Co. v. Bennewitz, 28 Minn. 62, 9 N. W. 80; Bank v. Pfeiffer, 108 N. Y. 242, 252, 15 N. E. 311. Moreover, assuming, but not deciding, that the contract in suit falls within the provisions of section 27 of the Code, and that good pleading would require that the plaintiff should aver the presentation to the trustees of the petition required by that section before they entered into the contract, the defect was amendable, and after verdict and judgment the appellate court will treat it as amended. Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158; Elliott's App. Proc. §§ 471, 473, 640.

After answer filed, an objection that the complaint does not state facts sufficient to constitute a cause of action is good only when there is a total failure to allege the substance or groundwork of a good cause of action, and is not good when the allegations are simply incomplete, indefinite, or statements or conclusions of law. Id.; Laithe v. McDonald, 7 Kan. 261; Glaspie v. Keator, 5 C. C. A. 474, 56 Fed. 203. This rule is in entire accordance with the common-law rule on the subject of aider by verdict. By that rule, where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict. Jackson v. Pesked, 1 Maule & S. 234; 1 Saund. Pl. & Ev. 228; Steph. Pl. 148.

The remaining assignments of error relate to the ruling of the court in admitting and rejecting evidence. A separate statement and consideration of these exceptions is not necessary, as none of them is of any general importance. They have all been examined very carefully, and we are satisfied that none of them has any merit. The evidence admitted or excluded by the rulings was too unimportant and trivial to have had any possible influence upon the verdict, and, if the ruling in any instance was technically erroneous, it was an error which worked no prejudice. The judgment of the circuit court is affirmed.

BELL et al. v. ATLANTIC & P. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. September 10, 1894.)

No. 377.

RAILROAD COMPANY—RIGHT OF WAY—STATIONS IN CHEROKEE NATION.

The treaty between the United States and the Cherokee Nation of July 19, 1866 (14 Stat. 799), art. 11, grants to any corporation authorized by congress to build a railroad north and south, and east and west, through the Nation, a right of way not exceeding 200 feet wide, except at stations, etc., where "more may be indispensable to the full enjoyment of the franchise herein granted, and then only 200 additional feet shall be taken, and only for such length as may be necessary." By the act of the national council of the Cherokee Nation of December 14, 1870, there was reserved to the Nation at every railroad station one mile square, to include such station, for town sites, to be located by commissioners, whose duty it should be also to sell the lots, and report to the principal chief the locations, surveys, and sales of lots, etc. *Held*, that where such commissioners,

in 1871, surveyed and laid off a town, pursuant to such act, and set off to a railroad company authorized by congress to build through the Nation a strip of land in the town 400 feet wide, the company was entitled to the whole of such strip, as against a citizen of the Nation, or any other person entering thereon after the passage of the act reserving the town site to the use of the Nation, and a part of it not actually occupied or needed for present use by the company was not subject to appropriation by a citizen of the Nation as part of the public domain thereof.

In Error to the United States Court in the Indian Territory.

This was an action by the Atlantic & Pacific Railroad Company and the St. Louis & San Francisco Railway Company against L. B. Bell and H. H. Trott to recover possession of certain real estate. There was a judgment for plaintiffs, and defendants bring error.

S. S. Fears and W. T. Hutchings, for plaintiffs in error.

L. F. Parker (E. D. Kenna, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the United States court for the first division of the Indian Territory by the defendants in error, the Atlantic & Pacific Railroad Company and the St. Louis & San Francisco Railway Company, to recover the possession of a small parcel of ground, particularly described in the complaint, with the improvements thereon, situated in Vinita, Cherokee Nation, Indian Territory, the plaintiffs alleging that the land claimed constituted a part of the right of way of the plaintiff the Atlantic & Pacific Railroad Company. There was judgment for the plaintiffs in the lower court, and the defendants sued out this writ of error. It is assigned for error that the court refused to instruct the jury to return a verdict for the defendants, and instructed them to return a verdict for the plaintiffs.

Article 11 of the treaty between the United States and the Cherokee Nation of July 19, 1866 (14 Stat. 799), provides that:

"The Cherokee Nation hereby grant a right of way not exceeding two hundred feet wide, except at stations, switches, water-stations, or crossing of rivers, where more may be indispensable to the full enjoyment of the franchise herein granted, and then only two hundred additional feet shall be taken, and only for such length as may be absolutely necessary, through all their lands, to any company or corporation which shall be duly authorized by congress to construct a railroad from any point north to any point south, and from any point east to any point west of, and which may pass through the Cherokee Nation. Said company or corporation, and their employees and laborers, while constructing and repairing the same, and in operating said road or roads, including all necessary agents on the line, at stations, switches, water-tanks, and all others necessary to the successful operation of a railroad, shall be protected in the discharge of their duties, and at all times subject to the Indian intercourse laws, now or which may hereafter be enacted and be in force in the Cherokee Nation."

