BURTON *v.* DRIGGS.

1. Where a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assign no ground of exception, the mere objection cannot avail him. Hence, where an original deposition, regularly taken, sealed up, transmitted, opened, and filed in the case, was lost, and a copy, taken under the direction of the clerk of the court and sworn to as a true copy, was offered in evidence in its place, an objection to the copy "on the ground that it *was not the original*" is too indefinite to let in argument that the witness was alive, and that the lost deposition could only be supplied by another one by the same witness, and that secondary evidence was inadmissible to prove the contents of the first deposition.
2. If the objection had been made in a form as specific as by the argument abovementioned it was sought to be made, it would be insufficient, it appearing that the witness lived in another State, and more than a hundred miles from the place of trial.
3. When it is necessary to prove the results of an examination of many books of a bank to show a particular fact, as *ex gr.*, that A. B. never at any time lent money to a bank, and the examination cannot be conveniently made in court, the results may be proved by persons who made the examination, the books being out of the State and beyond the jurisdiction of the court.
4. Where one, fraudulently exhibiting to another a sealed instrument reciting that the person exhibiting it has a claim for a sum of money on a third party (he having no claim whatsoever), fraudulently induced that other to buy it from him, and such other buying it, pays him in money for it, and takes an assignment under seal on the back of the instrument, the person thus defrauded may recover his money in assumpsit, on a declaration containing special counts setting out the instrument as inducement, and averring the utter falsity of its recitations, and the fraud of the whole transaction; the declaration containing also the common counts.

ERROR to the Circuit Court for the District of Vermont; the case being thus:

A certain O. A. Burton, of Vermont, in April, 1859, meeting in New York with one William Driggs, of Michigan, offered to sell to him a claim on the Bank of Tioga County, Pennsylvania, which he, Burton, alleged that he had against it; and by way of showing the reality of his claim exhibited to Driggs a paper, under seal, executed by him, Burton,

and three other persons, bearing date October 20th, 1858, whereby it was recited and agreed as follows:

"That the parties had severally furnished to the Tioga Bank, to enable it to redeem its bills promptly, certain sums of money, to wit, O. A. Burton, $7060.18, &c.; that the bank was to refund said moneys as soon as it was in a condition to do so, and that it would lend to said parties, not exceeding $10,000 at any one time, on paper payable in New York, with interest at the rate of five per cent. per annum; that the Tioga Bank had advanced, to be paid in on the stock of the Pittston Bank, of Pennsylvania, $9870, which money belonged to the four parties to the instrument, and it was agreed that each of the parties owned one-fourth part thereof, less cost and expenses."

Driggs bought the claim, paying $7060.18 for it; and Burton made this assignment on the back of the paper which he had shown Driggs:

"For and in consideration of the sum of $7060.18, I do hereby sell, assign, transfer, and set over to William Driggs, my interest of an equal amount in the Tioga County Bank, paid in according to a certain contract made October 20th, 1858, between O. A. Burton, and others, which is hereto attached, with all the rights and privileges therein which I have, or should have had, if this sale had not been made.

"Witness my hand and seal this 29th day of April, 1859.

"O. A. BURTON." [L. S.]

Upon presenting his newly purchased claim soon afterwards at the Tioga County Bank, Driggs was informed that Mr. O. A. Burton had no claim whatever on the bank; that he was not a stockholder in it; that his name was not to be found on its books, and that in the alleged sale a gross fraud had been practiced.

Hereupon, Driggs sued Burton in the court below in assumpsit. The *narr.* contained certain counts setting out the instrument which Burton had shown to him as inducement, and averred that the recitals which it made were wholly false; that Burton had no claim whatever on the bank, and that the plaintiff had got nothing whatever from it.

Burton, admitting that he had no such claim against the bank as was recited in the paper, set up in defence that he did in fact own certain powers of attorney to transfer stock in that bank, executed by parties who owned such stock, and for which he paid $10,000; that he had explained to Driggs at the time of the assignment to him that such was the real nature of the claim transferred to him, and he delivered to him these powers of attorney; and that Driggs had received them and subsequently acted under them, participated in an election of directors, and assisted in redeeming the notes of the bank in circulation.

In reply, Driggs gave evidence tending to prove that this allegation was as false as had been the other, and that he never received any consideration, benefit, or return whatever, directly or indirectly, for the money paid for it.

