

wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. In *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, the court held that the borrowing of money by a national bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow the money. It follows from that decision that, in order to sustain the fourth finding of the court in this case, there must be some evidence showing that the Whatcom bank had, with knowledge of the facts, received the benefit of the loan. The *Armstrong Case* is, in several respects, different from the case at bar. In that case the appellate court was not assisted by any findings or opinion of the court below, and was left to conjecture upon what grounds the court below had acted, while in this case we have both findings and opinion showing clearly the grounds upon which the court below acted. In its findings it is stated that the sum of \$10,000 was paid by the plaintiff to the First National Bank of Whatcom "for the use and benefit of the said First National Bank of Whatcom, and said bank received the said money for its own use and benefit." In the course of its decision the court said:

"The books of both banks, and all the evidence in the case, show that the Whatcom bank actually received the money in this manner: The amount of ten thousand dollars was placed to the credit of the Whatcom bank, in an account opened between the two banks, and was mingled with other deposits made in the Commercial Bank to the credit of the Whatcom bank, and the whole amount credited has been paid upon checks drawn from time to time by the Whatcom bank."

There is evidence in the record to support the finding and decision of the court, and herein the case differs essentially from the *Armstrong Case*. There the moneys obtained by Harper, vice president of the Fidelity National Bank, were appropriated by Harper to his own use, and it did "not appear that the bank ever got a penny of the borrowed money, or any benefit or advantage whatever by reason of the transaction." The distinction in the facts justifies the conclusion of the court in this case that the Commercial Bank is entitled to recover judgment, not upon the ground that Atkins was authorized by the directors of the Whatcom bank to borrow the money, but upon the ground that it received and appropriated the same to its own use and benefit. The judgment of the circuit court is affirmed, with costs.

TEMPLETON et al. v. LUCKETT et al.¹

(Circuit Court of Appeals, Fifth Circuit. May 12, 1896.)

No. 449.

1. EVIDENCE—ANCIENT INSTRUMENTS—PROPER CUSTODY.

In an action involving the title to land in Texas located under a land certificate issued to the heirs of a soldier in the war of independence,

¹ Rehearing denied June 9, 1896.

the defendant offered in evidence a deed executed more than 30 years before the trial, and purporting to convey the certificate, the same forming a part of defendant's chain of title. The deed was produced from the Texas general land office, and the commissioner of that office testified that it was deposited there, together with other proofs of title, by an agent of B., one of defendant's predecessors in title, who claimed the certificate at the time, and by whom it was located on the land in controversy. The said agent also testified that the deed was so deposited by him for B., by whom the certificate was located, and to whom a patent for the land was issued. The deed was regular in form, and acknowledged before a proper officer, whose signature was identified. *Held*, that the deed was sufficiently shown to have come from the proper custody to be entitled to admission as an ancient instrument.

2. SAME—IDENTITY—OPINION OF WITNESS.

Upon a question of identity, a witness who was familiar with the person whose identity it is sought to establish cannot be permitted to testify that he is satisfied that a certain individual is that person, though he may state his reasons for his belief.

McCormick, Circuit Judge, dissenting.

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

M. L. & W. L. Crawford, for plaintiffs in error.

W. L. Simpkins, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

SPEER, District Judge. Henry P. Lockett, for himself, and as next friend of the minor children of himself and his wife, Cornelia, now deceased, were the plaintiffs in these actions in the circuit court. M. M. Templeton and several others were defendants in one case; W. T. Waggoner, the defendant in another. They were both actions in the ordinary form in trespass to try title, under the Texas practice. They were consolidated by order of the court. The first case mentioned involves 1,600 acres of land in Wichita county, Tex.; and the other case, namely, that against Waggoner, involves 640 acres of land in the same county. The defendants filed a plea of not guilty. The case was tried on June 30, 1895, and a verdict was rendered for the plaintiff against Templeton for the 1,600 acres of land, and against Waggoner for the 640 acres, and against both of the defendants for costs. The conflict of titles was as follows: Patents were issued by the state of Texas to the heirs of F. Petreswick for the lands in question,—one in 1874, and the other in 1876. The plaintiffs claim as his heirs. Testimony was introduced to show that prior to the year 1835 there resided in the parishes of Rapides and Natchitoches, La., two brothers, Fred and Peter Petrovic, but that the people of the county called them "Petreswick." It further appeared that in the latter part of 1835 Capt. Wyatt's company, which was enlisted in Huntsville, Ala., was on its march to Texas to take a part in the struggle of the American frontiersmen against the Mexican rulers of the land now comprehended in the state of Texas. As this company passed through Natchitoches, Fred "Petreswick" volunteered and was enlisted as one of its members. He never returned to Louisiana. He was one of the victims

