in the courts of the United States. The purpose of the latter section is to bring about, as far as possible, uniformity in the mode of pleading and practice in law actions in the same state; and there seems to be no ground for holding that congress intended to secure uniformity only in cases arising at the common law, and to require diversity of practice in cases based solely upon the provisions of the laws of the United States. Whenever the substance of the action is such, as affecting the merits, that the adoption of the state practice would work injuriously, the United States courts may diverge therefrom, under the clause of the statute that required conformity to be "as near as may be"; but, unless good and sufficient reason exists, the statute requires the courts of the United States to conform to the settled practice obtaining in the state wherein the federal court is held. That these sections of the statutes of the United States are applicable to causes of action created by the laws of the United States is settled by the ruling of the supreme court in Campbell v. City of Haverhill, 155 U. S. 610, 15 Sup. Ct. 217; and it must be held, therefore, that, unless substantial grounds exist for excepting this class of actions from the operation of the section requiring conformity in the rule of practice in the federal courts with that provided for by the state law, the state rule of practice must govern.

The sole difference now contended for is that, upon the claims assigned, the action should be in the name of the original owner of the claim, for the benefit of the present plaintiff, instead of being, as it now is, in the name of the assignee, as the real party in interest. The form of the action in this particular does not in the least affect the merits of the controversy, and there is no sufficient reason shown justifying the court in holding that the merits involved in these claims are of such a nature that they form an exception to the general rule that an action at law, under the settled law of Iowa, can be maintained thereon in the name of the assignee, the claims being of the nature of property rights. The demurrer is overruled.

WRIGHT v. SOUTHERN EXP. CO.

(Circuit Court, W. D. Tennessee, W. D. March 30, 1897.)

No. 3,397.

1. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.
   A new trial will not be granted upon the ground of newly-discovered evidence, where the party making the application had heard rumors which, if followed up, would have led to the discovery of the evidence before the trial, or where the new evidence would be merely cumulative.

2. INSANE PERSONS—COMPETENCY AS WITNESSES.
   Where one who has been adjudged to be insane is offered as a witness, the inquiry for the court on the preliminary examination is limited to his understanding of the obligations of an oath and ability to comprehend the examination as a witness, and, if he can stand this test, the effect of his alleged insanity upon his credibility is for the jury.

3. SAME—NEW TRIAL.
   Where there can be no doubt, from what occurred at the trial, that a witness who had been adjudged to be insane would have stood the test

of any examination as to her sense of the obligation of an oath, the court will not grant a new trial merely because there was no such preliminary examination.

4. TRESPASS—USE OF FORCE TO PREVENT.
One who is a trespasser undertaking to carry away the property of another cannot complain if the owner lays hold of the property and takes it from him, provided excessive violence is not used; and this is true even though the taking away might have been prevented by detaining the trespasser without the use of any violence or physical force.

5. PRACTICE—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.
It does not follow, because a case ought to be submitted to a jury, that the court should let the verdict stand; and while the time might come when it would be the duty of the court to yield even to the perversities of the jury, and not any longer interfere with their verdict, two verdicts are not ordinarily conclusive of that duty.

6. SAME.
In actions to recover damages for personal injuries, the court should exercise the right of inspection of the verdict more readily and freely than in other classes of cases, where the occasion for its exercise does not so often arise; and where the alleged injury is hidden, and the plaintiff depends largely for success upon the bare opinions of medical men employed by him as expert witnesses, the court should be more vigilant than where the injury is obvious.

Action by Florence H. Wright against the Southern Express Company.

