personal undertaking, no different result would follow. The order, in and of itself, was a perfectly proper one; one which the situation and circumstances required to be given. The fault, if any, which resulted in the plaintiff's injuries, attended the execution of the order as an incident of that act, and was not naturally or necessarily inherent in or resultant from the order. It was the fault of those who were called upon to execute the order. If in carrying out the order those in charge of the work had reason to suppose that some one connected with the train already made up might be in a position of peril from moving it those circumstances would require them to give timely warning before attaching the switch engine onto the train, and the failure to give such warning, under such circumstances, might be an act of negligence; but it was the carelessness of those appointed to do the work, who are fellow servants with the plaintiff, and not a natural consequence of the giving of the order. The train master, when giving the order, had the right to assume that it would be properly carried out; that those appointed to execute it would exercise all reasonable and needful caution in doing so. No one could for a moment reasonably contend that it would be incumbent upon the train master, every time he ordered a train out on the road, to caution the engineer to blow the whistle at stations and at public crossings, and to run trains so as to avoid negligent injury of person or property, or specifically charge the brakemen that they should be cautious and watchful in the performance of their several duties, giving warning where warning should be made, and admonition where circumstances required it. He has the right to presume that all these things will be done as a necessary part of the servant's duty in connection with his work. These are all matters of detail incident to the performance of the servant's duty. Card v. Eddy (Mo. Sup.; December Term, 1894) 28 S. W. 979; Relyea v. Railroad Co., 112 Mo. 95, 20 S. W. 480.

Plaintiff has presented an amended petition, and asks that the motion to set aside the nonsuit be sustained, in order that he may file it. The application comes too late, but, even were it within the proper time, the legal aspect of this case would not be modified by it. The motion to set aside nonsuit will be overruled.

KIRTLEY et al. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, W. D. Missouri, W. D. January 21, 1895.)

No. 1,978.

ACCIDENT ON RAILROAD TRACK—MUTUAL NEGLIGENCE.

Recovery cannot be had of a railroad for the death of a person killed while walking on its tracks, notwithstanding persons were in the habit of walking there, where the persons in charge of the engine did not discover him in time to prevent the accident, though, by the use of ordinary care, they might have done so, deceased having been in full possession of his faculties, and negligent in not observing the engine.

Action by Lulu Kirtley and others against the Chicago, Milwaukee & St. Paul Railway Company.

Plaintiffs sue for the death of their father. He was killed while walking on one of the defendant's double tracks within the city of Kansas, by a single engine, moving with the tender forward. The accident occurred on a fair day, between 9 and 10 o'clock in the morning, at a place where the deceased had an unobstructed view, both before and behind him, of more than a thousand feet along the track. He was walking westward, and on the north one of the two tracks. The north track was used by trains going westward, and the other by those moving in an opposite direction. The deceased had been traversing the south track, until, a few feet before he was struck, he discovered the train approaching him, and he turned from off that, and moved towards the north track. Whether he got upon it further than the south rail does not distinctly and decisively appear. Just at this time alarm whistles were given by the engine (which was approaching him from the rear, and by which he was struck) a few feet distant from him, which he did not seem to heed, and hence was immediately struck and killed. There is no evidence that the engineer actually saw the deceased until the alarm whistles were given, when it was then too late to avert the accident. The tracks at the point of the accident were on an elevated embankment, and were not intersected by any streets which crossed them at the level. There was testimony tending to show that it was somewhat the common practice for pedestrians to occupy these tracks in going from one point to another in the city. The jury were directed to find a verdict for the defendant, whereupon the plaintiffs took a nonsuit, and now move to set it aside.

Ed. G. Taylor, for plaintiffs.

Pratt, Ferry & Hagerman, for defendant.