in the massacre of the volunteers under Fannin, who were captured at Goliad. Peter "Petreswick" was the sole heir of Fred "Petreswick." Cornelia Lockett, who was the wife of Henry P. Lockett, and the mother of their minor children, was the nearest and next of kin. Upon these facts plaintiffs rely for a recovery.

The defendants were in possession of the land in controversy,—Waggoner, of the 640 acres; and Templeton, of the 1,600-acre tract. They attempted to prove that the F. Petreswick, who, by virtue of his services and death as a soldier in the cause of the young republic of Texas, became entitled to the land, was not the Fred Petreswick of Natchitoches; but was in point of fact a barber of military inclinations who resided in Huntsville, Ala., in 1835. That he enlisted in Capt. Wyatt's company, in that town in Alabama, where it was assembled, and went with the company to Texas, and was killed at the battle of Coleto a few days before the massacre of Goliad. In support of these contentions they read in evidence a memorial signed by the members of Capt. Wyatt's company at a convention of Texans which had assembled the 1st of March, 1835. On this appears the name of A. R. Petrusseweiz and H. F. Petrusseweiz. The defendants also offered in evidence testimony to show that one Charles Petreswick was sole heir of Fred Petreswick, who it is claimed was the Alabama barber who enlisted in Capt. Wyatt's company at Huntsville, and was, as a soldier, entitled, under the laws of Texas, to the lands in question. They also offered testimony of W. L. McGaughey, commissioner of the general land office of Texas, to the effect that the certificates for 1,920 acres of land were issued to the heirs of F. Petreswick, and that a survey of same was made in Wichita and Archer counties on the 21st day of March, 1873; that this survey was abandoned on account of a conflict, and a copy of the original certificate issued was delivered to Spence & McGill, land agents, for relocation; that said survey was located in Archer, Wichita, and Jack counties. The survey of 1,600 acres involved in this suit, situated at Archer and Wichita counties, was made July 2, 1874, for E. Boon. This survey was patented to the heirs of F. Petreswick November 4, 1874, and the patent delivered to Spence & McGill April 1, 1875. The survey of the 640 acres was made for Jacob Frees June 20, 1874; was patented January 24, 1875, to the heirs of F. Petreswick, and the patent delivered to De Cordova, Withers & Co. This witness further testified that there was filed in the land office on the 28th of February, 1873, the following papers: (1) Proof of heirship of Charles Petreswick to Francis Petreswick; (2) deed from Charles Petreswick to Benjamin F. Brown; (3) power of attorney, Benjamin F. Brown to W. F. Cummins; (4) deed, Benjamin F. Brown, by attorney, W. F. Cummins, to E. Boon, conveying 1,920 acres, certificate of survey. Copies of these documents are still in the land office. It further appears from the record in the case, that the original papers were withdrawn from the land office by H. C. Ferguson, one of the parties to this litigation, under an order from the district court of Denton county; and the circuit court for the Northern district of Texas has impounded during the term of that court the papers with the