This is an action for damages for personal injuries alleged to have been sustained in a struggle between the plaintiff and the defendant's agent over a parrot in its cage, constructed of wooden strips tacked together with nails, such as is commonly used in shipping birds. It had come from Nicaragua, consigned by a brother to his sister, Mrs. Williams. The plaintiff, being a sister of the consigner and consignee, had heard, according to her story, that the bird was to be sold for charges, delivery to the consignee having been delayed by her absence. The plaintiff, appearing at the express office, proposed to buy the bird. Parleying ensued, which resulted in her paying the amount of the charges, executing a receipt on the delivery book, and the consequent delivery to her then and there. She laid her hands upon the cage to send it away by her servant, accompanying her, when the agent was warned by a bystander that the plaintiff was taking the bird as her own through a pretended purchase from him, contrary to his understanding of the transaction, according to his contention, and contrary to the bystander's notion of the agent's right to thus dispose of the bird. Anticipating trouble for himself and his company, the agent forbade the plaintiff to take away the bird, laid his hands upon the cage to prevent her from delivering it to her servant, and thereupon the struggle for its possession ensued. Upon the facts proved, the court peremptorily instructed the jury that the plaintiff was a trespasser and a wrongdoer, or else should have yielded a ready assent to the rescission of the supposed purchase from the agent for the correction of the mutual misunderstanding between them, and left the bird in the express office; that the agent had a right to retain it in the office, and to use such force as was necessary to accomplish that purpose; but that the defendant company would be liable for any unnecessary or excessive violence in defending his possession. Having received such other instructions as the case required, the jury returned a verdict for the plaintiff, assessing the damages at $3,500. There had been a previous trial of the case, Mr. District Judge Clark presiding, and also a verdict for the plaintiff for $2,500. The instructions in that case proceeded upon a somewhat different theory of trying the case, not being confined, as in this trial, to the question of excessive violence. That verdict was set aside, and a new trial granted, mainly upon the ground that the evidence did not make it reasonably cer-

tain that the plaintiff had been injured by the struggle in the express office. The defendant, upon this present motion for a new trial, filed an affidavit of newly-discovered evidence, as follows:

"Florence H. Wright versus Southern Express Company.

"In this case G. W. Agee makes oath that he was, when this suit was instituted, and ever since has remained, the superintendent of the Western division of the Southern Express Company, and that as such officer it has been his duty to look after this lawsuit and see to its defense; that he has been actively engaged in its defense since the suit was instituted, and has attended to the preparation of the case for trial and to the two trials which have been had in said case. He further states that during the last trial, in December, 1896, and not until then, did he discover that the plaintiff, Florence H. Wright, had been regularly committed to an asylum for the insane at Utica, N. Y., upon the certificate of Drs. John de Vello Moore and William J. Schuyler, legally qualified examiners in lunacy, approved by the Honorable W. T. Dunmore, judge of Oneida county, New York, this application for commitment to the insane asylum having been made by Miss Florence Wright, of Utica, N. Y., a daughter of said plaintiff, and her brother, Rev. B. F. Cossitt, of Waterville, Oneida Co., N. Y.; and that she had remained there in the insane asylum as a patient from September 11, 1895, until December 11, 1895, when the said Mrs. Florence H. Wright was allowed to leave the hospital for the insane on parole of thirty days, and at the expiration of thirty days she was entered on the books of said asylum as 'Discharged, unimproved.' He further states that soon after the plaintiff left the Utica Insane Asylum, unimproved, that she came to Memphis, Tenn., and this case was brought up for trial in February, 1896, about two months thereafter, at which time the plaintiff was, as he understands the facts, undoubtedly of unsound mind. He further states that he is thoroughly satisfied that she has not recovered from the mental disorder, and that she still was insane, at the time of the last trial, and still is insane; that upon a new trial of the case the defendant will be able to show by the testimony of Dr. G. Alder Blumer, superintendent Utica State Hospital for the Insane, Utica, N. Y., that the plaintiff was and is now afflicted with an incurable mental disorder rendering her insane, and which would either disqualify her as a witness or materially weaken any testimony given by her in this case. Upon the last trial of this case the defendant was not able to make this proof, as it was not aware of the fact that the plaintiff had been committed to an asylum for the insane, and only discovered the fact when a witness in the case, during the progress of the trial, showed defendant's counsel a letter from Dr. Blumer, stating these facts, and it was then too late to obtain the presence of witnesses at the trial or secure his deposition. He further states that he does not know of any negligence or want of care upon his part, or that of any officer of his company, or its counsel, that this fact was not known. In support of the above statement of facts he attaches hereto correspondence which he has had with Dr. Blumer, which correspondence will verify the facts above stated, all of which he respectfully submits to the court. He further states that this application is not made for the purpose of delay, but to the end that justice may be done.

"[Signed] G. W. Agee."

