Waldron Vs. Waldron

Waldron Vs. Waldron

SooperKanoon Citation : sooperkanoon.com/87900

Court : US Supreme Court

Decided On : Mar-04-1895

Appeal No. : 156 U.S. 361

Appellant : Waldron

Respondent : Waldron

Judgement :

Waldron v. Waldron - 156 U.S. 361 (1895)
U.S. Supreme Court Waldron v. Waldron, 156 U.S. 361 (1895)

Waldron v. Waldron

No. 97

Submitted December 4, 1894

Decided March 4, 1895

156 U.S. 361

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

SYLLABUS

A bill of exceptions may be signed after the expiration of the term at which the judgment was rendered, if done by agreement of parties made during that term.

If such bill is not delivered to counsel within the time fixed by the agreement, objection to the failure to do so must be taken when the bill is settled, and, if decided against the objector, the question should be reserved.

Page 156 U. S. 362

If evidence legally inadmissible is admitted over objection, that fact is ground for reversal by the appellate court.

The assertion in argument by counsel of facts of which no evidence is properly before the jury in such a way as to seriously prejudice the opposing party is, when duly excepted to, ground for reversal.

Where evidence is admitted for one certain purpose, and that only, the mere fact that its admission was not objected to at the time does not authorize its use for other purposes for which it was not, and could not have been, legally introduced.

It is the duty of the court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is duly made the cause of reversal is thereby removed.

The fact of a divorce's being confessed by the pleadings, and being admitted by counsel for defendant in open court, it is unnecessary to prove it, and the divorce record is inadmissible.

Mary Russell Beauchamp was married in September, 1865, to E. H. Waldron. They lived in Lafayette, Indiana, from the date of their marriage until 1875, when they removed to St. Louis, the employment of the husband calling him there. In 1877, they left St. Louis, and returned to Indiana, where they continued to live as husband and wife until June, 1886. At that date, the husband abandoned his

marital relations and fixed his permanent residence in Chicago. For twelve or fifteen years prior to June, 1886, the husband, Waldron, had friendly relations with E. S. Alexander and wife, who lived in Chicago, Waldron dealing with Alexander in a business way and also calling socially at his residence, and Alexander visiting Waldron when he came to Lafayette. In February, 1886, E. S. Alexander died, leaving a widow. Subsequently, Mrs. Waldron filed in the Superior Court of Tippecance County, Indiana, a suit for divorce against her husband, which ripened, in June, 1887, into a decree granting the divorce, and giving her $10,000 alimony. In October, 1887, E. H. Waldron married Mrs. Josephine P. Alexander, the widow of E. S. Alexander. In June, 1888, Mary Russell, the divorced wife of E. H. Waldron, sued Mrs. Josephine P. Waldron, the former Mrs. Alexander, in the Circuit Court of the United States for the Northern District of Illinois. The grounds of this action are stated in her complaint as follows:

"1st. Whereas, the said defendant, contriving and wrongfully,

Page 156 U. S. 363

wickedly, and unjustly intending to injure the said plaintiff and to deprive her of the comfort, fellowship, society, aid, and assistance of Edwin H. Waldron, the then husband of the said plaintiff, and to alienate and destroy his affection for said plaintiff, on, to-wit, the 6th day of June, A.D. 1886, and on divers other days and times between said 6th day of June, A.D. 1886, to the 21st day of June, A.D. 1887, at,"

etc.,

"wrongfully, wickedly, and unjustly debauched and carnally knew the said Edwin H. Waldron, then and there still being the husband of the said plaintiff, and thereby the affection of the said Edwin H. Waldron for the said plaintiff was then and there alienated and destroyed, and also, by reason of the premises, the said plaintiff from thence hitherto wholly lost and was deprived of the comfort, fellowship, society, and assistance of the said Edwin H. Waldron, her said husband, in her domestic affairs, which the said plaintiff during all that time ought to have had, and

otherwise might and would have had,"

etc., "aforesaid."