The plaintiff the Atlantic & Pacific Railroad Company was incorporated by act of congress of July 27, 1866 (14 Stat. 292), and authorized to construct a railroad through the Cherokee Nation upon a line and in a direction that entitled it to the benefits of the provisions of article 11 of the treaty above quoted. The road was constructed through the Nation, and the parties have filed a stipula-

tion to the effect that the plaintiff the St. Louis & San Francisco Railway Company was operating the road for the Atlantic & Pacific Railroad Company, and that the two companies were jointly entitled to the possession of all the property of the Atlantic & Pacific Railroad Company in the Indian Territory. By an act of the national council of the Cherokee Nation, approved December 14, 1870, there was "reserved to the Cherokee Nation at each and every station along the line of any railroad through the lands of the Cherokee Nation one mile square, to include such station, in such manner as may be deemed advisable," for town sites. Provision was made for the appointment of three commissioners, "whose duty it shall be to locate and survey said town sites and sell the lots thereof * * * and report to the principal chief, the locations, surveys and sales of lots" on the 1st day of October of each year. Under this act, three commissioners were appointed in 1871, and proceeded to locate and lay off the towns at the railroad stations. Among the towns so surveyed and laid off was Downingville, now called Vinita. The Atlantic & Pacific Railroad Company had constructed its road to and through this place where it crossed the Missouri, Kansas & Texas Railway, the north and south railroad constructed under the treaty. The commissioners located and surveyed the mile square at Vinita station, and laid it off into lots, blocks, streets, alleys, parks, and railroad rights of way. They made a plat of the town as laid out, which, together with their report, they filed with the principal chief of the Nation, as required by law, and from that time this plat has been accepted as an official plat of the town by the Nation and the public. The Nation sold the lots in the town, and the purchasers bought them according to this plat, and in reliance upon it. It has become a muniment of title to every property holder in the town. This plat shows that the commissioners surveyed and set off to the Atlantic & Pacific Railroad Company a strip of land 400 feet in width through that portion of the town lying west of the Missouri, Kansas & Texas Railroad; 100 feet of this strip being on the north side, and the remaining 300 feet on the south side, of the railroad track. The testimony shows that this strip of land was surveyed and set off by the commissioners to the railroad company, at its request, for right of way, depot grounds, side tracks, stock yards, and other railroad purposes, under the provisions of the treaty of 1866. Upon these facts, the plaintiffs below were clearly entitled to the full and exclusive possession and use of this strip of land as against a citizen of the nation or any other person entering thereon, after the passage of the act reserving the town site to the use of the Nation, and after the survey and dedication by the commissioners of the right of way to the railroad company.

The plaintiffs in error assert that, under the laws of the Nation, a citizen has the right to occupy any part of the public domain of the Nation not already taken up by another citizen; and that as the parcel of land in controversy was not actually occupied by the tracks or other structures of the railroad company, and as it was, in their opinion, not necessary for such purposes, they had the right to appropriate it to their own use. But the land had been previously dedi-

cated and appropriated under the treaty and by the act of the council to the use of the railroad company. The fee of lands in the Cherokee Nation is in the Nation. Whatever right a citizen has to occupy any particular parcel of the public lands of the Nation he must acquire under and in pursuance of the laws of the Nation, and not in defiance of them. He cannot enter upon land previously dedicated or appropriated to some other person or to some specific use. By act of the national council, this mile square was segregated from the public domain of the Nation, and reserved to the Nation for a special use, and to be disposed of in a particular manner. It was believed the land in proximity to the railroad stations would have a special value for town sites. A mile square at each station was therefore reserved to the Nation to be laid out in lots and blocks, not to be settled upon by the first comer, as is the case with the public domain generally, but the lots to be sold to the highest bidder, and the purchase money paid into the treasury of the Nation, as was done. The authority of the commissioners to lay out the town necessarily made it their duty to lay out and fix the boundaries of the land in the town set off to the railroad company for its station, side tracks, stock yards, and other like purposes. This was done, and their action has been acquiesced in and approved by the authorities of the Nation, legislative and executive. Whether there was any necessity for making the right of way 400 feet wide was a question between the Nation and the railroad company. Under the treaty, the railroad company had a right to demand 400 feet when that much was indispensable to the full enjoyment of its franchise. The citizen cannot settle on the right of way, and, when his right to do so is challenged, reply that the right of way set off to the company was in excess of its needs, and claim the right to settle upon it as a part of the public domain of the Nation. It is clear that it was never contemplated that there should be within the limits of these towns any unappropriated public domain subject to settlement under the general law on that subject. The disposition of the land within the limits of these town sites is regulated by laws specially applicable to them. It is not material to inquire whether the railroad company acquired the fee in this ground, or only an easement. In either case it acquired a right to the exclusive possession and use of it, as against the defendants. The judgment of the lower court is affirmed.

THOMAS et al. v. EAST TENNESSEE, V. & G. RY. CO. (AUGUST et al., Interveners).

(Circuit Court, N. D. Georgia. May 9, 1894.)

DEATH BY WRONGFUL ACT—ACTION BY WIFE — EFFECT OF SUBSEQUENT MARRIAGE.

M. and F., after a marriage ceremony while slaves, lived together in Georgia as husband and wife, and continued to do so until after Act Ga. March 9, 1866 (Code, § 1667), confirming for all civil purposes the marriage of persons of color. In 1867 they separated, and each married another person. *Held*, that F. was the lawful wife of M., and could recover for

his death by defendant's wrongful act in 1893, under the statute of Georgia giving to the wife the right to recover for the homicide of her husband.

In an action by Samuel Thomas and others against the East Tennessee, Virginia & Georgia Railway Company, Frances and Joseph August intervened, and claimed to be entitled to recover against the receivers of the railroad for the death of Moses August while a passenger on defendant's road, and caused by its negligence, and the case was referred to Benj. H. Hill, Esq., special master. The receivers excepted to the master's report.

McCutcheon & Shumate, for defendant.
Dean & Smith, for interveners.

NEWMAN, Circuit Judge. The following is the report of the special master to whom the above-stated case was referred:

"To the Honorable, the Judges of the Circuit Court of the United States for the Northern District of Georgia: The intervention of Frances and Joseph August in the above-stated cause was referred to me as special master, with directions to hear and determine the facts and report the same to the court. In pursuance of said order, and after due notice, I have caused all parties to appear before me, and, after an examination of the witnesses and hearing of argument of counsel, have prepared my report. The evidence taken before me is herewith submitted, and approved by me as correct. I find as follows:

"(1) That the East Tennessee, Virginia & Georgia Railway Company was on February 11, 1893, operated by Henry Fink and Charles M. McGhee, as receivers appointed by this court.

