
Atkinson's Lessee v. Cummins.

a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced.

It has been supposed, in the argument for the plaintiff, that the proceedings in Congress upon the report of the commissioners in relation to the title claimed under the Spanish authorities, which have now been referred to, distinguish this case from that of *Pollard v. Hagan*. But this Spanish title was acquired in 1809, and it has been repeatedly decided that a Spanish grant in this territory, whether inchoate or complete, made after the treaty of St. Ildefonso, in 1800, did not convey any right in the soil to the grantee. And this subject was again considered and decided, after careful research and examination, at the present term, in the case of *Reynes v. United States*, and the former decisions reaffirmed. Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State.

The judgment of the Supreme Court of Alabama is therefore affirmed.

ORDER.

[*479]

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

LESSEE OF ISAAC ATKINSON, PLAINTIFF IN ERROR, *v.* JOHN CUMMINS.

The rule of evidence, as stated by Tindal, Chief Justice, in the case of *Miller v. Travers* (8 Bing., 244), sanctioned by this court, viz.:—"In all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject cal-

Atkinson's Lessee v. Cummins.

culated to explain what was the estate or subject-matter really intended to be granted or devised." Therefore, where the sheriff sold a tract of land under a *fieri facias*, and made a deed of it to the purchaser, and it appeared afterwards that the debtor had two tracts near to, but separated from each other, and the sheriff's deed described one tract accurately except that it called to bound upon two parcels of land which were actually contiguous to the other tract, and the purchaser took possession of that to which the description was mainly applicable, and retained possession for nearly twenty years, parol evidence was admissible to show that the levy and sale applied to one tract only, and not both.¹

¹ Where reference is made in deeds to a recorded plat, and in an ejectment suit, evidence is offered to show that this plat differs from the original plat, the evidence ought not to be admitted. If an error existed, the proper remedy is in chancery to reform the deed. *Jones v. Johnson*, 18 How., 150.

Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject. *Noonan v. Lee*, 2 Black, 499. *S. P. Edwards v. Tipton*, 77 N. C., 222.

Where a conveyance of real estate is made to the grantee, as "trustee" without setting forth for whom or for what purpose he is trustee, parol evidence is admissible to establish the fact. *Union Pacific R. R. Co. v. Duran*, 5 Otto, 576.

Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used. *Brawley v. United States*, 6 Otto, 168.

When a deed of a town lot refers for description of the lot to the official map of the town plat, parol evidence of the actual survey may be received to correct the boundaries of the lot as indicated by the map. *O'Farrell v. Harvey*, 51 Cal., 125.

Declarations of a grantor, made at uncertain times before and after the conveyance, not being part of the *res gestae*, are not admissible to explain what he intended to grant by the deed. [Two judges dissenting.] *Aguirre v. Alexander*, 58 Cal., 21.

When land is described in a deed by metes and bounds, evidence is admissible to show that the particular

plat in controversy is not included in such description. *Maguire v. Baker*, 57 Ga., 109.

Where all the rights and appurtenances to the premises are conveyed by the deed, parol evidence is competent to show that the use of an alley was one of such rights. *Kirkpatrick v. Brown*, 59 Ga., 450.

When the language describing the land conveyed is doubtful, parol evidence of the construction given to the deed by the subsequent acts of the parties thereto, is admissible. *Lovejoy v. Lovett*, 124 Mass., 270.

Where a sheriff's deed described land sold under execution as situated in "township thirty." *Held*, that parol evidence was admissible to show that it was, in fact, situated in "township thirty-six." *Terry v. Berry*, 13 Nev., 514.

Evidence of practical location is permissible only where there is an ambiguity in the description or uncertainty in its application to the premises granted, or where the location operates as an estoppel *in pais*. *Baldwin v. Shannon*, 14 Vr. (N. J.), 596.

In the construction of any written instrument, it is competent to prove, by extrinsic evidence, the facts surrounding the parties, so that the court may see what they saw and know what they knew, not to vary or alter the writing, but to give it effect and carry it out according to its intent; and when it is apparent upon the face of the instrument that something was contemplated and agreed upon by the parties, which they have not distinctly defined or expressed with sufficient clearness, parol proof connecting the instrument with the subject-matter is allowable. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y., 328, 336. A party may show any facts and circumstances

Atkinson's Lessee *v.* Cummins.