"2d. Whereas, the said defendant, contriving, and wrongfully, wickedly, and unjustly intending, to injure the said plaintiff, and to deprive her of the comfort, fellowship, society, aid, and assistance of Edwin H. Waldron, the then husband of the said plaintiff, and to alienate and destroy his affection for the said plaintiff, on, to-wit, the 6th day of June, A.D. 1886, and on divers other days and times between said 6th day of June, A.D. 1886, and the 21st day of June, A.D. 1887, at,"

etc.,

wrongfully and unjustly sought and made the acquaintance of Edwin H. Waldron, the husband of the said plaintiff, and then and there, well knowing that said Edwin H. Waldron was the husband of said plaintiff, wrongfully, wickedly, and unjustly besought, persuaded, and allured the said Edwin H. Waldron to desert and abandon the said plaintiff, and thereby the affection of said Edward H. Waldron for the plaintiff was alienated and destroyed, and also, by reason of the premises, the plaintiff has from thence hitherto been wholly deprived of the affection, society, aid, and assistance of her said husband in her domestic affairs, which the plaintiff during all that time ought to have had, and otherwise might and would

Page 156 U. S. 364

have had, and also, by reason of the premises, the said plaintiff, during all said time from thence hitherto, suffered great mental anguish and loss of social reputation at,

etc., "aforesaid, to the damages of said plaintiff of one hundred thousand dollars, and therefore she brings her suit," etc.

The defendant pleaded that inasmuch as the relation of husband and wife which formerly existed between the plaintiff and defendant's present husband had been terminated by a decree of divorce granted at plaintiff's own demand, the action was not maintainable. She further pleaded the general issue.

The case came to trial in January, 1890. In the opening statement, foreshadowing the case which it was proposed to prove, one of the counsel for plaintiff read to the jury extracts from the divorce proceedings, and commented thereon in a manner which clearly indicated that they were links in a chain of evidence which plaintiff proposed to offer in order to establish the adultery of the defendant. Thereafter, during the progress of the trial, the record of the divorce suit was offered in evidence by the plaintiff for the general purposes of the case, and its admission was objected to by the defense on the ground that it was *res inter alios* and that the plaintiff could not make proof for herself by offering her own petition as evidence in her favor, and thus asperse the character of the defendant. The court admitted the record to prove the fact of the divorce alone, and, while thus admitting it, repeatedly declared that it could only be used for that one purpose, and that the averments in the petition and other matters reflecting on the defendant were not to be disclosed or read to the jury. The defendant excepted to the admission of the record for any purpose whatever.

The plaintiff then offered the statute of Indiana relative to divorce, and this was also admitted, in spite of objection, as evidence of the Indiana law on that subject. The testimony of the judge before whom the divorce proceeding was had was then admitted. Wilson, who appeared as attorney for Waldron in the divorce proceeding, was also allowed, over objection, to testify as to his connection therewith. Davie, the

Page 156 U. S. 365

witness on the strength of whose testimony the decree of divorce had been mainly based, was also allowed to testify. In the closing argument to the jury, Mr. Aldrich, of counsel for the plaintiff, used the following language:

"The divorce law of Indiana provides that . . . a divorce may be decreed . . . for the following causes, and no other: adultery, except as hereinafter provided; impotency existing at the time of the marriage; abandonment for two years; cruel and inhuman treatment of either party by the other; habitual drunkenness of either party; the failure of the husband to make reasonable provision for his family for a

period of two years; the conviction subsequent to the marriage, in any country, of either party, of an infamous crime. . . ."

"The only two that are referred to in this bill for divorce -- the record is not here. I shall state it, and if it is challenged, I shall read it when it comes -- are these: that he had abandoned her. Is there any conflict in the evidence in this case that that abandonment only extended from the 6th day of June up until the time this decree was entered, the 21st day of June, 1887 -- a year. Is that a compliance with the statute calling for abandonment for two years? Nothing of the kind. Cruel and inhuman treatment? Hasn't Edward H. Waldron testified upon the stand in this case, and is there any dispute upon this subject, that there was no cruel and inhuman treatment upon his part in this case; that he had never been guilty of cruel and inhuman treatment? And has the statement been challenged that cruel and inhuman treatment, under the laws of the State of Indiana, only means acts or cruelty coupled with personal violence? . . ."