"(2) That on February 11, 1893, Moses August was a passenger on cars of said railway, and was killed in a collision in Floyd county on said date; said collision occurring at a point six or eight miles from Rome, Georgia.

"(3) I find that said Moses August was without fault himself, and that said killing was the result solely of the negligence of the defendant, its employés and agents.

"(4) I find that said Moses August, at the time of his death, was between the age of fifty and fifty-five years, and was earning one dollar a day.

"Taking into consideration his expectation, under the mortality tables; his reduced capacity, affected by increased age; the further fact that he had no steady employment, but was working according as he could get jobs,—I think, a fair estimate as to the value of his life at the time of the killing, would be the sum of twelve hundred ($1,200.00) dollars.

"(5) I find that at the time of his death, the plaintiff Frances August was his lawful wife.

"On this point the master has had great difficulty in arriving at a conclusion. Plaintiffs set up a statutory marriage under the act of March 9, 1866 (Code Ga. § 1667). King v. State, 40 Ga. 244; Johnson v. State, 61 Ga. 306. The evidence establishing this marriage is conflicting, but, after a careful consideration of all of it, the master finds that Frances and Moses August, after a marriage ceremony between them when slaves, continued to live as husband and wife until some time in the year 1867, and that on the 9th day of March, 1866, they were so living together as husband and wife; and by that act they were made lawfully husband and wife, said act confirming, for all civil purposes, the marriage of persons of color. King v. State, 40 Ga. 244. It is contended by the defendant that said Frances and Moses were slaves, and that their marriage as slaves was illegal, and that such relation was not possible to slaves. This is true, but that was one of the very evils that the act of March 9, 1866, was intended to cure. That act, in the opinion of the master, was intended to make legal the relations of persons of color which before that time were illegal; and if, after the passage of this act, such persons were living together as man and wife, and continued to live together after the passage of the act, they were declared to be husband and wife. To avoid this rela-

tionship, which the law, in the interest of morality, cast upon them, such relationship should have been immediately dissolved after the publication of said act. The evidence is clear that in 1867 both Frances and Moses disregarded the relationship of husband and wife which the law cast upon them, and they separated, and each married again. The master is of the opinion, however, that the subsequent marriage of both parties simply made them guilty of the crime of bigamy, and could not affect their legal status, which had been fixed by the act of March 9, 1866.

"It is contended further by the defendant that the plaintiff Frances had not for at least 25 years before the death of said Moses claimed or received or derived any support or assistance from said Moses, and that his death was not any pecuniary loss to her or the said Joseph, or any loss of any kind, and that neither had any thoughts of ever deriving any benefits from his life, and that it would be illegal and unjust and inequitable to mulct this defendant on account of the death of the said Moses. The master, in rendering his decision, while fully sympathizing with this view, as matter of morality, yet is obliged to decide this point under principles of strict law, and where such principles are well established equity will follow the law. The master therefore holds that, it being shown that on March 9, 1866, the plaintiff and the deceased were living together as husband and wife, and continued to live in such relation until 1867, that she is entitled, as a matter of law, to recover for his killing. The master therefore finds, and so reports, that she is entitled to recover the sum of twelve hundred ($1,200.00) dollars. It was conceded that said Joseph, the son, was not entitled to recover, but that the suit could only be in the name of the wife. All of which is respectfully reported. Benj. H. Hill, Special Master.

"Filed in the Clerk's Office, 7th day of Feby., 1894. O. C. Fuller, Clerk."

Exceptions were filed by the receivers to the foregoing report, and the same were argued. Since the hearing, I have given considerable thought to the question involved. There is very little authority upon the question, and it is probably true, as stated by counsel for the receivers, that no such case has ever arisen before, or will ever arise again. No question is made as to the liability of the receivers, and very little as to the amount of the recovery. The evidence was conflicting, as stated by the master, as to whether the deceased and Frances August were living together as husband and wife at the time of the passage of the act of the legislature of Georgia in March, 1866; but the special master finds this in favor of the intervener, and it is conceded that there is sufficient evidence to justify the finding. The contention for the receivers here is that Frances August, having married another man, and having lived with him since 1884 as his wife, and having renounced in this way the former relationship with the deceased, she cannot now come in and take the benefit of that relationship for the purpose of recovering for his homicide. By the finding of the special master, under the provisions of the act of March, 1866, the intervener became the lawful wife of the deceased, and the fact of her subsequent marriage could not change the legal status of the parties by the relationship created by the act referred to. The statute of the state gives to the wife the right to recover for the homicide of the husband. Unquestionably she is his lawful wife. Therefore, controlled by what seems to be the law of the case, the report of the special master must be confirmed.

UNITED STATES v. CONVERSE.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 140.

CLERK OF COURT—FEES.

Clerks of district courts are not entitled to fees for filing certificates of discharge of witnesses, nor for filing duplicate abstracts and vouchers; but they are entitled to fees for entering orders of court for the marshal to pay witnesses and jurors, for making certificates to such orders, and for taking and entering of record separate recognizances of witnesses where it is shown that the witnesses could not recognize together without hardship.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Petition by Mervin B. Converse against the United States for fees as clerk of the district court. Petitioner obtained judgment. Defendant brings error.

Wm. E. Shutt, Dist. Atty., for the United States.