THIS case came up, by writ of error, from the Circuit Court of the United States for the Western District of Pennsylvania.

It was an action of ejectment brought in the Circuit Court by Isaac Atkinson, a citizen of Ohio, to recover a tract of land in Derry township, Westmoreland County and State of Pennsylvania.

The whole case was stated in the bill of exceptions, which it is only necessary to recite.

Copy of Bill of Exceptions.

“In the Circuit Court of the United States, Western District of Pennsylvania.

“RICHARD SMITH, Lessee of ISAAC ATKINSON, a Citizen of the State of Ohio, *v.* WILLIAM STILES, with Notice to JOHN CUMMINS, a Citizen of the State of Pennsylvania.

“November Term, A. D., 1846.—Action of Ejectment.

“Be it remembered, that at the November term, A. D., 1846, of the said court, before the Honorable R. C. Grier, an associate justice of the Supreme Court of the United States, and the *Honorable Thomas Irwin, judge of the said [§480 District Court, judges holding said court, at Pittsburg,

surrounding the making of a contract, which would enable the jury to determine the subject-matter to which the contract was in fact applicable. *Bickett v. Taylor*, 55 How. (N. Y.) Pr., 126.

The court will not hold a description of land in controversy too indefinite to admit parol proof to identify it when such description calls for natural boundaries and the lines of adjoining proprietors, especially when the defendant admits in his answer that he withholds the possession of the land claimed by the plaintiffs. *Wellons v. Jordan*, 83 N. C., 371.

Extrinsic testimony is admissible to identify land described in a deed as “a tract or lot of land known as the east half of the south-west division of § 17,” although such testimony shows that the land so conveyed is less in quantity than the mathematical half of the division. *Schlieff v. Hart*, 29 Ohio St., 150. Also to show that a heater and gas-fixtures were to pass to the purchaser of a house, under a

written agreement in which no mention was made of such articles. *Heysham v. Dettre*, 89 Pa. St., 506.

If there is any ambiguity in a deed as to the quantity of land conveyed thereby, arising from a conflict between the calls and the courses and distances, articles of agreement, in pursuance of which the deed was executed, may be admitted in evidence to show the intent of the parties. *Koch v. Dunkel*, 90 Pa. St., 264.

Parol evidence to show the locality of a line and corner designated in a grant as in another grant, *Held*, admissible. *Hughlett v. Connor*, 12 Heisk. (Tenn.), 83. And to show that erroneous courses and distances or recitals in a deed were inserted by mistake. *Jones v. Sharp*, 9 Heisk. (Tenn.), 660; *Elliott v. Horton*, 28 Gratt. (Va.), 766. See also *Bloomer v. Millinger*, 1 Wall., 340; *Clements v. Pearce*, 63 Ala., 284; *Baucum v. George*, 65 Id., 259; *Fisher v. Quackenbush*, 83 Ill., 310; *Crooks v. Whitford*, 47 Mich., 283.

Atkinson's Lessee v. Cummins.

in said district, the parties in this cause were at issue upon a plea of not guilty in manner and form as the said plaintiff hath thereof in his declaration complained, by said John Cummins, who had entered into and filed in said cause the common consent rule, confessing lease, entry, and ouster, &c., as appears of record in the same; and therefore a jury was called, and regularly and legally impanelled and sworn to try said issue; and on the trial thereof, the plaintiff, to prove the same on his part, gave in evidence the record of a judgment in the Court of Common Pleas of Westmoreland County, Commonwealth of Pennsylvania, in favor of Thomas Pumroy, for the use of John Sloan, junior, against George Pumroy, on the 5th day of September, 1820, for the sum of four hundred dollars debt and costs; also a writ of *fieri facias*, issued on said judgment from said court, dated December 2d, 1820, directed to the sheriff of said Westmoreland County, a levy by John Klingensmith, sheriff of said county, of said writ, on all the right, title, and claim of George Pumroy, of, in, and to a certain tract of land, situate in Derry township, adjoining land of James Henry, Nathaniel Doty, William Reed, William Bell, Robert Thompson, James Wilson, and others, containing 400 acres, more or less, about sixty acres cleared, thirty acres of which is in meadow, having thereon erected a grist-mill, shingle-roofed log dwelling-house, shingle-roofed log barn, with an apple-orchard thereon growing; and also of such further proceedings in the premises as showed a legal and valid sale by said sheriff of the premises so levied upon, as aforesaid, on the 18th of February, A. D., 1822, to one John Rhey, for the sum of fourteen hundred and one dollars; also a deed from said sheriff to said Rhey, for said premises so levied upon and sold as aforesaid, duly acknowledged in said court on the 9th day of April, 1822; and also evidence that, at the time of said levy and sale, said George Pumroy was the owner of said premises described in the plaintiff's declaration, and sought to be recorded in this action; also a conveyance in fee of said premises by said John Rhey, on the 16th of June, A. D., 1841, to said Isaac Atkinson. And the plaintiff, on said trial, for the purpose of exhibiting and defining what he claimed as embraced in said levy, sale, and conveyance to said Atkinson, as aforesaid, gave in evidence the plot or draft marked on the outside 'A, November 18th, 1846,' hereto attached, and herewith incorporated as a part of this bill, and claimed before said court and jury that said levy, sale, and conveyance to said Rhey embraced and contained the said land