The powers were not produced by Burton, nor did he give any evidence to show from whom he obtained them, by whom or how they were signed, in what amount, or what became of them.

Driggs gave evidence tending to prove that no such powers to transfer stock had ever been issued by the bank.

Upon these facts Driggs sought to recover back the money paid by him upon the grounds:

1. Of the warranty of Burton, both expressed and implied, that the claim assigned to the defendant in error was genuine:

2. That the money was obtained from him by Burton, through fraud, and without equivalent:

3. That the consideration upon which the money was paid and received, had totally failed.

The case being closed, the court—refusing several requests of the defendants for instructions, and among them a request to charge that the plaintiff was not entitled to recover on his special counts nor to recover in the action—intimated an opinion in favor of the plaintiff, upon the first and third points. But for the purposes of the trial instructed the jury to find whether the sale and representations made by Burton were such as he alleged, or whether they were such as were

alleged by Driggs, and that if they were such as were alleged by Burton that the verdict should be in his favor.

That if they were such as were alleged by Driggs, then to find whether or not they were true; that if true, the verdict should be in favor of Burton.

That if untrue, the jury should then find whether Driggs received any interest in the bank whatever by the assignment, or in the transaction, either such as that described in the paper, or such as Burton alleged that he had transferred to him. If he did, the verdict should be for Burton.

But that the payment of the money and the execution of the assignment being admitted, if the jury found the representations to have been such as Driggs alleged; that they were untrue in fact; that Burton had no such claim as he sold, and that Driggs received nothing whatever under the assignment or in the transaction, then that the verdict should be for the plaintiff, Driggs, for the money which he had paid.

The jury found in favor of the plaintiff, for the amount paid and interest, being $12,078.64; and judgment having been entered accordingly, the defendant brought the case here on error.

In the course of the trial the plaintiff offered to read a *copy* of the deposition of one Vine De Pue, a person who lived in another State, and more than one hundred miles from the place of trial; and whose deposition had been taken under the act of Congress authorizing depositions to be taken. "when the testimony of any person shall be necessary in any civil cause . . . who shall live at a greater distance from the place of trial than one hundred miles." No proof was given that the said De Pue was dead. The bill of exceptions said:

"The plaintiff proved, to the satisfaction of the court, that the original deposition was regularly and properly taken in this cause, sealed up, transmitted to the clerk of this court, and by him properly opened and filed, all in accordance with the provisions of the act of Congress; that said deposition was lost and could not be found; that the copy offered was a true copy, taken under the direction of the clerk, and by him compared with the original and certified.

"The defendant objected to the admission of the copy on *the ground that it was not the original.* The court overruled the objection and admitted the deposition, to which decision the defendant excepted."

This was the first exception.

The plaintiff then proved that the books of the Bank of Tioga County were in Tioga, Pennsylvania, where the bank itself was situated; that he had endeavored to obtain them for use on this trial; but that the officers of the bank who had them in their keeping refused to let them go away from the bank. He then offered the deposition of one C. P. Steers, and of A. C. Turner.

Steers had been cashier of the bank from the 15th of September, 1858, up to the 29th day of April, 1859. He thus testified:

"During the entire period that I was cashier I had charge of the financial affairs of the bank, and was well acquainted and familiar with all the financial business and matters of the bank. O. A. Burton did not, at any time during that period, loan, advance, or furnish to the said Tioga County Bank the sum of $7060.18, nor any other sum of money. The name of O. A. Burton was never on the books of the bank, nor did the bank at any time during the said period owe the said Burton for advance or otherwise; and *don't think* that the name of said Burton appeared upon the books of the bank as a stockholder during said period of time."

Turner, *former cashier of the bank*, and who had served as cashier from December, 1859, to August 18th, 1867, thus testified:

"In July, 1859, I made a careful examination of the books and papers of the bank *for the purpose of ascertaining its condition, assets, and liabilities.* I examined all the books and papers in the bank relating to its affairs from the time of its organization down to July, 1859, and on that examination *I found no evidence* in the bank of any kind that O. A. Burton ever had any connection with the bank, either as debtor, or creditor, or stockholder, or any interest of any kind whatever in the bank. I afterwards examined the books of the bank again at the request

of the plaintiff in this suit, and with direct reference to the matters involved in this suit, and *I did not find* that on the 20th day of October, 1858, or on the 29th day of April, 1859, or at any other time, that the bank was indebted to O. A. Burton in the sum of $7060.18, or in any other sum. *I did not find* the name of O. A. Burton on the books of the bank in any way."

