discretion, but the means employed must always be fair, and the exercise of discretion always reasonable, under the circumstances of the particular survey and measurement. Reasonable exactness is, of course, required, in order to allow the deed to operate as the parties originally intended it should. The fact is found that the Gile line does not include 10,000 acres of land, so again, and upon this ground, we hold that this line is not the boundary line between the parties.

Under the New Hampshire rule, that a deed is certain which can be made certain, and that such a deed operates as a conveyance, the Glen Manufacturing Company holds a valid title to 10,000 acres of land limited on the west and north by the lines to which we have referred, and such lines exist in contemplation of law, although, upon the evidence and the findings, the whereabouts are not ascertained. The parties holding this deed are, upon the findings, in actual possession of at least some portion of the territory, and in constructive possession of all that the deed conveys; while the Weston Lumber Company, being in actual possession of some portion of the township of Odell, is in constructive possession of all that the Thompson deed does not cover. In each of the cases under consideration the burden is upon the plaintiff to show that the defendant has entered his close, and, failing to establish that his domain includes the territory on which the acts in question were committed, he fails in his proofs, and therefore cannot recover. The parties acted upon the idea (and probably correctly) that the obligation was upon the grantor to make the survey, and locate the 10,000 acres, thereby rendering the deed certain and operative upon a particular part of the township. The grantors of the Weston Lumber Company, having conveyed to Thompson, under whom the Glen Manufacturing Company claim, 10,000 acres of the township of Odell, have so commingled the interests by creating a joint or interdependent constructive possession that neither party can establish exclusive title to the locus in quo, and therefore neither party is entitled to recover in trespass until the deed is made certain by ascertaining the true location of the contemplated divisional line, and this is for the reason, not that neither has title, or that neither has trespassed, but for the reason that neither shows title, nor exclusive right of possession, to the disputed territory as against the other. In other words, neither supplies the burden of proof by showing the extent of his own territory or the limit of his adversary's territory. While the deed is upheld as a muniment of title to the 10,000 acres, the title or right of possession to the particular locus in question is left uncertain upon the proofs. Ordinarily, upon such findings and rulings as are here presented, judgment would pass for the defendant in each case, but, in view of the great length and expense of the trial, and of the holding that the divisional line exists as a matter of law, although incapable of ascertainment upon the proofs and findings, we are inclined to defer judgment to the end that the parties may agree upon a surveyor or surveyors to mark the boundary in accordance with the foregoing findings and the construction which we have given to the deed; and, in the event of the inability of the parties to so agree, we will consider a motion from either side directed to the appointment of a surveyor or surveyors for

that purpose upon consent, and, that failing, to open the case for further and additional evidence as to the whereabouts of the true divisional line, including, perhaps, evidence of a survey upon notice to the adverse party, to be considered in connection with the evidence already before us.

BROWN, District Judge (concurring). I concur in the above findings and rulings, and state certain reasons which have led to the conclusion that the methods of the measurement of the Gile line are such as would deprive the Glen Manufacturing Company of a substantial amount of the land to which under its deed it is entitled. The problem of the surveyor is to measure a line upwards of nine miles in length, through rough and mountainous country, by successive applications of a measuring instrument. A part of the process necessarily involves personal skill and judgment, since the complete operation of measurement includes an observer as well as measuring instruments. Observation must determine at each application of the instrument whether the application is correctly made, whether it is upon the true course, whether there is a departure in any direction from the true theoretical line. Whatever the instruments employed, however scientific the processes, they merely reduce, but do not eliminate, the elements of personal judgment and personal error. The importance of error is to be determined by the practical purpose in hand. At times it may be disregarded, at times compensation should be made for it. It seems to me that upon the evidence in this case there appears the necessity for some allowance or compensation for error in order to reach a result even practically correct. The evidence for the Glen Manufacturing Company is to the effect that in measuring wild lands by a chain or tape error always results, and that the error is invariably one way. Given two points at a considerable distance from each other, a line measured between them will always be longer than the true theoretical line. Errors of measurement consume distance, and the surveyor of an uneven surface covers with his measure a greater distance than the true line. If the sum of his successive measurements is relied upon to give the required length, his terminal will be located at a point on the ground at a less actual distance from the starting point than the correct terminal point. This is obviously so. As a straight line is sought, and as this is the shortest possible distance between two points, no irregularity in the contour of the surface over which the line is extended can shorten it. On the contrary, every elevation, every depression must count one way and only one way; i. e. to elongate the measured line over the true line. In a line of over nine miles in length through mountainous and heavily wooded country every obstacle in the true path, every rock, every mountain, every valley contributes error. Every angle of deviation made to avoid an obstacle adds error. To accept the measurement of the Gile line, in which no allowances for error were made, but which is simply the sum of successive measurements, we are forced to hold that the surveyor who made it had the unerring observation, judgment, and eyesight to keep the tape always upon the true course and true horizontal line. In my opinion it is not satisfactorily proved

