding unless ratified by the defendant after the approval of the expert; that the defendant never knew, until shortly before the present suit was instituted, that Baccarisse had attempted to execute any contract, as set up in the petition; and that he never authorized him to make any contracts, nor ever approved or ratified any made by him. This answer was again amended, by leave of the court, by the addition of a further defense, in which the defendant averred that if any such contract or

contracts as are referred to and exhibited with the petition were entered into by his authority or ratified by him, which is denied, the same were without any consideration, or, if there was any valid consideration therefor, the same failed in this: that the law which permitted the purchase of the lands was repealed before the steps required thereby to obtain title, or any vested interest therein, could have been or were taken, and by reason thereof all right, if any, which defendant acquired or could have acquired under the contracts were lost to him.

J. L. Peeler, for plaintiff in error.

Charles Fred. Tucker, Clarence H. Miller, and Franz Fizet, (Hancock & Shelley, of counsel,) for defendant in error.

Before PARDEE, Circuit Judge, and TOULMIN, District Judge.

PARDEE, Circuit Judge. This case has been once before the supreme court of the United States, and is reported in 145 U. S. 522, 12 Sup. Ct. 930. That report contains a full statement of the general merits and pleadings in the case. In the supreme court, two questions were presented—First, whether the plaintiff below acquired any assignable interest in the real property described in the contract upon which the action was brought; and, second, assuming that he had an assignable interest, whether the rule for the measure of damages for breach of the contract for such interest by the defendant was correctly stated to the jury by the court. The first question was discussed, but not decided. The court, however, intimated “that if a right to purchase land, for however short a period, is vested in one, it is a valuable right, and is in that sense property, and, in the absence of express prohibition, would be therefore assignable.” The case was reversed and remanded because of error in the charge of the trial court as to the measure of damages. On the second trial, there was another verdict for the plaintiff in the court below, and the case is brought here for review on several assignments of error, which will be considered in order.

The first assignment of error relates to permitting the plaintiff to offer in evidence and read to the jury, over defendant's objection, certain telegrams from one C. K. Westcott to one C. Baccarisse in regard to executing the contract between plaintiff and defendant, sued on; and the second assignment of error complains of the charge to the jury, as follows:

“If, from consideration of the evidence, you conclude that Baccarisse had authority, direct from the defendant, to execute the contract in his behalf, then it would be binding upon the defendant. It would also be binding upon the defendant if Westcott, with authority from, and knowledge and consent of, defendant, empowered Baccarisse to execute it. If you find from the evidence that Baccarisse had authority from the defendant, or from Westcott, with the defendant's assent, approval, and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the legislature of 1879, by filing upon them and having the same surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created.”

The contract sued on purported to have been executed on the part of the plaintiff in error by one C. Baccarisse, agent. The amended answer denies the authority of C. Baccarisse as agent, but impliedly admits the agency of C. K. Westcott; so that the question of agency

was substantially raised by the pleadings, and the evidence tending to support or disprove the agency of either Baccarisse or Westcott could work no surprise. The bill of exceptions taken to the admission of the evidence complained of, and to the charge of the trial court in relation to such evidence, contains no statement of the facts otherwise proved, or attempted to be proved, in relation to agency, so as to enable this court to determine whether the evidence objected to was or was not admissible, or whether the charge of the court was relevant. The objection assigned to the admission of the evidence and to the charge of the court is that the plaintiff did not allege in his pleadings that Westcott was the defendant's agent, or that the said Westcott was authorized to empower the said Baccarisse to make the contract sued on. As we have seen, the question of agency was raised by the pleadings, so far as to fully inform each party that the lawful agency of both Baccarisse and Westcott would be an issue in the case. The charge of the court implies that evidence had been offered tending to show that Westcott had authority as agent of the plaintiff in error to empower Baccarisse, and that there was also evidence tending to show that Baccarisse had authority direct from the plaintiff in error himself. In either case, the evidence objected to was admissible, and the charge complained of was proper. As the case is presented to us under the bill of exceptions, however, we are unable to determine the admissibility of the one, or the propriety of the other.

The third assignment of error is the refusal of the trial court to charge the jury as follows:

"The court instructs the jury that the 'right, title, and interest' of plaintiff, in his application and files on lands, and which he contracted to sell, was not a vested right on the 1st day of November, 1882, in or to any lands surveyed after that date. The acceptance by the surveyor of the plaintiff's application for land invested plaintiff with no right that he could sell, and for such sections of land surveyed after said November 1, 1882, you will not consider, or include in the measure of damages."

The evidence relating to this matter shows that the plaintiff had made application, in two instruments of writing, for the survey of 1,813 sections of land described in his petition, which was addressed to, and the applications filed by, the county surveyor of El Paso county, on October 4 and 5, 1882, respectively. It shows, also, that the surveys of said land, for which said Russ had made application, were made at and prior to the time of the execution of the contract sued on, saving and excepting 98 sections, of 640 acres each, surveys of which were made between November 1 and November 9, 1882. These surveys were filed in the general land office on the 8th day of January, 1883. The instrument executed between the plaintiff and the defendant November 1, 1882, was an executory contract, by which the plaintiff, for and in consideration of a sum of money promised to be paid by the defendant, agreed on the 15th day of November, 1882, to transfer and assign to defendant all his right, title, and interest in and to the land in question, acquired by virtue of plaintiff's application. This contract was a valid and binding contract, at the time it was entered into, unless it was prohibited by law or public policy, which is not con-

tended. Under this state of the law and of the evidence, the instruction asked for did not present the law of the case, and, if technically correct, as a general proposition, was calculated to mislead, and was therefore properly refused. The actual charge of the court, given in this regard, is as follows:

"You are further instructed that the right to purchase the lands mentioned, which right the plaintiff acquired by virtue of his applications, as set forth in the contract and shown by the evidence, was a valuable right, and one which could be lawfully assigned."