Atkinson's Lessee v. Cunumins.

represented in said *plot or draft by the black lines, [*481] embracing $326\frac{1}{2}$ acres, and also $158\frac{1}{2}$ acres, and gave evidence that William Bell and William Reed, two of the persons named as adjoiners of the said $158\frac{1}{2}$ acres, as indicated on said plot or draft, are not adjoiners of any part of the $326\frac{1}{2}$ acres. The defendant, on the contrary thereof, insisted and claimed that said levy and sale did not embrace or contain any part of the land described in the plaintiff's declaration (which is the same marked $158\frac{1}{2}$ acres on the plot), but, on the other hand, was limited and confined to that marked on the said plot $326\frac{1}{2}$ acres, &c.; and thereupon, after giving evidence to show that the improvements on the said last-mentioned tract of $326\frac{1}{2}$ acres, &c., corresponded with the description in the levy, that the tract in dispute contained upwards of one hundred acres of cleared land, with an apple-orchard, a shingle-roofed log dwelling-house and barn and stable thereon erected, and that the said two tracts were entirely distinct, separate, and disconnected from each other, in order further to prove that said levy and sale did not embrace or contain any part of the land described in plaintiff's declaration, but, on the other hand, was limited and confined to that marked on the plot $326\frac{1}{2}$ acres, called John Klingensmith, Esq., late sheriff of Westmoreland County, by whom the levy and sale in the case were made, and proposed to prove by him as follows:—That he went to the land of George Pumroy, in 1821, to make the said levy; that the said George Pumroy furnished him with the adjoiners of both tracts; that, upon inquiring of said Pumroy whether the description furnished embraced more than one tract, and learning from him that it covered both, he objected to making the levy in that way; that the said Pumroy acquiescing in his decision, he then struck off, as well as he could, the names given to him as adjoiners exclusively of the tract in dispute in this action, and supposed that he had stricken them all off; that on the inquisition held upon the levy, indorsed on the *f. fa.*, the land in dispute was not submitted to the jury, or acted upon by them, but only what was called the mill tract, or, in other words, that upon which the purchaser entered after the sale; that at sale, upon a representation made to him by some of the bystanders that there was an ambiguity in the description of the land which rendered it uncertain whether one or both tracts were included within it, he stated, in the presence and hearing of John Rhey, that he was selling only the mill tract, and that bidders must govern themselves accordingly; that he made the same representation to Paul Morrow, by whom the property was purchased,

Atkinson's Lessee v. Cummins.

as the agent and for the use of said Rhey ; that, after the said *482] sale, he was directed to *execute the deed to said Rhey, which was accordingly done ; that, at the time of the execution thereof, it was again represented, and perfectly understood by both parties, that the property conveyed in said deed embraced only the mill tract, and not the land in dispute ; and that at a subsequent period, not very remote from the time of the said sale, upon a representation to him by some of the neighbours that the said Rhey was asserting his claim to the property in dispute under said sale, he took occasion to inquire of him whether the fact was as represented, to which the said Rhey replied that he might have said so in a jocular manner, but that he never intended to claim both tracts, for that he knew that he never bought both tracts, and that he never paid for both tracts, and to claim them now (then) would be too much like putting his hand into another man's pocket and robbing him.