Mervin B. Converse, pro se.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. The defendant in error was appointed clerk of the district court of the United States for the southern district of Illinois, on March 13, 1880, and has continued to hold that office until the present time. Between the 1st day of July, 1887, and the 30th day of September, 1891, his accounts, 17 in number, were duly presented to and approved by the court, in the presence of the United States district attorney. The accounting officers disallowed some of the items charged therein. He made up an account for these disallowances between the 1st day of July, 1887, and the 30th day of September, 1891, which was duly presented and sworn to in open court, for the purpose of bringing this suit. These disallowances comprise the following items: (1) Filing 2,765 certificates of discharge of witnesses by the district attorney, at 10 cents each, $276.50; (2) entering 2,574 orders for marshal to pay witnesses and jurors, at 15 cents each, $386.10; (3) copies of such orders for the marshal, at 10 cents each, $257.40; (4) certificates to 2,990 of such orders, at 15 cents each, $448.50; (5) writing 2,803 folios of complete record, at 15 cents each, $420.45; (6) affixing certificate and seal to 473 copies of sentences in criminal cases, at 20 cents each, and 61 certificates to copies of sentences, at 15 cents each, $103.75; (7) entering judgments of the court, $6.60; (8) docket fees in attachment cases, $4.00; (9) taking 365 recognizances of United States witnesses and defendants at 25 cents each, and entering of record the separate recognizances of 221 United States witnesses and defendants, of two folios each, at 15 cents per folio, $157.55; (10) filing 8 praecipes, and issuing and filing 8 subpoenas for government witnesses in the case of United States v. Grimes, $3.60; (11) filing duplicate abstracts and vouchers, $4.90; (12) for 103 oaths

administered to United States witnesses, at 10 cents each, $10.30; (13) complete record and docket fee in the case of United States v. Bruss, $2.95. The court below entered judgment for the full amount claimed, except that the item for entering judgments of the court amounting to $6.60 was reduced to $3.75. Counsel for the government has assigned error in respect to each item so allowed; but in argument he has abandoned his assignments of error, except those relating to the following items: (1) Filing 2,765 certificates of discharge of witnesses by the district attorney, $276.50; (2) entering orders for marshal to pay witnesses and jurors, $386.10; (4) certificates to the same, $448.50; (9) taking and recording recognizances, $157.55; (11) filing duplicate abstracts and vouchers, $4.90. We will proceed to consider these items in the order of their statement.

(1) This item embraces the fees charged for filing 2,765 certificates or orders of discharge issued to witnesses by the United States district attorney. In the case of U. S. v. Taylor, 147 U. S. 695, 13 Sup. Ct. 479, it is expressly decided that the clerk is not entitled to charge or receive any fee for filing certificates or orders of the district attorney discharging witnesses. The court below, therefore, erred in allowing the defendant in error therefor.

(2) This item embraces fees charged for entering of record orders for the marshal to pay witnesses and jurors. In the opinion of the court below, it is stated that it finds as matter of fact, established by the evidence on the trial, that the plaintiff, as clerk, did enter upon the minutes or record of the court 2,574 separate orders for the payment of United States witnesses and petit jurors, of one folio each. It is also found by the court, and stated therein, that for many years it has been the practice of the court to enter a separate order for the payment of witnesses and jurors as a measure of public convenience. There is no dispute in regard to these facts, nor in regard to the practice of the court in causing a separate order for the payment of each witness and juror to be entered of record on its minutes. The "several circuit and district courts" have the right, under section 918, Rev. St., to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." In the case of U. S. v. Van Duzee, 140 U. S. 199, 11 Sup. Ct. 941, it is held that, when a clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of the statute authorizing compensation for such services. Section 855, Rev. St., requires the entry of orders on the minutes of the court for the payment of jurors and witnesses in all cases where the United States is a party; section 828, Id., allows a fee of 15 cents per folio for the entry of all orders; and section 854, Id., defines a "folio." These orders having been entered of record on the minutes of the court in accordance with its practice, which it is expressly authorized by law to regulate, as well as under the express provisions of the statute, we can perceive no reason why the government should refuse to pay the compensation fixed by law for the services of the clerk in entering them. No au-

thority is cited by the plaintiff in error which supports its contention. The court committed no error in allowing this item.

(4) This item embraces charges for certificates to orders for the payment of jurors and witnesses. In the case of U. S. v. Taylor, 147 U. S. 695, 13 Sup. Ct. 479, it is said: "Charges for copies of orders and certificates thereto are allowable, but the charge for seals is disallowed, upon the authority of U. S. v. Van Duzee, 140 U. S. 169, 174, par. 6, 11 Sup. Ct. 758." As this item embraces charges for certificates only, and makes no claim for seals, the court properly allowed it, upon the authority of the above case.

(9) This item embraces charges for taking recognizances, and entering the same of record. These recognizances were separately taken and entered of record. It appears from the record to be the practice of the court for the clerk to take the acknowledgment of recognizances, and enter them upon the records. Only one acknowledgment was charged for each recognizance. The contention of the government is that more witnesses might have been included in a single recognizance; but it is not alleged in any pleading, nor is it shown by any evidence, that more witnesses might or ought to have been included in a single recognizance than were included. The charge is for a gross amount for taking and recording a stated number of recognizances, which were separately taken and entered of record. The court below found that to join them would often work a hardship to the witnesses, compelling all to wait until the last was discharged. The charge, in view of the findings of the court, seems to be a proper one, and the principle on which it is sustainable is not in conflict with, but is supported by, the case of U. S. v. Barber, 140 U. S. 164, 11 Sup. Ct. 749. In the case of U. S. v. King, 147 U. S. 676, 13 Sup. Ct. 439, it is held that a charge for taking separate recognizances is not allowable, "unless it be made to appear that the witnesses could not conveniently have recognized together." In this case the court found that the witnesses could not recognize together without working a hardship, which is equivalent to finding that they could not conveniently recognize together. It follows that the charge for taking these separate recognizances was a proper one; and, if so, the charge for entering them of record was also proper, as such recognizances, by law and by the practice of the court, are required to be spread of record. This item was properly allowed.

