WOHLGEMUTH V. UNITED STATES, 1892-NMSC-020, 6 N.M. 568, 30 P. 854 (S. Ct. 1892)

MORRIS WOHLGEMUTH, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellees

No. 391

SUPREME COURT OF NEW MEXICO

1892-NMSC-020, 6 N.M. 568, 30 P. 854

August 24, 1892

Appeal, from a Judgment Convicting Defendant of Perjury, from the Third Judicial District Court.

The facts are stated in the opinion of the court.

COUNSEL

E. C. Wade for appellant.

Thomas Smith, United States district attorney, for appellees.

JUDGES

McFie, J. O'Brien, C. J., and Freeman, Seeds, and Lee, JJ., concur.

AUTHOR: MCFIE

OPINION

*{*568}* **{1}** The defendant was convicted of the crime of perjury at the October term, 1888, of the district court of the Third judicial district, sitting in the county of Dona Ana, and the case is in this court on appeal by the defendant. The perjury alleged to have been committed by defendant was swearing falsely in *{*569}* making proof upon his preemption claim, number 2671, before the register of the United States land office at Las Cruces, New Mexico, on the first day of September, 1886. The indictment alleges that the defendant Wohlgemuth, testified in his own behalf before said register; that he was duly sworn before a competent officer, and that it became material to show "that the said Morris Wohlgemuth had made actual settlement upon, and had built a house and placed improvements of a certain value upon, and had resided continuously upon, the east half northeast quarter section thirty, and west half northwest quarter section

twenty-nine, township fifteen south, range twelve east, from the first day of February to the first day of September, eighteen hundred and eighty-six." The allegation of what the defendant did swear upon that occasion is as follows: "That he, the said Morris Wohlgemuth, made actual settlement on said land, on or about the first day of February, eighteen hundred and eighty-six, and that he had built a house and made dollars' worth of improvements on said land, and that he commenced to reside on said land on the day of February, A. D. 1886, and that he resided on said land continuously until the first day of September, eighteen hundred and eighty-six." Upon the trial the prosecution offered in evidence the testimony of the defendant, taken in the form of question and answer, in the usual form, and upon the blanks used in the land office for that purpose; and from this written testimony of defendant it appears that what he actually did swear was as follows: "Question. When did you first make settlement on the above described land? Answer. About the first day of February, 1886. Question. What was your first act of settlement? Answer. Put in fence posts. Question. When did you first establish an actual residence on said land? Answer. February, 1886. Question. *{*570}* Has your residence thereon since been continuous? Answer. Sometimes I had to make money to improve my place. Question. What improvements have you made on the land since settling it, and what is the value of the same? Answer. Made ditch, cleaned the land, and put in fence posts."

{2} These questions and answers were all included in the same deposition, upon the same sheet of paper, and constituted all of the testimony of the witness upon the points involved in this case. To the introduction of this deposition of the defendant, as evidence in the case, the defendant by his counsel at the time objected, upon the ground of variance; but the court overruled the objection, and permitted the deposition to go to the jury. To this ruling of the court, the defendant by his counsel at the time excepted, and that is one of the errors assigned for our consideration. An examination of the allegations of this indictment as to what time the defendant swore, and an examination of the defendant's testimony, which constituted the only proof offered in the case of what the defendant actually did swear, shows a decided variance between the allegations and the proof. Waiving consideration of the important blanks which are to be found in the allegations of this indictment, it will be observed that the indictment alleges that the defendant swore that he had made "actual" settlement on the first day of February, in 1886, while the affidavit shows that the witness swore that he had made "settlement." It may be contended that the word "actual" being added is of no importance, but we are disposed to attach some importance to the word "actual" in this case. The word actual being added to the word "settlement," was calculated to lead the jury to believe that settlement was equivalent to "residence;" but, when used in connection with preemption claims upon land, it does not *{*571}* necessarily mean "residence." A preemption claimant may make "settlement" upon land by actually establishing a residence thereon, but he may make "settlement" upon the land, within the meaning of the preemption law, without actually residing upon the land. "Settlement," within the meaning of the preemption law, may be made by the erection of a dwelling house, or by the erection of a fence, or many other visible acts of the preemptioner's expression of his intention to appropriate, and such acts as are

calculated to give notice to the world that he has appropriated a certain portion of the public domain.

{3} But the indictment further alleges that the defendant swore that he had built a house on said land; but an examination of the testimony shows that the witness did not so swear. On the contrary no mention of a house is to be found in his testimony. Again, the indictment alleges that the defendant swore that he commenced to reside on said land on the day of February, A. D. 1886, and that he resided on said land continuously until the first day of September, 1886. The witness did not so testify. The defendant was asked the following question: Has your residence thereon since been continuous? Answer. "Sometimes I had to make money to improve my place." This answer can not be construed to mean what is alleged the defendant swore upon that point. It is only by the merest inference that such a meaning could be induced from it. The witness' answer is either no answer at all, or it is equivalent to saying that he did not reside continuously on the same. Certainly it can not be contended that by that answer he swore to a continuous residence on the land, as is alleged in the indictment. The court permitted this deposition or affidavit to go to the jury, over the objection of counsel, and we think this was error. There was a material variance between the allegations and the proof *{*572}* offered to sustain them. The testimony of the defendant was reduced to writing at the time he made proof upon his preemption claim, and it was the best evidence of the facts sworn to by him, and no other testimony was offered upon the trial. The testimony that was permitted to go to the jury, as shown by this record, was clearly incompetent; and upon the objection of the defendant, for variance, it should have been excluded, under this indictment.

{4} The rule of pleading on this subject is well settled. The pleader may set out the instrument upon which the perjury is assigned in haec verba, or he may set it out in substance; but, if he elect to set out the substance, he must set it out correctly. 2 Bish. Crim. Proc. [3 Ed.], secs. 911, 913; 2 Whart. Crim. Law [9 Ed.], secs. 1129, 1313; U.S. v. Hardyman, 38 U.S. 176, 13 Peters 176, 10 L. Ed. 113.

{5} It is not necessary to consider further the assignments of error in this case inasmuch as the first assignment of error fully justifies a reversal of the judgment of the court below. The judgment will be reversed and the cause remanded to the lower court for further proceedings in accordance with the views herein expressed.