PRIEST, District Judge (after stating the facts). This case, in its every essential feature, so closely resembles that of Railway Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921, that it is quite sufficient, for the justification of the action of the court in giving the peremptory direction to the jury, to refer alone to that case; but counsel contend that there is a charge in the petition here which was not made in the one in that case, and an element present here not noticed there. We think counsel in this is mistaken. The facts upon which counsel seek to distinguish this case from that were present there as conspicuously as here, but, because they were not so prominent and decisive of the case as those dwelt upon by the court, they appear not to have been directly commented upon. In addition to this, the charge of the trial court in that case obviated the necessity of reviewing those theories which are now called to my attention as distinguishing that case from this. In that case there was a contention that the plaintiff ought to recover because the defendant's servants saw him, and might, by the exercise of ordinary care, have averted his injuries; and also that, by the exercise of ordinary care, they would have discovered him in time to have avoided injuring him. Upon these two issues the trial court charged as follows:

"But there can be no recovery in this case on the ground that the engineer and fireman saw him, and might have avoided injuring him for this reason. There is no evidence in the case tending to show that either the engineer or fireman saw him before he was struck. That being so, the plaintiff is not entitled to recover upon the ground which I last stated. The plaintiff's attorney contends that under other circumstances the plaintiff would be entitled to recover, and he further contends that such circumstances exist in this case, and can be proven; that is to say, the plaintiff's attorney contends that the engineer and fireman, although they did not see him, by exercising

such reasonable care as they were bound to exercise might have discovered the plaintiff on the track, and the danger he was in, in time to have avoided injuring him. He further contends that they did not exercise such care, and on that ground he asks a verdict at your hands. The court is of the opinion, and the court so instructs you, that there can be no recovery on the ground last stated; that is to say, there can be no recovery on the ground that the engineer and fireman were at fault in not discovering the plaintiff on the track; and the court is of that opinion for the following reasons: It is true that it was the duty of the engineer and fireman to exercise ordinary care in looking out for persons and objects who might be ahead of them on the track, but it was also the duty of the plaintiff to exercise care to see that he was not overtaken by the trains or engines approaching him from the front or rear. The obligation resting on the engineer and fireman to look out ahead was no greater than the obligation resting on the plaintiff to keep a careful lookout to the rear. If the engineer and fireman in this case were at fault, in the mere matter of watching the track, the plaintiff was equally at fault in the same respect; and you are aware when two persons are equally at fault, and one of them is hurt, he cannot recover of the other. For that reason, I say to you, gentlemen, that you cannot render a verdict for the plaintiff in this case on the ground that the engineer and fireman were guilty of neglect in not discovering him on the track before he was struck. Conceding that they were guilty of neglect in that regard, plaintiff himself was guilty of the same species of neglect in not discovering the engine. Both were at fault, and, under these circumstances, he is not entitled to recover on account of the particular neglect last mentioned."

It is true this theory concerning the want of exercise of care after discovering the peril of one upon the track, or the failure to exercise ordinary care in discovering the peril of one on the track, —the theory now put forward with earnestness in this case,—was not descanted upon at length in that. We will give our understanding of the principles which form the component elements of that rule of law which permits a recovery by the plaintiff, although he may be in a condition of negligence, if by the exercise of ordinary care the defendant could have avoided injury to him after discovering his peril. Such a rule has its origin in the opinion of the court in the case of Davies v. Mann, 10 Mees. & W. 546, where it is said:

"This subject was fully considered by this court in the case of Bridge v. Railway Co. [3 Mees. & W. 246], where, as appears to me, the correct rule is laid down concerning negligence, namely: That the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that the rule of law is laid down with perfect correctness in the case of Butterfield v. Forrester [11 East, 60], that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided, he is the author of his own wrong."