(11) This charge is for filing duplicate abstracts and vouchers. The defendant in error concedes, upon the authority of the case of U. S. v. Jones, 147 U. S. 672, 13 Sup. Ct. 437, that this item was improperly allowed. We are of opinion, upon the authority of this case, that this item is not allowable. The judgment of the court below is therefore reversed, and the case remanded, with directions to reduce the judgment in conformity with this opinion.

MacDONALD et al. v. UNITED STATES.[1]

(Circuit Court of Appeals, Seventh Circuit. March 22, 1894.)

No. 149.

1. CRIMINAL LAW—APPEAL AND ERROR—REVIEW—INDICTMENT.
Where an indictment contains three counts, to the first of which a motion to quash is overruled, and afterwards a bill of particulars is filed with the first count, which practically confines the prosecution to the more specific charges contained in the other counts, overruling the motion cannot be assigned as error.

2. SAME—EXCEPTIONS TO CHARGE.
If a bill of exceptions states that an exception to the court's charge was taken when the charge was given, but discloses that it was not in fact taken until afterwards, the exception is not available.

3. SAME.
Where the court instructs the jury that the issue is not whether the defendants' business was a cheat, but whether it was a lottery, the fact that the charge also states that the defendants' business was a cheat no better than highway robbery is not ground for reversal.

4. SAME—SENTENCE—JOINT ASSIGNMENT OF ERRORS.
Where three defendants, who are jointly indicted, but separately sentenced to different punishments, join in a writ of error, and assign as error that "the court erred in the sentence which it passed upon the defendants," the assignment is too indefinite to present any question.

5. OFFENSES AGAINST POSTAL LAWS—LOTTERY—INDICTMENT—EVIDENCE.
Where an indictment charges the defendants with sending through the mails circulars concerning a lottery, the prosecution may show by evidence outside the circulars that the business advertised therein was in effect a lottery.

6. LOTTERIES—GUARANTY INVESTMENT COMPANIES.
Where the value of bonds in an investment company depends upon their number, and the numbering is done by the secretary according to the order in which the applications happen to reach him, the result of a purchase of such bonds is so dependent on chance as to render their sale a lottery.

Error to the District Court of the United States for the Northern District of Illinois.

Indictment of George M. MacDonald, Francis M. Swearingen, and W. H. Stevenson for sending through the mails matter concerning a lottery. Defendants were convicted, and they bring error.

The appellants, George M. MacDonald, Francis M. Swearingen, and W. H. Stevenson, were indicted, with others, tried, convicted, and sentenced, for sending through the mails matter concerning a lottery. Rev. St. U. S. § 3894, as amended (26 Stat. 465). The indictment was returned October 14, 1893. The first count is general, and, formal parts omitted, charges that at Chicago the defendants, "unlawfully, did knowingly deposit and cause to be deposited in the post office of the United States there, and send and cause to be sent through the same, to be conveyed and delivered by mail, divers letters and circulars concerning a lottery, that is to say, ten letters and ten circulars, directed respectively to divers persons and addresses to the said grand jurors as yet unknown, and concerning a lottery in the same letters and circulars called the Guarantee Investment Company." The second count charges that the defendants, "unlawfully, did knowingly deposit and cause to be deposited in the post office of the said United States there, and send and cause to be sent through the same post office, to be conveyed and delivered by mail of the said United States, a certain envelope, then and there bearing

[1] Rehearing denied October 27, 1894.

the address of Mr. J. J. McIntosh, Box 448, Chicago, Ill., which said envelope then and there contained a certain pamphlet concerning a lottery in the same pamphlet mentioned, and purporting to give, amongst other things, the plan of said lottery; which said pamphlet was and is of the tenor following, that is to say." The pamphlet, as set out in the indictment, contains, with other things, the following matter:

"Copy of Bond.

"Know all men by these presents, that the Guarantee Investment Company of Nevada hereby promises to pay to —— or order, at its office in St. Louis, Mo., one thousand dollars, lawful money, at the time and on the conditions following, to wit: This is one of a series of bonds of like tenor, numbered consecutively from No. 1 to the number borne by this bond, sold and issued to the purchasers of the maker hereof. The holder hereof has paid for this bond ten dollars, and by accepting it agrees to pay the maker, at its home office in St. Louis, Mo., on the first day of each successive month hereafter, an installment of one dollar and twenty-five cents until this bond matures. A failure for fifteen days to pay said installment subjects the holder or owner of the same to a fine of one dollar, which, together with the omitted installment, must be paid within the next fifteen days in order to reinstate the said bond. And if the same is not done within the said time this bond becomes null and void and of no effect, and the said holder forfeits all payments and fines assessed thereon to the fund for the payment of this series of bonds. It is hereby guarantied by the maker of this bond that one dollar of all the monthly installments and all fines paid on the bonds of this series shall constitute a trust fund for the payment of the bonds of this company in the order and manner following: The first bond paid shall be bond No. 1, the second bond paid shall be bond No. 5, the third bond paid shall be bond No. 2, the fourth bond paid shall be bond No. 10, and so on, reverting back to the first issued unforfeited unpaid bond in this series, and alternating with the multiple 5 until all the bonds issued are paid; and said fund shall be honestly guarded and applied to such purpose, and shall not be impaired, used, or diminished for any other purpose whatever; and this bond, if unforfeited, becomes and is due and payable immediately after there are sufficient funds in said trust fund to pay it, all subsisting and uncanceled bonds issued and numbered prior to this having been paid.