"There has been no cruelty, or anything of the kind. They say there is no charge of adultery in this case. The record says that there was no cruel and inhuman treatment, and that he was enamored of Josephine P. Alexander, in this case. . . . Mr. Davie was the only witness upon this subject, . . . and he has said . . . that he . . . did not know Edward H. Waldron until he came to Chicago, and Edward H. Waldron . . . has testified . . . that up to the time he

Page 156 U. S. 366

came to Chicago he had no acquaintance with Robert Davie. . . . He was the agent -- the paid agent -- or Edward H. Waldron. Edward H. Waldron is too able a man, he has too much brains, he is too cute, he is too slick, gentlemen of the jury, not to apply any other terms but those that are fitting to him, to suppose that a decree could be obtained in Indiana for abandonment or for cruelty or for inhuman treatment. Edward H. Waldron knew as well as you know that he could only get a divorce, and it could only be procured on the ground of his adultery with somebody. . . . Robert Davie knew it. By reason of this nonacquaintance at that time, Robert Davie could not have testified to any of the acts of cruelty. How did

Robert Davie acquire his information? By these innumerable visits to Chicago. . . . In view of the testimony in this case, in view of the relations of the parties, in view of the fact that Edward H. Waldron has testified that he had talked with the defendant on two occasions about these divorce matters, and the fact that he was living at this house at that time, with that fact before you, you cannot believe that it was unpremeditated, that it was unknown, or anything of that kind."

"Mr. McCoy, for the defendant, excepted to the statement of counsel that Robert Davie had obtained the information to which he testified in the divorce proceeding in Chicago, or from Edward H. Waldron, on the ground that the court had excluded the evidence of Robert Davie on that subject."

"Mr. McCoy: 'I read a question here as to whether or not, Mr. Davie obtained his information in Chicago, and he replied that he did not, and that extra question and answer was stricken out as being within the character of the evidence excluded by the court. Therefore, I do not think it is proper to comment upon to the jury.'"

"Mr. Aldrich further stated to the jury: 'I submit to you, gentlemen, that any information upon that subject-whether it was cruelty, or whether it was cruel and inhuman treatment, or whether it was abandonment-must have been acquired by Mr. Davie while he was in Chicago.'"

"To which statement of

Page 156 U. S. 367

counsel for the plaintiff, Mr. McCoy, counsel for the defendant, objected, and then and there duly excepted, for the reasons above stated."

"Mr. McCoy further objected to the statements of the counsel for the plaintiff to the jury as to the laws of Indiana on the subject of divorce, and the argument that it must have been granted on the grounds alleged in the complaint in the divorce proceeding reflecting upon the character of the defendant, Josephine P. Alexander, and then and there duly excepted to such statements."

"And thereupon, after further arguments to the jury, . . . Mr. Dexter addressed the jury in a closing argument on behalf of the plaintiff, in the course of which . . . he spoke as follows:"

" *Mr. Dexter's Closing Argument* "

" Now what was that divorce? Gentlemen, this subject of divorce was spoken of, you recollect, between Waldron and the defendant. It is was a matter of conversation, he says, on one or two occasions, and you have heard read his language on that subject. Now I assert that here was a wicked scheme against the established order of society and the rights of this woman, and that the defendant shall not escape here by throwing up false issues. Are there any grounds of divorce here, except those which sustain this action?"

" Mr. Walker, for defendant: I enter my objection to the statement of counsel."

" The Court: All that was in the declaration the court excluded."

" Mr. Dexter: . . . The conclusion that it [the evidence] leads to, counsel shrinks from; it hurts him. The jury cannot be fogged about it. There is something underneath here that is reached for, and you will lay hold of it, and you will not be deceived about it. There will be no effectual effort to keep your minds from coming to the conclusion that it ought to reach. I shall confine myself to the statements admitted by the court and read to the jury. . . ."

" The plaintiff prays for decree of divorce for misconduct of the defendant on account of his cruel and inhuman treatment

Page 156 U. S. 368

of this plaintiff -- neither cruel nor inhuman treatment proven save in the language of the bill -- 'in this, that he has become enamored of one Josephine P. Alexander, a married woman.'"

In its final charge to the jury, the court, among other things, said:

"The court has already adjudged that the decree of divorce obtained by the plaintiff from Mr. Waldron, June 21, 1887, is evidence conclusive in this case that the marriage relations between the plaintiff and Mr. Waldron were dissolved from the date of that decree. The decree of divorce acted on the status of the parties, and dissolved the marriage relation theretofore existing between them, and left each free to remarry; but the allegations contained in the bill of complaint in that case against Mrs. E. S. Alexander, the present defendant, are not evidence in this case, and were excluded by the court."

