

Statement of the Case.

MATTHEWS *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 778. Submitted March 8, 1896.—Decided March 16, 1896.

The defendant was indicted for perjury alleged to have been committed on the 7th of June. The minutes of the stenographer of the testimony, alleged to be false, were read upon the trial, and they said that the testimony alleged to be false was given on the 6th of June, instead of the 7th. The defendant, being convicted, moved for a new trial upon the ground that the variance was fatal, which was refused. *Held*, that such a variance was not material in this case.

Stenographers' minutes of evidence are not records.

THE plaintiff in error was indicted in the Circuit Court of the United States, for the Southern District of New York, for the crime of perjury, alleged to have been committed upon the trial of an action between the United States and one John Matthews, impleaded with others. The trial of the action in which the perjury was alleged to have been committed was had in the Circuit Court for the Southern District of New York, and Matthews, plaintiff in error, was sworn upon the trial, and the indictment in this case alleges that he committed the perjury set forth in the indictment upon that trial "before the said judge and jury, to wit, on the 7th day of June, in the year of our Lord one thousand eight hundred and ninety-four, and within the district aforesaid and within the jurisdiction of this court." For the purpose of proving the testimony of plaintiff in error, taken upon the original trial in which the perjury was alleged to have been committed, and by stipulation of counsel for the parties in this case, the minutes of the stenographer were read upon the trial, and from those minutes it appeared that the testimony, alleged to be false, was given by plaintiff in error upon the 6th instead of the 7th of June. The plaintiff in error was convicted. His counsel then made a motion for a new trial and in arrest of judgment, both of which motions were

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denied. Upon the trial the objection was raised by counsel for defendant that there was a fatal variance existing between the indictment and the proof as to the time when the perjury was committed, and that question was reserved for the purpose of being heard on the motion for a new trial, in case the plaintiff in error was convicted. The motion for a new trial having been made on that ground and denied, the defendant below obtained a writ of error from this court, and the case is now here for review.

Mr. W. J. Townsend for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

The only point suggested by counsel for plaintiff in error upon which to obtain a reversal of the judgment is the fact of the variance between the indictment and the proof as to the day when the alleged perjury was committed. We think the decision of the court below was clearly right. The cases cited by counsel for plaintiff in error, in regard to the necessity for specific and accurate proof of the very day upon which the perjury was alleged to have been committed, were those in relation to records, depositions or affidavits which were to be identified by the day on which they were made or taken. Under such circumstances a misdescription of the date of the particular record, deposition or affidavit has been sometimes held fatal on the ground, substantially, that it has not been identified as the particular one in which the perjury is alleged to have been committed, because the record or other paper itself bears one date and the indictment describing it bears another. It is not the same record, and therefore there is variance, which has been held fatal to a conviction.

In this case there was no record which was contradicted by the proof given upon this trial. The trial was described accurately, the parties to it, the court in which it took place, the

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term and the time at which it was tried, and the only difference between the allegation in the indictment and the proof in the case is that during this trial, which occupied several days, the plaintiff in error swore on the 6th of June instead of on the 7th, as alleged in the indictment, to the matter which was alleged to be false. The date upon which the evidence was given, which was alleged to have been false, appeared by the stenographer's minutes, who took the evidence on the trial, to have been the 6th of June. This is no record, and it is not within the principle upon which the cases relied upon by counsel for plaintiff in error were decided. Such a variance as appears in this case is not material. *Rex v. Coppard*, 3 C. & P. 59; *Keator v. People*, 32 Michigan, 484; *People v. Hoag*, 2 Parker's Cr. Rep. (N. Y.) 10. It will be seen that the time was stated under a *videlicet* in this indictment, although that fact is probably not very material. The opinion written by the learned judge in denying the motion for a new trial and in arrest of judgment says all that is necessary to be said in this case, and we concur entirely in the conclusion reached by him. 68 Fed. Rep. 880.

The judgment must be

Affirmed.

ORNELAS *v.* RUIZ.APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TEXAS.

No. 622. Argued January 13, 1896.—Decided March 16, 1896.

The appellees were brought before a Circuit Court commissioner in the Western District of Texas, charged by the Mexican consul with the commission, in Mexico, of a crime extraditable under the treaty of June 20, 1862. The commissioner found the evidence sufficient to warrant their commitment for extradition. On the application of the prisoners a writ of *habeas corpus* was issued by the United States District Judge, directed to the marshal of the district. The judge, after hearing, decided that the offences charged were political offences, and not extraditable, and ordered the prisoners discharged. From this judgment the consul appealed to this court. *Held*, that as his government was the real party