This case has been much misunderstood and maligned, and its principles put to very unjust uses and applications. Analysis of it will demonstrate the perfect soundness of its reasoning, and the validity of the principle there laid down. Every principle must be tested by the particular facts in relation to which it is announced. The facts in this case, briefly stated, are these: The plaintiff turned his ass out on the highway, fettered, to graze, and abandoned him. The defendant's servant, coming along with a wagon and team, care-

lessly ran over the animal, for the injuries in consequence of which the plaintiff brought action. Of course, it could not be predicated of the animal that it was guilty of negligence, and its owner was not present; so that, notwithstanding it was the duty of the owner not only to keep the animal from doing harm, but out of harm's way, he had not the opportunity of knowing that it was exposed to danger through the negligence of defendant's servant. On the other hand, it was not only the duty of the defendant's servant to keep a lookout to avoid harming anything which might be upon the public highway, but he had also, what the plaintiff had not, the present opportunity to know that the plaintiff's animal was exposed to danger through his careless driving. So that, when the rule in Butterfield v. Forrester was invoked, the court, in effect, said:

We admit the rule in that case to be perfectly accurate, but it is not applicable to the conditions in this; for in this case, while the duty to watch out was alike incumbent upon the plaintiff and the defendant's servant, yet the servant had in the discharge of that duty imposed upon him an opportunity to know of the animal's danger, and with that knowledge the power to avoid the injury, while the plaintiff had not; and therefore the plaintiff's neglect was not a present co-operating cause of the injury, but merely an attendant condition. If the plaintiff had been present in charge of the animal, with an opportunity to know of the danger to which it was or might be exposed through the negligence of the defendant's servant, and with that knowledge, or such as he would have gained by giving attention to the duty incumbent upon him by reason of the circumstances surrounding him, could have avoided the effect of the defendant's servant's negligence, it would have been perfectly proper and just to have applied the rule of Butterfield v. Forrester. The rule deducible from the case of Davies v. Mann is that where both parties are under obligation to anticipate, and have contemporaneous opportunities to know of, a danger which may be impending, and, with the knowledge which would come from the performance of the duty and the observance of the opportunity, have the capacity to avoid the danger, and both fail to discharge the duty or employ the opportunity, and one or both be injured in consequence, neither can recover of the other.

No well-considered case has fallen under my observation which cannot, by close and analytical study, be made to fall within the rule which we have just stated. This principle has been invoked in cases wherein there was not a mutual or like duty of vigilance, as in the cases of Huelsenkamp v. Railway Co., 37 Mo. 537; Walsh v. Transportation Co., 52 Mo. 434; or in those cases where like duties rested upon the party injured and the party charged with liability, and like opportunities to know of the danger in which the injured party was, but with a want of capacity on the part of the injured person (which was imparted to the tort feasor at the time) to avoid injury. This latter principle may be illustrated by supposing one, lawfully upon a railway track, suddenly prostrated, in the full possession of his senses, yet powerless to extricate himself from an approaching train, in which condition he is negligently run onto and killed. In such a case both parties were alike neglectful of their duties to watch. Both had contemporaneous opportunities to know of the danger of the one prostrate upon the track, but the driver of the engine could, by regarding the duty and opportunity, have stopped the engine before striking him; the prostrate individual, through no fault of his, could not have avoided the injury. Unless the rule is applied with

a view to these discriminating and distinguishing characteristics, it results in folly and injustice. It is ridiculous as reasoning, and accidental in application. It is nothing more than a declaration that, although both parties have contributed equally by their fault to the injury, the one who has suffered damage is to be exonerated, and the other punished, for the product of their mutual fault. No clearer statement of this principle can be made than that which is contained in the following expression in the case of O'Brien v. McGlinchey, 68 Me. 552, where it is said:

"This rule applies usually in cases when the plaintiff or his property is in some position of danger from a threatened contact with some agency under control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury."