clerk, as evidence in this case. The defendants also submitted the testimony of Joseph Spence. This witness stated that he was a member of the firm of Spence & McGill, land agents, Austin, in 1873; that this firm procured from the land office a certified copy of the certificate for 1,920 acres for E. Boon; that this was done for relocation of the lands; that they sent the certificate to Boon; that in order to show his right to withdraw the certificate, they filed in the land office, for him, papers showing his title. This corroborates the testimony of McGaughey to the effect that the patent for the 1,600 acres of land in controversy was delivered to Spence & McGill; that they received both for Boon, who furnished the money to pay for the patent, and who paid the expenses of the firm who procured it. This evidence was all offered in support of the deed purporting to convey the land certificate, under which the land in controversy was located; and the defendants offered the deed of Charles Petreswick, the heir of Francis Petreswick, of Capt. Wyatt's company, to Benjamin F. Brown, which purports to be executed in St. Louis, Mo., in 1852, and to be acknowledged before S. J. Levy, he being a commissioner of deeds for the state of Texas. The deed further purports to have been executed in the presence of two witnesses,—Albert Taylor and H. Lee. This deed, as before stated, was impounded with the clerk of the court. In further support of the deed, the defendants offered the testimony of William C. Jones and Morris Jack. These witnesses reside in St. Louis, Mo., and state that they were well acquainted with S. J. Levy, commissioner of deeds for Texas, and that they knew his handwriting; they had examined the original deed, and that the handwriting purported to be that of S. J. Levy; that the certificate of acknowledgment to the said deed was a genuine signature of Levy; and that Levy died in St. Louis about the year 1873. This deed, upon the admission of which the title of defendants necessarily depends, was objected to by the counsel for plaintiff because an affidavit of forgery had been filed. The defendants offered the deed as an ancient instrument. Counsel for plaintiff objected on the ground that the deed was not shown to have come from the proper custody. The court sustained the objection to exclude the deed, and it follows, necessarily, that a verdict was rendered in favor of the plaintiff. To the ruling of the court the defendants excepted, and assigned it as error.

The rule governing the question thus presented is announced with his usual clearness by Prof. Greenleaf:

"Where these instruments are more than thirty years old, and are unblemished by any alterations, they are said to prove themselves. The bare production thereof is sufficient, the subscribing witnesses being presumed to be dead. This presumption, so far as the rule of evidence is concerned, is not affected by proof that the witnesses are living. But it must appear that the instrument comes from such custody as to afford a reasonable presumption in favor of its genuineness, and that it is otherwise free from just grounds of suspicion."

The possession and control of such instrument by the party claiming the land, where it is not made to appear that such contract was fraudulent or unlawful, is a proper custody. Documents found in a place and under the care of persons where and with whom one would

naturally and reasonably look for such papers are in proper custody. 1 Greenl. Ev. par. 142. The rule is elsewhere expressed as follows:

"Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable." 7 Am. & Eng. Enc. Law, 90.

Indeed, the evidence applicable to this deed brings it within the rule as announced by the supreme court of the United States, which seems to require some supplementary evidence of genuineness. In *Applegate v. Mining Co.*, 117 U. S. 255, 6 Sup. Ct. 745, Justice Wood, for the court, remarks:

"The rule is that an ancient document may be admitted in evidence, without direct proof of its execution, if it appears to be of an age of at least thirty years, when found in some proper custody, and either possession under it be shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion."

In that case deeds were produced from the file of the highest court of the county where the lands were situated, where they had been placed for necessary and proper use, and from which they could not be withdrawn without the order and consent of the court. The court held that the proper custody, and for these reasons the deeds should have been admitted.

Error is also assigned on the ruling of the court excluding testimony of John C. Duval. This relates to the signatures of H. Francis Petrusseweiz and Adolph Petrusseweiz. This witness served under Fannin at the battle of Coleto, and at Goliad. He said that he knew a man whose name was Francis Petrusseweiz, who was there at the time; that he belonged to Wyatt's company; he was a foreigner,—Polish, Prussian, or Hungarian. He did not know him by the name of "Petreswick." The witness stated, "I never saw the name spelled, except as it appeared on Wyatt's muster roll, and on the memorial," the original of which witness examined in the office of the secretary of state of Texas in December, 1892. He identifies his own signature, as well as his brother's, but could not identify that of H. Francis Petreswick, as he had never seen him write. The memorial, he said, was signed by the soldiers about February 1, 1836, but not by all at the same time. The defendant then offered to read from the deposition of the witness, this statement:

"I am satisfied in my own mind that the man whose name is signed to the said document as 'H. Francis Petrusseweiz' is the same man whose name appears on Capt. Wyatt's muster roll as 'F. Petreswick,' and that is his own signature, which I presume was his real name, and the correct spelling of it, from the appearance of the signature, and the circumstances under which it was signed, and because there was no other name at all similar to this on the roll of Capt. Wyatt's company, except that of A. Adolph Petrusseweiz, that could have been so spelled. I am reasonably certain that the correct name is, as there written, H. Francis Petrusseweiz."

