the Supreme Court of Tennessee, and is brought to revise a decree of that Court which declared null and void a certain sale and lease of school lands in Polk County, under which sale and lease the plaintiffs in error claimed title to these lands.

The statement of the facts in the transcript will show that the validity of this sale and lease depended altogether upon the laws of the State, and the proceedings of the State authorities. The plaintiffs in error do not claim under any laws of Congress, or any authority exercised by the United States. On the contrary, they deny the authority of Congress to pass the Act of 1843, (which is the only Act of Congress referred to,) and claim that a lease for ninety-nine years, made by the School Commissioners under a law of the State, was valid, and passed the title for the term, although in direct opposition to the provisions of the Act of Congress. Such a controversy, where no right is claimed under the Constitution or laws of the United States, is exclusively within the jurisdiction of the State Court, and this Court has no appellate power over its judgment. This writ must therefore be dismissed for want of jurisdiction.

RUSSELL *vs.* ELY ET AL.

1. In Wisconsin the fee of mortgaged premises, rests in the mortgagee or assignee only after foreclosure and sale: not upon the mere default of the mortgagor.
2. A deed in fee, executed by the mortgagor, subsequent to the mortgage-deed, but prior to the foreclosure, passes the legal title.
3. But if the mortgagee is in lawful possession of the mortgaged premises, after condition broken, he will not be turned out until the debt is paid.
4. Possession obtained by the mortgagee through an arrangement with the tenant of the mortgagor whose lease has expired, without the consent of the mortgagor, is not lawful possession.
5. It is not necessarily error for a Court to instruct the Jury,

that if the testimony of a certain witness is believed it will establish a specified fact, leaving to the Jury to believe or disbelieve the witness.

6. The propriety of such instruction depends upon the fullness, certainty and clearness of the testimony of the witness upon the point in issue.

7. A bill of exceptions which alleges that the instructions of the Court laid too large a stress upon the testimony of a particular witness, should embody the testimony, at length, or so refer to it as to make it part of the record: otherwise a Court of error must presume that it justified the instruction.

Error to the District Court of the United States for the District of Wisconsin.

The facts are fully stated in the opinion of the Court. It was argued by

Mr. Doolittle, of Wisconsin, for Plaintiff in Error.

Mr. Lynde, of Wisconsin, *contra.*

Mr. Justice MILLER. This was an action of ejectment in the District Court of the United States for the District of Wisconsin in which the defendants in error obtained a judgment against the plaintiff in error, for the possession of block 70, of the School Section of the City of Racine.

The legal title to this block was in David L. Barton, on the 24th April, 1851, and on that day he made a mortgage deed conveying said block to Floyd P. Baker, to secure the payment of a note for $1,400, due one year after date, and on the next day, the 24th of the same month, he conveyed it in fee to Clifford A. Baker.

The plaintiffs on the trial exhibited a regular chain of title from Clifford A. Baker to themselves, and the defendant proved himself to be the owner and holder of the note and mortgage above recited, and being in possession of the block sued for, claimed the right to hold it until the debt was paid. It appears further by the bill of exceptions, that plaintiffs traced their title through one Charles R. Dean, and testimony was given tending

to show that Charles R. Dean was a fictitious person, who never had any real existence. The only other fact shown by the bill of exceptions, necessary to an understanding of the case, is the statement of Thomas S. Baker, that from the summer of 1853, until the spring of 1856, he held possession of the property under a lease from plaintiffs, and then surrendered it to the defendant, without the knowledge or consent of plaintiffs.

The defendant on the trial excepted to the three propositions following, contained in the charge of the Court to the jury:

1. "If the defendant procured the possession and occupies it in pursuance of an arrangement, in the spring of 1856, with T. S. Baker, without the consent of the mortgagor, or of these plaintiffs, then he is not lawfully in possession."

2. "If the testimony of Clifford A. Baker is believed, the deed" (to Charles R. Dean) "passed the title from him."

3. "The legal title, in the opinion of the Court, on the face of the deeds, is in the plaintiffs."

In examining the questions arising on these exceptions, it will be convenient to take up first, the one last mentioned. It is the province of the Court in trials by jury to construe instruments of writing and determine their legal effect, and if it was apparent that on the face of the deeds,—the legal title was in plaintiffs, it was not only the right of the Court, but its duty to so instruct the jury. Is it true, then, that the deeds read in evidence showed the title in plaintiffs?

The plaintiff in error maintains, that by the mortgage deed of D. L. Barton, of July 23d, 1851, the legal title passed to Floyd P. Baker, and that by the deed made July 24th, to Clifford A. Baker, nothing passed but the equity of redemption; and if he is correct in this the instruction was error.

Numerous authorities from English and American decisions are cited by counsel on both sides in reference to this point, but in the view which we take of the matter they become of little value, except those of the Wisconsin Court. These deeds were both made in Wisconsin, in reference to land lying in that State, and in their construction, must be governed by its laws. The Revised Statutes of Wisconsin, chap. 141, sec. 28, enact,

that "no action of ejectment shall hereafter be brought by a mortgagee, or his assigns, or representatives, for the recovery of the possession of the mortgage premises, until the equity of redemption shall have expired." Chap. 154, sec. 11, provides, that "in every case the mortgagor may retain full possession in trust for the mortgagee or purchaser of all premises mortgaged by him, *until the title shall absolutely vest* in the purchaser of such mortgaged premises, according to the provisions of this chapter."

The Supreme Court of Wisconsin, in the case of *Wood and Moon* vs. *Trask*, (7 Wis. R., 512), speaking of these provisions, and perhaps others in *pari materia*, says: "Our statute has essentially changed the rule of the common law, in relation to the position of the fee of the mortgaged premises, after condition broken. The fee does not vest upon default of the mortgagor, in the mortgagee, or his assignee. The fee only vests upon sale and foreclosure." In *Tallman* vs. *Ely*, (6 Wis. R., 257), the same Court says: "Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption; sec. 53, chap. 106, or in other words he must complete his title, before he shall be permitted to recover at law upon the strength of it."