This, then, suggests an inquiry as to when a perilous situation exists, so as to call into application the principle which we have been discussing. This is not a question of fact purely, but, like the question of negligence itself, is a mixed question of law and fact, or, upon undisputed facts, is purely a question for the court. The very moment a person starts in the direction of a railway track, with the purpose to cross it, he is confronted with perils, unless he uses a proper degree of care to avoid trains which may be passing; but if he looks and listens, as a prudent man should, he is in no greater danger than if he were elsewhere. So a man upon a railway track is in no more danger from an engine approaching him 100 feet away, if by looking or listening he could see or hear it, and, seeing or hearing it, get out of its way, than if the engine was a mile away. From this we infer that so long as a person can, by the proper exercise of care, avoid a danger which might otherwise be impending, he is not in that dangerous situation contemplated by the rule which we are discussing, and which calls for active efforts of prevention on the part of trainmen.

From this discussion of the law it is easy to make application to the facts in this case. The deceased was in a situation which imposed upon him, for his personal safety, a duty of constant vigilance. Upon the other hand, the defendant's servants had no reason to anticipate that trespassers would be upon the defendant's track, and hence was under no duty to look out for them. The deceased had an opportunity, by the exercise of vigilance, of seeing and knowing of the approach of the engine by which he was struck. The defendant's servants might also have seen him if they had been on the lookout for him. The deceased having regard for his duty, and availing himself of the opportunity to know of the approach of the engine, had the ability, by a single step, to have gotten out of the way of the engine. If the defendant's servants had seen the deceased, they might also have stopped the engine, and have avoided injury to the deceased. Thus, it will be seen, of the three elements which go to make up a completed transaction in the relation of direct causing agencies, all of them were present and operating on the side of the deceased, whereas only two lay on the side of the defendant's servants; and in cases of that character the principle here invoked

and insisted upon has no sort of application. Conceding that there was a duty upon the defendant's servants to anticipate that persons would be upon the track, this is set off by the duty on the part of the deceased to anticipate that trains would run on the track, and hence to keep a lookout for them. Conceding that a careful lookout on the part of the defendant's servants would have revealed the deceased on the track, this is set off by the fact that a diligent outlook by the deceased would have revealed the approach of the engine at his rear. Conceding that the defendant's servants might have stopped the engine by the exercise of ordinary care before running onto the deceased, this concession is set off by the indisputable fact that the deceased after he might have discovered the engine, and even at a later stage in the events which led up to the catastrophe, might have stepped aside and have avoided the engine. In addition to this, there is no evidence that the deceased was in a position of peril a sufficient length of time to enable those in charge of the engine to realize his peril, or do more to protect him from injury than was done. The evidence disclosed the fact that, so soon as the deceased was discovered in danger from the engine by those in charge of it, alarms were given, and there is no proof that they could have done more than they did to avert the sad accident. The evidence shows that the engineer did make an effort to notify the deceased of his danger, while it shows no response to this admonition on the part of the deceased. This, at least, manifests a willingness upon the part of the engineer to do all in his power to save the deceased from harm; and we cannot justly presume, in the face of such actual efforts, that the engineer would have relaxed any efforts that under the stress of circumstances might have occurred to an agitated mind to avert the accident. We are not to judge of the care exercised under circumstances of this kind, by a deliberate retrospect of the facts, because we can never place ourselves, by a calm analysis of the features of these occurrences, in precisely the same frame of agitation as those who are actors in such events. If the engineer did all that reasonably occurred to him to do, confronted, as he was, by a pressing emergency, we cannot censure him because, after deliberate reflection over the events, we can point out something else which he might have done to have averted the calamity. The extremity of the situation was not of the engineer's making. It was created by the deliberately unlawful act of the deceased, and it would be unjust to charge the engineer and defendant with fault because his mind did not operate with the same deliberation which we have a right to expect if he were confronting an anticipated occasion usually within the line of his experience. If the deceased had manifested one-half the effort for his own protection that the engineer displayed, his life might have been saved. His wrongful act created the duty and necessity for the exercise of care upon the part of the engineer, and for his, and not the railway company's, interest, and thereby, so to speak, he made the engineer his agent for his safety; and hence he, and not the railway company, should suffer should the engineer be at fault under the cir-

cumstances. Nothing short of an injury willfully or wantonly inflicted, under such circumstances, should visit a liability upon a defendant. We have thus seen that the principle contended for by the plaintiffs' counsel, that a recovery might be had notwithstanding the contributory negligence of the deceased, is without justification in principle, so far as its application to the facts of this case is concerned.