The two attorneys of the plaintiff filed their affidavits in the absence of their client, which indicate that she herself will swear that she had been unjustly placed in an insane asylum, and had been released therefrom by habeas corpus; that there had been no formal adjudication of her insanity, but an examination by medical men for the purpose of transferring her from a sanitarium or hospital to the asylum; that while the full extent of the information possessed by the defendant company and its counsel before the first trial and before the second trial is not known to affiants, they do know, from conversation with the counsel of the defendant company, that they had some information or had heard some rumor that the plaintiff had been in an insane asylum; and that they were informed by the testimony of Bishop Gailor, and other clergymen having knowledge of the plaintiff, that

she was suspected of being insane. It is not necessary to give these affidavits in full, nor to await the filing of the plaintiff's affidavit, because there is no doubt of the fact that the defendant company and its counsel all the time have had intimations or suspicions of the plaintiff's insanity. They questioned her on the trial about her having been in sanitariums or hospitals, though not upon the subject of her having been confined in an insane asylum or adjudicated insane.

The testimony as to the injury of the plaintiff consisted of her own description of her physical and mental sufferings, and that of medical men who had attended her or examined her, some of them for the purpose of giving their evidence, and some for purposes of treatment. Witnesses testified as to her condition of health, her habits and conduct of life, before and since the occurrences at the express office. This testimony was met by the defendant company with the testimony of medical men speaking to a hypothetical case, or men who had examined her while under treatment, and especially the physician who treated her at home after the altercation at the express office, and such other witnesses as could speak of the plaintiff's physical condition, habits of life, and conduct. Among other incidents of her life, it appeared that she had some years before been thrown from a carriage, and received serious injury affecting her spine, for which she had in the intervening time been often treated. Her own proof, and that of her medical men, was that she had recovered from this injury, she producing, among other testimony, that of a New York physician who had certified to her good health in aid of her application to become a member of the Episcopalian Order of Deaconesses. Around this old-time accident, and the conflict over the bird at the express office, the testimony of the plaintiff was gathered to show that she had entirely recovered from the previous injury, and that all her pain and sufferings were attributable to the violence of the struggle with the defendant company's agent; and on the part of the defendant to show that she had never been a well woman, had never recovered from the former injury, was not at all injured by the quarrel over the bird and cage, and that she was a physically frail woman, with mental disorders that made her irascible, quarrelsome, and unreasonable in her conduct towards other people. There was a motion by the defendant company to direct a verdict, both at the end of the plaintiff's testimony and at the end of all the proof, which motion the court refused to grant, but submitted the case to the jury as hereinbefore indicated.

J. H. Watkins and E. E. Wright, for plaintiff.
Geo. Gillham and F. G. Dubignon, for defendant.

HAMMOND, J. (after stating the facts). Being dissatisfied with the verdict, which on the proof was not expected by the court, and at the same time seriously averse to interfering with the right of trial by jury merely because the court is disappointed by the verdict, the ground of newly-discovered testimony offers a plausible and somewhat tempting excuse to direct a new trial. If, however, that were the only ground, it would be refused, for the proof offered does not at all justify a new trial for that reason, when we carefully scrutinize it. It may be doubtful if there has been any judicial adjudication of the plaintiff's insanity, and probably it was only an administrative determination, with judicial sanction, as between hospitals. The affidavits do not disclose the facts with sufficient fullness to exhibit the technical character of the proceeding; but, suppose there were an adjudication as upon a writ de lunatico inquirendo, it ought to have been produced at the trial. Due diligence is required in all cases, and testimony is not newly discovered, in the sense of the law of new trials, merely because the party did not know of it at the time. There must be more than