"To the admission of which testimony of said Klingensmith, proposed to be given by the defendant as aforesaid, the plaintiff objected, and insisted that the same could not be legally admitted for the purpose aforesaid.

"Whereupon said court did overrule said objection, and admitted said testimony of said Klingensmith so proposed to be given as aforesaid, and the said plaintiff here in court, and during the trial of said cause, excepts to the judgment, opinion, and determination of said court in admitting said testimony ; and as the facts aforesaid do not appear of record, the said plaintiff prays that this bill of exceptions may be certified, signed, and sealed by the judges of said court, that the same may become part and parcel of the record in said case. By the court allowed and ordered to be lodged on file.

"R. C. GRIER, [L. S.]
THOMAS IRWIN. [L. S.]"

The jury found a verdict for the defendant.

Upon a writ of error sued out by the plaintiff, the case was brought up to this court.

It was argued by *Mr. Cooper*, for the plaintiff in error, and *Mr. Wylie*, for the defendant in error.

Mr. Cooper made the following points.

The court erred in admitting the testimony of John Klingensmith to contradict, vary, and limit the description of the bond as recited in the levy, *fieri facias, venditioni exponas*, and deed of the sheriff to the purchaser.

Atkinson's Lessee v. Cummins.

I. The levy, *fieri facias*, *venditioni exponas*, sheriff's deed, *and acknowledgment thereof, are records, and parol [*483 evidence is not admissible to contradict, vary, or limit the description of the premises contained in them. The extent of the grant is only to be ascertained by levy, *fieri facias*, *venditioni exponas*, and deed. *Sergeant v. Ford*, 2 Watts & S. (Pa.), 126; *Woodward v. Harbin*, 1 Ala., 104; *Hobson v. Doe*, 4 Blackf. (Ind.), 487; *Hellman v. Hellman*, 4 Rawle, 448, 449; *Patterson v. Forry*, 2 Pa. St., 456; *McClelland v. Slingluff*, 7 Watts & S. (Pa.), 134; *Aulenbaugh v. Umbehauer*, 8 Watts (Pa.), 50; *Beeson v. Hutchison*, 4 Id., 442-444; *Streaper v. Fisher*, 1 Rawle (Pa.), 155; *Grubb v. Guilford*, 4 Watts (Pa.), 223; *Haynes v. Small*, 9 Shep. (Me.), 14; *Lawson v. Main*, 4 Pike (Ark.), 184.

II. Natural monuments, clearly visible, such as a road, a stream, adjoining farms or lands, prevail over other marks, such as quantity, improvements, &c., and even over courses and distances. *Cox v. Couch*, 8 Pa. St., 147; *Howe v. Bass*, 2 Mass., 380-384; *Pernam v. Wead*, 6 Mass., 131-133; *Wendell v. Jackson*, 8 Wend. (N. Y.), 185-190; *Jackson v. Moore*, 6 Cow. (N. Y.), 706; *Newton v. Pigon's Lessee*, 7 Whart. (Pa.), 7, 11; *Cronister v. Cronister*, 1 Watts & S. (Pa.), 442; *Hare v. Harris*, 14 Ohio, 529.

III. George Pumroy, and Cummins, the defendant, who claims under him, being privy in estate, were in default in permitting the sheriff's deed to be acknowledged. Having stood by in silence when they should have spoken out, they are estopped from alleging that all that was levied upon and conveyed to the plaintiff by deed was not sold. This is also so in relation to the sheriff. *Zeigler v. Houtz*, 1 Watts & S. (Pa.), 540; *Sergeant v. Ford*, 2 Id., 127; *Streaper v. Fisher*, 1 Rawle (Pa.), 161; *Thompson v. Phillips*, 1 Baldw., 271.

IV. In cases of ambiguous or doubtful description, the court adopts the construction most liberal to the purchaser. This is true of purchasers at judicial as well as other sales. 1 Shepp. Touch., 82, 83; *Jackson v. Blodget*, 16 Johns. (N. Y.), 178, 179; *Jackson v. Gardner*, 8 Id., 394-406; *Doe v. Dixon*, 9 East, 15, 16; *Palmer's Case*, 2 Co., 74; *Inman v. Kutz*, 10 Watts (Pa.), 90-100; *Strein v. Zeigler*, 1 Watts & S. (Pa.), 259, 260.