These expositions of the statutes of Wisconsin are to be followed by the Federal Courts as rules of construction, and from them it results that the legal title did not pass to Floyd P. Baker by the mortgage deed of July 23d, but did pass to Clifford A. Baker by the deed in fee made the day after.

The instruction was therefore correct.

The next error alleged is based upon that part of the Court's charge embraced in the following sentence: "If the defendant procured the possession, and occupies it in pursuance of an arrangement in the spring of 1856, with T. S. Baker, without the consent of the mortgagor or of these plaintiffs, then he is not lawfully in possession." The truth of this proposition would seem to be a necessary corollary from the one just discussed. Indeed it would seem to be a clearer deduction from the statutes cited, than that made by the Supreme Court of Wisconsin, in

reference to the position of the fee; for if the mortgagee has no right to recover the possession by legal proceedings, it would seem that he should not be permitted in any other manner to obtain that possession against the consent of the mortgagee, or the person holding under him. We are, however, referred by counsel for plaintiff in error to the cases of *Gillett* vs. *Eaton*, (6 Wis. R., 30), and *Tallman* vs. *Ely*, (Wis., 257), as establishing a contrary doctrine. A careful examination of these cases does not sustain the proposition in favor of which they are cited, to an extent which will conflict with the instruction of the Court under consideration.

It is true, that in both of these cases, it is held that the mortgagee *lawfully in possession* cannot be turned out by ejectment brought by the mortgagor. In both the cases, the decision turned upon the fact that the mortgagees *were* lawfully in possession, and in both it is evident that the defendants originally entered with the consent of the mortgagor, either express or implied.

The language used in the second of the cases cited, namely, *Tallman* vs. *Ely*, a part of which has already been quoted in regard to the position of the fee, shows very clearly the distinction which was in the mind of the Court as to the *lawfulness* of the mortgagee's possession. The Court says: "Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption, sec. 53, chap. 106, or in other words, he must complete his title before he shall be permitted to recover at law upon the strength of it. Still, if he *is lawfully* in possession after condition broken, he will not be turned out until his debt is paid."

This leaves still undecided the question as to what is lawful possession, and we concur with the District Court, that if the defendant in this case, although he may have been the holder of the mortgage and the debt secured by it, obtained the possession of the block in controversy, by an arrangement with the tenant of the plaintiffs, after said lease had expired, and without their consent, he was not lawfully in possession.

The remaining exception is to the charge of the Court, "that

if the testimony of Clifford A. Baker is believed, the deed" (to Charles R. Dean) "passed the title from him" (Baker). In that part of the charge which immediately precedes the words objected to, the Court says: "The deed of Clifford A. Baker to Charles R. Dean is alleged to be fraudulently executed by Floyd P. Baker in the name of Clifford A. Baker. That he used Clifford's name without authority, and that Charles R. Dean was a fictitious person. The evidence of Botsford shows these facts *prima facie*."

It is manifest that if Charles R. Dean was a fictitious person, plaintiffs had no title, for they claimed under a deed from him. It is equally clear, that if the testimony of Botsford showed that fact *prima facie*, the testimony of any witness who proved the existence of Dean as a real person was very important, and required careful scrutiny; and the comments of the Judge on any such witness, or his evidence, should have been given with great caution, and should have left to the jury all that properly belonged to it. But we are unable to see from anything in this record that the Court exceeded its functions in the charge. It was certainly proper that it should call attention to Baker's testimony, as it had done to that of Botsford. Baker may have testified to facts, which if true, or if believed by the jury, made it so clear that the title passed from him to Dean, as to justify the Court in saying so. And if he did so testify, we cannot say that the conclusion thus stated by the Court, leaving as it did the right to believe or disbelieve the witness to the jury, was error.

It is true that this Court does not see anything in that part of Baker's testimony embodied in the bill of exceptions which justifies such an inference. But the bill of exceptions does not purport to give all that he said, and according to a well-known rule, this Court, under such a condition of the record, is bound to presume that there was that in Baker's testimony which justified the instruction. What purports to be the entire deposition of Baker is sent up by the Clerk of the District Court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made

a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties. Clerks who certify transcripts to this Court should know what does properly constitute the record they are to send up, as it is a matter which has been often decided, and which may be readily learned with a little attention.

The judgment of the District Court is therefore affirmed.

THE SHIP POTOMAC—*Simpson, Claimant; Baker, Libellant.*

1 Case of *The Steamer St. Lawrence,* (1 Black, 525,) reaffirmed.

2. The claimant of a vessel libelled for repairs, cannot be permitted in this Court to contest the amount of libellant's claim, except in so far as specific objections appear by the record to have been taken to it in the Court below.

3. Where a master found the amount due, but stated no account, and his report was excepted to as being excessive, not sufficiently proved, erroneous under the pleadings, and founded on illegal evidence, such general objections may justly be treated as frivolous, and if overruled and the case brought here on appeal, this Court cannot say that particular charges were wrongly admitted, or particular credits wrongly thrown out.

4. Where the libellant proved his demand by shop books, the Circuit Court might well consider the evidence in his favor stronger than the contrary opinion of experts taken *exparte* after the work was done.

5. The decree of the Court below is presumed to be right, and a record showing that it may possibly be erroneous, or raising a doubt upon conflicting evidence is not enough to reverse it.

6 If the contract was made and the work done by the libellant, his right to recover, in his own name, cannot be defeated by showing that he had a partner interested in the contract.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On the 23d of November, 1855, the libel in this cause was