"The evidence also taken on the trial of that case is not competent evidence against the defendant in this case, and was also excluded. She, not being a party thereto, is not permitted to appear and cross-examine the witnesses. Nor should the jury assume or infer from anything in evidence in this case that the judgment of divorce was granted upon the ground of adultery, as that is not one of the grounds alleged in the bill of complaint, nor upon any ground or for any of the causes having reference to the conduct of the defendant in this case. Such an inference has been sought to be drawn by counsel from the proceedings in that case, but it is an inference not warranted by the record in evidence, and unfair towards the defendant. The jury will try this case upon the evidence produced on this trial, and not assume or infer that other evidence might have been produced here, or was produced in some other case, to which the defendant was not a party."

In February, there was a verdict in favor of the plaintiff for $17,500. In March an application for a new trial was heard, and taken under advisement. In June, the motion for a new trial having been overruled, the defendant moved in arrest. This motion was also overruled, and on the same day judgment

Page 156 U. S. 369

was rendered on the verdict. The record states that, on motion for defendant, the time to file a bill of exceptions was extended to the first day of November next. Thereafter, a writ of error was sued out, and a supersedeas bond fixed at $25,000. On October 6, 1890, a written stipulation was entered into between counsel, which, after mentioning the suing out of the writ of error, the giving of the

supersedeas bond, and the issuance of citation returnable here in October, 1890, expressed the desire of the plaintiff in error to obtain an extension of time to prepare the bill of exceptions and file the record here, and set out that this extension was agreed to by the defendant in error, provided:

"First. That the above-named defendant, as plaintiff in error, shall file in the office of the Clerk of the Supreme Court of the United States the said writ of error, the said citation, and this stipulation, and shall have the said cause docketed in said Supreme Court, in its regular order, within the time regularly required by the rules of said court for the filing of the transcript of the record in said cause in said supreme court, as if this stipulation had not been made."

"Second. That counsel for the above-named defendant shall have until November 15, A.D. 1890, to prepare the bill of exceptions in said cause, and deliver it to counsel for the above-named plaintiff for examination and such correction as he may deem proper."

"Third. That counsel for the above-named plaintiff shall examine said bill of exceptions and return it to counsel for the above-named defendant within thirty days after it shall have been delivered to him, with any proposed corrections or alterations which he may deem proper."

"Fourth. Thereafter, as soon as practicable, but within thirty days, upon reasonable notice, said bill of exceptions shall be presented to the judge who conducted the trial of said cause, for his approval, after the settlement by him of any parts of said bill of exceptions as to which counsel may have been unable to agree."

"Fifth. That said bill of exceptions shall be approved by said judge, and be by him sent to the clerk of said circuit

Page 156 U. S. 370

court, with directions that it be filed as of the date of the entry of said judgment."

"Sixth. That within thirty days after said bill of exceptions shall have been so filed, the transcript of said record shall be completed, and filed in the Supreme Court of

the United States in said cause as theretofore docketed."

"That in the meantime, so long as counsel for said above-named defendant make no default in the performance of the conditions of this stipulation, counsel for the above-named plaintiff (defendant in error) will make no motion to dismiss said writ of error for failure to file said transcript of the record within the time regularly prescribed by the rules of said Supreme Court, and the said transcript, when so filed, shall be taken and considered as having been filed in apt time."

"This stipulation is executed in triplicate, one to be filed in the Supreme Court of the United States, and one to be retained by counsel for each of said parties."

"Dated at Chicago, Illinois, October 6, A.D. 1890."

Application was made here in due season to docket this agreement and writ of error in lieu of the record, and was refused. The settlement of the bill of exceptions by the court is thus stated in the record:

"The clerk of said court will file this bill of exceptions as of the date of July 10th, A.D. 1890."

"R. Bunn, *Judge* "

"To William H. Bradley, Esq., Clerk."

"Upon the presentation of the bill of exceptions to the judge for settlement, on February 21, 1891, counsel for plaintiff (defendant in error) moved that the judge do not sign the same, because the defendant (plaintiff in error) has waived her right thereto, since said defendant has not filed this bill of exceptions within the time prescribed by the judge at the time the appeal was prayed, and has failed to have said case docketed in the Supreme Court, as in and by a stipulation entered into on October 8, 1890, between the attorneys of the respective parties prescribed."

