intended to suggest that if the person who, as the bill showed, held the legal title to the land in controversy, in trust for the Reorganized Church, should bring an action of ejectment to recover the property from the pretended trustee in possession, who, as the bill alleged, had no title, but was merely a trespasser, and should succeed in such suit in recovering the possession, there would probably be no occasion thereafter for asking a court of equity to determine who was the proper beneficiary. The remark was intended to emphasize the fact that according to the averments of the bill there was no apparent difficulty in maintaining a suit in ejectment which would settle the entire controversy, inasmuch as the bill alleged, in substance, that the legal title in trust was vested either in the heirs of Blakeslee or in the present bishop of the Reorganized Church, whereas the parties in possession of the property were alleged to be mere trespassers. A person who holds the legal title to property, in trust for a religious sect or congregation, may doubtless maintain an action of ejectment against a person in possession who has no title, either legal or equitable. We think that the paragraph of the opinion in question, when judged by the context, is not liable to mislead, and is not subject to any just criticism.

The petition for a rehearing is accordingly denied.

O'NEIL v. MANHATTAN LIFE INS. CO. (two cases).

(Circuit Court of Appeals, Third Circuit. December 11, 1895.)

Nos. 31 and 32, September Term, 1895.

REVIEW ON ERROR—WAIVER OF JURY—GENERAL FINDING.

Where a jury is waived, pursuant to Rev. St. §§ 649, 700, and the court makes a general finding, which alone is assigned as error, the only question for review is whether the evidence supports the finding. Whether it would have justified a different finding is immaterial.

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

These were two actions of ejectment brought by the Manhattan Life Insurance Company against Edward O'Neil. A jury was waived, and the case submitted to the court, under the provisions of Rev. St. §§ 649, 700. The court made a general finding in favor of plaintiff, in each case, and defendant brought error.

Both parties claimed title under one James C. McKown. McKown was for a long time an agent of the Manhattan Life Insurance Company, and prior to March 10, 1893, had become largely indebted to it, for which indebtedness, at about that time, he gave his bond, with sureties. He was a brother-in-law of defendant O'Neil, and on August 4, 1893, he gave the latter a deed of all his real property, including the pieces of property involved in these suits. The consideration was $2,000 in cash, paid to a third party, to cancel a debt due from McKown. The insurance company, having obtained a judgment against McKown on his bond in 1894, caused levies to be made upon the pieces of property now in question, and bought them in at the marshal's sales. After obtaining deeds from the marshal, the insurance company brought these actions of ejectment against O'Neil, attacking the conveyances to him by McKown on the ground of fraud. The evidence related to the bona fides of that transaction, the adequacy of the consideration paid, and the value of the property at the time.

Johns McCleave, for plaintiff in error.
M. A. Woodward, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The parties in these cases dispensed with juries, and submitted the testimony to the court, under sections 649 and 700 of the Revised Statutes. The first of these sections provides that "the finding of the court upon facts * * * shall have the same effect as the verdict of a jury"; and the second provides that "the rulings of the court during the progress of the trial, if excepted to at the time * * * may be reviewed * * * upon writ of error or appeal, and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Here the finding was general, as follows: "The court finds in favor of the plaintiff, and against the defendant for the land described in the writ, with 6¼ cts. damages, and costs of suit."

The plaintiff assigns this finding, alone, as error. The single question therefore is, does the evidence support the finding? We think it does. It is not important that the evidence might possibly justify a different finding; that was a proper consideration for the circuit court.

The judgment is therefore affirmed.

ROUNDTREE et al. v. REMBERT.

(Circuit Court, D. South Carolina. January 4, 1896.)

1. PARTY AS WITNESS—FEES.
   A party called and examined as a witness on his own behalf is not entitled to fees for travel and attendance.
2. COSTS—COPIES OF TESTIMONY.
   The expense of copies of testimony taken de bene esse, obtained solely for the convenience of counsel, cannot be taxed as part of the costs, in the absence of an agreement to that effect.

Action by R. H. Roundtree & Co. against E. E. Rembert. Heard on exceptions to the taxation of costs.

Mordecai & Gaasden, for plaintiffs.
Lee & Moise, for defendant.

SIMONTON, Circuit Judge. This case comes up upon exceptions to the taxation of costs. The defendant gained his case. He was examined as a witness in his own behalf. He now claims mileage and per diem for his attendance as a witness. The clerk disallowed it. Defendant excepts. No affidavit accompanies his exceptions to the taxation, that his travel to and attendance at the court were solely for the purpose of testifying in the case, and not to assist in the management of the case. This affidavit was

considered necessary by Judge Severens in Tuck v. Olds, 29 Fed., at page 883, quoted by counsel. The decisions of the United States courts are not harmonious on this point. In Nichols v. Brunswick, 3 Cliff. 88, Fed. Cas. No. 10,239, Justice Clifford, on circuit, held that a party called and examined as a witness on his own behalf is not entitled to fees as a witness for travel and attendance. In The Elizabeth & Helen, 4 Ben. 101, Fed. Cas. No. 4,354, Blatchford, J., held the same rule binding on him, quoting Steere v. Miller, 28 How. Prac. 266, approved in the New York court of appeals. 30 How. Prac. 7. The case quoted above from Judge Severens holds to the contrary, provided the affidavit be filed. The question never has come up in this court. But the reasons given by Mr. Justice Clifford seem conclusive:

"When a party is called and examined in his own behalf, he is not entitled to travel and attendance as a witness. He may be sworn, or not, in his own favor, at his election, but he cannot claim compensation for doing what he may omit if he sees fit. In other words, the law gives him the privilege to introduce his own testimony, if he sees fit, but he cannot require the opposite party to pay him for exercising the privilege which the law confers."