To this plaintiff objected. With regard to the objection of the testimony, we are of the opinion that part of it should have been admitted, and the remainder excluded. The witness' statement that he was satisfied that Petrusseweiz and Petreswick is the same

man was not proper. It was proper for him to state that there was no other name at all similar to this on the roll of Capt. Wyatt's company that could have been so spelled, and all other facts actually within his memory which might serve to illustrate the question of the identity of the person in question. These facts having been stated, the jury were quite as competent as the witness to form conclusions as to the identity, and the law imposes that duty upon them. A belief of the witness, however well founded, cannot be regarded as evidence. He is not able to state as a fact that which he states he believes. The authorities cited by plaintiff in error in support of the admissibility of this belief do not conflict with our conception of the proper application of a familiar rule of evidence to this objection. Upon consideration of the questions raised by the exception, we are satisfied that the verdict should be set aside, and a new trial ordered. The decision of the circuit court is therefore reversed.

McCORMICK, Circuit Judge (dissenting). I cannot concur in the decision of this case. I do not find in the record any evidence that the purported grantor in the deed offered as an ancient instrument was the heir, or one of the heirs, to whom the land was granted by the state, or that he held under them, or in any other manner had a right of ownership in the certificates which the instrument offered purports to convey. Such evidence is a fundamental requisite in showing proper custody of the instrument offered.

UNITED STATES ex rel. HUIDEKOPER v. MACON COUNTY COURT JUSTICES AND TREASURER.

(Circuit Court, E. D. Missouri, W. D. April 23, 1887.)

No. 107.

1. WARRANTS ON COUNTY FUND—PARTIAL PAYMENT.

Though warrants on a county fund are payable in the order of registration, it is not necessary, where several are registered at the same time, that enough to satisfy all be accumulated before there is any payment, but, a reasonable amount being accumulated, it should be distributed among them.

2. SAME.

A county, with power to levy a tax of five mills for county purposes, having levied only three mills for such purposes, cannot refuse to apply funds to payment of warrants which have been registered for years, on the ground that such funds are needed for current county expenses.

3. SAME—LEVY OF TAX.

A county which levies a tax of only three mills for county purposes, though having power to levy five mills for such purposes, cannot object to levying the other two mills for payments of registered warrants against the county, on the ground that a township levy of two mills was really for county purposes; a township being a separate organization, having control of roads and bridges, and whose board levies all taxes for township, road, and bridge purposes. 2 Rev. St. Mo. 1879, §§ 7434, 7476, 7489.

Mandamus, on the relation of Alfred Huidekoper, against the Macon county court justices and treasurer.

Joseph Shippen and Cunningham & Eliot, for relator.
Robert G. Mitchell, for respondents.

BREWER, Circuit Judge. The relator, who has a judgment against Macon county, and a registered warrant issued in pursuance of the mandate of this court, now asks two further orders based upon these facts: His warrant is drawn upon the general fund. In that fund is a trifle over \$14,000. There is a prior registered warrant of seven thousand and odd dollars in favor of the county school fund. At the same time that relator's warrant was registered other warrants were also registered, amounting to about \$180,000.

We think, upon these facts, the relator is entitled, as in the first place he prays, to an order on the treasurer to pay to him his pro rata of the surplus in the treasury after paying the school-fund warrant. The defendants interpose two objections to this. They say, first, that orders are to be paid in the order of priority of registration, and that no warrant can be paid until it is surrendered to the treasurer. As these warrants were all registered at the same time, it follows that none could be paid until there was money enough in the treasury to pay all. This would compel the treasurer to retain these funds until they had accumulated to nearly, if not quite, \$200,000. This is absurd. Whenever any reasonable amount has accumulated, it should be distributed, and the order of the court is full protection to the officer. Secondly, they say that all this money is needed for current county expenses. But this warrant was registered years ago, and the law provides that warrants shall be paid in the order of registration. Further, it appears, as we shall hereafter see, that the county has not levied the full amount that it could have done for county purposes. It may be here remarked, in passing, that the division by the county board into separate funds is immaterial, for they all constitute, in fact, simply portions of one general fund.