The counsel of the defendant objected to the admission in evidence of such parts of these depositions as referred to what appeared, or did not appear, on the books of the Tioga County Bank. But the court allowed the depositions as above set forth to be read.

Mr. L. P. Poland, for the plaintiff in error:

I. *The court erred in admitting the paper said to be a copy of the deposition of Vine De Pue.*

The Federal courts have ever held parties to strict conformity to the statutes authorizing and prescribing the occasions, mode, and form of taking depositions. No statute of Congress—no decision—authorizes the use, as evidence, of a copy of a deposition, where the original is lost. The action of the court below must rest, for its justification, upon the common-law doctrine, that secondary evidence is admissible, when the primary cannot be had—as, parol evidence of the contents of a lost writing. But there are good reasons why this doctrine should not be extended to the case of lost depositions; as—

1st. The statutes authorizing the use of depositions in cases at law, are variant from common law, and imply the existence of a better kind of evidence, viz., the testimony of the witness in open court; and allow depositions only in peculiar cases, and to prevent a possible failure of justice. As far, therefore, as the statute goes we may follow, but no further. Depositions themselves are regarded as only secondary evidence.*

2d. The rule requiring the best evidence attainable to be used *in the cause*, demands that the witness, who is apparently

* Haupt *v.* Henninger, 37 Pennsylvania State, 138.

in life, should be produced, not to testify to what he once testified to in a deposition, but what he at the time of the trial knows of the matter. For this (the best evidence) the statute allows, in peculiar cases, an inferior grade, viz., a deposition made out of court; but goes no further. The common rule then should exclude evidence of a still inferior grade (as, a copy of a deposition), so long, at least, as the testimony of the witness in court or a new deposition can be obtained.

3d. It might be safely admitted, that if the witness had died, the contents of his deposition, being lost, might be proved; for, in such case, this would have been the best attainable evidence. But it would be of dangerous precedent and practice to allow secondary evidence of the contents of depositions, except in case of such absolute necessity. If proof of what the witness swore could be made by a copy of his deposition, it could be made by any other evidence of contents, as by the recollection of a witness, since there are no degrees in secondary evidence.*

Here, too, the court erroneously determined not only the question of loss of the original, but the accuracy of the copy. Two Vermont decisions, *Follett* v. *Murray*† and *Low* v. *Peters*,‡ are decisive of this question.

II. *The depositions of Turner and Steers were wrongly received.*

1st. The books of the bank were but private writings, and were not evidence *per se*—certainly not as to strangers—though admissible perhaps as *memoranda*, in aid of the testimony of the party making them. They were used purely as substantive evidence.

2d. Before the admission of secondary evidence of the contents of the books, more especially evidence of what does *not* appear upon the books, it should have been proved that the bank had and kept books, and their authenticity; that those books had upon them, in regular entry, items, and all

* Brown *v.* Woodman, 6 Carrington & Payne, 206 (25 English Common Law, 358).

† 17 Vermont, 530.

‡ 36 Id. 177.

items of the class represented by the said defendant's claims. It is only in such case that the absence of an entry representing the defendant's claim could furnish an inference of the non-existence of the claim.

No preliminary evidence of this kind was given, but these preliminary facts were assumed.

Turner's deposition is limited to what he found, and to what he did not find upon what he calls the books of the bank, kept, not by himself, but before he became cashier. This witness's interpretation of the meaning of the books to his mind was clearly not evidence, nor was his construction of the contract, which was exhibited to him. If the contents of these bank books were evidence, and they could be proved without production of the books themselves, then the proof should be by an examined and sworn copy of the books. Instead of this, *Turner* swears only to the result of his examination. As clearly the statements of Steers were not admissible evidence.