Mr. Wylie, for the defendant in error, made the following points.

1. In Pennsylvania there is no court of equity, but equitable principles are applied, under the direction of the courts of law, in the same manner as legal principles. *Kuhn v. Nixon*,

Atkinson's Lessee v. Cummins.

15 Serg. & R. (Pa.), 118; *Hawthorn v. Bronson*, 16 Id., 278; *484] *Torr's Estate*, 2 Rawle (Pa.), 252. Ejectment is a substitute for a bill in equity, and may be defeated by the same considerations which would defeat a bill for a specific performance in a court of equity. *Pennock v. Freeman*, 1 Watts (Pa.), 408.

2. Equity will not permit a party to enforce compliance with a deed or contract, when such compliance would work a fraud on the other party. *Woollam v. Hearn*, 7 Ves., 211; 2 Atk., 98; Story, Eq., § 769. And parol evidence is admissible to show the fraudulent purposes. *Bowman v. Bittenbender*, 4 Watts (Pa.), 290; *Oliver v. Oliver*, 4 Rawle (Pa.), 141; *Hultz v. Wright*, 16 Serg. & R. (Pa.), 345; *Mitchell v. Kintzer*, 5 Pa. St., 216; Greenl. on Ev., § 248. And it is an admitted principle, that courts of law have concurrent jurisdiction with courts of chancery, in cases of fraud. *Gregg v. Lessee of Sayre*, 8 Pet., 244.

3. The evidence was for the purpose of applying the deed to its proper subject, and therefore competent. 1 Greenl. on Ev., § 301.

Mr. Justice GRIER delivered the opinion of the court.

The single question in this case arises on a bill of exceptions to the admission of certain testimony. In order to judge of its correctness, we must ascertain what was the matter in dispute before the jury at the time the testimony was offered and received.

The action was ejectment for a tract of land containing 158½ acres. In 1822, George Pumroy was owner of this tract, and also of another of 326½ acres, lying near to it, but not adjoining. A judgment had been obtained against Pumroy for the sum of \$400, and an execution issued, on which the sheriff returned that he had levied on "a certain tract of land, situate in Derry township, adjoining lands of James Henry" (and a number of others), "containing 400 acres, more or less, of which 60 acres were cleared land, and 30 acres of meadow, and on which were erected a grist-mill, dwelling-house," &c., &c. A sale was made by the sheriff under a writ of *venditioni exponas*, and a deed delivered by him to John Rhey, legally conveying to him the tract of land as described in the levy. Under this deed, Rhey took possession of the tract of 326½ acres, on which the grist-mill was erected, and has held it from the year 1822 till the present time. In 1841, he made a conveyance to Isaac Atkinson, the plaintiff's lessor, a citizen of Ohio, in whose name the present ejectment was

Atkinson's Lessee v. Cummins.

instituted for the other tract, owned by Pumroy, of $158\frac{1}{2}$ acres, and now in the possession of the defendant, Cummins.

The only evidence offered in support of the plaintiff's claim *was, that two of the adjoining tracts, called for as boundaries in his deed, did not adjoin the mill tract of $326\frac{1}{2}$ acres, but were contiguous to, and adjoined the tract of $158\frac{1}{2}$ acres. It was admitted, that all the other parts of the description correctly applied to the larger tract, but it was contended that, if this portion of the description applied only to the other, the levy and deed for this reason included both.

The defendant, on the contrary, insisted that the levy and sale did not embrace any part of the land in dispute, and gave evidence to prove that it was a distinct and separate tract of land, having a house, barn, orchard, and 100 acres of cleared land, not occupied or used in connection with the larger or mill tract. They contended, also, that the deed called for but one tract of land, which was well described, except in this one particular, which was evidently an ambiguity, caused by a mistake of the sheriff in making his levy.

The defendant might, perhaps, have safely rested his case on the evidence as it now stood, but, in order to remove all possible doubt, he offered to prove by the sheriff "how the mistake in the description occurred; and that the purchaser and other bidders at the sale had remarked this ambiguity in the description, and were informed how it happened, and were perfectly aware that but one tract was levied on and offered for sale, called the mill tract. That Rhey, the purchaser, was fully aware of it, and accordingly claimed and took possession of the mill tract only; that the sheriff, having afterwards heard a report that Rhey was asserting a claim to the property in dispute, took occasion to inquire of him if it was true; and that Rhey replied, 'that if he had said so it was only in jest; that he had bought and paid for one tract only, and to claim them both would be too much like putting his hand in his neighbour's pocket and robbing him.'