We now turn to the questions of the deceased's contributory negligence, and a brief survey of the circumstances will be helpful in the solution of this inquiry. It must be borne in mind that whatever care is imposed upon the defendant is in consequence of the wrongful conduct of the deceased in going upon the railroad tracks, and using them for common highway purposes. He was a trespasser, invading the rights of the defendant, and violating a positive statutory law, while the defendant was enjoying the use of its property in that manner to which it was dedicated, violating no law and doing no wrong. The deceased was in full possession of all his faculties, and knew from experience and daily observation that many trains were continually passing to and fro over the track, and might have seen and heard the one by which he was struck, and by a single step have gone completely out of its way. We have, then, a case, in brief, of a person trespassing upon another in a place beset with dangers, abandoning all care and effort for his own safety, and demanding of those whom he was wronging to anticipate his unlawful conduct, and exercise for his protection more caution and greater care than he was willing to employ. This demand cannot be supported by law. Moore v. Railway Co., 24 N. J. Law, 268; Manly v. Railway Co., 74 N. C. 658; Railroad Co. v. Kean (Md.) 5 Atl. 325; Tuff v. Warman, 5 C. B. (N. S.) 585; Frazer v. Railroad Co. (Ala.) 1 South. 85. Contributory negligence, in its practical form, is the failure of plaintiff to exercise that degree of care which is incumbent upon him by reason of his circumstances and surroundings, and which would enable him to avoid the effect of the defendant's negligence. As evidence tending to establish a liability, some proof was offered tending to show that it was customary for footmen to travel along the track at the point where the deceased was struck. Conceding, for the present, that the frequency of persons upon the tracks would call for the employment of greater care in the operation of the defendant's trains than under other circumstances, and created a duty to anticipate their presence there, yet the degree of care to be exacted of the traveler is not diminished in the proportion that the degree of care of the railroad operatives is increased. The care of the respective persons is increased in equal ratio as the proportion of possible dangers of accident is increased. It is a rule of common sense that persons ordinarily prudent will exercise watchfulness to avoid danger in proportion as the sources of peril by which they are surrounded are few or great, or are capable of slight or more serious injury. If the instruments from which danger may be apprehended would be capable of inflicting only slight injury, a less degree of care on the part of the person exposed would

be exacted than if the instruments were capable of inflicting distressing, and perhaps fatal, injuries. As was well said by the supreme court of Missouri in Harlan v. Railway Co., 65 Mo. 24:

"The increased care exacted of the company on the one hand, and of the public on the other, is equal, and leaves the question of liability of the company to an adult person of sound mind, in the enjoyment of the senses of sight and hearing, dependent upon the rule applicable if the accident had occurred at any point on the road."

It follows from this, conceding that the defendant's servants are bound to exercise care because they might reasonably anticipate the presence of persons on the track, that this did not absolve to the slightest extent the deceased from the exercise of ordinary vigilance, having regard to the perils of his surroundings, for his own safety. He was the person who was in danger. It would be unusual that an injury should befall those in charge of the engine, or the engine itself, from a collision with an individual, but very natural that in such collision the individual should sustain serious, and perhaps fatal, injuries. The deceased, therefore, had the greatest inducement and greater reason to be alert and watchful, and this duty should never abate while a person is upon a railroad track. The books abound with authorities to the effect that one approaching a railroad track is bound to exercise his faculties in order that he may discover, and discovering avoid, collisions with trains that may be passing. Is it reasonable to exact this degree of care before one comes into a position of actual peril, and then relieve him when in a position of actual peril? The deceased, in going upon the track without the use of his senses of sight and hearing, was in a situation of peril continuously, and each moment that he lingered brought him nearer and closer in the presence of immediate danger. His duty was one of constant and unremitting vigilance so long as he remained upon the track. It continued down to the very instant of the collision, as a prominent factor to its accomplishment. The latest hope of rescue was within the power, and the exclusive power, of the deceased, had he exercised proper care; for he could, in an instant, having discovered the near approach of the train, have stepped out of its way, when it would have been too late possibly to have stopped the engine. So that, in point of time, his neglect is more proximate to the harmful act than that—conceding there was some—of the defendant's servants. The views which we have herein expressed are amply supported by one of the latest decisions of the supreme court of the United States. Elliott v. Railway Co., 14 Sup. Ct. 85. The motion to set aside nonsuit will be overruled.