Fees to witnesses owe their origin to a period when none but disinterested parties could be witnesses. When, therefore, a person was compelled by the process of the court, or could be so compelled to leave his business and attend the court for the purpose of testifying in a matter in which he had no interest, fair dealing required that he should be indemnified for the expense at which he was put,—going, staying, and returning. But a party to the cause, either plaintiff or defendant, going to testify in his own behalf, does not come within the reasons of this rule. The exception is overruled.

Another exception is the disallowance of the fee paid for a copy of the testimony taken de bene esse. By consent, counsel on both sides were allowed to obtain a copy of the testimony taken in New York. Properly, this is no part of the costs of the case. The copies were solely for the convenience of counsel. In the absence of any agreement that it should be included in the costs, that cannot be done. Counsel for the plaintiffs deny that there was any such agreement, and no stipulation in writing to that effect is in the record. The exception is overruled.

PARKER v. ROBINSON.

(Circuit Court of Appeals, First Circuit. November 15, 1895.)

No. 143.

NATIONAL BANKS—STOCK ASSESSMENT—EXECUTOR'S LIABILITY.

An executor who receives certificates of national bank stock as part of the assets of decedent's estate, and includes them in his inventory returned to the probate court, is a shareholder, and liable as such for an assessment, under Rev. St. § 5151, subject to the relief granted by section 5152.

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

Action by William S. O'B. Robinson, receiver, against Gustavus D. Parker, executor and trustee. There was a judgment in favor of plaintiff, and defendant brings error.

Edward Avery, for plaintiff in error.
George E. Smith, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. David Parker, the testator of the defendant below, now plaintiff in error, died February 22, 1887, and the defendant was qualified as coexecutor of his will, March or May, 1887. Prior to and at his decease David Parker was the unquestioned owner of 50 shares of the capital stock of the First National Bank of Wilmington. At his death the bank was solvent. The certificate of stock came into the hands of the executors, and the shares were included in their inventory of his estate which was returned to the probate court. They thus accepted them, and by the common law, which prevails in the jurisdiction where they were so qualified, they were thus vested with the legal title to the stock. Subsequently the coexecutor of the defendant below deceased, leaving him sole surviving executor. In November, 1891, the bank became insolvent. December 21, 1891, the comptroller of the currency appointed the plaintiff below its receiver, and May 6, 1892, he ordered the assessment in controversy here. This assessment was for the full par of the stock, so in no event can the jurisdiction at law be properly questioned.

Under the circumstances, the defendant below became in law the owner of the stock, although he held it in his capacity as executor, and was holden to account for it as such. He thus became a shareholder, and liable, as such, under section 5151 of the Revised Statutes. Under these circumstances no questions of survivorship of actions or of limitation arise, and the circuit court properly entered judgment against him. The provisions of section 5152, relating to stock held by executors, administrators, guardians, or trustees, are purely supplementary, and are intended only to relieve the classes of persons named therein from execution against their individual assets, and they do not qualify the general rule of liability under section 5151. The plaintiff in error claims that the assets of a testate person under the laws of Massachusetts, where he qualified as executor, are in custodia legis, under authority of the state judicial tribunals, and so are not subject to an execution issued by a federal court. But the question now before us is only as to the validity of the judgment, and not at all as to the manner of its enforcement. The record does not show that any execution has been ordered, and no error has been assigned touching any such matter. The judgment of the circuit court is affirmed, with costs of this court against the plaintiff in error personally.

NORTHWESTERN MUT. LIFE INS. CO. v. STEVENS et al.

BANKERS' LIFE ASS'N OF MINNESOTA v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1895.)

Nos. 635 and 636.

1. LIFE INSURANCE POLICY—PRESUMPTION OF DEATH.
In an action on a policy on the life of one who disappeared about a year before the commencement of suit, it is proper to charge that the death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing exposure to danger which might probably result in his death.

2. SAME.
It is also proper to charge that, while seven years is the period at which the presumption of continued life ceases, this period may be shortened by proof of such facts and circumstances connected with the person whose life is the subject of inquiry as, submitted to the test of reason and experience, would force a conviction of death within a shorter period.

3. SAME—INSTRUCTION NOT APPLICABLE.
An instruction based upon the assumed state of facts to which no evidence applies is erroneous.

4. CHARGE TO JURY—APPEAL TO SYMPATHIES.
In an action against an insurance company by the widow and child of the insured, the court opened his charge by stating that, when women and children were connected with a case, he made it a rule to say as little as possible to the jury, because his sympathies frequently got the better of his judgment, and he subsequently said that, while he always tried to close his eyes to the fact that a woman and child had an interest in a suit, he could not always do it, and did not suppose the jury could, and proceeded: "It is not expected. If a man can do that, he is no better than a brute. He is as bad as the heathen is supposed to be, and worse than the horse thief is thought to be. If he could close his eyes to that fact, lose all sense of decency and self-respect, he would not be fit for a juror." *Held*, that this was ground for reversal of a judgment in favor of plaintiffs.

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

Actions by Jennie S. Stevens and Jennie S. Stevens as next friend of Maud Stevens,—one against the Northwestern Mutual Life Insurance Company, and the other against the Bankers' Life Association of Minnesota. Judgments were rendered in favor of plaintiffs in each case, and defendants bring error. Reversed.

J. W. Deweese (F. M. Hall was with him on the brief), for the Northwestern Mut. Life Ins. Co.

James W. Dawes (Joseph R. Webster was with him on the brief), for the Bankers' Life Ass'n of Minnesota.

F. I. Foss (Geo. H. Hastings, E. E. McGintie, and W. R. Matson were with him on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The life of George D. Stevens was insured by each of the plaintiffs in error for the benefit of his wife and child, the defendants in error. The latter brought actions