And it seems to have correctly presented the law of the case.

The fourth assignment of error complains of the refusal of the trial court to charge the jury as follows:

"You are instructed that the law required the field notes of the land to be returned to and filed in the general land office within sixty days after the same was surveyed. The evidence shows that the field notes of only twenty-four sections of land were returned to and filed in the general land office within said sixty days. Therefore, the court charges you that you can only consider plaintiff's right in twenty-four sections of land."

This assignment, relating to the filing in the general land office of the surveys made under the application of the plaintiff in the court below, may be disposed of with the fifth assignment of error, which relates to a question as to whether the surveys made under the plaintiff's application, and returned to and filed in the general land office, were actual surveys on the ground, or were "chimney-corner" or office surveys. In the view that we take of the case, it is wholly immaterial whether the surveys made under the application of the plaintiff, and returned to the general land office, were made and returned within 60 days after the date of the survey, or were returned at all, and also whether the surveys made under the said application were actually made on the ground, or were office surveys.

With regard to the return of the surveys to the general land office, with the field notes, within 60 days after the date of the survey, a reference to the law will show that the duty of making such return devolved, not upon the applicant, but upon the surveyor, and that the failure to make such return within the time, on the part of the surveyor, is not a reason for forfeiture, under the terms of the act. The ninth section of the act is the only section of the same which provides for the forfeiture of the rights secured by the application, and that provision is that should any applicant for the purchase of public land fail, refuse, or neglect to pay for the same, at the rate of 50 cents per acre, within the time prescribed in section 5 of the act, he shall forfeit all rights thereto, and he shall not be allowed, thereafter, to purchase the same. But, be this as it may, the contract sued on is an agreement to transfer from Russ to Telfener, all and singular, the rights, title, and interest that the said Russ now has or may be entitled to in and to said lands, by reason of the application theretofore made by him to purchase the same. There was no agreement whatever that any actual surveys had been made under such application, or that, if such actual surveys had been made, he (Russ) would cause them to be returned

and filed in the general land office at any time, or in any manner whatever. The contract made the same day between the same parties provided that Russ, at his own proper cost and expense, should make all the surveys, field notes, and maps of the said lands, and file them in the office of the surveyor of El Paso county, and in the general land office of the city of Austin, Tex., in the manner and within the time required by the provisions of said law, but this only in case the sale and transfer should be made under the contract first mentioned at the time agreed on, to wit, November 15, 1882.

As it is conceded that Telfener made default under the first-mentioned contract on the 15th of November, 1882, and that the sale and transfer under said contract was never carried out, the second-mentioned contract became wholly inoperative and irrelevant; and the rights of the plaintiff became fixed, definite, and certain, on the 15th of November, 1882, at the time defendant, Telfener, made default. Under these circumstances, we fail to perceive any obligation resting upon Russ to either complete the surveys, or file the same in the general land office. Whatever was done by Russ after the 15th of November to perfect the surveys and file the same was done at his own cost and at his own risk, and could in no wise affect the plaintiff in error, Telfener, because the rule for damages in the case was, as declared by the supreme court in *Telfener v. Russ*, supra, as follows:

"On the 15th of November, he [Russ] possessed all the right to the land which he ever possessed, and, assuming that the defendant then failed to make the payment which he had agreed to make, all the damage suffered by the plaintiff was the difference between the value of the right, as stipulated to be paid, and the amount which could then have been obtained on its sale."

The sixth assignment of error is that the court erred in overruling the defendant's motion for a new trial, and in not setting aside the verdict rendered and granting a new trial. It is well settled that a refusal to grant a new trial cannot be assigned as error. On the record, as presented to us, we find no reversible error, and therefore we are compelled to affirm the judgment.

MANHATTAN LIFE INS. CO. v. P. J. WILLIS & BRO. et al

(Circuit Court of Appeals, Fifth Circuit. January 23, 1894.)

No. 172.

1. PARTIES—PLEADING—WAIVER OF OBJECTIONS.

Where, in a suit on a life insurance policy by an assignee holding it as collateral security, the administrator of the assured is made a defendant, but in a petition for removal to the federal court he aligns himself on the side of plaintiff, and becomes an actor against the insurance company, the latter, if it desires him to abandon his position as defendant, and assume that of plaintiff, and plead specially as such, must make the objection before going to trial on the merits, as otherwise it will be waived.

2. PLEADING AND PROOF—VARIANCE—DESCRIPTION OF INSURANCE POLICY.

It is sufficient to describe generally a policy sued on as a policy of insurance covenanting to pay to the assured, his executors, etc., a specified