"In witness whereof, the officers have hereunto subscribed their names and affixed the seal of the company thereto at its home office in St. Louis, Mo., this —— day ——, 18—. ————, President.

"[Seal.] ————, Secretary.

"Table for Payment of Bonds.

"Copyrighted 1891, by J. G. Talbot.

1 then 5	12 then 60	23 then 115
2 then 10	13 then 65	24 then 120
3 then 15	14 then 70	then 125
4 then 20	then 75	26 then 130
then 25	16 then 80	27 then 135
6 then 30	17 then 85	28 then 140
7 then 35	18 then 90	29 then 145
8 then 40	19 then 95	then 150
9 then 45	then 100	31 then 155
then 50	21 then 105	32 then 160
11 then 55	22 then 110	33 then 165

—"And continuing until the multiple extends beyond the number of bonds sold, when payment will revert back, and bonds will be paid in the numerical order, until, by additional sales of bonds, the suspended multiple is reached, when that number will be paid, and this manner of payment shall continue until all unforfeited uncanceled bonds issued are paid."

"Issuing of Bonds. We issue an investment bond on the following conditions: At the time application is made for a bond, the purchase price of $10.00 is paid to the agent taking the application, and a monthly installment of $1.25 is payable on the first day of the month following the date of said

application. If the installment is not so paid when due, a fine of $1.00 is levied against the holder of such bond, unless the same is paid within fifteen days, and if not paid in the next fifteen days then the said bond will be canceled on the books of the company for nonpayment. The company pledges the bondholder that out of the monthly installment of $1.25 paid, that 25 cents only shall be used for the payment of bonds in the order of their issue as follows: As soon as there is $1,000 paid into said trust fund, it shall be paid to the person holding bond entitled thereto by the table issued by this company (providing said bond has not been canceled for nonpayment), as follows: Bond No. 1 will be entitled to the first $1,000 paid into the trust fund, and bond No. 5 to the second $1,000; bond No. 2 to the third $1,000; bond No. 10 to fourth $1,000, etc., etc."

Thereupon the indictment proceeds: "And which said envelope also then and there contained a certain other circular, entitled 'The Guarantee Investment Company, Incorporated; September Bulletin, 1893,' concerning the same lottery, and purporting to give, amongst other things, a list of the prizes drawn at divers drawings of the same lottery theretofore held; and which said envelope also then and there contained a certain other circular entitled 'Application to The Guarantee Investment Co., of Nevada, Mo.,' and concerning the same lottery, and which said envelope also then and there contained a certain letter concerning the same lottery, and of the tenor following, that is to say." Then follows a copy of the letter.

The third count charges that the defendants, "unlawfully, did knowingly deposit and cause to be deposited in the post office of the United States there, and send and cause to be sent through the same post office, to be conveyed and delivered by mail of the said United States, a circular concerning an enterprise similar to so-called 'gift concerts,' offering prizes dependent upon lot and chance; that is to say, a circular directed to one George Houghton, at Downer's Grove, in the state of Illinois, by the direction and address following, to wit, 'Mr. George Houghton, Downer's Grove, Ill.,' and entitled and bearing on the outside of the cover thereof (amongst other things) the words 'The Guarantee Investment Company, Incorporated; September Bulletin,' and concerning an enterprise of that character in the same circular mentioned."

A motion of the defendants to quash the first count of the indictment was overruled. During the progress of the trial, at the conclusion of the evidence for the government, the district attorney, over the objection and exception of the appellants, was allowed to file a bill of particulars with the first count of the indictment, to the effect that the circulars and letter and envelope mentioned in the second and third counts were or would be relied upon for the support of the first count.

Collins, Goodrich, Darrow & Vincent, Barnum, Humphrey & Barnum, and Elisha Whittlesey, Jr., for plaintiffs in error.

Thomas E. Milchrist, U. S. Atty., and John P. Hand, Asst. U. S. Atty.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge (after stating the case). The practical effect of the bill of particulars filed with the first count of the indictment was to confine the prosecution to the more specific charges contained in the second and third counts. If, therefore, there was error in overruling the motion to quash the first count, it became an immaterial and harmless error,—as much so as if the count had been formally dismissed or withdrawn before the case was submitted to the jury.

The objection that the printed matter described in the indictment was admitted in evidence without previous proof of re-

sponsibility on the part of the defendants for the mailing of it is not supported by the record. When the offer was first made, it is true, the objection was interposed and overruled, as stated, and an exception taken; but no part of the matter was read to the jury until adequate proof had been made, by admissions and by the testimony of witnesses, that the mailing was done with the knowledge and by the authority of the defendants. In fact, when finally the evidence was given to the jury, the objection was not renewed, and no exception was taken to its introduction; and, even if there had been error in the first instance, it was cured by the proof afterwards made.

It is claimed next that the court erred in admitting evidence of the methods of business of the Guarantee Investment Company for the purpose of showing its scheme to be a lottery. The indictment containing no direct averment of the company's methods of business, it is insisted that the charge that the defendants sent through the mails circulars concerning a lottery means that the circulars, on their face, showed or purported to concern a lottery, and that other evidence of the fact was therefore incompetent. This position is plainly untenable. Any proper evidence upon the point, whether found on the face of the papers or elsewhere, was admissible on behalf of the government, just as it was competent for the defendants, and would have been even if the circulars had purported to concern a lottery, to show that in fact the scheme was not of that character.

