

rectory only. The language is that the "appointment" shall be filed, and this language alone, if there were no other considerations on either side, might be held sufficient to imply that the appointment is complete before it is filed. But the substantial ground of my conclusion is that the filing of the paper is not of the essence of the act to be done, but relates solely to the manner of procedure. The essence of the act is the determination and decision on the part of the circuit judge—*First*, that the public interest requires that a judge be designated; and, *secondly*, that a particular judge is selected for that purpose. The act of putting this on paper and signing it, if signature be necessary, is perhaps the last and essential element of that determination. The filing of the notice seems to have no office except to notify the clerk and the judge that the determination has been made.

Against this view of the scope and intent of the statute nothing can be found in the words of the statute itself. There is no prohibition against procedure otherwise than is directed. The provision that the circuit judge may "designate and appoint" is complete in itself, and the provision as to filing the appointment is afterwards added in separate sentences. There is nothing in the words or in their collocation which obstructs the separation of those provisions which appear to me non-essential and directory from those which are essential and mandatory. If it were held that the filing in the clerk's office is essential it would seem that there could be no escape from the conclusion that the sending of a copy to the designated judge is also essential. Such a conclusion would, as it seems to me, be absurd. For example, there might be a case in which the circuit judge had made his determination and appointment, had reduced his appointment to writing, and delivered it to the judge therein appointed, and that judge had himself delivered the paper to the clerk of the district court, and the clerk had filed and entered the same, and yet the authority of the judge would be incomplete because the clerk had not handed him in return a certified copy of the paper of appointment. This copy, it is observed, could serve no purpose except to notify him of that which he already knew, since there is no provision that he shall preserve it by way of evidence of the facts. I cannot think it safe to follow an argument which leads to such conclusions.

The motion in arrest of judgment is overruled.

MISSOURI PAC. RY. CO. v. TEXAS & P. RY. CO., (DEHONEY, Intervenor.)¹

(Circuit Court, E. D. Louisiana, January 2, 1888.)

REFERENCE—PROOF OF DAMAGES—EXCEPTIONS.

The intervenor filed a claim against defendant company for damages. The evidence was not sufficiently certain as to the extent of the damage. *Held* that, as the complainant should have made his case and the extent of his damage reasonably certain by proof, his exceptions to the master's findings against his claim should be overruled, and the master's report confirmed.

¹Reported by Charles B. Stafford, Esq., of the New Orleans bar.

In Equity. On exceptions to master's report.

A claim was filed by E. L. Dehoney against the receivers of the Texas & Pacific Railway Company for damages caused by the burning of his meadow by fire ignited by a locomotive of the railway in passing. The claim was for \$2 an acre damage to the meadow, and \$40 for 4 acres of millet destroyed. The master allowed the claimant the \$40 damage to the millet, but nothing for general damages. The claimant excepted to the master's report.

Foster & Wilson, for claimant.

W. W. Howe, for receivers.

PARDEE, J., (*orally*.) The evidence in this case is not sufficiently certain as to the extent of damage by fire to the meadow which was burned over. The meadow had been mown, and the grass was dried out by the weather. A fire was likely to do no injury except by kindling the roots of the grass. The evidence shows that after the fire the grass did not come up in spots. How extensive the spots were, and whether the failure in such spots was on account of the fire or the drouth, does not appear with any such certainty as to furnish the basis for the master or court to assess the damage. The complainant should have made his case and the extent of his damage reasonably certain by proof.

The exceptions will be overruled and the master's report confirmed.

In re MOY CHEE KEE et al.

(*Circuit Court, N. D. California. December 24, 1887.*)

1. COSTS—IN HABEAS CORPUS PROCEEDING—REV. ST. U. S. § 828.

An application for a writ of *habeas corpus* is a proceeding *sui generis*, and the provisions of Rev. St. U. S. § 828, regulating the fees of clerks of the circuit and district courts, do not govern in the taxation of costs in such proceedings.

2. SAME—DISCRETION OF COURT.

The court, in its discretion, may fix a reasonable fee to be paid by the petitioner in *habeas corpus* cases, which fees, when collected, are to be accounted for as in ordinary cases.

On Writ of *Habeas Corpus*. Application to tax costs.

Thos. D. Riordan and *L. I. Mowry*, for petitioners.

John T. Carey, U. S. Atty., for the United States.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

SAWYER, J., (SABIN, J., *concurring*.) The petitioner is a subject of China, of the Mongolian race, who, on arriving at the port of San Francisco, on the steam-ship *City of Sidney*, from China, in September, 1887, claimed a right to land under the treaty and laws of the United States. The collector having refused to permit him to land, he sued out a writ of *habeas*