III. *As to the charge.*

The contract in this case, as well as the assignment, were under seal. The action proceeds upon an assumpsit of the defendant, that he was the lawful owner of a claim of $7060.18, mentioned in the sealed instrument, against the Tioga County Bank. It is for a breach of this agreement that the suit is brought. Now, if the contract has this force, and there is any such agreement in it, whether expressed or implied, it is a covenant and not a simple assumpsit, and the action should be covenant.* Upon this idea, the first request of the defendant below should have been answered; certainly the first branch of it.

In the charge as given, the case was put wholly upon the ground of want of consideration, or of an implied warranty; grounds which we must suppose may not have entered into the argument for the defence.

This was a double error: 1st. This position was inconsistent with the form of action, as applied to a sealed con-

* Young *v.* Preston, 4 Cranch, 239.

tract. 2d. It was misleading in the argument of the case, working a surprise and a mistrial.

Mr. E. J. Phelps, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

The first assignment of error relates to the admission in evidence of a copy of the deposition of Vine De Pue. The bill of exceptions sets forth that the original deposition was regularly taken, sealed up, and transmitted to the clerk of the court where the cause was pending, and by him properly opened and filed; and that thereafter it was lost and could not be found; and that the copy offered was a true copy, taken under the direction of the clerk, and by him compared and certified. The exception is as follows: "The defendant objected to the copy on the ground that it was not the original. The court overruled the exception and admitted the deposition, to which decision the defendant excepted."

It is a rule of law that where a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assign no ground of exception, the mere objection cannot avail him.* In *Hinde's Lessee* v. *Longworth* this court said: "As a general rule, we think the party ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only." Here the objection was that the copy was not the original. This, as a fact, was self-evident; but as a ground of objection it was wholly indefinite. It does not appear to have been suggested that the place of the lost deposition could only be supplied by another one of the same witness retaken, and that secondary evidence was inadmissible to prove the contents of the former. If the contents

* Camden *v.* Doremus, 3 Howard, 515; Hinde's Lessee *v.* Longworth, 11 Wheaton, 199.

of the one lost could be proved at all by such evidence, that offered was certainly admissible for that purpose. But the objection was presented in the argument before us in the latter shape, and we shall consider it accordingly.

It is an axiom in the law of evidence that the contents of any written instrument lost or destroyed may be proved by competent evidence. Judicial records and all other documents of a kindred character are within the rule.* But it is said a different rule as to depositions—unless the witness be dead—obtains in Vermont, and the cases of *Follett* v. *Murray*† and *Low* v. *Peters*‡ are referred to as supporting the exception.

Those cases are unlike the one before us. In *Follett* v. *Murray* the witness resided within the State, and there being no copy of the caption it did not appear that the deposition had been regularly taken. In the other case the witness was dead, and no question was raised as to any defect in the lost original. The copy was, therefore, admitted as of course. If a deposition be not properly taken it is not made admissible by the death of the witness.§ In *Harper* v. *Cook*,‖ it was held that the contents of a lost affidavit might be shown by secondary evidence. The necessity of retaking it was not suggested. In the present case the witness lived in another State and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one State be in the possession of a person living in another State, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary.¶ Here

* Renner *v.* The Bank of Columbia, 9 Wheaton, 581; Riggs *v.* Tayloe, Ib. 483; 1 Greenleaf's Evidence, § 509.

† 17 Vermont, 530.

‡ 36 Id. 177.

§ Johnson *v.* Clark, 1 Tyler, 449.

‖ 1 Carrington & Payne, 139.

¶ Shepard *v.* Giddings, 22 Connecticut, 282; Brown *v.* Wood, 4 Bennet (19 Missouri), 475; Teall *v.* Van Wyck, 10 Barbour, 376; see also Boone *v.* Dykes, 3 Monroe, 532; Eaton *v.* Campbell, 7 Pickering, 10; Bailey *v.* Johnson, 9 Cowen, 115; Mauri *v.* Heffernan, 13 Johnson, 58.

there was nothing to prevent the operation of the general rule as to proof touching writings lost or destroyed. The deposition was one of the files in the case. The plaintiff was entitled to the benefit of the contents of that document. Having been lost without his fault, he was not bound to supply its place by another and a different deposition, which might, or might not, be the same in effect with the prior one.

There was no error in admitting in evidence the copy to which this exception relates.