It is assigned as error "that the verdict is against the law," and, to make this out, it is insisted that the business of the investment company, "as set forth in the pamphlet in the indictment, is not a lottery, within the meaning of the law." The essential question, as we have seen, is, what was the nature of the business, as shown by the entire evidence, and not merely as set forth in the pamphlet, and, under proper instruction, that was a question of fact concerning which this court, following the well-settled practice of the supreme court, will not review the evidence, when sufficient, as it was in this case, to go to the jury in support of the verdict. Crumpton v. U. S., 138 U. S. 361, 11 Sup. Ct. 355.

This brings us to the court's charge to the jury, and in respect to that we are constrained to observe that no question is properly presented. The record shows that at the conclusion of the charge the defendants gave notice "that they would except to the charge;" and thereupon the court stated the practice of the court to be that objections to the charge should be stated before the jury retired, but that the court would permit the bill of exceptions to show objections to all the substantial portions of the charge, though not then specified, except portions which might have been the result of mere lapse or inadvertence, or which, in view of the whole trial, would have probably been corrected if the court's attention had been called to them before the jury retired, and that, subject to this limitation, counsel might have time to prepare their exceptions. When afterwards the bill of exceptions was presented to the judge for settlement, with various objections to different parts of the charge, some were allowed, and appear in the bill as if stated before the jury had retired.

Other objections the judge refused to allow, because they were not presented in time, and to that refusal "the defendants then and there excepted," and have assigned it as error. We are aware that out of considerations of convenience and accommodation, and by acquiescence of opposing parties, the trial courts sometimes permit bills of exceptions to show objections and exceptions as if they had been announced at the time of the ruling complained of, and on appeal in such cases the record must be accepted as true; but when, as in this instance, the facts are all disclosed, it is impossible to recognize the exceptions as valid. We have, however, considered the principal objections to the charge of the court, and are convinced that there was no error which could have been made available upon proper exception. The court, it is true, employed strong language, to the effect that the Guarantee Investment Company was a cheat, doing things no better than highway robbery; that, by its very constitution, its success depended upon its insolvency, and a wholesale repudiation of its promises,—and used other expressions which, it is claimed, were both inaccurate and unfair, and calculated to inflame the minds of the jurymen against the defendants. It is apparent, however, that these portions of the charge were, in part at least, responsive to the argument and insistence of counsel for the defendants that the scheme and business of the company were honorable and fair, and the court was careful to explain that the question at issue was not whether the business was a cheat, but was it a lottery? "It may be a cheat," said the court, "but we must ascertain by the legal canons and definitions whether it was a lottery;" upon the whole charge it is impossible to believe that the jury could have misapprehended the issue.

Continuing on the subject, the court said: "What is a lottery? The best definition I can find for it is this: 'When a pecuniary consideration is paid, and it is determined by chance or lot, according to a scheme held out to the public, whether he who pays the money is to have anything for it, and, if so, how much, that is a lottery.'"

Upon this definition, which was inaccurate if at all because it was not as comprehensive as it might have been, the question whether or not the investment company was conducting a lottery was one for the jury; and, if we could be required to review the evidence, we would not disturb the verdict. It is insisted that the element of chance is wanting in the scheme, but its presence is manifest. It is not present primarily in the uncertainty of the time when a bond will be paid, because, once bonds have been issued, the order of payment is governed by a fixed rule, and the time of payment is uncertain only so far as it depends upon the amount of business done by the company, and the number of lapses of bonds of earlier issue. The element of chance which condemns the scheme is incident to the numbering of the bonds before issue, and not directly to their payment afterwards. By the table, which determines the order of payment, bond numbered one is payable first, No. five next, No. two next, and so on, alternating between numerals, so-called, and multiples of five, except, it will be observed, that between every

fourth and fifth of the multiples no numeral intervenes. There are four numerals to every multiple, and it follows that a bond (which might as well be called a ticket) bearing a high multiple number will be entitled to payment sooner than three-fourths of the bonds bearing lower numbers among the numerals, and the further the process is carried the greater becomes the disparity between the multiple and numeral numbers next to be paid, and correspondingly the bonds numbered with numerals, except as benefited by lapses, become less and less valuable, because the day of possible payment becomes more and more remote. Now, whether or not a purchaser will obtain a bond of one number or another depends, as the evidence very clearly shows, upon the order in which his application shall reach the hand of the secretary, and that is largely a matter of chance. The secretary receives applications by mail and otherwise, sometimes singly and sometimes a number together, and in the order of receipt, and, as he chances to take up one or another first, passes them through a registering device, and in accordance with the notations thereby made upon the applications the bonds are numbered and issued. But for the purchaser's hope, or, as it may as well be said, for his chance, of getting a multiple number, the business would soon cease. "The multiple system is a new invention," said a witness for the defendants, "a table, copyrighted, to make the inducement for a person to purchase a bond at one time just as great as at another;" and, however disguised in words, it is evident that the inducement consists mainly in the chance of obtaining a multiple number. It was insisted at the hearing that since every bondholder who shall continue to pay his dues will ultimately receive the promised sum, the prizes are equal, and therefore there is no lottery. But it is idle to say that a sum or an obligation for a sum due and payable to-day or at an early day is of no more value than an obligation for an equal amount, without interest, payable at a remote and indefinite time. Reference has been made to Horner v. U. S., 147 U. S. 449, 13 Sup. Ct. 409, but, in the elaborate presentation there made of the subject, we find nothing which we deem inconsistent with our views of the present case.