this, and it must appear that by due diligence it could not have been discovered, or, rather, that after due diligence it had not been discovered, in time for the trial. There was known to be a question about the plaintiff's sanity, and the fact that it was rumored that she had been in an asylum was well known to the defendant company. It was contented with such proof as was given at the trial, and did not, as it should have done, follow up the plaintiff's life, and discover, as could easily have been done, the facts about the confinement in an asylum; the proceedings, judicial or other, upon which it was had; her release on habeas corpus, if such were the fact; the nature of her malady, and all there was or is concerning it. That this was not done is obviously a want of due diligence, because, in the very nature of it, the facts could not be concealed from ordinary inquiry in and about the places where she had been, and of the persons who knew of her life and its surroundings. In Carr v. Gale, 1 Curt. 384, 5 Fed. Cas. 116, Mr. Justice Curtis says that "it cannot be considered as the use of due diligence to suffer a trial to proceed, and after a verdict against him proceed to make the inquiries which he might and ought to have made before." Price v. Jones, 3 Head, 84; Martin v. Nance, Id. 649; Shipp v. Suggett, 9 B. Mon. 5. Moreover, in this case, as in that, the testimony offered is only cumulative. The court can well see how much more potential it would have been if the defendant had proved that the plaintiff had been adjudicated a lunatic, had been in an asylum, and had left it unimproved in the opinion of the asylum authorities, and how much more effective this proof may have been with the jury than the opinions of the clergymen and one of her own doctors that she was "crazy" or "unbalanced," etc.; but still it would have had no other than a cumulative effect in that direction upon the issue of the condition of her mind. It is said that on proof of an adjudication she might have been altogether excluded as a witness on the presumption of law that once insane always insane, until the contrary is made to appear. This is a misapplication of that presumption to the law of evidence. The inquiry for the court on the preliminary examination, when she was offered as a witness, would have been limited to her understanding of the obligations of an oath and ability to comprehend the examination as a witness.

This matter was fully considered in the case of District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, as it had previously been considered in the case of Reg. v. Hill, 5 Cox, Cr. Cas. 259, commented upon by Mr. Justice Field in his elaborate judgment. Both Mr. Justice Field and Lord Chief Justice Campbell approved the rule of Baron Parke in an unreported case, that "it is for the jury to determine whether the person so called has a sufficient sense of religion in his mind, and sufficient understanding of the nature of an oath, for the jury to decide what amount of credit they will give to his testimony"; and the lord chief justice said that "the proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, and his state of mind may be dis-

covered, and witnesses may be adduced to show in what state of sanity or insanity he actually is. Still, if he can stand the test proposed, the jury must determine all the rest."

On this practice the court would undoubtedly have permitted the plaintiff in this case to go to the jury with her own evidence. Enough was developed by her own conduct at the trial to show that she was then and there of sufficient comprehension to fully understand all that was said to her. Her testimony was intelligently delivered, and if with the artfulness that sometimes belongs to insane persons it was for the jury to determine. As to the obligations of an oath, it was manifest from the developments of the proof, and particularly from the proof of the clergymen who were examined in this case, that she was given to a rather high state of religious feeling; and there can be no doubt from what did occur at this trial that she would have stood the test of any examination as to her sense of the obligation of an oath. So, at last, it is only a technical situation that a preliminary examination upon this subject did not occur; and the court, being now satisfied from what did occur that on a preliminary examination her testimony would have been admitted, and the question left to the jury as to the effect of her alleged insanity upon her credibility as a witness, will not now grant a new trial merely because there was no such preliminary examination. On the whole, this ground for a new trial should be overruled. Neither technically nor on its merits is it sufficient to furnish any just foundation for a new trial.

Also this application for a new trial would be refused if it rested alone upon the objections that have been taken to the sufficiency of the proof to establish the fact that excessive force was used by the agent of the defendant company in recovering possession of the parrot and its cage. I use the word "excessive" advisedly and discriminatingly. It was and is almost incomprehensible to me how the jury could have reached the conclusion that there was any "excessive" force used on this occasion. It would seem that the almost perfect condition of the frail structure of lath and small nails constituting the cage would prevail as a physical circumstance over the mere opinions of witnesses as to the extent of the force used; for it looks as if it would be impossible for any really formidable struggle to have taken place between two persons for the unhanding of such a frail structure without tearing it to pieces. In the light of that fact, the court has been wholly at a loss to conjecture upon what theory the jury could have proceeded to find excessive force, unless it may be that, believing that the plaintiff had been as seriously injured as she claims to have been, they concluded that there could not have been such an injury without a formidable struggle, which the cage withstood notwithstanding its frailty. It must be remembered here that there was no concussion or blow of any kind ensuing from the struggle, and that all of the witnesses describe it as merely a grappling between the two for the possession of the cage, with such physical "wrenching" as the plaintiff claims by her proof took place. It might be reasonable to infer that a "wrench" that would strain the vertebræ of the plaintiff's