KLEVER et al v. SEAWALL et al.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1895.)

No. 150.

CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—PARTITION.

The circuit courts have no power to hear, on their law side, petitions for partition of lands, under a state statute which provides for the determina-

tion of questions arising in such proceedings without a jury, since actions for partition are among the suits at common law in which, under the constitution of the United States, trial by jury is preserved; but jurisdiction may be taken in equity, partition being a recognized head of equity jurisprudence.

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

This was an action by J. Hairston Seawall and others against J. M. Klever and Edmund Klever to recover an undivided interest in certain lands, the demand for relief also joining a prayer for partition of the premises. A judgment was rendered for the plaintiffs for the relief demanded. Defendants brought error. The circuit court of appeals affirmed the judgment as to the recovery of the land claimed and mesne profits, but directed further argument as to the power of the circuit court to entertain the proceeding for partition on its law side. 65 Fed. 373.

Mills Gardner and Humphrey Jones, for plaintiffs in error.

Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This was a proceeding in error to review a judgment for plaintiff in an action at law in the circuit court to recover an undivided one-third interest in certain real estate in the Southern district of Ohio, for mesne profits, and for partition, under the Ohio statute. In an opinion announced May 14, 1894, we affirmed the judgment for the undivided interest in the land and for the profits, but we reserved the question for further argument whether it was within the power of a circuit court of the United States to hear and determine on its law side a petition for partition of lands under the statute of Ohio. Further argument has been had, and we are now to decide the point reserved.

Partition under the Ohio statute is now a civil action, under the Ohio Code of Civil Procedure (McRoberts v. Lockwood, 49 Ohio St. 374, 34 N. E. 734), though it has not always been so regarded (Barger v. Cochran, 15 Ohio St. 460). By section 5756, Rev. St. Ohio (Smith & Benedict), it is provided that:

"A person entitled to partition of an estate may file his petition therefor in the court of common pleas, setting forth the nature of his title, and a pertinent description of the lands, tenements or hereditaments of which partition is demanded and naming each tenant in common, co-parcener, or other person interested therein, as defendants."

Upon the filing of the petition, a summons issues against the defendants, under section 5035 of the Civil Code. Thereafter the defendants may file answers under sections 5059 and 5070, and the plaintiff may reply under section 5079. By section 5757 it is provided that:

"If the court find that the plaintiff [in partition] has a legal right to any part of such estate, it shall order partition thereof in favor of the plaintiff and all parties in interest, appoint three disinterested and judicious freeholders of the vicinity to be commissioners to make the partition, and order a writ of partition to issue."

By section 5758 the writ issues to the sheriff, commanding him, by the oaths of the commissioners, to cause to be divided and set off to the parties the land in question as the court shall order. By section 5759 the commissioners are required to set apart the land "in such lots as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts thereof." By section 5762 the commissioners are to appraise the land when, in their opinion, it cannot be divided without manifest injury to its value, and report their action to the court; and, if this is approved by the court, one or more of the parties shall be permitted to take the land at the appraised value. If the land is not taken at the appraisement, then by subsequent sections the land is to be sold, and the proceeds are to be divided. The supreme court of Ohio has decided that in the statutory action for partition the parties are not entitled to a jury. McRoberts v. Lockwood, 49 Ohio St. 374, 32 N. E. 734. If, therefore, on the petition and answers in a partition proceeding, a controversy should arise,—for example, as to whether the plaintiff was entitled to one-third or one-half of the land,—the issue, whether of fact or law, must be settled without a jury, and by the court alone. We are of opinion that the circumstance that the parties are not entitled to a jury in the proceeding for partition under the statute of Ohio requires a United States court to decline to assume jurisdiction over such a proceeding except on its equity side.