"Which motion was denied by the judge."

"To which ruling counsel for plaintiff then and there duly excepted."

Page 156 U. S. 371

"Date, Madison, Feb'y 21, 1891."

The bill of exceptions in its caption recites:

"Be it remembered that on the trial of the above-entitled cause on the 21st, 22d 23d 24th, 27th, 28th, 29th, 30th, and 31st days of January, and the 1st, 3d and 4th days of February, A.D. 1890, in the December term of said court, A.D. 1889, the said cause having been reached and come on for trial in its regular order on the trial calendar of said court, the following proceedings were had, *viz. . . .* "

When it reaches the point where the evidence for plaintiff is recited, there appears the heading, "Plaintiff's Evidence." At the point where the opening evidence for the plaintiff ends, is the following entry: "Which was all the evidence here offered on the part of the plaintiff on the trial of the cause." This is immediately followed by the words, "Defendant's Evidence. Thereupon, the defendant, to maintain the issues on his part in said cause, introduced the following evidence." At the close of the evidence which follows, the foregoing is the entry, "Here counsel for defendant rested their case," and following, this: "Rebuttal. And thereupon the plaintiff, further to maintain the issues on her part, introduced the following evidence in rebuttal." At the conclusion of this evidence is the statement, "Which was all the testimony offered on the trial of said cause." The record was filed and docketed here February 28, 1891. In December, 1892, defendant in error moved to vacate the supersedeas because the surety on the bond had become insolvent. On December 12th it was ordered that a new bond be given within thirty days, and on the same day the new bond was filed.

Page 156 U. S. 378

MR. JUSTICE WHITE, after stating the case, delivered the opinion of the Court.

The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered was lawful, if done by consent of parties given during that term. *Hunnicutt v. Peyton,* 102 U. S. 333 ; *Davis v. Patrick,* 122 U. S. 138 ; *Bank v. Eldred,* 143 U. S. 293 .

The fact that the bill of exceptions was not handed to counsel for defendant on or before November 15, 1890, does not appear of record; and, if it did, it would be rendered immaterial by the action of the judge below in settling the bill.

If the bill was not delivered to counsel within the time fixed by the agreement, objection to the failure so to deliver it should have been urged when the bill was settled. And if an objection then taken was overruled, the question of the correctness of such action should have been then reserved. The fact is that the only reservation made in the settlement of the bill is thus stated in the record:

"Counsel for plaintiff move that the judge do not sign the same, because the defendant has not filed this bill of exceptions within the time prescribed . . . at the time the appeal was prayed."

This, of course, was not sound, in view of the agreement whereby the time which had been at first fixed was extended. The only question reserved in this connection is accordingly also without merit. As to the contention that the appeal was docketed too late, the defendant in error is precluded from relying thereon by reason of his motion here for a new bond, long after the entry of the case on the docket of this Court, which was made at the return term.

Whether the concluding words in the bill of exceptions, "which was all the testimony offered on the trial of the cause," would be treated as meaning all the evidence, if unexplained by the context of the bill, need not be considered, as all the recitals in the bill, from the caption to the end thereof, taken together, we think, conclusively show that the

words, "all the testimony," were used as synonymous with "all the evidence." This conclusion is strengthened by the fact that the bill was settled contradictorily, and no reservation as to its incompleteness was made.

Coming, then, to consider the record, we find that the assignments of error here are of a threefold nature: (a) those which relate to the conclusions of law reached by the court upon the merits of the controversy; (b) those which complain of perversion and misuse by counsel of evidence admitted, which it is alleged were so serious that they must have affected the minds of the jury to such an extent as to render the verdict and judgment necessarily reversible, and (c) those which rest upon the alleged rejection of legal and admission of illegal evidence.

We will first approach the investigation of the matters mentioned under the second heading, since, if the complaint of perversion and misuse of evidence is justified, it is not necessary to consider whether the rulings on the admissibility of testimony, or the final conclusions of law, upon the merits, were correct.