that the Gile line was run upon a more accurate or more scientific method than the older lines, which his measurements increase in length from 6½ to 10 per cent., thereby augmenting the land area about 17 per cent. The method lacked what is known as a correction for the personal error of the observer; what in measuring wild lands may be said to be a lack of correction of the personal error under conditions which make error inevitable. The evidence as to the Gile line discloses a confident assumption of accuracy under conditions which do not permit of it. In one respect, at least, the older lines seem to me more scientific than the Gile line, namely, in a recognition of the existence of error, and in an attempt to rectify it. One of the witnesses in favor of the Gile line ventured the opinion that deviations in the surface tend to balance each other. This is clearly not so. As we have seen, the current of error is all in one direction, and there is no tendency towards a correction. On the other hand, it may well be true that where allowances are made by men of experience, errors of judgment can hardly be all one way, and that in a long series of judgments there will be an average of practical accuracy. Without passing, however, upon the accuracy of the older surveys, since under the findings it is unnecessary to do so, I concur in the findings that the Gile line is not located according to the calls of the deed, and is based upon an imperfect method of measurement.

UNITED STATES v. GAY.

(Circuit Court, D. Indiana. April 30, 1897.)

No. 9,230.

1. IMMIGRATION—CONTRACT LABOR LAWS.
   The acts of February 26, 1885, and March 3, 1891, are highly penal, and must be so construed as to bring within their condemnation only those who are shown by direct and positive averments to be embraced within their terms. They are to be construed in the light of the evil to be remedied, and are limited to cases in which the assisted immigrant is brought into this country under a contract to perform manual labor or service.
2. SAME—PLEADING.
   In an action for the penalty for violation of these laws, a declaration is insufficient which fails to show the character of the labor which the immigrant was to perform, or the terms of the contract, at least in substance, under which he came to this country, and which fails to allege definitely that he actually came here pursuant to the contract, or to set forth the acts done by the defendant to assist or procure his immigration.

Frank B. Burke, for the United States.
Miller, Winter & Elam, for defendant.

BAKER, District Judge. This is an action to recover the penalty of $1,000, prescribed for the importation of aliens under contract to perform labor and service in this country, in violation of the acts of February 26, 1885, and March 3, 1891 (1 Supp. Rev. St. pp. 479, 934).

The declaration, omitting the caption, is as follows:

"The plaintiff complains of the defendant, and says that the defendant is a resident of the city of Indianapolis, in the state of Indiana, and that heretofore, to wit, on the 20th day of July, 1893, the said defendant did assist and encourage the importation and migration of a certain alien and foreigner into the United States, to wit, one James H. Henderson, who was then and there a native of Scotland and a subject of Great Britain, by promise of employment, through advertisements printed and published in the city of Glasgow, Scotland, and under contract and agreement made previous to the importation and migration of said alien and foreigner, and previous to his becoming a resident and citizen of the United States, by the defendant with the said James H. Henderson, by which said contract and agreement the said James H. Henderson was to perform labor and service in the United States for the sum of twelve dollars per week, and the said defendant further agreed to refund the passage money and cost of transportation of the said James H. Henderson from Scotland to the United States; wherefore plaintiff says the defendant has become liable to a penalty of one thousand dollars, for which sum plaintiff demands judgment against defendant, and for all other proper relief."

To this declaration the defendant has interposed a demurrer, for insufficiency of facts to constitute a cause of action.

The statute in question is highly penal, and must be so construed as to bring within its condemnation only those who are shown by the direct and positive averments of the declaration to be embraced within the terms of the law. It will not be so construed as to include cases which, although within the letter, are not within the spirit of the law. It must be construed in the light of the evil which it was intended to remedy, which, as is well known, was the importation of manual laborers under contract previously entered into, at rates of wages with which our own laboring classes could not compete without compelling them to submit to conditions of life to which they were unaccustomed. U. S. v. Laws, 163 U. S. 258, 16 Sup. Ct. 998; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511; U. S. v. Craig, 28 Fed. 795. It is settled by these and other cases that the statute must be construed as limited to cases where the assisted immigrant was brought into this country under a contract to perform "manual labor or service." The declaration does not state the character of the labor or service which the immigrant was under contract to perform, and hence fails to bring the case within the terms of the statute, as construed by the supreme court. The court cannot indulge the presumption that the labor or service which the immigrant was under contract to perform was manual, in the absence of such averment. The declaration does not set out the advertisements, or otherwise state the terms of the contract or agreement alleged to have been entered into. The pleader has contented himself with a mere statement of conclusions, without stating either the advertisements or contract in hæc verba, or even attempting to set forth the substance of either. At least, the substance of the advertisements and contract should be set out to enable the court to determine whether they bring the defendant within the condemnation of the statute. U. S. v. Edgar, 45 Fed. 44. There is no direct allegation that the immigrant named in the declaration actually came to this country pursuant to the alleged contract for the purpose of performing manual labor or service. Such an averment is essential. U. S. v. Craig, 28 Fed. 795, 799. There is no statement of the acts done by the defendant to assist or procure the immigration into this country of the person