To the reception of this testimony the plaintiff's counsel objected, and the admission of it by the court forms the subject of the bill of exceptions now under consideration.

It is contended that this testimony ought not to have been received, because "the levy, *fieri facias*, *venditioni exponas*, sheriff's deed, &c., are records, and parol evidence is not admissible to contradict, vary, or limit the description of the premises contained in them."

This proposition is undoubtedly true. But it assumes the very fact in dispute, and on which the jury were about to

Atkinson's Lessee *v.* Cummins.

pass, on parol proof given by both parties. It is true that, if a sheriff levies on a whole tract of land, and describes it accurately in his levy and deed, parol testimony cannot be received to show *that he intended to sell less than his deed describes, or that he expected a part of the premises at the time of the sale.

*486] But that is not the case before us. The testimony offered is not to contradict the levy and deed, but to explain and confirm them. The plaintiff's testimony had shown that there was a latent ambiguity on the face of his deed. It purported to convey a single tract of land; it described one tract completely, with a single exception which applied to another. It might be void for uncertainty, if its description equally applied to two tracts, while it clearly purported to convey but one. It might convey one, and the part of the description which did not apply to that would be rejected as *falsa demonstratio*, or misdescription. Or it might possibly be intended to convey both; but in the present case the latter supposition had hardly a shade of probability to support it.

It would be of little profit to notice the infinite variety of cases on this subject, or to seek for one precisely in point with the present. The general rule is well stated by Tindal, Chief Justice, in the case of *Miller v. Travers* (8 Bing., 244), that "in all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be granted or devised."

The deed in this case called for but a single tract of land, the purchaser had himself taken possession and held up to certain boundaries for near twenty years, and had thus by his acts given his own construction of an ambiguity in his deed which he now showed by extrinsic evidence to exist. The evidence offered tended to confirm what appeared on the face of the deed; that but one tract was sold; that the practical location of this grant made by the purchaser was correct; that he had not acted under a mistake of his just rights, but had a due appreciation of the merits of the claim now set up to the land in question. This testimony may have been superfluous and unnecessary, but was not irrelevant or illegal. It did not contradict the record or deed under which the plaintiff claimed, but showed the gross injustice of the claim now attempted to be established under cover of an ambiguity in their terms.

The judgment of the Circuit Court is therefore affirmed.

The United States *v.* Brown.

ORDER.

This cause came on to be heard on the transcript of the *record from the Circuit Court of the United States for the Western District of Pennsylvania, and was argued [*487] by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

OBADIAH B. BROWN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.**THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* OBADIAH B. BROWN.**

An act of Congress passed on the 2d of July, 1836 (5 Stat. at L., 83), directs that, where any money has been paid out of the funds of the Post-Office Department to any person in consequence of fraudulent representations or by mistake, collusion, or misconduct of any officer or clerk of the Department, the Postmaster-General shall institute a suit to recover it back.

Where the person who was the chief clerk and treasurer of the Post-Office Department transferred to the Department a deposit which he had made, in his own name, in a bank which had become broken, and in consequence of such transfer received the whole value of the deposit from the Department, it was a case which fell within the statute; and the adjudication of the Postmaster-General, ordering the person to be credited upon the books and to receive the money, cannot be considered a final adjudication, closing the transaction from judicial scrutiny.

The rules and regulations of the Post-Office Department placed the whole subject of finance under the charge of the chief clerk. It was within the range of his official duties, therefore, to superintend all matters relating to finance, and he was not entitled to charge a commission for negotiating loans for the use of the Department.

THESE two cases were merely branches of a single case which was tried in the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

The suit was instituted by the United States against Obadiah B. Brown, upon an account, two items only of which were disputed. Upon one of these items the instruction of the court to the jury was unfavorable to Brown, and he took a bill of exceptions to it. This constituted the first case. Upon the second item, the instruction was unfavorable to the United States, and they excepted.

The account upon which the suit was brought was as follows, viz.: —