The complaint of the conduct of counsel in argument is substantially predicated upon the following analysis of the facts, which we find borne out by the record. In the opening statement of counsel for plaintiff, portions of the divorce proceedings were read to the jury, counsel saying, among other things:

"Here was an allegation that she has enticed him from his home, and the divorce was granted upon that ground, among others -- that is, the decree finds that the facts in the complaint were proved, and that the divorce was granted upon that ground."

When the record of the divorce proceedings was offered by the plaintiff, objection was made thereto, and thereupon the court admitted it to prove the fact of the divorce alone, expressly limiting it to such purpose and forbidding the reading or stating to the jury any of the averments found in the petition which in any way reflected upon the defendant. When the statute of Indiana was admitted, over objection, its introduction was allowed solely for the purpose of showing the law under which the divorce was granted.

Page 156 U. S. 380

Having thus obtained the admission of the record and the statute for qualified and restricted purposes, plaintiff's counsel, in their closing argument to the jury, used these instruments of evidence for the general purposes of their case, repeated to the jury some of the averments in the petition which assailed the defendant's character, and put those allegations in juxtaposition with the statute of Indiana on the subject of divorce, and the testimony of certain witnesses, in order to produce the impression upon the minds of the jury that the decree of divorce had been granted on the ground of adultery between the defendant and Waldron. Indeed, the fact is that the counsel, after referring the jury to the evidence which was not in the record, stated to them in effect that it established the fact, or authorized the fair inference, that the decree of divorce had been rendered on the ground of adultery with Mrs. Alexander, and therefore conclusively established the right of the plaintiff to recover in the present case. It is unnecessary to say that all this is ground for reversal, unless its legal effect be in some way overcome. It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and it is equally well established that the assertion by counsel, in argument, of facts no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor. *Farman v. Lauman,* 73 Ind. 568; *Brow v. State,* 103 Ind. 133; *Bulloch v. Smith,* 15 Ga. 395; *Dickerson v. Burke,* 25 Ga. 225; *Loyd v. H. & St. J. Railroad,* 53 Mo. 514; *Wightman v. Providence,* 1 Cliff. 524; *Martin v. Orndorff,* 22 I. 505; *Tucker v. Henniker,* 41 N.H. 317; *Jenkins v. N.C. Ore Dressing Co.,* 65 N.C. 563; *State v. Williams,* 65 N.C. 505; *Hoff v. Crafton,* 79 N.C. 592; *Yoe v. People,* 49 Ill. 412; *Saunders v. Baxter,* 53 Tenn. 369.

The foregoing conclusions are not disputed by the defendant here, but she seeks to avoid their application as follows: first, by denying the right of the plaintiff in error to raise the question, upon the ground that no exception was reserved to the misuse by counsel of the evidence which is complained of;

Page 156 U. S. 381

secondly, by asserting that the misuse did not take place, and that the assertion thereof in the bill of exceptions is erroneous and "inadvertent;" thirdly, by admitting that use was made of the various items of evidence mentioned in argument, and contending that this was not a misuse, because the evidence was legally admissible for all the purposes of the cause, and was therefore properly so used; and, finally by insisting that, even if use was made of alleged facts evidence whereof had been expressly excluded and which were not therefore before the jury, the wrong thus committed by counsel was cured by the final charge of the court, and therefore does not give rise to reversible error. Without pausing to consider the palpable inconsistency of these various contentions, we pass to the consideration of their correctness.

The claim that no exception was reserved to the misuse of testimony is founded on the proposition that as the objection made by defendant to the record and statute was to their admissibility in any form or for any purpose, and as they were admissible to show the fact of divorce, the objection, being general, was not well taken. To state this argument is to answer it. It is clear that where evidence is admitted for one certain purpose, and that only, the mere fact that its admission was not objected to at the time does not authorize the use of it for other purposes for which it was and could not have been legally introduced. The right of the defendant below to object to the perversion and misuse of the evidence depends upon whether objection was duly reserved thereto, and not upon whether exception was taken to the admissibility of the evidence which, it is asserted, was misused. That exception was here taken to the misuse of the evidence is plain. At the close of the case, when reference was made by one of the counsel for the plaintiff to the record and to the Indiana statute, and the other matters connected therewith, the following exception was reserved:

"Mr. McCoy, counsel for defendant, further objected to the statements of counsel for the plaintiff to the jury as to the laws of Indiana and the suit for divorce and the argument that it must have been granted upon the grounds alleged in the complaint

in the divorce proceedings, which reflected upon the character of the defendant, Josephine P. Alexander, and then and there duly excepted to such statements."