The seventh amendment of the constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Before the adoption of the constitution, suits for partition could be brought either at the common law or in equity. In the common-law action for partition the general issue was raised by the plea "non tenent insimul." It was triable before a jury (Chit. Pl. [6th London Ed.; 11th Am. Ed.] 1394, note); and such is the procedure under many of the state statutes for partition (Clapp v. Bromagham, 9 Cow. 530; Hewlett v. Wood, 62 N. Y. 75; Covington v. Covington, 73 N. C. 168; Harding v. Devitt, 10 Phila. 95; Ham v. Ham, 39 Me. 216). When suits for partition under such statutes are brought into the United States courts, either by original action or by removal, there is no difficulty in assigning them to the law side of the court. Thus, the partition statute of Massachusetts provided for the trial of the issues raised in an action for partition by jury as in other cases (Act March 11, 1784, as amended by Act Feb. 14, 1787); and Mr. Justice Story took jurisdiction on the law side of the court of a suit brought in a state court under these acts, and removed to the United States court (Ex parte Biddle, Fed. Cas. No. 1,391, 2 Mason, 472). The same learned justice, in Parsons v. Bedford, 3 Pet. 452, in defining the meaning of the phrase "common law," as used in the seventh amendment to the constitution, above quoted, said (page 445):

"The phrase 'common law,' found in this clause, is used in contradistinction to equity and admiralty and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United

States, and treaties made or which shall be made under their authority,' etc., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes in courts of equity and admiralty juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved, in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By 'common law' they meant what the constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. *Probably there were few, if any, states in the Union in which some new legal remedies, differing from the old common-law forms, were not in use, but in which, however, the trial by jury had intervened, and the general regulations in other respects were according to the course of the common-law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified.* In a just sense the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And congress seems to have acted with reference to this exposition, in the judiciary act of 1789, c. 20 (which was contemporaneous with the proposal of this amendment); for in the 9th section it is provided 'that the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury'; and in the 12th section it is provided that 'the trial of issues in fact in the circuit courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury'; and, again, in the 13th section, it is provided that 'the trial of issues in fact, in the supreme court, in all actions at law against citizens of the United States, shall be by jury.'" (The italics are ours.)

The twelfth section of the judiciary act of 1789, above quoted, is now embodied in section 648 of the Revised Statutes.

It follows from the foregoing that every civil action provided by state statute not of equity and admiralty jurisdiction is a suit at common law, within the meaning of the seventh amendment, and that the United States courts, if they assume jurisdiction in such an action at all, must afford a jury trial, even though this is contrary to the spirit and letter of the state statute. But partition was cognizable either at law or in equity before the adoption of the constitution. It is and has been for centuries a well-recognized branch of equity jurisprudence. When, therefore, a statutory proceeding for partition cannot be heard in a United States court on the law side, without affording a jury trial, and thereby doing violence to the forms of procedure provided in the state statute, it seems to us to be the duty of the court to decline to take jurisdiction of it as a court of law, and to direct that it be brought in equity, where no jury need be had, and where every remedy provided by the statute may be amply administered. We are fully supported in this conclusion by the decision of the supreme court of the United States in Bank of Hamilton v. Dudley's Heirs, 2 Pet. 492. That was a writ of error to a judgment in ejectment in the circuit court of the United States for the district of Ohio. The occupying claimant law of Ohio provided that the defendant should not be evicted until he should be fully paid the value of his lasting improvements, made in good faith, previous to his re-

ceiving notice of the suit, unless the defendant should refuse to pay the plaintiff, at his election, the value of the land without the improvements. The second section directed the court to make the valuation prescribed in the preceding section by commissioners. A verdict was found for the plaintiff, whereupon the counsel for the defendant moved the court, in accordance with the state statute, to appoint commissioners to value improvements. This motion was overruled, and judgment was rendered for plaintiff. The action of the court was assigned for error. The supreme court affirmed the action of the court below. Chief Justice Marshall used this language in delivering the opinion of the court:

"The seventh amendment to the constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This is a suit at common law and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title; the compensation for improvements is an important part of it, and, if that is to be determined at common law, it must be submitted to a jury. It has been said that the occupant law of Ohio must, in conformity with the 24th section of the judiciary act, be regarded as a rule of decision in the courts of the United States. The laws of the states and the occupant law, like others, would be so regarded, independent of that special enactment; but the exception contained in that section must be regarded likewise. The law, so far as it consists with the constitution of the United States and of the state of Ohio, is a rule of property, and, of course, a rule of decision in the courts of the United States; but that rule must be applied consistently with their constitution. Admitting that the legislature of Ohio can give an occupant claimant a right to the value of his improvements, and can authorize him to retain possession of the land he has improved until he shall have received that value, and assuming that they may also annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts, still that legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, nor direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. But this inability of the courts of the United States to proceed in the mode prescribed by the statute does not deprive the occupant of the benefit it intended him. The modes of proceeding which belong to courts of chancery are adapted to the execution of the law; and to the equity side of the court he may apply for relief. Sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law until its decree shall be complied with."

The analogy between the case cited and the one at bar in respect to the question we are discussing would seem to be complete. It is true that in courts of Ohio the statutory proceeding for partition has frequently been held not to be a suit in chancery, and, though termed a "special statutory proceeding," was heard on the law side of the state courts, before the new constitution of 1851 and the Code of Civil Procedure were adopted. Doane v. Fleming, Wright, 168; Penrod v. Danner, 19 Ohio, 218–221. But this ruling by the state court can have little or no bearing on the proper course to be taken by a United States court in determining whether such a proceeding is to be heard by it in law or in equity. The constitution of Ohio of 1802 provided that the right of trial by jury should be inviolate, but the supreme court of the state had no difficulty in reconciling with that provision the determination, in an action of ejectment, of the

value of improvements by commissioners under the occupying claimant's law, though the supreme court of the United States, as we have seen, had held it impossible, under the seventh amendment of the federal constitution. Hunt v. McMahan, 5 Ohio, 132. The fact that in a state court a proceeding is triable in an action at law does not affect the right and duty of the United States court, if the action is, under the federal system, cognizable in equity, to take jurisdiction of it in equity. Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75.

It follows from what has been said that it was the duty of the circuit court, when the defendants below objected to the joinder of the petition for partition with the action to recover real property, to dismiss the petition for partition, with leave to the plaintiffs to file a bill in equity for the same purpose. The judgment of the court below in partition is reversed, with instructions to dismiss, for want of jurisdiction, so much of the amended petition as prayed partition and the proceedings thereon, at the costs of the plaintiffs. The costs in this court will be equally divided.

VESEY et al. v. SEAWALL et al.

CRAWFORD et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1895.)

Nos. 151 and 152.

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

Mills Gardner and Humphrey Jones, for plaintiffs in error.
Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. As in these cases the same question is presented as that just now discussed, the same order must be made, reversing the case so far as partition proceedings are concerned, and affirming the judgment in ejectment. See opinion in Klever v. Seawall (No. 150) 65 Fed. 393.

VESEY v. SEAWALL et al.

CRAWFORD et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1894.)

Nos. 151 and 152.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

Mills Gardner and Humphrey Jones, for plaintiffs in error.
Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge. In these cases the same question precisely is presented which was decided in the preceding case of Klever v. Seawall, 65 Fed. 373. The same result, therefore, is reached, and the same orders will be made.