The county court levied three mills for county purposes. The limit at the date of the issue of the bonds, as well as at the present time, was and is five mills. The relator asks an order for a levy of two mills, the proceeds to be applied to the payment of the several registered warrants. Defendants object that there was a township levy of two mills, and that this was really for county purposes. We think not. The township is a separate organization, a body corporate, with power to sue and be sued, purchase and hold real estate, make contracts, and regulate its corporate property. 2 Rev. St. 1879, § 7434. The township board levies all taxes for township, road, and bridge purposes. *Id.* § 7476. The township has control of roads and bridges. *Id.* § 7489 and following. So that what is levied for township purposes cannot be considered as levied for county purposes. We think, therefore, the relator is entitled to an order for the levy of the two mills and the distribution of the proceeds pro rata between the holders of the several registered warrants.

The same order will be entered in the other mandamus cases pending in this court in which the relators hold registered warrants of same date drawn on the general fund.

UNITED STATES v. WADE.

(Circuit Court, W. D. Missouri, W. D. June 15, 1896.)

1. ARMY REGULATIONS—PAYMENTS TO EXTRA-DUTY MEN.

Under Rev. St. § 1287, and the army regulations (sections 902-905, 907), it must appear, in order to authorize payments to enlisted men for extra duty, that the service performed was not less in duration than 10 days.

2. SAME—TRANSMISSION OF DUPLICATE PAY ROLLS—IGNORANCE OF REGULATIONS.

Ignorance of the requirements of the army regulations, by an officer appointed to act as regimental quartermaster, during the war, in the temporary absence of the quartermaster, *held* no excuse for failure to transmit duplicate pay rolls, on which money was paid out to extra-duty men.

3. SAME—SETTLEMENT OF ACCOUNTS—ALLOWANCE OF CREDITS.

The first section of the act of June, 1870, authorizing the treasury accounting officers, in settling the accounts of disbursing officers of the war and navy departments, arising during the Rebellion, to allow, under certain circumstances, such credits, for overpayments, loss of funds, vouchers, and property, as they may deem just and reasonable, have no application to the case of a disbursing officer who failed to account for money received, and who never presented any claim for a credit for overpayment, or loss of funds, vouchers, or property.

4. SAME—LOSS OF PROPERTY.

The second section of said act, which authorizes the approval and closing of the accounts of military officers "for government property charged to them" whenever, in the judgment of the accounting officer, it is for the interest of the United States to do so, in the absence of fraud, relates only to property charged against officers, such as ordnance stores, equipments, quartermaster supplies, etc., in contradistinction to the class of property and funds committed to disbursing officers.

5. SAME—SETTLEMENT OF QUARTERMASTER'S ACCOUNTS.

The allowance of a credit to the assistant quartermaster of the army, for a sum of money turned over by him to an acting regimental quartermaster, for which the latter failed to account, and the settlement of his accounts, *held* not to have operated to release such acting regimental quartermaster from his liability to account for such money.

6. SAME—ACTIONS BY GOVERNMENT—CLAIMS FOR CREDIT—PRESENTATION TO ACCOUNTING OFFICERS.

Rev. St. § 951, forbidding individuals sued by the United States to claim any credit which has not previously been presented to the treasury accounting officers and disallowed, unless defendant, at the time of trial, is in possession of vouchers not before in his power to procure, applies to a suit brought against one who failed to account for money received during the war as acting regimental quartermaster.

This was an action by the United States against William H. Wade to recover a sum of money alleged to be due.

John R. Walker, for plaintiff.

Geo. A. Neal, for defendant.

PHILIPS, District Judge. This suit was instituted on the 5th day of July, 1887. The petition, in substance, alleges that on the 13th day of September, 1862, the defendant was captain and acting regimental quartermaster in the thirty-first regiment, Ohio volunteers; that on said day he received from one Mackay, assistant quartermaster of the army, the sum of \$485.15, the money of the United States; that he took said money into his custody, as such officer, for and on behalf of the United States; and that he has