It is true that when, in the closing argument for the plaintiff, made by other counsel, similar language was used and objected to, no exception was reserved. This, however, is immaterial, as exception was reserved to the language first used, and this one exception, if well taken, must lead to reversal.

The contention that the prejudicial averments in the petition for divorce were not conveyed to the jury is thus argued: true, the bill of exceptions shows that they were so conveyed, but, because this statement is in direct conflict with the rulings of the court, therefore the statement in the bill of exceptions would seem to be an inadvertence. In other words, the argument is that the bill of exceptions must be disregarded on the theory that, if the facts stated in the bill be true, error results, and error is not to be presumed.

The remaining suggestions are quite as unsound as the specious one we have just considered. The divorce proceeding and statute, it is asserted, were admissible for all purposes, because there was evidence tending to show that the divorce was inspired by Waldron in connivance with the defendant below, and because such proceedings were part of the *res gestae,* etc. Whatever weight these propositions may intrinsically possess need not be considered, since the question we are examining is not whether the divorce proceedings should have been admitted for the general purposes of the cause, but whether, having been rejected by the court for such purposes, it was competent for the plaintiff to use them in direct violation of the restriction placed upon their use. If error was committed in restricting the use of the evidence, the plaintiff's remedy was to except thereto, and not to disregard the ruling of the court, and use the evidence in violation of the conditions under which its admission was secured.

We come now to the last contention, which is this: that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court,

therefore the error was cured. Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. *State v. May,* 4 Dev. (Law) 330; *Goodnow v. Hill,* 125 Mass. 589; *Smith v. Whitman,* 6 Allen 562; *Hawes v. Gustin,* 2 Allen 406; *Dillin v. People,* 8 Mich. 369; *Specht v. Howard,* 16 Wall. 564. There is an exception, however, to this general rule by virtue of which the curative effect of the correction in any particular instance depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. The rule and its exception were considered in *Hopt v. Utah,* 120 U. S. 430 , where the foregoing authorities were cited, and the principle was thus stated, by MR. JUSTICE FIELD:

"But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with its accompanying instruction, cured the error. It is true that in some instances there may be such strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the original objection may avail on appeal or writ of error, but such instances are exceptional."

The case here, we think, comes within the exception. The charge made in the complaint was a very grave one, seriously affecting the character of the defendant below. The record ,which was admitted for a limited purpose, had no tendency to establish her guilt of that charge, if used only for the object for which it was allowed to be introduced. This is also true of the Indiana statute and of the other testimony relating to the divorce proceeding. The admission of the record and other testimony having been thus obtained, in the closing argument for plaintiff, all the restrictions imposed by the court were transgressed, and the evidence was used by counsel

in order to accomplish the very purpose for which its use had been forbidden at the time of its admission.

Indeed, when the statements made by plaintiff's counsel in opening are considered, it seems clear that the failure to obtain the admission of the divorce proceedings in full left the case in such a condition that much of the subsequent testimony introduced, while it proved nothing intrinsically, was well adapted to fortify unlawful statements which might thereafter be made in reference to those proceedings. Thus the case, in its entire aspect, was seemingly conducted in such a manner as to render the illegal use of evidence possible, and to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous. Our conviction in this regard is fortified by the fact that although the unauthorized use of the evidence occurred in the final argument of the counsel for plaintiff who first addressed the jury, and was then and there objected to and exception reserved, the same line of argument, in an aggravated form, was resorted to by the counsel who followed in closing the case. Indeed, the language of this counsel invited the jury to disregard the finding of the court by looking beneath the facts which were lawfully in evidence.

As the fact of divorce was confessed by the pleadings, and besides was admitted by counsel for defendant in open court, we are of opinion that the divorce record was inadmissible because of irrelevancy. We also consider that the statute of Indiana was not admissible for any purpose. We have not rested our decree upon the question of the admissibility of this evidence, because the mere illegal introduction of irrelevant evidence does not necessarily constitute reversible error, and hence we have been compelled to consider not alone the admission of the irrelevant evidence, but also the illegal use which was made of it.

Judgment reversed and cause remanded, with directions to set aside the verdict and grant a new trial.