The court was asked to instruct the jury that, "if the only element of uncertainty was as to the date at which the bonds matured or were to be paid, it was not sufficient to characterize the business of the defendants as a lottery." This and similiar requests were properly refused, because they presented an immaterial question, and ignored the element of chance incident to the numbering of the bonds before they were issued. Only in that phase of the scheme did the court, by its charge, suggest, or leave it to the jury to find, the presence of chance; and of its existence there the proof is so clear that all collateral questions sought to be raised either upon the instructions given and refused, or upon the evidence, may be regarded as immaterial. Indeed, if it were ever permissible in a criminal case that the court should direct a verdict of conviction, it might have been done in this instance. The evidence is without conflict.

It was assigned for error, and is insisted upon, that "the court erred in the sentence which it passed upon the defendants." This is too general and indefinite upon its face to present any question, and when applied to the facts of the case it is still more uncertain. The court passed no sentence upon the defendants, but a separate sentence upon each,—upon Swearingen and Stevenson, each, a fine of $200, and, upon MacDonald, imprisonment in the county jail for eleven months, and a fine of $1,000. Which one or what part of these sentences it was intended to question, the assignment does not indicate. In the brief objection is made to the sentence upon MacDonald only, and because the fine is double the amount of the maximum authorized by the statute for each offense. It is said to be "impossible to tell from the record whether the court did this inadvertently, or proceeded upon the theory that MacDonald was indicted and convicted of two separate offenses, and imposed a cumulative sentence," and for this reason, it is contended, the judgment must be reversed, and the case remanded, not for resentence, but for a new trial. This is a question in which MacDonald alone is interested, and the assignment of error should have been by him or in his behalf only, and should have stated specifically his objection to the sentence. See Whiting v. Cochran, 9 Mass. 531; Porter v. Rummery, 10 Mass. 64; Shirley v. Lunenburg, 11 Mass. 379; Shaw v. Blair, 4 Cush. 97; Jaqueth v. Jackson, 17 Wend. 436; Henrickson v. Van Winkle, 21 Ill. 274. Though indicted and tried together, the defendants were entitled to separate appeals; and, the sentences against them being necessarily individual and several, there can be no necessity for steps to effect a severance, as in civil cases, when the judgment is joint against two or more. Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58. If, however, there was error, as now claimed, it was more of form than of substance; and, if we were compelled to remand the case, it would be simply for resentence. The appellant was convicted by a general verdict upon an indictment which contains at least two distinct charges, which were properly joined. Rev. St. U. S. § 1024; In re Henry, 123 U. S. 372, 8 Sup. Ct. 142. The fine does not exceed the sum of the several sentences which might have been awarded, and according to the decision in Carlton v. Com., 5 Metc. (Mass.) 532, that was legal; and in the case of In re Henry, supra, the supreme court, referring to the provision in section 5480 of the Revised Statutes, that three distinct offenses may be joined in the same indictment, said:

"In its general effect this provision is not materially different from that of section 1024 of the Revised Statutes, which allows the joinder in one indictment of charges against a person 'for two or more acts or transactions of the same class of crimes or offenses,' and the consolidation of two or more indictments found in such cases. ' Under the present statute, three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all."

The general rule seems to be that there should be a separate sentence for each offense. Bish. Cr. Proc. §§ 1326, 1327; Mullinix v. People, 76 Ill. 211. See, also, Blitz v. U. S., 153 U. S. 308, 14 Sup.

Ct. 924. But, as already explained, the question is one we are not called upon to decide. There is no essential or available error in the record, and the several judgments below are affirmed.

UNITED STATES v. KESSEL.

(District Court, N. D. Iowa, Cedar Rapids Division. October 12, 1894.)

1. DISTRICT COURTS—CRIMINAL CASES—TIME AND PLACE OF TRIAL.
Rev. St. § 563, provides that the district courts shall have jurisdiction of all crimes cognizable under the authority of the United States, committed within their respective districts. Section 581 provides that a special term of any district court may be held at a place where any regular term is held, or at such other place in the district as the nature of the business may require, and any business may be transacted at such special term which might be transacted at a regular term. Act Cong. July 20, 1882 (22 Stat. p. 172), creating the northern district of Iowa, and Act Cong. Feb. 24, 1891 (26 Stat. p. 767), amendatory thereof, and creating the Cedar Rapids division, contain no provision in regard to the place of trial of criminal actions, nor any limitations of the power conferred by Rev. St. § 563. *Held*, that the district court of the northern district of Iowa may name the time and place of trial of criminal cases, whether at a regular or special term, or at the usual places for holding court or otherwise, subject only to the right of defendant to a speedy trial within the district in which the offense was committed.

2. SAME—TRANSFER FROM CEDAR RAPIDS TO DUBUQUE—WHEN ORDERED.
Several indictments against the same person, returned at Cedar Rapids, charged the commission of offenses in the eastern division of the northern district of Iowa, in which division defendant resided. *Held*, that a motion by the district attorney to transfer the cases to Dubuque for trial, to save expense, should be granted, in the absence of any showing that defendant would be prejudiced thereby.

Several indictments were returned at Cedar Rapids against George Kessel, and the district attorney moved to transfer the cases to Dubuque for trial, for the purpose of saving expense. Motion granted.

Cato Sells, Dist. Atty., for the United States.
H. T. Reed, for defendant.

SHIRAS, District Judge. At the present (September) term of this court held at Cedar Rapids, several indictments were returned by the grand jury against the defendant, who resides at Cresco, Howard county, Iowa. Several indictments of the same general character are now pending for trial at Dubuque, having been presented by the grand jury at the December term, 1893, of this court. The district attorney now moves that the indictments returned at Cedar Rapids be set down for trial at Dubuque, the purpose being to save costs and expense. The defendant, appearing by counsel, objects to the transfer, mainly upon the ground that the court does not possess the authority to make the transfer.

By section 2, art. 3, of the constitution of the United States, it is provided that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed. * * *" And,