The next assignment of error is the admission in evidence "of such parts of the depositions of A. L. Turner and C. P. Steers as refer to what appeared or did not appear on the books of the Tioga County Bank." It was shown by the plaintiff in this connection that the books in question were in the village of Tioga, Pennsylvania, that the plaintiff had endeavored to obtain them for use on this trial, and that those having the custody of them refused to permit them to go. The testimony of Turner was, in substance, that he was the cashier, that he had examined the books and papers in the bank relating to its affairs from its organization down to July, 1859, and that he found no evidence of any kind that the defendant ever had any connection or transaction with the bank, or any interest in it whatever; and that subsequently, at the request of the plaintiff and for the purposes of this suit, he repeated the examination with the same result. Steers testified that he was cashier of the bank from about the 15th of September, 1858, to about the 29th of April, 1859, and that during that time the defendant, Burton, did not furnish to the bank $7060.18, or any other sum of money, that his name was never on the books of the bank, nor did the bank owe him anything on any account during that period, and that the witness did not think his name appeared on the books of the bank as a stockholder during that time. The books being out of the State and beyond the jurisdiction of the court, secondary evidence to prove their contents was admissible.

When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination.* Here the object was to prove, not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter.

The last assignment relates to the charge of the court.

The examination of this subject renders it necessary to refer briefly to the cause of action. The defendant, Burton, and three others, executed an instrument, under seal, bearing date October 20th, 1858, whereby it was recited and agreed as follows: That the parties had severally furnished to the Tioga Bank, to enable it to redeem its bills promptly, certain sums of money, to wit, O. A. Burton, $7060.18, &c.; that the bank was to refund said moneys as soon as it was in a condition to do so, and that it would lend to said parties, not exceeding $10,000 at any one time, on paper payable in New York, with interest at the rate of five per cent. per annum; that the Tioga Bank had advanced, to be paid in on the stock of the Pittston Bank of Pennsylvania, $9870.00, which money belonged to the four parties to the instrument, and it was agreed that each of the parties owned one-fourth part thereof, less cost and expenses. To this paper was annexed a further instrument, under seal, dated April 29th, 1859, whereby the defendant assigned to the plaintiff, for the consideration of $7060.18, his interest in that amount paid by him to the Tioga Bank, according to the instrument first mentioned, with all the privileges relating thereto which the assignor would have had if the assignment had not been made. The declaration contained several counts, setting out the instrument as inducement and averring the utter falsity of its recitals. The common money counts were

* 1 Greenleaf's Evidence, § 93.

added. The defendant admitted the receipt of the $7060.18, stated in the assignment, as the consideration for making it, but gave no evidence tending to prove that the recitals in the instrument to which the assignment related were true. Both parties submitted prayers for instructions. Both sets were refused. Those of the defendant sought to defeat the action because it had not been brought upon the written instrument and the assignment. The court instructed the jury in effect, with full and proper explanations, that if the transaction on the part of the defendant had been a fraud, and there had been an entire failure of consideration, the plaintiff was entitled to recover.

The defendant excepted to these instructions, and to the refusal to give those which he had asked to be given. The former were correct in point of law.* The instructions given covered the whole case. It was not, therefore, the duty of the learned judge to give others suggested by either party. If wrong, they were inadmissible, and if otherwise, unnecessary.† We are satisfied with the charge as it appears in the record.

Judgment affirmed.

Tioga Railroad *v.* Blossburg and Corning Railroad.

1. Where, in a judicial proceeding, the matter passed upon is the right under the language of a certain contract to take receipts on a railroad, the judgment concludes the question of the meaning of the contract on a suit for subsequent tolls received under the same contract.
2. The highest courts of New York, construing the statutes of limitations of that State, have decided that a foreign corporation cannot avail itself of them; and this, notwithstanding such corporation was the lessee of a railroad in New York, and had property within the State, and a managing agent residing and keeping an office of the company.

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* Weaver *v.* Bentley, 1 Caines, 47; Gillet *v.* Maynard, 5 Johnson, 85; D'Utricht *v.* Melchor, 1 Dallas, 428; Wilson *v.* Jordan, 3 Stewart & Porter, 92; Eames *v.* Savage, 14 Massachusetts, 425; Lyon *v.* Annable, 4 Connecticut, 350; Pipkin *v.* James, 1 Humphrey, 325; 1 Swift's Digest, 400.

† Laber *v.* Cooper, 7 Wallace, 565.